CONTEMPORARY TRENDS IN THE EVOLUTION OF THE INTERNATIONAL LEGAL NORMS GOVERNING NATIONALIZATION OF PROPERTY OF ALIENS IN UNDERDEVELOPED COUNTRIES WITH SPECIAL EMPHASIS ON THE JURIDICAL IMPLICATIONS OF THE WORKS OF THE UNITED NATIONS:

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Abstract

The central theme of this thesis is one of ascertaining the contemporary international legal norms which govern the nationalization of property of aliens in underdeveloped countries.

The thesis defines the conceptual scope and content of the 'regime' of nationalization; draws a clear conceptual distinction between nationalization and other types of property "takings"; and argues, by employing a historicist approach, that those norms which traditional international law evolved in connection with "takings" of the "expropriation-type", do not apply over nationalization incidents that take place in underdeveloped countries in the contemporary period.

The author of thesis, then, suggests that the appropriate rules should be sought, instead, in the "norm-generating" works of the U.N., and argues that international controversies which arise from contemporary nationalization incidents should be resolved pursuant to the new juridic norms that emanate from the authoritative body of international consensus which evolved within the U.N. machinery.

Résumé

Le thème central de cette thèse est celui de vérifier les normes légales internationales contemporaires qui régissent la nationalisation de la propriété des étrangers dans les pays sous-développés.

La thèse définit l'étendue et le contenu conceptuels, du régime de la nationalisation; établit une nette distinction conceptuelle entre le nationalisation et d'autres genres d'appropriations; et argumente, en employant une approche historiciste que ces normes que le droit international traditionnel a dégagées par rapport aux prises en main du "genre expropriation", ne s'appliquent pas aux incidents de nationalisation qui ont cours dans dans les pays sous-développés depuis la période contemporaire.

Par conséquent, l'auteur de cette thèse suggère que les règlements appropriés devraient être puisés, plutôt, dans les travaux"générateurs de normes" des N.U., et poutient que les controversis internationales qui surgissent à cause d'incidents dûs à la nationalisation contemporaire devraient être résoues, con conformémens aux nouvelles normes juridiques émanant d'un confus de concencus international faisant autorité, qui se dégagèrent au sein de l'apparatus des N.U.

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INTRODUCTION

There are perhaps very few areas in the field of international law where the norms that regulate the conduct and behavior of states towards one another are as uncertain and as controversial as those dealing with the nationalization of property of aliens in the underdeveloped countries in the post-war period. The irony of it all, is that this uncertainty and confusion is in part the result of the immense amount of literature on the subject ostensibly intended to clarify and resolve the intricate tandem of legal issues that arise out of those nationalization incidents.

While legal uncertainty is a general predicament characteristic of that enigmatic domain (discipline) which we call international law, the marked uncertainty of the norms governing state conduct in this particular area stems, in large measure, from the fact that the rules of international law in this field, perhaps more than in any other field, attempt to "reconcile", to the extent that any law can possibly do, the diametrically opposed economic interests between the various groupings of states and social systems that inter-act in the international arena.

This uncertainty is further compounded by the fact that incidents of nationalization infringe upon the sensitive and controversial regime of property relations, in the mode of whose organization, states representing different social systems are not in agreement, and with respect to which, consequently, the international "community" of nations is not known to exibit any degree of "commonality" of views.

In short, the uncertainty that abounds in this particular field of international law is as much the result of the underlying conflict of economic interests between states as it is a necessary consequence of the ideological sensitiveness

of the subject matter of nationalization itself.

Like every other branch of international law, the normative rules dealing with nationalization are predicated, needless to say, on the possibility as well as desirability of "regulating" and "regularizing" inter-state behavior so as to create a climate of "order" out of a certain state of "Disorder". But international law, like municipal law, is capable of creating "order" out of "disorder" only on condition that the state of "disorder" which the law tries to bring to "order" is itself "reasonably disorderly". The problem which that branch of international law dealing with nationalization has to graple with is, however, that it is called upon to "regularize" state behavior and forge some degree of "order" in an area where the disorder is too unruly to be susceptible of being "ordered". To start with, the most controversial acts of nationalization, i.e. those which require international regulation the most, come into being as a result of cataclysmic social upheavals and revolutions and are, therefore, by their very nature, anti-thetical to a state of Order. In other words, international law is confronted with the task of calling to "order" state behavior involving that step-daughter of social revolution which inherently tends to defy any normative order. Secondly, nationalizations in underdeveloped countries occur at a time when the old international status quo is the process of disintegration and the traditional international legal order fashioned to serve that old status quo is in the process of being antiquated; at a time when elements of a new socio-economic and political order are in the process of emerging to replace the old status quo; at a time when the old legal order is increasingly losing rapport with the new reality, and at a time when the elements of a new legal order have not yet ripened to replace the old. In short, nationalizations in underdeveloped countries occur at such a historical juncture in the transition between the

old legal order and the new, that the legal vacuum, thus, created in the process, finds its reflection in the current state of chaos and uncertainty surrounding the legal norms governing nationalization.

It is the glaring uncertainty of the norms in this particular field of international law that prompted international organizations and regional bodies, learned societies as well as interested states to seek various ways of reducing the prevailing state of chaos on the subject. The effort in this direction proceeded along two main lines. On the one hand, there was an attempt particularly since the second decade of this century, to codify the rules on the subject of state responsibility relating to the treatment of aliens with respect to their person and property interests.[1] On the other hand, increasing attempts were made to use the devise of concluding bilateral as well as multi-lateral Treaties with in-built provisions that were intended to protect the property interests of aliens.

Among those efforts in the area of codification, mention may be made of the principal ones carried so far by learned societies and noted jurists, regional bodies as well as international organizations such as the League of Nations and the United Nations.

As early as 1925, the American institute of International Law, for instance, prepared two draft projects (Nos.15 and 16) on "Responsibility of Governments" with respect to the treatment of aliens as well as on "Diplomatic Responsibility".[2]

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[1] For an exhaustive review of the effort in the field of codification, see, Robert Ago, First Report on State Responsibility: Review of previous work on codification of the topic of the international responsibility of states, U.N. Doc. A/CN.4/217 (1969).

In 1926, the Japanese association of international law (i.e., the Kokusaiho Gakkwai) prepared, in collaboration with the Japanese section of the international law association, a draft code on international law, part of which (Chapter II) dealt with "Rules concerning Responsibility of a state in relation to the life, person and property of aliens".[3] In 1927, the institute of international law adopted, at its Lausanne Session, a set of draft articles on "International Responsibility of States for injuries on their territory to the person or property of foreigners".[4] In 1956, the same institute adopted, at its Granada session, a set of draft norms on "The Rule of the Exhaustion of local Remedies"[5], and nine years later in 1965, it adopted at its Warsaw session, another set of draft rules on "The National character of an international claim presented by a state for injury suffered by an individual".[6] In 1929, the Harvard Law School prepared, under the responsibility of professor Borchard, a draft convention on "Responsibility of States for damage done in their territory to the person and property of foreigners",[7] supplemented by an extensive commentary backed by citations to pertinent treaty provisions international case law, state practice and legal doctrine. That draft was later revised

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[2]For the text of projects, see F.V. Garcia Amador, State Responsibility" (First Report), Annex 7 to U.N. Doc. A/CN.4/96, 2 Yearbook of the International Law Commission, 1956, at 227 (1957); see also, 20 A.J.I.L. (special supp.), at 329-330 (1926).

[3]For the text, see International Law Association, Report of the 34th conference, 382-383 (1926); see also Robert Ago, supra, Annex II, U.N. Doc. A/CN.4/217/ Add.1 (1926).

[4]For the text see, 33 (3) Annuaire de l'institute de droit international 330-335 (1927).

[5]For the text see, 46 Annuaire de l'institute de droit international, 364 (1956); see also Robert Ago, supra, Annex IV.

[6]51 (2) Annuaire de l'institute de droit international, 269-271 (1965) see also, Robert Ago, supra, Annex V.

in 1956 under the responsibility of professors Sohn and Baxter, and the updated "Draft convention on the international responsibility of states for injuries to aliens"[8] prepared by the Harvard Law School, was finally issued in 1961. The German International Law Society (Deutche Gesellschaf fur Volkerrecht) similarly prepared, back in 1930, a "Draft convention on the responsibility of states for injuries caused in their territory to the person or property of aliens".[9] In addition to those drafts prepared by learned societies and private bodies, individual western jurists of prominence also contributed to the codification process in the early period. In 1927, for instance, professor Karl Strupps prepared a draft "Treaty concerning the responsibility of a state for internationally illegal acts",[10] and a few years later, professor Roth prepared, in 1932, a "Draft convention on the responsibility of states for international wrongful acts".[11]

Apart from learned societies and prominent western jurists, regional forums such as the various international conferences of American states, and regional bodies such as the Inter-American Juridical Committee, the Inter-American Council of Jurists, as well as the Asian-African legal consultative committee had, at various times, made a number of contributions to the codification process. As far back as 1889, for instance, the First international conference of American states, held in Washington D.C. adopted a recommendation containing draft rules on international "claims and deplomatic intervention"[12] relative to the treatment of aliens. Again,

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[7] Harvard Law School, Research in International Law, 139-239 (Cambridge, Mass. 1929); see also Robert Ago, supra, Annex VI.

[8] Harvard Law School, Draft convention on the international responsibility of states for injuries to aliens (Cambridge, Mass. 1961); see also, 55 A.J.I.L., 548-584 (1961); see also, Robert Ago, supra, Annex VII.

[9] See text in Robert Ago, supra, Annex VIII.

[10] See text in, Robert Ago, supra, Annex IX.

at their second conference held in Mexico City back in 1902, the Inter-American states adopted a "convention relative to the Rights of aliens".[13] At its Montevideo session in 1933, the seventh conference of Inter-American states once more adopted a resolution[14] in which it instructed its subordinate organs to carry out the codification process in co-ordination with other international bodies such as the League of Nations. Again, in 1954 at its Caracas session, the Tenth International conference of American states took up the matter of codification, and recommended that the Inter-American council of Jurists, and the Inter-American Juridical Committee should prepare a study on the contributions of the American continent to the rules of international law on state responsibility.[15] Accordingly, the Inter-American Juridical Committee prepared and issued, in 1961, a report entitled "contribution of the American continent to the principles of international law that govern the responsibility of the state",[16] and that report was later submitted for the consideration of the fifth session of the Inter-American council of jurists held in San Salvador in 1965. In view of the fact that the above report only covered the contribution of the Latin American countries and excluded the view of the United States on the matter, the Inter-American Council of Jurists endorsed the

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[11] See text in, Robert Ago, supra, Annex X.

[12] See text in, Robert Ago, supra, Annex XI.

[13] See text in, Robert Ago, supra, Annex XII.

[14] See text in, Robert Ago, supra, Annex XIII.

[15] Pan-American Union, Tenth Inter-American Conference, Final Act, 103 (Washington D.C., 1954).

[16] Inter-American Juridical Committee, contributions of the American continent to the principles of international law that govern the responsibility of the state, OAS, official Records, Doc. CIJ-61 (Pan American Union, Washington D.C. 1961); see also, Robert Ago, supra Annex XIV.

report but further recommended the incorporation into the report, of a supplement dealing with the contributions made by the United States of America to the law on state responsibility. Pursuant to the recommendation of the Inter-American council of jurists, the Inter-American juridical committee prepared in 1965 a second report[17] dealing exclusively with the views and practices of the United States on the law of state responsibility.

Similarly, the Asian-African legal consultative committee had carried out, ever since its first session held in New Delhi back in 1957, a number of activities geared towards influencing the codification process on the law of state responsibility.[18] At its New Delhi session in 1957, for instance, the Asian-African legal consultative committee discussed such topics as the status of aliens as well the responsibility of states with respect to the treatment of foreigners. A similar discussion again took place at the second session of the committee held in Cairo a year later, in 1958. At that session, the committee instructed its secretariat to study the subject and submit draft articles for consideration by the committee at its next session. At its third session held in Colombo back in 1960, the committee considered a report submitted by its secretariat. Although no concrete results were achieved by way of the formulation of the substantive rules governing state responsibility, opinions were exchanged at the committee's fourth session in Tokyo in 1961, as well as at its seventh session held in

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[17] See Text in Robert Ago, supra, Annex XV.

[18] For a review of the work of the committee see, F.V. Garcia Amador, "Report on the fourth session of the Asian-African legal consultative committee", U.N. Doc. A/CN. 4/139 (1961), 2 Yearbook of the International law commission, 1961, at 80 (1962).

Bagdad in 1965.[19]

A far more ambitious attempt to codify the rules on state responsibility was also launched, as early as 1924, by the league of nations.

The attempt of the league of nations to codify the law on state responsibility was initiated by a Resolution of the League's Assembly adopted on 22 September 1924.[20] In that Resolution the Assembly requested the council of the league to appoint a committee of experts to codify the law on state responsibility, and accordingly, a committee of experts was subsequently convened. The committee of experts for the codification of international law, which held its first session in Geneva between the 1st and the 8th of April 1925, formed a sub-committee to prepare a study on the responsibility of states for injury caused in their territory to the person or property of aliens. During its second session in January 1926 the committee received what was known as the Guerrero report from the sub-committee entrusted with the task of preparing a study on the subject of state responsibility. The committee then decided to prepare and circulate to states along with the Guerrero report, a questionaire[21] on the "responsibility of states for damage done in their territories to the person or property of foreigners", so as to get the view of states as to whether it was necesssry and possible to include a set of codified rules on state responsibility in some form of an international convention. The Guerrero report

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[19] Robert Ago, "Report on the seventh session of the Asian-African legal consultative committee", 2 Yearbook of the International Law Commission, 1965, at 148 (1966).

[20] Robert Ago, supra, U.N. Doc. A/CN.4/217, at 11 (1969); see also U.N. Secretariat, Historical Survey of the Development of International Law and its codification by international conferences, U.N. Doc. A/AC.10/5, (1947); see also, 20 A.J.I.L. (special supp.), 12 (1926).

[21] 20 A.J.I.L. (special supp.), 176 (1926).

as well as the questionaires were, then, circulated to states (both members and non-members of the league), and out of 34 states which responded to the questionaire, some (about 24) supported the idea of codification while others held the view that "the conclusion of a convention on the subject was neither possible nor opportune".[22] In any case, after examining the responses of states to the questionaire at its third session between March and April of 1927, the committee of experts recommended to the council of the league of nations that the replies received warranted that the rules on state responsibility "were sufficiently ripe for ... treatment in an international convention".[23] The council of the league, then, transmitted the recommendation of the committee of experts to the League's Assembly in June 1927, and in September 1927, the Assembly of the league of nations decided to convene an international conference for the codification of the law on, among others, the responsibility of states for damage done in their territory to the person or property of foreigners. Accordingly, a preparatory committee was established and that committee formulated during its three sessions held in Geneva between Feb. 1928 and May 1929, a basis of discussion for the conference. The long-awaited conference for the codification of international law finally met at the Hague from March 13 to April 12, 1930. The conference, then, established three committees, one of which was entrusted with the task of preparing a draft code on the law of state responsibility. The latter committee examined the state of the law on state responsibility, and in the process, formulated a draft text as a basis for further discussion on the subject. In the course of the discussion, however, wide divergences of views arose in connection with the "substantive principles" governing the treatment of aliens, and as a result,

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[22] Robert Ago, op. cit, at 12.

[23] Ibid.

the committee was unable to submit any definitive conclusions on the subject to the conference.[24] Consequently the Hague conference of 1930 on the codification of the law on state responsibility was disbanded without any concrete result. Although the league of Nations still continued to make similar attempts to codify the law on the subject even after the failure of Hague conference, nothing substantial came out of the effort.

After the demise of the league of Nations, its successor, the U.N. once again tried to codify the law on state responsibility.[25] The effort towards codification began when the international law commission of the U.N. decided, at its first session back in 1949, to include the item on state responsibility among the 14 topics selected for codification. The work of the commission got further impetus when the General Assembly, at its eighth session in 1953, adopted Resolution 799 (VIII) in which it requested the International law commission to explore the possibility of codifying the law on state responsibility. Pursuant to the latter Resolution, the international law commission formally started the work on codification at its seventh session in 1955 by appointing Mr. Garcia Amador to serve as a special Rapporteur for the study of the law on state responsibility.[26] Consequently, the special Rapporteur, Mr. Garcia Amador, submitted, between 1956 and 1961, six successive reports on the subject of state responsibility to the International Law Commission. The special Rapporteur also submitted, as an addendum to the sixth report, the text of a "revised draft on international responsibility of the state for injuries caused in its territory to

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[24] Ibid at 14.

[25] Gracia Amador, supra, U.N. Doc. A/CN.4/96, at 174 (1956).

[26] Robert Ago, supra, U.N. Doc. A/CN. 4/217, at 17-25(1969).

the person or property of aliens".[27] However, before that preliminary work on codification was even considered by the General Assembly, a serious divergence of views arose during the fourteenth session of the international law commission in 1962, regarding the overall approach towards the codification of the law on state responsibility. On the methodological level, the objection to the approach adopted by Mr. Garcia Amador's preliminary work on codification, was that it "fused together" the secondary (i.e. non-substantive) and primary (i.e. substantive) rules on state responsibility, and, therefore, made the prospect of agreement on the subject unlikely. On the far more important substantive level, the main objection was that Mr. Garcia Amador's approach was so slanted in favour of the protection of aliens that it tended to make the treatment of aliens the "central" problem of state responsibility. As a result of those fundamental differences of views, the international law commission was forced to abandon the effort to codify the substantive rules on state responsibility and to restrict its codification work merely to the secondary (non-substantive) rules on the subject. Consequently, the initial work done by Mr. Garcia Amador was permanently shelved, and left in abeyance, which meant that the substantive principles embodied in the Amador Draft code on state responsibility was neither considered nor approved by the General Assembly.

The foregoing attempts to codify the substantive norms governing the treatment of aliens not only failed invariably, but the mere fact the works which began in earnest ended in limbo almost half-way before they received a final stamp of approval by states in a definite and formal way meant that they tended, particularly in their unfinished form, to add

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[27] Text reproduced in 2 Yearbook of the International Law Commission, 1961, at 46-54 (1962).

more "confusion" and "uncertainty" into the already "troubled waters" of international law.

There are, of course, several reasons why those attempts failed, and why, given their orientation, they were not bound to succeed. While some of the reasons have to do with the complexity of the subject matter itself, those codification efforts had at least two fundamental weaknesses which contributed to their failure. In the first place, nearly all the codification efforts involved merely a re-statement of the traditional rules on state responsibility without any serious regard for the fundamental changes that were taking place in the social, economic and political operational climate surrounding the subject matter. In other words, those responsible for codification were not only oblivious of the ever changing international economic and political reality to which "living" law must respond, but they also seemed to be caught in that "disease" which one publiscist called "juridicism", namely the tendency to "insulate" law and legal problems from problems of economics and politics to which law is inextricably linked.

Secondly, nearly all the codification efforts that failed, did so, because their overall orientation was unduly biased towards the protection of the property interests of aliens, i.e. the economic interests of the western nations. The orientational bias of the codification process which made the protection of aliens the "central" problems of the law on state responsibility is, of course, understandable in view of the fact that the dominant influences that were brought to bear on the codification process were the views and works of western jurists and learned societies. With the exception of some of the works of the Latin American and Afro-Asian groups whose influence on the codification process was quite marginal, nearly all the initiatives for codification and most of the ready-made draft material originated from

western governments, jurists and learned societies. In that respect, one can even say that the "international" forums of the league of Nations and the United Nations were in actual fact, used by western jurists, learned societies and governments as "window dressing" to smuggle a decidedly one-sided set of rules and pass them as "universal" norms under umbrella of those organizations.

Apart from, and in addition to, the effort towards codification, there have also been attempts to lessen the uncertainty of the norms in this field through the devise of concluding bilateral as well as multi-lateral treaties with in-built property-protecting clauses.

The typical bilateral Treaty devises, which have been commonly employed were those treaties of friendship, commerce, and navigation that contained provisions regulating the conditions of property "takings". According to a 1963 survey, the United States government alone had concluded more than seventeen such agreements between the end of the second world war and 1960, mostly with underdeveloped countries.[28] To one degree or another the same devise was used by Britain, France, the Federal Republic of Germany as well as Switzerland.[29]

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[28] Ellen C. Collier, "Expropriation of American-owned property by foreign governments in the twentieth century", 2 International Legal Materials, 1099 (1963); see also Robert R. Wilson, "post war commercial treaties of the United States", 43 A.J.I.L., 262-287 (1949); see also, Robert R. Wilson, "property-protection provisions in United States Commercial Treaties", 45 A.J.I.L. 83-107 (1951); H. Walker, "Treaties for the encouragement and protection of foreign investment: present United States practice" 5 American journal of comparative law, 229 (1956); H. Walker, "provisions on companies in United States commercial Treaties", 50 A.J.I.L. 373 (1956).

[29] Georg Schwarzenberger, Foreign investments and international law, 32 (1969).

The problem with such Treaties, however, is that they tended to remain in force, at least in underdeveloped countries, only as long as the regimes which signed them stayed in power. The moment the Batista's (Cuba), the Selassie's (Ethiopia), or the Pahlavi's (Iran) are gone (overthrown), those treaties are bound to be repudiated, and consequently, the western nations which initiated the concluding of those treaties (mostly in bad faith) tended to have nothing to fall back on except the flexing of their economic and political muscle to secure concessions through extra-legal and often illegal methods. Even by the admission of the U.S. state department, such treaties triggered "deep seated opposition" and controversy because they tended "to infringe upon the sovereignty and independence of individual countries".[30] The politically indefensible character and the legal ineffectiveness of the bilateral-type of property protecting treaties finally led western nations and private organizations of western investors to try yet another device, namely the concluding of multi-lateral conventions with in-built property-protecting provisions.

One of the earliest post-second world war attempts to formulate a multi-lateral convention on the subject was initiated by the International Chamber of Commerce which prepared, back in 1949, a Draft convention in the shape of an "international code of fair treatment for foreign investments".[31] Although nothing substantial came out of that exercise, the initiatives of the International Chamber of Commerce influenced others to pursue the effort along similar lines.

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[30] Ellen C. Collier, supra, at 1110.

[31] For a discussion regarding that Draft, see Arthur S. Miller, "protection of private foreign investment by multilateral convention", 53 A.J.I.L., 371-372 (1959).

Again, in 1957, a German banker by the name of Hermana J. Abs raised the proposal of concluding a multi-lateral convention at a San Francisco gathering of over 550 representatives of western private business interests convened under the auspicies of the International Industrial Development Conference. In line with that proposal, the society to advance the protection of Foreign investments, a private organization of west German business interests, put forward, in November 1957, a draft entitled an "International Convention for the mutual protection of private property rights in foreign countries". The latter draft subsequently led to what is known as the Abs-Shawcross Draft Convention on investments abroad of 1959, a proposal put forward by private business groups (mainly German) and backed by the government of the Federal Republic of Germany, to serve as a basis for an actual multi-lateral treaty.[33] Although the one sidedness of that Draft Convention forced even western governments to shy away from it initially, the Organization for Economic Co-operation and Development (O.E.C.D.) finally decided to consider it, and in 1962, a toned-down version of the Abs-Shawcross text entitled "Draft Convention on the protection of

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[32] Ibid at 372.

[33] For a comment on that Draft, see Stanley D. Metzger, "Multilateral conventions for the protection of private foreign investment", 9 Journal of public law, 133-146 (1960); see also, Georg Schwarzenberger, "The Abs-Shawcross Convention on investments abroad: A critical commentary", 9 Journal of public law, 147-171 (1960); Arthur Lavson, "Recipients' rights under an international investment code", 9 Journal of public law, 172-175 (1960).

foreign property" was prepared for further study. By the time the O.E.C.D. Draft text was finalized in 1967 to serve as a basis for formal negotiation, however, very few countries were willing to be parties to it.

Perhaps the only[34] attempt that partially materialized in this direction was the conclusion, back in 1965, of the multi-lateral Convention on the settlement of investment disputes between states and nationals of other states sponsored by the World Bank - - (i.e. the International Bank for Reconstruction and Development).[35] Although that convention was highly lauded by many western jurists as an "astounding" success and as "ingenious" mechanism for settling investment disputes, it still does not substantially resolve the problem of uncertainty of the norms in this field. To start with, the majority of the states members of the United Nations have not shown willingness to be parties to the Convention. Secondly, even among those who initially signed the Convention, a considerable number of them did not, for various reasons, ratify it. Thirdly, even as regards those states which signed and ratified it, the one-sided orientation of the convention in favour of capital - exporting countries in itself invites the kind of conflict that leads to its subsequent repudiation by succeeding governments, i.e., precisely for the same reasons that similar bilateral property-protecting Treaties were often repudiated in the past.

From the standpoint of resolving the problem of uncertainty of the norms in this field, the major limitation of the Convention still consists in the fact that it only provided a procedural mechanism for settling investment disputes without defining, beforehand, the substantive

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[34] It should be noted that several other attempts in this direction were tried earlier and failed. The most important of those attempts include: the Havana Conference of 1948 on the Charter of the International Trade Organization; the 1948 Inter-American Conference at Bogota; the 1949 Washington Conference of the Pan-American Union; as well as the 1957 inter-American Conference of Buenos Aires: for

rules of international law which governs the treatment of property of aliens. As a matter of fact, it was precisely that vital question which the framers of the Convention tried, for fear that no agreement could be possible, to somehow circumvent, by merely providing in Article 42 of the Convention, that, in the absence of agreement between the parties to the contrary, the Tribunal to be constituted under the Convention, shall apply the law of the contracting state party to the dispute and "such rules of international law as may be applicable". The crux of the problem, and that which the Convention did not resolve, is, however, the question as to what, in fact, the "rules of international law" are in substance. In deliberately avoiding to define the substantive rules of international law, the framers of the Convention, of course, intended to give to the Tribunal itself (i.e. a three-man tribunal whose third member, in the absence of agreement between the parties, would be appointed by the President of the International Bank), the freedom to determine the substance of the applicable "rules of international law" in settling the disputes before it, and that is precisely where the real weakness of the Convention lies, and it is in that respectthat the convention "avoids" the problem instead of solving it.

In fact, it was largely out of an awareness of the sensitivity of such a controversial approach for determining the substance of the applicable "rules of international law", that the framers of the Convention, decided to make the submission of disputes under the Convention completely optional for the signatory states. In other words, even those states which signed and ratified the convention can refuse (as some have, in fact, done) to submit to the jurisdiction of the International Centre for the Settlement

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Metzger supra, at 133; see also Herman Walker "Treaties for the Encouragement and Protection of Foreign Investment: present United States practice", 5 American Journal of Comparative Law, 240-241 (1956).

35 For a comment on that convention see. G. Schwarzenberger.

of Investment dispute, which means that even the procedural mechanism for settling investment disputes provided by the Convention remains, in the last analysis, open-ended.

Hence, both by reason of its non-substantive nature and the "optionality" of the procedural mechanism of dispute settlement which it provides, even the "highly" lauded World Bank-sponsored Convention of 1965, in the end fails to resolve the one and central problem which consumed the efforts of western jurists, business lobbyists and governments as well as international and regional bodies over the last few decades, namely the question of defining and ascertaining the international legal norms which govern the treatment of property of aliens.

In launching this investigation, the author of this paper, therefore, proceeds from three principal considerations which, from the perspective of the failures of earlier efforts to define and ascertain the substance of the norms in this field, the author considers to be his key points of departure for the present research.

The first principal consideration is that, despite earlier efforts to resove the uncertainty of the norms in this field, the problem continues to persist and still awaits definite solution. It is, in fact, the authors belief that the topicality of nationalization controversies in the contemporary period not only lends further currency to the problem, but that there is also an urgent and pressing need for seeking a solution to the problem, in view of the fact that nationalization controvercies are increasingly becoming grave sources of international tension which pose a menacing threat to the peaceful co-existence of states.

The second point of departure for the present research is that, nearly all the earlier efforts to define and as-

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Foreign Investments and International Law, 135-152 (1969); For the text of the convention see Command papers, no.2745, at 5 (1965).

certain the norms in this field, failed largely because they approached the problem of defining and ascertaing the pertinent norms in this particular area of international law almost invariably from the "centrality" of the protection of the property interests of aliens, that is, from the standpoint of the economic interests of capital-exporting countries and western investors. What strikes the eye, even upon a cursory glance of the numerous draft codes and Conventions prepared and subsequently abandoned, as well as the huge amount of doctrinal commentary written on the subject, is that, so "plentiful" in legal literature a subject matter as nationalization, is yet so"barren" and "scanty" in its treatment of the problem from the standpoint of the interests of the "takings" underdeveloped countries.

The third point of departure for this research is that, previous efforts to define and ascertain the norm in this area were, in large measures, exercises in mere re-statement of the patchy as well as contradictory rules of traditional international law, and therefore, amounted, at the most, to the formal systemization and synthesis of the old norms. In other words, the major weakness of those efforts was that they did not make a serious attempt towards the progressive development of the norms of ~~natural law~~ international law. In other words, by being oblivious to the dynamic changes that are taking place in the international arena and in trying to ensure the maintainance of the old status quo, those who were responsible for initiating most of the earlier efforts of codification made no serious attempt towards the progressive development of the norms in this area.

In light of the above considerations, the present study, will try to re-examine the problem along a fresh line. First of all, unlike most of the earlier works in

this particular field, this investigation will approach the problem of ascertaining the norms from the standpoint of the "centrality" of the "protection" of the "taking" underdeveloped country, as opposed to the standpoint of the "protection" of the alien property owner. As a thirld world student of international law, the author proceeds from the belief that, under the realities of the contemporary period, where the alien property owner is almost always a giant multinational corporation, it is the "taking" state of an underdeveloped country that needs "protection" under international law, since it is the latter that is increasingly becoming the victim of physical intimidation, political intrigue and economic retaliation for resorting to nationalization.

Secondly, this study will focus on the works of the U.N. not only because the U.N. is the broadest international forum that allows most nations to participate and make their voice heard either in the rejection of old norms or in the creation of new ones relative to the subject matter of nationalization, but also because, it is in the works of the U.N. that one discerns the "futuristic" thrust of a changing normative order.

The paper is divided into three major parts and 9 chapters. In part I, which consists of 2 chapters, the author will try to lay down the conceptual framework for the treatment of the subject matter of nationalization. Under chapter I, an attempt will be made to define the concept of nationalization proper, and then, distinguish that factual "regime" from property "takings" which fall under other cognate typologies, such as expropriation strictly so-called, requisition, confiscation, liquidation and sequestration, etc.

Chapter II will then try to delineate, from a conceptual standpoint, the type of proprietory or pecuniary interest that can be the object of nationalization, and examine the question of the territorial situs of the property subject to nationalization as well as the problem of determining the nationality of the alien whose property becomes the target of nationalization.

Part II of the paper, will try to define the historical and economic operational climate under which contemporary nationalization incidents take place, particularly in the underdeveloped countries. In that light, chapter III will try to situate post-war and current nationalization incidents within the overall historical dynamics in which the nature of the "taking" of property of aliens had evolved since the pre-first world war period. Chapter IV will then try to characterize and specify the kind of economic problems that force underdeveloped countries to resort to nationalization in the contemporary period.

Part III, which consists of the main body of this paper will examine, in chapters V, VI, VII, VIII and IX, the substantive traditional international law norms that governed property "takings" in the past, as well as those modern norms that are in the process of evolving from the works of the United Nations. Chapter V will be dealing with the determination of the juridic basis for carrying out an act of "taking". Here, the discussion will proceed under two separate headings. Under the first section, the discussion will examine the juridic basis for the act of "taking" under traditional international law. In the second section, the discussion will try to base acts of nationalization by underdeveloped countries on the juridic force of U.N. resolutions and declarations.

Chapter VI will be concerned with the problem of whether or not the carrying out of a legal act of "taking" is subject to compliance with certain rules of "prior-restraint". Here, again, the discussion will proceed under two separate headings. In the first section, the author will examine the traditional rule of prior-restraint to property "takings" of the "non-nationalization" type. In the second section, the discussion will deal with the question of whether the norms that emanate from the works of the U.N. attach any prior-restraint as a condition precedent to the carrying out of a legal act of nationalization.

Chapter VII will be concerned with the question of whether there exists an international legal "obligation" to pay compensation for property "taken". There, again, the discussion will be divided under two separate sections. The first section will examine the question of "obligation" to pay compensation under traditional international law, i.e., in connection with property "takings" of the "non-nationalization" type. Under the same section, the author will examine nationalization practices of <u>selected</u> socialist and <u>underdeveloped countries</u> to establish whether those state practices furnish any evidence as to existence of a strict legal "obligation" to pay compensation in property "takings" of the "nationalization-type". Then, section II of chapter VII, will examine whether the works of the U.N. give rise to norms that oblige underdeveloped countries to pay compensation for nationalized property as a matter of strict legal duty.

Chapter VIII will be dealing with the question of whether international law establishes a <u>minimum international standard</u> as regards the "amount", "manner" and "mode" of compensation for property "taken", and if so, what those

standards consist of. Here, too, the discussion will proceed under two separate headings. In the first section, the author will examine the question of "standard" of compensation under traditional international law in connection with "takings" of the "non-nationalization" type. Under the same section an attempt will be made to examine the nationalization practice of selected socialist and underdeveloped countries to establish whether those practices show compliance with a minimum standard of compensation in cases of "nationalization-type" takings. In the second section, the paper will examine the works of the U.N. to ascertain whether the norms emanating from those works recognize a minimum standard of compensation with which underdeveloped countries might be required to comply in the event of the nationalization of property of aliens.

In the last chapter (i.e. chapter IX), the author will examine the question of the legal obligation of states "whose nationals are adversely affected by nationalization measures and as well as "third states" to <u>respect</u> acts of nationalization by underdeveloped countries. Here, again, the discussion will proceed under two separate headings. In the first section, the paper will examine the problem associated with the uncertainties surrounding the "Act of state doctrine" strictly from the standpoint of <u>public</u> (and not private) international law. In the second section of chapter IX, the paper will examine the works of the U.N. to establish whether norms of a binding character have emerged that impose, on "adversely affected" as well as "third states", a legal obligation to respect acts of nationalization carried out by underdeveloped countries.

Taken as a whole, the discussion in those 9 chapters will revolve around two basic themes, namely:

(a) whether the norms governing "taking" which evolved under traditional international law can apply over those property "takings" of the "nationalization-type" which occur in underdeveloped countries in the contemporary period; and:

(b) whether the works of the United Nations create new binding norms that replace the traditional ones, and are capable of governing the contentions issues which often arise in connection with nationalization incidents in underdeveloped countries.

In the course of pursuing the examination of those two principal themes, the author will try to do two things. The author will, first of all, attempt to carry out, in relation to the subject matter of property "takings", a comparative exposition and analysis, of traditional as opposed to modern international law, both in terms of the overall orientation, and underlying assumptions as well as the specific normative rules, of each legal order. Secondly, and most importantly, the author will try to do, what one might metaphorically call, an exercise in "demolition and reconstruction". That is to say, the author will try to conclude by showing on the one hand, why the old norms should be discarded, while suggesting, on the other hand, with what new norms the old ones should be replaced.

PART I

CONCEPTUAL FRAMEWORK UNDERLYING THE TREATMENT OF NATIONALIZATION

CHAPTER I

Nationalization: The Definition of the Juridic Concept; its Similarities and Differences with Other Cognate Concepts

The ideological origin of the concept of nationalization and its foundation in economic theory goes as far back as the middle of the nineteenth century when it began to take shape as a socio-political principle[1]. As a juridic institution, however, nationalization is a relatively new phenomenon of recent formation.

It is, of course, generally true that nearly all contemporary juridic concepts find their counterparts in an embryonic form in the earliest seeds of law. In that sense, one can make a general, indeed trite, observation that the process by which a state in an organized society appropriates private property or activities to utilize them in the "general interest" could be traced as far back as the days of Babylon, Athens, Rome and the Middle Ages. Although some of those embryonic forms of state intervention and control over private property could be marginally analogized with some of the elements characterizing the new concept of nationalization, it is indeed "...idle to look in the far distant past for the origins of a system of nationalization in the contemporary sense of the term".[2] According to Katzarov, most of the inherited legal systems, "especially Roman law, canon law and indeed, most of the civil law systems at present in force, are alien to the moral and material origins of nationalization".[3]

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[1] Konstantin Katzarov, The Theory of Nationalization 1-2 (1964).

[2] Ibid. at 22. Emphasis ours .

In making a comparative study of nationalization back in 1946, the Paris Institute of Comparative law, for instance, took the year 1914 as the earliest time for the emergence of nationalization as a full-fledged juridic institution.[4] In fact, according to Katzarov, the concept of nationalization assumed definite juridical shape only in 1917 upon its incorporation in the constitution of Mexico and the first revolutionary decrees of the Russian Soviet Socialist Republic.[5]

Nationalization: Definition of the Concept

Like most juridical concepts, the legal institution of nationalization defies a hard-and-fast definitional framework. Not only does a simple definition prove inadequate to accommodate the manifold features and aspects of nationalization, but even if it were possible to include some of the 'essential' features in a workable definition, there is hardly an agreement among jurists as to which elements or features are essential to constitute a definite characterization to warrant inclusion in such a definition. In order to show some of the prevailing differences among jurists in this respect, we shall examine a few representative definitional propositions.

As a basis for discussion on the international effects of nationalization held in 1952 under the auspices of the Institut de Droit Internationale, for instance, La Pradelle defined nationalization as:-

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[3] Ibid. Emphasis ours .

[4] Ibid. at 22-23.

[5] Ibid. at 23.

> "...Opération de haute politique par laquelle un Etat réformant tout ou partie de sa structure économique enlève aux personnes privées pour la remettre à la nation là disposition d'entreprises industrielles ou agricoles d'une certaine importance en les faisant passer du secteur privé au secteur public".6

During the same debate, a somewhat similar definition was put forward by Rolin as follows:-

> "La nationalization est la mesure législative de caractère politique par laquelle un état, réformant la structure de son economie, enlève aux personnes privées et confie à des organismes publics la jouissance et l'administration d'entreprises industrielles ou agricole de nature determinée".7

At the conclusion of the Debate, however, the Institute adopted the following modified definition:

> "La nationalization est le transfert à l'Etat, par mesure législative est dans un intérêt public, de biens ou droits privés d'une certaine catégorie, en vue de leur exploitation ou contrôle par l'Etat, ou d'une nouvelle destination qui leur serait donnée par celui-ci".8

Stressing still another aspect of the notion, Foighel defined nationalization as:-

> "...the compulsory transfer to the state of private property dictated by economic motives and having as its purpose the continued and essentially unaltered exploitation of the particular property".9

From still another orientation, Katzarov defines nationalization as:-

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[6] 43 (I) Annuaire de L'Institude droit International 126 (1950).

[7] Ibid. at 99.

[8] 44(II) Annuaire de L'Institut de droit Internationale 283 (1952).

[9] Isi Foighel, Nationalization: A study in the Protection of Alien Property in International Law 19(1957). [Emphasis ours].

> "...the transformation...in the public interest of a superior kind,...of specific assets or...of a specific activity, which...are, or may be, means of production or exchange...into the assets or activity of the community ...state...local authority or...cooperative-...with a view to...their...immediate or...future utilization in the general interest and no longer in the private interest".[10]

At a meeting organized by the International Association of Democratic lawyers in Rome between May 4 and 5, 1957, Adrian Kuwatly put forward the definition of nationalization as "the operation by which the property of an undertaking or a group of undertakings passes to the nation for the purpose of rescuing it, in the general interest, from capitalist administration".[11]

Despite differences in emphasis, some common denominators are discernible in the foregoing definitions. Almost all of the authors agree that nationalization consists in:-

(i) The transfer of ownership and control of property or economic activity from private to public hands. Even here, there is, no agreement as to the nature of the transfer and the subject to whom the transfer is made. Unlike most authors, Katzarov maintains that nationalization does not merely involve an act of transfer. According to him, nationalization instead involves an act of "transformation". He asserts that:-

> "In the light of the different categories of property which have evolved, and of the differing degrees of protection afforded them, nationalization appears as a conversion of private property into a higher quality of ownership to which the legislature gives preference - ownership of a higher category affecting assets which should

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[10] Katzarov, op. cit. at 160.

[11] Adrian Kuwatly, "Introductory Statement on the Problems of Nationalization" in International Association of Democratic lawyers, Study Circle on Nationalization 5 ,(1957)

> not be the subject of private ownership or even of civil transactions, but which should enjoy special protection".[12]

As regards the subject to whom the transfer is made, authors like Kawatly maintain that nationalization involves transfer of private property to the "nation" or to the "community" and not to the "state" or its various organs.[13]

(ii) The putting of the property or activity taken from private hands under public control with a view to its utilization in the general interest.

(iii) The withdrawal of a particular category of property or activity from private enterprise.

Of all the features that characterize nationalization, the most decisive element that distinguishes it from other institutions is that, unlike other related institutions, it involves "the conversion of a particular class of private property, chosen because of its nature into collective, socialist, peoples' state property and its utilization in the general interest".[14]

Although the difference has virtually no bearing in international law, it should be noted that "nationalization" is not necessarily equivalent to "socialization". While nationalization may occur in connection with socialization, the latter strictly involves "the reorganization of certain forms of property within a given sector of the economy" with the aim of securing "the benefits of technical reorganization to new classes which are acceding to power".[15]

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[12] Katzarov, op. cit. at 160. The underlined phrases appear in italics.

Similarities and Differences Between Nationalization and Other Cognate Concepts

Perhaps the best way to comprehend the concept of nationalization and to avoid the confusion that abounds this institution would be to examine the similarities and differences between this institution on the one hand, and the institutions of expropriation, requisition, confiscation, liquidation and sequestration on the other. The need for distinguishing between nationalization and these other cognate concepts is not solely one of a drive for conceptual clarity. It is principally aimed at dispelling the confused attempt, on the part of a considerable number of jurists, to resolve legal problems arising from nationalization by means of norms and rules of international law adopted in connection with some of these cognate concepts.

In so far as nationalization is one form of state interference against private property, it tends to have certain similarities with other forms of government interference. On the other hand, nationalization is a form of state interference of such a "particular" kind that a thorough distinction has to be made between this notion and other related institutions so that an analysis of the legal questions attaching to this notion would not be obscured by an indiscriminate application of distinct rules of international law adopted in connection with other institutions. In other words, the conceptual difference between nationalization and other forms of public interference against private property is of paramount importance in international law in so far as the distinction determines what precise legal rules would govern a certain factual regime.

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[13] Adrian Kuwatly, op. cit. at 6-7. For an interesting discussion on the distinction between nationalization and etatization, see, Katzarov, op. cit. at 150.

[14] Katzarov, op. cit. at 161. Emphasis ours .

In the following discussion, we shall examine the meaning and nature of the institutions of expropriation, requisition, confiscation, liquidation and sequestration and their respective difference with nationalization.

Expropriation and Nationalization

The task of defining expropriation is no less easier than that of nationalization. In a somewhat simplistic fashion Foighel describes (does not define) expropriation as "a compulsory acquisition of property which takes place for the benefit of the common good and which gives to the person affected by the expropriation a claim to full compensation".[16] The weakness of this description is that it gives the impression that one of the distinct features of expropriation, and indeed its distinguishing element, is the "existence and extent of compensation". Although the element of compensation is mostly implicit in the concept of expropriation, it does not constitute a decisive distinguishing feature of expropriation from nationalization. The conceptual relationship (both similarities and differences) between expropriation and nationalization essentially lies in certain distinct elements possessed by each institution and having virtually nothing to do with the question of compensation. It may be submitted, however, that although it is not the presence or absence of compensation or the amount due that conceptually distinguishes expropriation from nationalization, the existence or extent of compensation could be affected once the distinction is made on the basis of other decisive criterion.

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[15] S. Friedman, Expropriation in International Law 6 (1953).

[16] Foighel, op. cit. at 14.

Expropriation and nationalization are not only related concepts but also exhibit such important common features that some jurists have tended to overlook their distinction.[17] There are at least three important common features between expropriation and nationalization which cummulatively account for the confusion, and indeed controversy, that abounds today in international law. These are that both nationalization and expropriation:-

(i) involve a form of public (state) interference against private property rights;

(ii) derive from the state's "territorial sovereignty over all property within its borders";[18]

(iii) involve the compulsory transfer of property from private to public ownership for the purpose of the public good.

Although expropriation and nationalization are cognate concepts sharing the foregoing basic common features they are distinguished from each other by a host of factors such as motive or purpose, extent, subject-matter and form.[19]

Among those jurists who attach importance to motive or purpose as a decisive factor in distinguishing between nationalization and expropriation are La Pradelle[20], Foighel[21], Katzarov[22] and Rolin.[23] According to Foighel, for instance,

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[17] One such author is S. Friedman. Although that author attempts to differentiate expropriation strictly so-called from nationalization, the distinction is posed merely as one between two forms of expropriation, namely "individual" as opposed to "general". In other words, Friedman treats both categories of "takings" under one single generic concept of "expropriation". See, S. Friedman, op. cit. at 5.

[18] Gillian White, Nationalization of Foreign Property 43 (1961).

[19] Foighel, op. cit. at 14-15.

[20] 43(I) Annuaire, op. cit. at 126.

expropriation is usually motivated by the desire of the state to take over property from private hands "for the benefit of a special purpose of the state - different from the previous use".[24] As examples of expropriation, Foighel provides instances where the state expropriates agricultural land for the purpose of laying railways or building hospitals and roads - a process which involves the taking of private property for a use other than the previous one. The same author maintains that, unlike expropriation, nationalization involves the unaltered use of the property with the crucial difference that the object of nationalization is the withdrawal of the property from private enterprise and the transfer of its ownership to the community or nation.[25] In the words of Foighel, in the event of nationalization, "...the state does not desire to let private individuals utilize the property for so-called private economic purposes and therefore desires to take over and carry on the hitherto practiced utilization of the property".[26] The essence of the difference in the objectives sought by the two institutions lies in that in the case of expropriation the specific property which is the object of expropriation is chosen not because the ownership over that property is private and not public but because that particular property as against other properties of the same category (adjacent immovables or same category of property under private ownership) happens to fall (locationally, etc.) within the determined plans or manner of utilization set out by the state. On the other hand, the central objective of

[21] Foighel, op. cit. at 14-15.

[22] Katzarov, op. cit. at 160-161.

[23] 43(I) Annuaire, op. cit. at 99.

[24] Foighel, op. cit. at 18.

[25] Ibid.

[26] Ibid. at 18-19.

nationalization is to curtail private control and therefore power and pecuniary benefit over a key sector of an economy and important categories of property and to strengthen public control and appropriate the economic gains accruing therefrom. This subtle and crucial distinction between nationalization and expropriation is fairly well borne by the different connotations carried by each of these two terms in the sense that nationalization reflects the strong element of gain of subsequent ownership by the "nation" while expropriation carries the strong element of loss of ownership on the part of the previous private owner.

Authors like Friedman attach importance to extent of interference as a decisive factor in distinguishing between expropriation and nationalization. According to Friedman what distinguishes expropriation ('individual' expropriation as the author calls it) from nationalization (otherwise referred to as 'general' expropriation) is that the former is confined to a particular property and affects only a specifically named individual while the latter involves a deprivation of property on a general and impersonal basis determined by kind.[27] In the words of Katzarov "the object of expropriation is always an individual or specific item of property which is found to be necessary to the community for some particular purpose..." while on the other hand, "nationalization is always an impersonal measure" based on the general idea of public control over key economic sectors and factors of production.[28] It must be noted, however, that while the criterion of extent of interference may be an expedient tool for distinguishing expropriation and nationalization most of the time, its weakness lies in that it overlooks certain instances where both nationalization

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[27] S. Friedman, op. cit. at 5-6 and 12-13.

[28] Katzarov, op. cit. at 143.

and expropriation could relate to similar objects. Although nationalization typically involves general interference extending to property and rights of a certain category it may sometimes be directed against specific (single) enterprises.[29] The nationalization of the Anglo-Iranian Oil Company in Iran and that of the Suez Canal Company in Egypt, as we shall see subsequently, are cases in point.

Another distinguishing factor is the element of subject matter: Authors like Katzarov argue that expropriation "generally relates to rights of property over immovables and only exceptionally over movables or incorporeal rights".[30] They maintain that nationalization, on the other hand, "deals with entire economic undertakings taken complete with good will as a going concern or even as a sort of universitas...and only to a minor extent or by way of exception, with corporeal property such as immovables or agricultural implements".[31] Unlike the case of expropriation, the subject matter in nationalization constitutes "undertakings, activities and material assets which...are of a 'superior' order, and in that capacity should be withdrawn from private enterprise for utilization in the interests of all citizens".[32] Here again, while this distinguishing criterion is valid in most cases its inadequacy lies in that it overlooks the possibility that any kind of property could either be expropriated or nationalized.

The other distinguishing feature between nationalization and expropriation lies in the "legal nature of the proceedings instituted to effect the transfer of property".[33]

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[29] Gillian White, op. cit. at 42-43.

[30] Katzarov, op. cit. at 143.

[31] Ibid.

[32] Ibid.

In the case of expropriation, the dispossession is subject to a legally prescribed limitation of "public interest" which allows the interested parties to challenge the existence of "public interest"[34] that could warrant the expropriation in the first place. Besides, the actual transfer of the property is effected by authority of an administrative act ordering the expropriation and the authority is derivative in character. On the other hand, nationalization always results from the exercise of an absolute discretion of the highest policy-making organ of the state in deciding that certain activities or assets must be appropriated by the state.[35] Nationalization measures do not, as a rule, reserve any right of recourse against the act of nationalization itself. In the case of nationalization, therefore, the power of transfer of property is original and not derivitive in character. It should be noted that although this distinguishing feature carries special weight under municipal law, it is not without significance, as we shall see later, in international law as well. The question of whether an act of nationalization in international law is subject to the existence of "public interest", in the same way as the act of expropriation is, for instance, one of the significant implications of the difference between expropriation and nationalization.

And lastly, the difference between nationalization and expropriation consists in the fact that the former is an institution of substantive law and the latter is an institution of procedural law.[36] Expropriation, being an institution of procedure has as its object, the establishing of the existence of "public interest", and having established

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[33] Ibid.

[34] Ibid. at 143-144.

[35] Ibid. at 144.

[36] Ibid.

the interest, governs the manner of assessment and the prior payment of full compensation and ultimately the transfer of ownership. On the other hand, being an institution of substantive law, nationalization is principally involved with the substantive prescription that "a given activity or form of wealth can belong only to the community and must be utilized by the community in the general interest"[37] and it is only incidentally related to the procedural aspects of its realization and the juridical consequences following therefrom.

Thus, in municipal legal theory, the difference between expropriation and nationalization is mainly determined by the foregoing distinguishing elements. Even here, however, one may entertain the reservation with respect to the validity of the criterion of extent, subject matter and legal form as distinguishing features of nationalization from expropriation. One can safely maintain that the crucial difference between nationalization and expropriation, at least in municipal legal theory is a difference in the objectives sought by each institution. As far as international law is concerned, however, the basis of the distinction is to be sought, as we shall show subsequently, not in this or in that narrow feature (i.e. purpose, extent, subject-matter, legal form, etc.) but rather in the overall change in the international operational climate - conceptual, historical, socio-economic and political - that has given birth and shaped the institution of nationalization.

Requisition and Nationalization

In municipal legal theory, the institution of requisition is a unique form of state interference against private

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[37] Ibid.

property and it is very much allied with the institution of expropriation. Requisition involves a compulsory seizure of private property (could even be public property of another state) "to enable a sudden emergency to be dealt with in the general interest" and it is mostly followed by payment of compensation.[38] It differs from the ordinary type of expropriation in that "more than public utility is required to justify it" and compensation is paid after the seizure "since the urgency of the situation may not allow prior payment".[39] Recourse to requisition is mostly made in time of war and for military purposes although it may also extend to satisfy urgent non-military needs. As far as international law is concerned, requisition is mostly regarded as another variant of expropriation and as such, the distinction between expropriation and nationalization is valid as far as the difference between requisition and nationalization is concerned.

Confiscation and Nationalization

The ordinary dictionary definition of the verb "to confiscate" is "to appropriate (private property) to the public treasury by way of a penalty".[40] Confiscation is generally understood as "the deliberate seizure of property, by the state, without provision for adequate compensation".[41] In fact, confiscation inherently implies the denial of any right to restitution or to damages.[42]

Both confiscation and nationalization are forms of

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[38] B.A. Wortley, Expropriation in Public International Law 29 (1959).

[39] Ibid.

[40] 1 Shorter Oxford dictionary 367

[41] B.A. Wortley, op. cit. at 39.

state intervention against private property rights. Both involve the takeover, by the state, of private property. It is probably these common features that explain the confusion that abounds in the treatment of these two distinct concepts as sometimes overlapping institutions. The most common confusion among jurists as far as the relations between nationalization and confiscation goes, consists in categorizing cases of nationalization without compensation as confiscation measures. In order to ensure clarity and avoid confusion, it would be appropriate to examine some of the important distinctions between nationalization and confiscation.

The difference between nationalization and confiscation, at least in municipal legal theory,[43] is quite clear and definite. While confiscation is basically a penal measure derived from the police power of the state, nationalization is a public non-penal act involving the conversion of private property into collective property with a view to its utilization in the general interest.[44] Aside from this basic difference, the two concepts could be distinguished from one another on the basis of the subject matter to which each relates, the objective sought by each and the relation of the act to the subject matter in the case of nationalization and that between the act and the actor in the case of confiscation.

The subject matter in the case of nationalization consists of assets or activities (a universitas) forming a certain category over which the state decides to exercise

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[42] Ibid.

[43] For an interesting discussion regarding the distinction between the two see, B.A. Wortley, Ibid. at 40.

[44] Katzarov, op. cit. at 147.

full control in order that they could be utilized in the general interest. On the other hand, confiscation "relates to things and rights designated by a criterion which has nothing in common with that of nationalization. It affects objects which have been used for the commission of a criminal offence or which are merely in the ownership of the criminal".[45]

In terms of objectives sought, nationalization aims at the transfer to the state of an activity or an asset of a vital nature in order that it may be utilized in the general interest. On the other hand, confiscation is not occasioned by the aim of utilizing a certain asset or activity in the public interest although that could be the ultimate consequence. Instead, it is aimed at sanctioning the criminal behaviour of an actor by adversely affecting the material interests of the author of a criminal offence.

And lastly, nationalization is by its very nature impersonal. In other words, it is concerned with the nature of the property or activity which is the subject matter of the nationalization regardless of the personality of the owner.[46] On the other hand, confiscation focuses solely on the personality of the owner who has committed an offence. The state confiscates the property of the offender with the object of punishing him through his property and in doing so, the state's decision is in no way affected by the special characteristics of the property confiscated. The act of confiscation may relate to a specific property in cases where that property has itself been an instrument (i.e. a factory producing ammunitions for supplying enemies of a state as in the case of Usine Renault in France during the Second World War) for the commission of an offence, and even then, the considerations for focussing on a specific property in those types of cases has nothing in common with those

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[45] Ibid.

considerations underlying nationalization.[47]

Despite these profound differences, however, there are still such authors as Doman,[48] Van Hecke,[49] Fawcett[50] and Adrianne[51] who treat certain cases of nationalization as confiscation. Doman, for instance, insists that "in the case of refusal of compensation or the offer of granting inadequate compensation, nationalization resembles confiscation".[52] Van Hecke, in fact, asserts that so long as nationalization is not accompanied by just compensation it is in no way different from outright confiscation.[53] The identification of nationalization without compensation (or with partial compensation) with confiscation and the resultant confusion with respect to the distinction between confiscation and nationalization overlooks the very essence of the latter concept in that acts of nationalization without any or adequate compensation are in fact typical of the institution of nationalization since the concept's very inception. As we shall see in subsequent chapters, the nationalization measures effected in Eastern Europe following the Second World War were in fact accompanied by partial compensations mainly because it was thought by the state's concerned that only partial compensation was due since the property nationalized was regarded, either by virtue of its origin or subsequent accumulation, the fruit of the country's social and economic environment. Still in the case of

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[46] Ibid. at 148.

[47] Ibid.

[48] N.R. Doman, "Post-war Nationalization of Foreign Property in Europe", 48 Columbia Law Review 1125-1161 (1948).

[49] Van Hecke, "Confiscation, Expropriation and the Conflict of Laws", International Law Quarterly 340 (1951).

[50] Fawcett, "Some Foreign Effects of Nationalization of property", 27 British Year Book of International Law 355 (1950).

nationalization measures in the U.S.S.R. no obligation to compensate was recognized because it was thought that the nationalized property was merely being restored to its legitimate owners.[54] Thus, in all cases where private property is taken without compensation or upon payment of partial compensation the characterization of the act of "taking" does not in any way depend on the question of compensation but rather on circumstances such as the actual social and economic background that prompted the "taking", the personal or impersonal character of the taking, whether or not the personality of the owner is considered as a basis for the taking, and the objectives sought by the act of the taking. In any case, "it is unacceptable in principle to assimilate nationalization to confiscation on the sole ground of the absence of compensation".[55]

Other Forms of Government Interference against Private Property and Nationalization

Although there is no legitimate basis for confusion between nationalization and other forms of government interference against property such as liquidation, sequestration and still remote forms such as taxation, except in so far as all of them involve some form of state interference against property rights, it may still be necessary to point out the marked difference that exists between nationalization and these other forms of state measures against private property.

According to the Black's Law Dictionary, liquidation

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[51] P. Adrianne, Confiscation in Private International Law 6-7 (1956).

[52] N.R. Doman, op. cit. at 1125.

[53] Van Hecke, op. cit. at 345.

[54] Konstantin Katzarov, op. cit. at 149.

[55] Ibid. at 150.

generally involves a process of ascertaining debt, gathering the assets of the debtor and distributing these assets to the appropriate creditors.[56] In the specific context of international law liquidation is characterized by the compulsory seizure of property for the purpose of settling claims of war reparation directed against the property of the nationals of a belligerent state. In this respect, liquidation poses as a distinct regime different from both expropriation and nationalization. In the case of Certain German Interests in Polish Upper Silesia (1926) the Poles maintained that liquidation and expropriation are distinct notions differing from each other mainly in terms of objectives.[57] According to the polish view, expropriation is a measure carried for public purposes while liquidation in the specific context of the Peace Treaties is intended to settle war reparations and to degermanize Poland. In the words of the Polish litigants:-

> "...Il y a toute une gramme de différences entre les deux notions. L'expropriation, ayant un but, que toutes les législations du monde déterminent comme 'utilité publique', et pouvant s'appliquer à tous - sans aucune distinction de nationalité - resulte, d'une legislation nationale, et chaque etat civilsé, par sa législation interne, règle cette institution d'une façon précise. Les trois circonstances: mais - utilité publique; caractère - non-differentiel; et source - legislation interne, composent le substratum de la notion d'expropriation. Ces mêmes circonstances la distinquent de la mesure appelée liquidation... c'est un but politique et non un but d'utilité publique qui a inspiré les auteurs du Traité de réserver aux puissances alliées et associées le droit de liquider les biens, droits et intérêts des ressortissants allemands: Il s'agissait de grantir les reparations et de contribuer à la degermanization; c'est une Traité internationale et non une législation interne qui est la source du droit réservé aux puissances alliées. Et c'est enfin la caractère exclusivement differentiel, découlant logiquement du

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[56] Black's Law Dictionary 1531 (4th ed., 1951).

[57] 1926 P.C.I.J., Ser. C, No.11 at 699-705.

but de degermanization des pays alliés, qui distinque la liquidation de l'expropriation".[58]

Although authors like Friedman do not accept this distinction, we still feel that it spells out some of the distinct features of liquidation that differentiate it from both nationalization and expropriation.

Still another form of state interference against private property is sequestration. Sequestration in the context of international law is strictly a process in which the State compulsorily seizes property (private or public property belonging to another state) for the purpose of placing it under temporary state administration.[59] It is mostly directed against the nationals of a belligerent state immediately before, during or after the incident of war or conflict. Typical cases of sequestration could be traced to the aftermaths of the First and Second World Wars. In recent times, the government of Indonesia resorted to sequestration against Dutch property during the Dutch-Indonesian conflict over West Irian, before Indonesia ultimately nationalized various Dutch concerns. The most important distinction between sequestration and nationalization, or for that matter expropriation is, among others, that sequestration falls short of actual transfer of ownership and is only limited to temporary state administration.

Taxation is still another form of state interference which is sometimes regarded as an indirect means of expropriating private property. Like expropriation and nationalization, taxation is an act of the sovereign state exercised over persons and proprietory activities for the purpose of the public good. This remote similarity between taxation and

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[58] Ibid. at 704.

[59] Black's Law Dictionary, op. cit. at 1531.

nationalization (or expropriation) should not, however, blur the distinction that exists between it and these other institutions. Despite their obvious difference there is an exaggerated claim by certain publicists that unreasonably heavy taxes could be construed as indirect (creeping) expropriation. White, in fact, cites, as an example, the case of the Corn Products Refining Company - an American-owned firm in Yugoslavia - upon which the Yugoslav government imposed a large mortgage in favour of the state land fund pursuant to a decision of the local tax office in respect of war profit taxes.[60] The United States government regarded the act as confiscation of the entire property on the grounds that the amount was disproportionate to the alleged war profits. The Corn Products Refining Company Case notwithstanding, the form of state interference against property rights by way of taxation (however heavy the levy might be) is such a distinct legal act of sovereignty that there can hardly arise in the contemporary period a legitimate ground for confusing it with nationalization or expropriation.

From the standpoint of this paper, therefore, it is not simply a matter of conceptual clarity that the juridic notion of nationalization be understood as a distinct institution different from each of the above cognate concepts. Instead, the distinctness of nationalization as concept is posed right at the outset in order to serve as a basis for developing one of the central themes of this research, namely that the legal issues raised by a factual "regime" of nationalization proper cannot be resolved by drawing analogies or precedents that evolved in connection with, and applied over, other cognate concepts, such as expropriation strictly so-called.

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[60] Gillian White, op. cit. at 43.

CHAPTER II

The Scope of Operation of the 'Regime' of Nationalization in International Law

In the preceding chapter we saw that nationalization is an act of a state whose subject matter is a definite category of property belonging to private persons. Acts of nationalization by a state could relate to property located within or outside the territory of the nationalizing state and belonging either to nationals or foreigners. In so far as nationalization measures affect the property of nationals of the 'taking' state they do not concern international law. Where, however, the nationalization measures are directed against the property of aliens (foreigners) they involve international law since those acts affect another state and give rise to claims of diplomatic protection by the state whose national the foreigners are. Thus, in its international aspect, the 'regime' of nationalization is concerned with three important elements - the property which forms the subject matter of nationalization, the nature of the material connection that must exist between the property and the nationalizing state, and the nationality of the owner of property. In the following section we will be dealing with these three aspects that constitute the conceptual 'regime' of the subject-matter of nationalization under international law.

(1) The Nature of the Property or Pecuniary Interest which can be the Object of Nationalization

In examining the international aspects of nationalization and its legal consequences one of the most difficult questions relates to the determination of the nature and content of property which is recognized under international law as being capable of nationalization and in respect to which, assuming there is an international obligation to indemnify at all, states may be required to pay compensation.

This aspect of nationalization is wrought not only with theoretical but also with practical problems. The dispute concerning the Mexican Oil Nationalization Measures of 1938, for instance partly centred around the question of "what" has actually been nationalized and for "which" proprietory interests compensation was due.[1]

There is hardly an agreement among jurists as to what constitutes "property" under international law to warrant a claim that nationalization has taken place with respect to that property and in connection with which a claim for compensation could be sustained. Despite the dearth of authority, however, it is possible to identify the type of proprietory interest that is capable of being nationalized by reference to state practice and the decisions of international tribunals.

The content of property affected by any measure of nationalization is seemingly ascertainable by examining each and every actual incident of nationalization. In point of fact, the question of ascertainment is indeed easy as regards tangible objects such as movables and immovables. There is hardly any contestation in international law that practically all types of tangible movable and immovable property are legally susceptible of nationalization. On the other hand, a difficult problem arises with respect to intangible proprietory interests. The controversy regarding this category of interests partly revolves around the question of whether these interests are accorded legal recognition and protection under general principles of international law. This problem is compounded by the fact that contemporary nationalization, unlike its forerunner-expropriation, occurs at a time when proprietory claims are not limited only to tangible movables

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[1] John H. Herz, "Expropriation of Foreign Property", 36 A.J.I.L. 245 (1941).

and immovables, but also extends to a variety of incorporeal proprietory interests occasioned by the complexity of modern production and distribution and the special role technology plays in these processes.

Contemporary cases of nationalization measures in the underdeveloped countries provide ample indications as to what kinds of proprietory interests are susceptible of nationalization. The scope of property interests covered by nationalization laws of Third World countries vary from case to case depending on the economic activity nationalized. Article 1 of the Egyptian law of July 26, 1956, for instance, provided that "the Suez Canal Maritime Company, S.A.E., is nationalized. All money, rights and obligations of the company are transferred to the state. All organizations and committees now operating in the company are dissolved".[2] Article 3 of the same law provided that "The money and property of the nationalized company in Egypt and abroad are frozen. Banks, organizations and individuals are prohibited from disposing of same in any manner except by Order of Board mentioned in Article 2".[3] The Egyptian law of nationalization was so broad in scope and general in its formulation that it is difficult to identify the kind of proprietory interests it excluded. The Indonesian Act, No.86, concerning the nationalization of Dutch owned enterprises in Indonesia was even more vague and general. Article 1 of that law provided that "Such Dutch-owned enterprises situated within the territory of the Republic of Indonesia as shall be determined by Government Ordinance shall be nationalized and declared full and complete property of the Republic of Indonesia".[4] On the other hand, Article 8 (11) of the

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[2] See Chapter VII.

[3] Ibid.

[4] Ibid.

National Bank of Commerce (establishment and vesting of assets and liabilities) Act of 1967 of Tanzania which nationalized the Banking Business provided that "all assets of the Banks, which are Tanzanian assets, subsisting upon the effective date shall by virtue of this section and without further assurance be vested in the National Bank and shall be deemed to have so vested upon the effective date".[5] The same act defined "assets" in Article (2) as consisting of "real and personal right of every kind including:

(a) rights under contracts and agreements
(b) books, books of account and records
(c) choses in action; and
(d) all other rights, interests and claims in or to real or personal property, whether liquidated or unliquidated, certain or contingent, accrued or accruing".[6]

A similar language was employed by the State Trading Corporation (Establishment and vesting of Interests) Act of 1967,[7] and the National Agricultural Products Board (Vesting of Interests) Act of 1967.[8] The Tanzanian Nationalization laws did not only include tangible movables and immovables, but also included incorporeal rights and interests of the type enumerated above. Economic interests in the form of goodwill were not, however, envisaged and compensation did not extend to such interests as the Tanzanian experience illustrates.[9] Similarly, Decree law, No.4 of Oct. 9, 1968 of Peru nationalizing the La Brea and Parinas oilfields and the industrial installations operated by the International

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[5] 6 International Legal Materials 1194-1201 (1967).

[6] Ibid.

[7] Ibid. at 1202-1211.

[8] Ibid. at 1212.

[9] Clarence Dias, "Tanzanian Nationalizations: 1967-1970", 4 Cornell International Law Journal 59-79 (1970).

Petroleum Company, Ltd. provided in its fourth preambular paragraph that the nationalization measure extended..."to the facilities, plants, systems of transport, camps, storage tanks, refinery and other installations included in the industrial complex, as well as the surface of the La Brea and Parinas fields...".[10] Article 1 of the same Decree, provided for the nationalization of the Industrial Complex of Talara"...including the Talara refinery with its adjacent facilities and storage tanks on the Talara Mesa, the facilities in Ve Rdun Alto, including the cracking, electricity and water plants at Portachuel, the systems of transport for gases and analogous hydrocarbons, the port facilities, the camps, those parts of the surface of the La Brea and Parinas fields which are previously owned, and all facilities attached or accessory to the said industrial complex...".[11] Article 1 of Supreme Decree No. 08956 (otherwise referred to Decree No.22 of the Revolutionary Government), of Oct. 16, 1969 of Bolivia, nationalizing the oil operations of the Bolivian Gulf Oil Company provided for "the reversion to the state of all the concessions granted to Bolivian Gulf Oil Company and the nationalization of all its installations, real estate, means of transportation, studies, plans, projects and any other asset without any exception".[12] Ordinance no. 71-8 of Feb. 24, 1971 regarding the nationalization of oil operations in Algeria, provided in Article 1:

> "The following are nationalized as of the date of publication of the present ordinance in the official journal of the Democratic and popular Republic of Algeria.
> 1. The properties, shares, title and interests of every sort which constitute in Algeria the estate of the 'Societé d'exploitation des Hydro Cabures de Hassi r'Mel' (SEHR) whose head office is at Paris... and more generally, the properties, shares,

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[10] 7 International Legal Materials 1257-1259 (1968). Emphasis ours .

[11] Ibid. Emphasis ours .

title and interests of every sort held by all companies, subsidiaries or establishments known under the trade name, initials, or partial or total denomination... of the said company.

2. All mining interests including existing equipment for exploitation as well as equipment and pipelines used to remove products held directly or indirectly by all companies under the concessions enumerated in the ordinance".[13]

A similar language was employed in the Algerian ordinance No.71-9, 71-10, and 71-11 of Feb. 24, 1971 as well as in Decrees No.71-64, 71-65, and 71-66 of Feb. 24, 1971 relating to the transfer of property nationalized. Law 14, 450 of July 15, 1971, amending Article 10, section 10 of the political constitution of the Chilean State which authorized the nationalization of major mining industries provided, in Article 1 (c) that

"...in the case of nationalization of mining activities or companies classified by law as Gran Mineria (major mining industries) the nationalization shall include the companies or activities themselves, rights in them or their total or partial assets".[14]

Excluding concessionary rights from the scope of nationalization the Chilean Law, in Article 1 subsection (c) provided that "...no right to compensation shall be allowed for rights to mineral deposits. Such rights shall be registered, without further formality, in the name of the state".[15] Article 1 of the Libyan Law nationalizing the operations of British Petroleum Exploration Company (Libya) provided that:

"Activities of the British Petroleum Exploration Co. (Lybia) Ltd. in oil concession No.65 shall be nationalized and shall become the property of the state.

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[12] 10 International Legal Materials 175-178 (1971) Emphasis ours .

[13] Ibid. at 847-854. [Emphasis ours] .

[14] Ibid. at 1067-1072 [Emphasis ours] .

[15] Ibid. [Emphasis ours] .

> All funds, rights, assets and shares related to such activities of crude oil and natural gas prospection, drilling, extraction, transportation, separation, storage and export as well as other assets and rights pertaining to the said activities" shall pass into the hands of the state.16

Article 1 of Law. No.69 of June 1972 nationalizing the operations of the Iraq Petroleum Company Ltd. provided as follows:

> "The operations of the Iraq Petroleum Company Limited in the areas delimited for it in accordance with law 80 of 1961 shall be nationalized. The ownership of all property and existing rights relating to the above mentioned operations shall revert to the state and this includes in particular installations and equipment for exploration, drilling, production of crude oil and gas, treament, gathering, pumping, transportation, refining and storage, and the main and field pipelines, and other installations and equipment as well as other assets among them the office of the above mentioned company in Baghdad with all its installations and equipment".17

From the foregoing cursory survey of nationalization legislations it becomes clear that not only does nationalization relate to tangible movables and immovables , but also to incorporeal rights such as shares and other proprietory interests short of ownership. While the foregoing legislations seem to be definitive as regards tangible movables and immovables, the question of incorporeal rights is not defined with precision.

One of the most problematic questions as regards intangible proprietory interests relates to contractual and concessionary rights.[18] International jurists are divided as to whether contractual and concessionary rights constitute proprietory interests of such a character as would be susceptible to expropriatory "taking" and much less to natio-

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[16] 11 International Legal Materials 380-382 (1972) Emphasis ours .

[17] Ibid. at 846-848. Emphasis ours .

nalization, so as to warrant a claim for compensation. One point of view holds that an abrogation of contractual or concessionary rights by a state amounts to expropriation of the rights and it entails an obligation to pay compensation. Writing in 1931, Verdross, for instance, maintained that, in addition to tangible movables and immovables, property under international law includes, for the purpose of expropriation, concessionary rights.[19] Similarly Herz maintains that:

> "According to a great array of diplomatic and judicial cases and the great majority of authors, property comprises rights as well as tangible property, above all contractual rights arising from contracts of concession, purchases, loans, etc."20

To support his claim Herz cites[21] the Delagoa Bay Concession Case[22], the Sicilian Sulphur Monopoly Case[23], the El Truinfo Company Case (concerning franchise for the use port facilities),[24] the Shufeldt Claim[25], the Cheekcase (concerning a contract which conferred the right to exploit certain forests),[26] the Norwegian Ships Arbitration Case (concerning the cancellation of Shipbuilding Contracts),[27] the case of Dr. Ashmore (concerning fishing rights)[28] and the George W. Hopkins Case (concerning rights resulting from the possession of money orders).[29] Herz argues, and he is supported in this by authors[30] such as Kelsen, Eagleton,

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[18] By concessionary rights we mean the right of a contractor to engage in or undertake a certain economic activity under a concession agreement concluded between a government and a private operator.

[19] Alfred Verdross, "Les Regles Internationale Concernant le Traitement de Étrangers", 37 Recueil Des Cours 364 (1931).

[20] John H. Herz, op. cit. at 244-245.

[21] Ibid. at 244.

[22] 2 John Bassett Moore, History and Digest of the International Arbitrations to which the United States has been a party. 1865-1899 (1898).

Nielson and Clarke that in the foregoing cases contractual and concessionary interests were regarded as forming part of proprietory rights susceptible to expropriation. On the other hand, Friedman maintains that property susceptible to expropriation includes not only tangible movables and immovables but also incorporeals "...with the exception of contractual rights which are subject to special rules..."[31]. Unlike Herz and the rest of the authors mentioned earlier, Friedman strongly maintains that "a closer examination of international judicial decisions" leads "to the conclusion that cases of interference with a concession are outside the field of expropriation, being more violations of contractual obligations".[32] It should be noted that the authorities who argue either way - those who maintain that concessionary and contractual interests are proprietory rights susceptible to expropriation and those who deny this claim - are principally concerned with Expropriation and not with nationalization. The claim that interference with concessionary or contractual rights amounted to "taking" and that it should be incorporated into the notion of expropriation, could make sense because the essential conceptual feature of the latter institution is EXpropriation and not APpropriation. In other words, it appears that jurists and tribunals

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[23]See Chapter VII of this paper

[24]See account in, The Status of Permanent Sovereignty over Natural Resources, U.N. Doc. A/AC.97/5 Rev.2, 100 (1962).

[25]John H. Herz, op. cit. at 244.

[26]John Bassett Moore, op. cit. at 1899-1908.

[27]2 J.B. Scott, Hague Court Reports 39 (1932)

[28]John Bassett Moore, op. cit. at 1857-1889.

were led to incorporate abrogation of concessionary or contractual rights by the state into the category of expropriation mainly because the latter concept involves deprival by the state, of pre-existing proprietory interests. However, unlike expropriation which conceptually lends itself to such incorporation, nationalization carries the decisive connotation of subsequent appropriation by the state, and in this latter respect, it would be tenuous to argue that an act of nationalization which incidentally abrogates existing concessionary or contractual rights results in the subsequent appropriation by the state of these same rights. It is true that the nationalizing state or any other organ designated for the purpose, becomes the successor of certain rights enjoyed by the previous owner or holder of interest by virtue of the act of nationalization. The point, however, is to distinguish between those rights which the state or its designated organ possesses by virtue of its sovereignty alone and those which it acquires directly through the previous holder of the nationalized proprietory interests. The point can be illustrated better by identifying two distinct types of contractual rights that may be affected by an act of nationalization.

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[29] 4 U.N.R.I.A.A. 80

[30] Works Cited in John H. Herz, op. cit. at 245.

[31] S. Friedman, Expropriation in International Law 148 (1953). For a discussion on the rules of International Law regarding Contractual Rights see the same author at 153-157.

[32] Ibid. at 152.

One category of contractual rights that may be adversely affected by an act of nationalization relate to those rights which the nationalized enterprise might have had against Third Parties on the basis of private contracts. Upon nationalization, the state or the organ designated for the purpose, is substituted in the place of the nationalized enterprise, and by virtue of such subrogation, it acquires those contractual rights previously held by the nationalized enterprises against Third Parties. This category of contractual rights are, therefore, of a type susceptible to nationalization.

On the other hand, the nationalized enterprise might have had, by virtue of a contract with the state or its organs a right to engage in a particular economic venture. This right, like most concessionary rights, may constitute not only a right to engage in a particular economic activity for the concessionaire but also a right to exclude other Third Parties from engaging in that same activity delimited by type or location. It is evident that this right bears a definite economic interest to the concessionaire. The question, however, is whether this right is at all sustainable against the grantor state, and even if so sustainable, whether the prejudice suffered as a result of nationalization gives rise to a contractual or an extra-contractual claim.

By its very nature, a concessionary right has relative sustainability depending on whether the intruder against the right is a Third Party or the State or its organs which granted the concessionary right in the first place. In other words, a concessionary right, being exclusive to the concessionaire, appears to be sustainable against the whole world except the grantor state. The problem, however, is complicated by the fact that a concession instrument has a dual legal feature. A concession instrument blends the element of a sovereign grant revocable at any time on the one hand,

and a contractual obligation, on the part of the state, to desist within the duration of the concession, from rendering the grant inoperative on the other. One of the unsettled legal controversies, as we shall see later in the paper, relates to the determination as to which one of the two conflicting elements prevail in a concession instrument. Assuming, then, that a concessionary right is sustainable against the grantor state, the basis upon which a concessionaire, whose interest is adversely affected as a result of a nationalization measure, could claim redress can only be strictly contractual. In other words, the claim would rest on the repudiation, by the state, of its contractual obligations and not on the fact of directly appropriating the concessionary right itself.

The subtle distinction between the repudiation of a contractual right which in effect results from nationalizing an enterprise operated on the basis of a concession, and the strict appropriation by the state of a pre-existing right by virtue of nationalization determines whether or not the subject matter is governed, under international law, by rules applicable to state responsibility arising from breach of contracts or those governing nationalization proper.

Although a concessionary right may be adversely affected as a result of the nationalization of an enterprise operated on the basis of a concession or an Administrative Contract, for the redress of which, as we shall see in another chapter, the rules of international law are far from clear, it is still inappropriate to maintain that the concessionary right itself is an object of nationalization. Conceptually, nationalization comprises of a dual act of EXpropriation of an existing right by the state and the subsequent appropriation by the state or an organ designated by it, of that same right. While the reversion of a concession could be regarded as an EXpropriation of an existing concessionary right, the element of subsequent appropriation by the state (a necessary feature

of nationalization) is missing since the state's right to engage in the particular economic activity in question, subsequent to nationalization, is inherent in its sovereignty and is not something derived by subsequent appropriation from the previous concession - holder. Thus, it is highly doubtful that concessionary rights of the latter type are susceptible of nationalization. Not only would earlier decisions of international Arbitral Tribunals and opinions of Publicists with respect to expropriation lack relevance to serve as precedents[33] for cases of nationalization, but it is also inappropriate to claim that abrogation of concessionary rights as a result of nationalization would amount to take-over by the state of those rights. The distinction between expropriation and nationalization in this respect is crucial, especially as regards matters of compensation, since the claims for compensation in the event of nationalization, if at all sustainable, rest on the basis of enrichment by the state to the detriment of the private right-holder, while in the case of expropriation, the claim rests mainly on the loss to the proprietor.

Another class of intangible proprietory rights which deserve consideration include proprietory interests in securities, stocks, shares and coupons. In the case of the Banque D'Orient V. Turkey (1926), the Greco-Turkish Mixed Arbitral Tribunal included coupons, stocks, shares and securities in its broad determination that property subject to expropriation comprises of "...toutes les choses qui, pouvant procurer à l'homme une certain utilité, sont susceptibles d'appropriation privée".[34] A more authoritative position that these categories of incorporeal rights are susceptible of being nationalized is found in post-second World War East European nationalization legislations and compensation agreements as well as in recent nationalization legislations in underdeveloped countries. A typical example is paragraph 4 (2) of part 1 of Czech Decree No. 100 of 1945 which nationalized

mines and industrial undertakings which stated that:

> "Nationalization affects all the immovable property, buildings and equipment serving the running of the nationalized concern, including...all bills, cheques, securities, deposit books, cash and assets belonging to the concern as well as all finished and unfinished products and semi-manufactures, as well as all stocks and materials belonging to the concern on the date on which this decree comes into force".35

Among the recent nationalization legislations in countries of the Third World, the 1967 Tanzanian Nationalization Acts, the Libyan Nationalization Act of 1971 and the Algerian Nationalization Ordinances of 1971 made express reference to such intangible rights as shares. It is, therefore, safe to assume that intangible rights of the latter category (securities, stocks, shares and coupons) are susceptible of nationalization.

Another category of incorporeal rights whose susceptibility to nationalization raises controversy includes literary, artistic and industrial property. According to Verdross, literary, artistic and industrial property of foreigners are not afforded protection under General International Law and therefore do not form an object of expropriation, unless these rights are covered by special international conventions.[36] In the post-Second World War East European nationalization legislations and compensation agreements, patents and trademarks were listed as proprietory interests affected by nationalization and in regard to which compensation was granted. The Czech Degree No. 100 of 1945 nationalizing mines and industrial undertakings, protocol no.1 between Switzerland and Czechoslovakia of Dec. 18, 1946 and the Compensation Agreement between the Netherlands and Czechoslovakia of Nov.11, 1964 explicitly referred to patents and trademarks as proprietory rights forming part of the object of nationalization measures.[37] The compensation agreements of March 31, 1951 between Sweden and Hungary made a general reference to "assets, rights,

interests and claims" and it appears to include industrial and intellectual property as part of the proprietory rights for which compensation was payable.[37] Despite East European state practice, it is still doubtful whether literary, artistic and industrial property rights are protected under general international law outside of international treaties and conventions. Although the broad language employed could very well include this category of incorporeal rights, the recent nationalization legislations in countries of the Third World do not explicitly refer to patents and trademarks as objects of nationalization. It may very well be argued that if this category of rights are recognized and protected under the municipal law of the nationalizing state and if, upon nationalizing an enterprise, the state or its designated organ, appropriates a patent or trademark for subsequent use, the patent or trademark in question could be said to have been nationalized notwithstanding the fact that the nationalizing state did not commit itself to a patent or trademark convention prior to the act of nationalization.

The question of the susceptibility of incorporeal rights to nationalization also raises problems of distinguishing between actual legal rights and mere economic interests or "expectancies" and "favourable situations". In order for an incorporeal interest to be protected under international law or to be susceptible of nationalization, it must be "an actual legal right as distinct from a mere economic or other benefit such as a situation created by the law of a state in favour of some person or persons who are, therefore, interested in its continuance".[39] Goodwill, being one

[33] For a discussion of this question see Chapter VII of this paper in connection with the Norwegian Ships Arbitration Case.

[34] 7 Recueil Des Decisions Des Tribunaux Arbitraux Mixtes 969 (1928).

[35] Cited in Gillian White, Nationalization of Foreign Property 48 (1961). Emphasis ours .

such category of corporeal interests was regarded as comprising a proprietory right by the Franco-German Arbitral tribunal in the case of Le Soie V. Germany (1922) (involving an expropriation case) provided that its value in money is fully ascertainable.[40] However, one of the most authoritative decisions with respect to "Goodwill" was made by the Permanent Court of International Justice in the Oscar Chinn Case in 1934. In that decision, the Tribunal categorically stated that:

> "The court, though not failing to recognize the change that had come over China's financial position, a change which is said to have led him to wind up his transport and shipbuilding business, is unable to see in his original position - which was characterized by the possession of customers and the possibility of making a profit - anything in the nature of a genuine vested right. Favourable business conditions and goodwill are transient circumstances subject to inevitable changes; the interests of transport undertakings may well have suffered as a result of the general trade depression and the measures taken to combat it".41

The latter position is further supported by the absence, in the East European nationalization legislations and compensation agreements and the recent nationalization legislations in the countries of the Third World, of any reference to "goodwill" or "favourable business conditions" as proprietory rights forming the object of nationalization and in respect to which a claim for compensation could ever be sustained. A typical instance where "goodwill" was excluded as an object of nationalization and in respect to which compensation was

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[36] Alfred Verdross, op. cit. at 364.

[37] Laws cited in Gillian White, op. cit. at 48-49.

[38] Ibid.

[39] Ibid at 49 [Emphasis ours].

[40] 2 Récueil Des Décisions Des Tribunaux Mixtes 739 (1923).

categorically denied is borne by the Tanzanian nationalization experience.[42]

Thus, with regard to the nature of property or pecuniary interest which is susceptible of nationalization, it may be concluded that all tangible movables and immovables and incorporeal rights embodied in coupons, shares, cheques, securities, bills and the like are capable of being nationalized. Contractual rights vis-a-vis third parties belonging to an enterprise which is the target of nationalization are susceptible of nationalization. On the other hand, contractual and concessionary rights subsisting between the grantor state and the enterprise which is the object of nationalization do not strictly fall within the conceptual scope of the regime of nationalization, and as such, the rules of international law governing nationalization do not afford protection to them. As far as incoporeal rights such as patents and trademarks are concerned, it is doubtful whether general international law (special conventions aside) provides any protection by making those proprietory interests an object of compensation in the event of nationalization. As for financial interests created by favourable business conditions such as Goodwill they are merely expectancies and not actual legal rights, and as such, they cannot be an object of nationalization in respect to which a claim for compensation can be sustained. It can therefore, be concluded that in order for nationalization to occur with respect to a given proprietory interest, it is not sufficient that the adversly affected interest in question is capable of procuring a person a certain pecuniary advantage that is susceptible to private ownership. The interest in question must, in addition be an object of subsequent enrichment, appropriation and use by the nationalizing state.

Moreover, the prerogative to determine whether a certain interest becomes the object of nationalization in respect to

which, among others, a claim for compensation can be sustained rests upon the nationalizing state itself. In other words, it is the will of the nationalizing state as reflected in the nationalization legislation that in the final analysis determines whether an interest forms the object of nationalization in respect to which a claim for compensation can be made. And lastly, in order for nationalization to occur in regard to a proprietory interest in point of law, the proprietory interest that is the object of nationalization must exist at the time of the taking.[43] Besides, the proprietory right in question must have been acquired legally by the proprietor in the first place.[44]

2) Territorial Connection as a Basis for Nationalization

In general, the basis for the nationalization of property of aliens derives, under international law, from the territorial sovereignty (supremacy) of a state over property situated within its jurisdiction.[45] The situs of the property within the territory of the state furnishes sufficient connection with that state so as to support the right of that state to nationalize the property by virtue of its territorial sovereignty. In other words, the state's right to nationalize is generally limited by the territorial extent of its sovereignty in that it is not entitled as a general rule to nationalize any property or property right which, at the moment of nationalization is not situated within its territory.[46]

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[41] (1934) P.C.I.J., ser. A/B, No.63 at 88. (Emphasis ours).

[42] Clarence Dias, op. cit. at 66-67.

[43] S. Friedman, op. cit. at 157-158.

[44] Ibid at 158.

The question of situs or territorial connection raises at least three distinct problems. The first one is the problem of the extra-territorial extension of sovereignty in cases of nationalization. The second one involves the question of identifying the international legal rules governing the legal situs of property. The third relates to the problem of determining the exact moment when nationalization is said to occur such as to have certain legal consequences attendant thereto. We shall now examine each of the foregoing problems in a somewhat generalized fashion.

As an exception to the territorial extent of sovereignty and the related international rule that "a state must not perform acts of sovereignty in the territory of another state".[47], there could be certain special cirmustances in which the territorial exercise of sovereignty may legitimately extend to property situated outside the territory of the nationalizing state. This may result both from (1) the material and economic connections that a specific property situated outside the territory of the nationalizing state may have with property which is situated within the latter state and with respect to which a nationalization measure is directed and (11) the centrality of the proprietor which (who) is the target of nationalization.

The property which forms the object of nationalization may be such an economically indivisible whole - a universitas so to say, that nationalizing a major portion located in the territory of the taking state may necessitate the incorporation of the rest located elsewhere in the nationalization process. Although territorial sovereignty does not directly

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[45] According to Oppenheim, territorial sovereignty comprises in "the power of a state to exercise supreme authority over all persons and things within its territory", see 1 H. Lauterpacht, Oppenheim's International Law 286 (8th ed. 1955).

[46] Gillian White, op. cit. at 102.

[47] H. Lauterpacht, op. cit. at 295.

extend to that portion of the property which is located outside the territory of the nationalizing state, territorial sovereignty over the latter portion may derive from that major portion which one may argue, could determine the locus of sovereignty. In other words, if the material and economic connection of the two portions of the property is such as to make the property located elsewhere an accessory (economically) to the one situated within the nationalizing state, one may argue that the nationalizing state could derive (perhaps by legal fiction) constructive territorial jurisdiction over that portion of property situated outside its territory.

The foregoing argument may further be supported by the centrality of the proprietor who is indirectly the target of the nationalization measure. The impersonal character of nationalization notwithstanding the exercise of territorial sovereignty over property situated in the state exercising it would automatically entail an exercise of territorial sovereignty over a definite proprietor or several proprietors. To put it differently, in undertaking nationalization measures, a state is exercising territorial sovereignty over both the property and the proprietor. Thus, the scope and extent of the property which is the object of nationalization may have to be defined by the proprietory domain of the owner, irrespective of the location of the property. A proprietor which, under contemporary conditions is almost always a legal entity and over which the nationalizing state is exercising territorial sovereignty by virtue of the situs (not necessarily the domicile) of the proprietor, could very well have proprietory interests located outside the territory of the nationalizing state. In this respect, therefore, the relationship that exists between the differently located portions of property would be dual. On the one hand, as we have pointed out earlier, the two portions may be inextricably linked - both materially and economically with one another that one can hardly assign separate situs to each. Secondly, the two portions form part

of the proprietory domain, an undivided whole so to speak, of a single proprietor. Moreover, the objective of nationalization, especially by underdeveloped countries being what it is, the treatment of both portions as one, irrespective of their locations, could be justified because a portion of the property that lies outside the territory of the nationalizing state may well have been, in the first place, the direct product of the social and economic environment of the principal situs of the economic activity which is nationalized. A further justification may be that by taking over the property interests of an enterprise the nationalizing state or more appropriately the new entity to which the property interests devolve by virtue of law, is substituted in the place of the previous proprietor so that it could claim all the proprietory interests of the previous owner located within or outside the territory of the nationalizing state.

Although rationalizations such as the foregoing were hardly expounded, the post-war nationalizations in Eastern Europe provide ample instances where states expressed manifest intension to extend their nationalization measures over assets located outside of these states and owned by the nationalized enterprises.[48] The Czechslavak Decree No.100 of 1945, the Yugoslav Nationalization Decree of Dec., 1946, the Hungarian Decree No.20 of 1949, the Austrian Nationalization Law of July 26, 1946, all envisaged extra-territorial exercise of nationalization over assets located outside of their respective territories.[49]

Among the recent cases of nationalization, in the countries of the Third World, Egyptian law 285 of 1956 nationalizing the Suez Canal operation involved extra-territorial

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[48] Gillian White, op. cit. at 97.

[49] Ibid.

exercise of nationalization over the assets of the Suez Maritime Company situated outside of Egypt. Article 1 of the Egyptian law provided, in part, "the Suez Canal Maritime Company, S.A.E. is nationalized".[50] Ordinarily, since nationalization attaches to property or an economic activity, it is inappropriate to speak of the nationalization of a company as such. What was envisaged by the language of Article 1 of the Egyptian law was the nationalization of the global assets of the company. This interpretation is supported by Article 3 of the same law which provided that "The money and property of the nationalized company in Egypt and abroad are frozen. Banks, organizations and individuals are prohibited from disposing of same in any manner except by Order of Board mentioned in Article 2".[51] Among the recent cases of nationalization laws where express extra-territorial extention was envisaged, Article 2 sub-para (2) of the National Bank of Commerce (Establishment and Vesting of Assets and Liabilities) Act of 1967 of Tanzania provided that "for the purpose of this act, a chose in action, wherever situated, relating to the Banking Business of a Bank in the United Republic shall be deemed to be situated in the United Republic".[52] Although not explicit as the Egyptian and Tanzanian nationalization legislations, Article 1 (c) of Law 17, 450 Amending Article 10, sec. 10 of the Political Constitution of Chile, which nationalized major mining industries provided:-

> "In the case of nationalization of mining activities or companies by law as Gran Mineria (major mining industry) the nationalization shall include the companies or activities themselves, right in them, or their total or partial assets".53

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[50] See Chapter VII.

[51] Ibid. (Emphasis ours).

[52] 6 International Legal Materials 1194-1201 (1967).

[53] 10 International Legal Materials 1067 (1971) (Emphasis ours).

Article 2 of the same law provided:

> "...pursuant to the provisions of Article 10, Sec.10 of this political constitution those companies constituting the major copper mining industry, as designated by law, and in addition, the Andina mining company are hereby nationalized, and thereby declared to be incorporated into the full and exclusive domain of the nation. By virtue of the provisions of the preceding paragraph, all assets of those companies and in addition those of their affiliates as determined by the President of the Republic, are transferred to the national domain".54

In distinctly referring to the nationalization of the companies in question, the Chilean legislation seems to imply an extension of the exercise of nationalization over assets belonging to those companies even outside of Chile. Similarly Article 1, sub-section 1 second paragraph of Ordinance 71-8 of Feb. 24, 1971 nationalizing foreign oil companies in Algeria provided for the nationalization of "the properties, shares, title and interests of every sort", other than those provided in the first paragraph, held by the nationalized enterprise.[55] The extra-territorial extension of the exercise of nationalization over assets situated outside of Algeria is implied from a joint reading of paragraphs (1) and (2) of Article 1, sec. 1 of the foregoing ordinance. Paragraph 1 refers to the nationalization of "properties, shares, title and interests of every sort which constitute in Algeria the estate of "the nationalized enterprise, while paragraph 2 seems to refer to "properties, shares, title and interests of every sort held" by the Company in question both within and outside of Algeria other than those indicated in Paragraph 1.

From those practices, it appears that exceptional derogation from the territorial limitation rule in the exercise of

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[54] Ibid. at 1068. [Emphasis ours].

[55] Ibid. at 847.

nationalization is sometimes possible. In most of these cases, it can reasonably be assumed that the jurisdictional basis for the extra-territorial extension of nationalization measures must have rested upon such claims as derivative territorial jurisdiction invoked by virtue of the material and economic connections of the differently located portions of the property which forms a single propietory unit under the domain of a single (i.e. relative to the various portions of the patrimony) proprietor.

Thus, while there seems to be general agreement[56] that the state's right to take measures of nationalization is limited by the territorial extent of its sovereignty and that a state must not perform acts of sovereignty in the territory of another state, it appears that under certain exceptional circumstances, nationalization may justifiably extend over property situated outside the borders of the nationalizing state.[57]

Related to the question of situs, there are two other problematic issues, namely the question of identifying the international legal rules governing the legal situs of property and the exact moment when nationalization is said to occur so as to determine the legal consequences that follow from it.

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[56] S. Friedman, for instance, states clearly with respect to expropriation that:
"the general rule is that expropriation which is derived from the jurisdiction exercised by the state in virtue of its territory...can only affect property situated within such territory as defined by international law", see, S. Friedman, op. cit. at 161. [Emphasis ours].

[57] As we shall show in the last chapter of this paper, the extra-territorial extension of nationalization measures is still a source of intense controversy between states and among jurists.

The question of determining the situs of property hardly raises serious problems in the case of tangible movables and immovables. The problem becomes difficult, however, when it comes to proprietory interests involving incorporeal rights. The difficulty, here, is that international law "lacks rules for determining the situs of property".[58]

Gillian White,[59] Schwarzenberger[60], and Lipstein[61] suggest that the most acceptable sources for international law rules to determine the situs of property could be those juridical notions "common" to most municipal legal systems as would constitute "general principles of law recognized by civilized nations". Perhaps the best solution to determine the situs of property and that which harmonizes with the essence of nationalization would be a policy-oriented approach which would have to involve a liberal construction of the "territorial connection" principle. According to Friedman:-

> "The concept of a territorial connection is..one of fact which does not easily lead itself to abstract definition. It must, therefore, be determined in each particular case whether the connection between the property or the foreigner and the territory of the expropriating state (read nationalizing state) is sufficiently close and whether the extent of their participation in the life of the political community is sufficient for them to share in common sacrifices".62

A similar approach was advanced by Hary Calvert in his analysis of the problem of determing situs in the nationalization of the operations of the Suez Canal Company.[63]

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[58] Gillian White, op. cit. at 97.

[59] Ibid. at 98.

[60] 1 Georg Schwarzenberger, International Law 75 (3rd ed. 1957).

[61] K. Lipstein, "Conflict of laws before International Tribunals", 27 Transactions of the Grotius Society 158-159 (1962).

[62] S. Friedman, op. cit. at 166.

The other difficult problem is the question of determining the exact moment when the legal consequences of nationalization begin to have effect. The legal significance of determining the exact moment of nationalization lies in the fact that it has important bearing on determining:[64]

1. The moment as of which a complaint against nationalization could be sustained;
2. The situs of property and therefore, the territorial jurisdiction of the nationalizing state;
3. The prevailing market value of the nationalized property for purposes of compensation, if the granting of compensation is envisaged at all.

For the moment, we shall be concerned with the second element. In as much as a definite proprietory right has a spatial connection to the territory of a state, it also has temporal connections in the sense that it arises at a certain moment in time or that it comes into contact with or changes its spatial connection to, a territory in point of time. In order for nationalization to give rise to certain legal consequences the time at which a certain proprietory right comes into spatial contact with a territory becomes crucial. This is because nationalization cannot affect property interest which at the time of nationalization did not either exist or did not have spatial connection with the territory of the nationalizing state.

There seems to be a general agreement among jurists that the legal consequences of nationalization begin to have effect as of the moment of the formal publication or promulgation of

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[63] Hary Calvert, "The nationalization of the Suez Canal Company in international law", 4(1) University of Western Australia Law Review 52 (1957).

[64] It should be noted that the time factor for each of those 3 consequences need not be the same. For an interesting discussion of this point see, Hary Calvert, Ibid. at 53.

the Nationalization Decree.[65] This means that nationalization would have legal effect over property which is situated in the territory of the nationalizing state at the time of the Official (formal) Promulgation of the Nationalization Decree. This position could be supported by analogy from the judgement of the Permanent Court of International Justice in case of the German Interests in Polish Upper Silesia where the Court, in connection with the issue of determining the time when a complaint against the infringement of the right of property could be made, held that there is an unfringement of the right as soon as there is a notification of intension to expropriate.[66]

By analogy White maintains that:

> "The moment when the international claim arises should also be the moment of nationalization...for the purpose of territorial limitation...To regard the moment of nationalization...as the instant when the law makes its actual impact on the particular right of property accords both with authority and with general principles".67

3) The Principle of Alienage

As we have pointed out earlier, in order for an act of nationalization to form the subject matter of international law, it is a necessary pre-condition that the property right which is the object of nationalization must have belonged to a foreigner or alien vis-a-vis the nationalizing state. The question that follows, then is what (who) is an alien?

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[65] See Gillian White, op. cit. at 99; and S. Friedman, op. cit. at 161-163. An entirely different position was taken in the case of Ellerman V. Poland where the International Mixed Arbitral Tribunal held that "expropriation only takes place when it becomes effective" and not when a mere notice to that effect is served. For a discussion of this case see, Hary Calvert, Ibid. at 53.

[66] (1926) P.C.I.J., series A, No. 6 at 26.

[67] Gillian White, op. cit. at 97.

Ordinarily, alienage implies the lack of nationality of the nationalizing state. In international law, however, alienage does not only involve lack of the nationality of the nationalizing state but also the possession of the nationality of another state. If, for instance, an alien lacks not only the nationality of the nationalizing state but also the nationality of any other state, i.e. if the alien is a "stateless" person, the nationalization in question would not strictly constitute a problem of international law. This is so because the concern of international law revolves around the conduct of states towards one another and the protection afforded to aliens is a vicarious protection guaranteed to states by virtue of which they would represent persons with whom they are tied by the bond of nationality.[68] According to Gillian White:-

> "It is only on the basis of the bond of nationality that individuals can request the protection of a state and thereby enable their claims to be transposed from the plane of municipal law to that of international law. If this bond is lacking, not only is no state competent to intervene on behalf of the stateless person, but also in strict theory, no international wrong has been committed".69

Cases of dual nationality[70] where persons possess the nationality of the nationalizing state and that of another state are also treated in the same way as cases involving stateless persons since diplomatic protection cannot be set against the action of the nationalizing state towards its own nationals and since "the treatment of nationals and their property is

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[68] Edwin M. Borchard, The Diplomatic Protection of Citizens Abroad or the Law of International Claims 16 (1916).

[69] Gillian White, op. cit. at 52.

[70] This does not include cases where persons possess the nationality of more than one state other than the nationalizing state.

a matter outside the sphere of international law".[71]

The principle of alienage and the question of diplomatic protection it involves, extend to natural as well as juridical persons. The question of alienage with regard to natural persons hardly poses serious legal problems. On the other hand, the question of alienage with respect to juridical persons involves thorny issues. The target of contemporary nationalizations being, in the main, corporate entities, the question of alienage as regards juridical persons assumes crucial importance especially since the attribution of nationality to corporations is as problematical as it is relatively new.

According to Mervyn Jones, the idea of a corporation as a distinct juridical person is of great antiquity while the attribution of nationality to a corporation, is a relatively recent phenomenon.[72] This was partly because corporations did not attract the attention of international law until the nineteenth century before which time nationality was only associated with personal allegiance, and as a result, the idea of extending nationality from physical persons to cover artificial persons was accepted very lately.[73] Even today, nationality as regards juridical persons denotes not a sense of allegiance to a state as in the case of physical persons but rather "the possession of...some kind of connection with a given state".[74] Regardless of the qualifications it attaches,

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[71] Gillian White, op. cit. at 53. In cases involving juridical persons where the legal entity is incorporated in the nationalizing state and where some of the shareholders are aliens, the problem of dual nationality could arise, and it is precisely that problem that we shall discuss below.

[72] J. Mervyn Jones, "Claims on behalf of nationals who are shareholders in foreign companies", 26 B.Y.I.L. 226 (1949).

[73] Ibid.

[74] Gillian White, op. cit. at 62.

international law now attributes "nationality" to legal persons.

A corporation may be connected to a state by either one or more of the following four elements. It may be attached to a state by the fact of being created or founded in the sense that the legal formalities of its constitution, authorization and incorporation have been carried out in that state. It may also be connected by the fact that the centre of its management and control (siege social) is located in a certain state. Thirdly, it may be attached to a certain state by the fact that it undertakes its actual operations and economic exploration in a particular state. Lastly, it may be connected to a state by the fact that the shareholders of that corporation may be nationals of a given state. As Borchard notes, when all these four elements exist, in combination, in one single country, there can hardly arise any contestation that the corporation has the nationality of that country.[75] The question of determining nationality becomes problematic, however, when these different elements of connection exist, as regards a given corporation, in different countries. Thus, one of the problems of alienage with respect to legal persons consists in the fact that there is no international agreement as to what constitutes the decisive connecting element for the purpose of determining the nationality of a particular corporate entity.

In the area of the municipal law of states the lack of uniformity in the criterion for determining nationality is grossly manifest.[76] Certain legal systems (mainly Anglo-American) determine nationality on the basis of place of

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[75]Edwin M. Borchard, op. cit. at. 617.

[76]Gillian White, op. cit. at 63.

"incorporation". Most continental legal systems (especially French) on the other hand, determine nationality of legal persons by reference to the "seige social" - the place where the company exercises, legal, financial and administrative control over its operations. According to still others (especially that of Italy and Switzerland) nationality of legal persons is determined by reference to the nationality of the pre-ponderant shareholders in the legal entity.[77] In the sphere of international law, there is hardly any single criterion accepted by international tribunals as a decisive determinant of the nationality of legal persons.[78]

The absence of a definite criteria for determining the nationality of legal persons, therefore, means that the problem of dual nationality which arises from different material connections of a given corporation with different states would remain unsolved - under international law. One of the practical implications of the absence of a definite international criteria for determining the nationality of legal persons is that a state, which nationalizes the property of a corporation which is either incorporated in that state, or having its "seige social" in the territory of that state, or having the majority ownership of its nationals as shareholders, depending on which of these particular criteria that particular state adopts for determining nationality and subject, of course, to the principle of estoppel[79], may invoke the absence of a foreign element in the nationalization measure on the ground that the nationalized corporation is its

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[77] Ibid.

[78] Georg Schwarzenberger, op. cit. at 162-169.

[79] According to this doctrine, a state which subscribes to a certain principle in order to avail itself of an advantage from its application, cannot, on another occasion, turn around and refuse to be bound by the same principle when that principle tends to operate counter to its interests.

own national. The problem created by this kind of position is not merely a theoretical one. In the nationalization of the property of the Mexican Eagle Oil Company by Mexico pursuant to Article 27 of the Mexican Constitution, the Mexican Position against the British Claim for the diplomatic protection of its shareholders, was that the corporation affected was a Mexican Joint Stock Company - a national of Mexico, and that the legal personality of the corporation as against its shareholders being distinct, the nationality of the latter cannot be "attributed by extension to their shares".[80] As it appears from the Mexican position, and this position is supported by a considerable number of jurists, it is not a settled matter whether nationalization which is directed against a national corporation involving the financial interest of foreign shareholders forms the subject matter of international law at all. Foighel's position on the other hand, is that so long as the interest of aliens is affected either directly as in the case where the nationalization is directed against an alien corporation or indirectly when the interest of alien shareholders is affected, international law comes into the picture.[81] According to Foighel:

> "The rules of international law concerning the protection of foreign property aim at safeguarding the interests of foreign states and their nationals; and the interests a foreign national has in a company, in his capacity as a shareholder must in general be regarded as a right to share in the property of the company proportionate to the amount of the shares held. The person in question is the owner of his share in the same way as he is the owner of a thing or a claim and when the value of such share is extinguished by the nationalization of the company, there is the same need for the international legal rules to protect this form of property as in the case of real property or chattels".82

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[80] See text of the Mexican Note of April 21, 1938 as reproduced in Gillian White, op. cit. at 69.

[81] Isi Fioghel, op. cit. at 105-106.

[82] Ibid.

The uncertainty of international law in this regard has serious implications with respect to the 'nationality-basis' of diplomatic protection by states in cases of nationalization.[83] According to one view, a state could claim diplomatic protection in cases of nationalization affecting the property of corporate entities only if the corporation is a national of the claimant state. The other view is that the nationality of the shareholders could be a sufficient basis for diplomatic protection, irrespective of the nationality of the corporate entity. Even if one were to concede to the latter view, it should be noted that the conditions under which a claim on behalf of shareholders can be sustained and the scope and nature of such a claim are not the same, under international law, as those claims raised on behalf of the adversely affected corporate entity itself.

According to Mervyn Jones, under normal conditions, "an international claim in respect of an injury to a company can only be made by the state of which the company is a national and that it is not permissible to get behind the corporate entity so as to permit claims to be made by states whose nationals some of the shareholders are".[84] The same author observes, however, that"..notwithstanding the fact that the corporation itself is the legal person that has sustained the injury, and is not a national of the intervening state", intervention on behalf of individual shareholders is allowed under international law "in certain exceptional cases".[85]

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[83] It is important to note that the uncertainty is further compounded by the Calvo doctrine (which, incidentally, is widely accepted, and sometimes invoked, by the Latin American underdeveloped countries) according to which an alien forfeits diplomatic protection so long as it enters into a host country and agrees to be bound by its internal laws, thereby rendering the "nationality-basis" of diplomatic protection quite irrelevant.

[84] J. Mervyn Jones, op. cit. at 234.

[85] Ibid. at 237. [Emphasis ours].

According to Jones, International law does not recognize an "unlimited right of intervention on behalf of nationals who are shareholders in foreign corporations".[86] Pointing out the exceptional circumstances, Gillian White maintains that "shareholders' rights in companies possessing the nationality of the respondent state can be protected where the injury is of such a nature as to determinate the existence of the legal person or to render it defunct for all practical purposes".[87] The justification for the exception in allowing intervention under such cases is the fact that the shareholders would be left with no "effective remedy".[88] Since nationalization of property of corporations almost always results either in the termination of the legal existence of the corporation affected or in rendering it defunct as far as the potential proprietory interests of the shareholders are concerned, one doubts how these circumstances could be considered exceptional grounds to justify diplomatic intervention. Moreover, the question of the termination of the legal existence of corporations as a result of nationalization raises a host of issues such as the claim that only the personal law of the company is competent to terminate the company's existence, as well as the problem raised by the thorny doctrine of the "split company"[89] in the sphere of the extra-territorial effect of nationalization.[90]

In any case, it appears that the difference in the treatment under international law, of cases of diplomatic intervention on the basis of the nationality of corporation as against the nationality of shareholders consists not so much in the circumscribed conditions under which the latter claim is allowed, as much as in the scope and nature of the respective

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[86] Ibid. at 256.

[87] Gillian White, op. cit. at 69.

[88] J. Mervyn Jones, op. cit. at 257.

permissible claims. It seems certain that in the case of diplomatic protection on the basis of the nationality of the corporation, the claim could extend to all the legal aspects of the nationalization - the legality of the taking as well as the question of compensation - since the act is directed against the distinct corporate entity and not against the separate financial interests of the shareholders. On the other hand, the scope of the claim that could be raised on behalf of shareholders appears to be relatively limited. The most that a state representing shareholding nationals could claim, in the event of nationalization, is the sole pecuniary prejudice suffered to the extent of the financial stake which the shares bear, and no claim whatsoever could lie with respect to the legality of the nationalization as this would be a claim exclusively reserved to the representative of the corporation. In respect to the limited scope of the claim permissible to the representative of shareholders' interests as against the representative of the corporation which is the direct target of nationalization the Chilean nationalization legislation presents an interesting illustration. Article 1

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[89] In the dispute before German courts involving cases that arose in connection with the Chilean nationalization measures, the doctrine of the "split company" otherwise known as the doctrine of "Severence" was raised, and that doctrine held that a nationalized corporation which has assets outside the territory of the nationalizing state could be considered to have split upon nationalization with the effect that its external "portion" could be said to survive after the nationalization. According to the German courts, the purpose of the doctrine is "to protect in the state forum all assets of the nationalized company which have remained unaffected by the nationalization, including assets which have left the nationalizing state after the nationalization". For an interesting discussion of this doctrine, see, Ignaz Seidl Hohenverdern, "Chilean Copper Nationalization Cases before German courts", 69(1) A.J.I.L. 110-119 (1975) at 118-119.

Section (c) of Chilean law 17, 450, amending Article 10, sec. 10 of the Political Constitution of Chile, for instance, provides that:-

> "The law shall determine that partners or shareholders of nationalized companies shall have no rights to assert, either against the state or against each other, other than the right to collect their proportionate share of the compensation received by the respective companies".91

Article 2, section (h) of the same law repeats the same principle. Although the principal aim of this restriction is to bar any possible challenge regarding the legality of the nationalization - a limitation that would equally apply to the representative of the nationalized corporation - the law is illustrative of the narrow scope of redress available to shareholders and therefore to those who invoke diplomatic protection on behalf of the shareholders.

In light of the foregoing discussion, then, the conceptual "regime" constituting the subject matter of nationalization should thus, be delineated in relation to a definite category of property that is territorially attached to the nationalizing state and belonging to aliens. With that conceptual delineation as a basis, we shall try to examine, in subsequent chapters, the pertinent rules of international law governing the distinct factual regime of nationalization.

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[90] In the last chapter of this paper, we shall examine the extra-territorial effect of nationalization in connection with the problem of international obligation of "adversely affected" as well as "third states" to respect nationalization measures by underdeveloped countries.

[91] 10 International Legal Materials 1067-1068 (1971).

PART II

THE HISTORICAL AND ECONOMIC BACKGROUND UNDERLYING THE OPERATIONAL CLIMATE OF NATIONALIZATION

CHAPTER III

Expropriation and Nationalization of Property of Aliens: A Factual and Historical Presentation

The study and presentation of a factual and historical account of the incidents of expropriation and nationalization of property of aliens, as is attempted in this chapter, requires so special justification both as a matter of stylistic cogency and in the specific context of the logical order of the arguments in this research. Inasmuch as the formal and substantive norms of international law generally evolve, directly or indirectly, out of actual international state practice, a proper understanding of the legal questions attaching to nationalization would be impossible without grasping the factual and historical setting in which the phenomenon of nationalization currently unfolds. Moreover, a relatively broad and all-sided picture of such a factual and historical setting would be in order, particularly in light of the fact that one of the principal themes of the present thesis revolves around a critical examination of: (a) the extent to which the juridic rules and principles attaching to the various incidents of expropriation that occurred in the past are presently connected, in a somewhat atavistic sense, to those rules and principles that are in the process of evolving in relation to the affin and yet distinct incidents of nationalization; (b) the degree to which the lack of appreciation, by some jurists, of the historical specificity of the juridic notions attaching to each category of incidents has resulted in blurring the distinction between the two concepts of expropriation and nationalization; (c) whether, and how far, the legal rules that evolved in connection

with past incidents of expropriation strictly so-called can serve as authoritative norms to govern current disputes arising from measures of nationalization proper.

The presentation of a factual and historical account relating to any topic of interest, expropriation and nationalization included, could, needless to say, assume various forms depending on the specific thrust of the research pursued and the particular predilection of the researcher involved. Inasmuch as the present research is concerned with nationalization in a dynamic evolutionary setting, the following presentation of a factual and historical account of the incidents of expropriation and nationalization is, therefore, intended to provide a bi-focal perspective for comprehending the separate regimes of expropriation and nationalization both in their distinctiveness to each other as well as in their atavistic link in a definite historical-conceptual nexus. In order to do that, the presentation will try to trace the quantitative and qualitative evolution of the incidents of "taking" in international practice over a period of time.

A systematic presentation of a factual and historical account of the incidents of expropriation and nationalization of alien property must, therefore, begin by an appropriate periodization and categorization of these incidents on the basis of a definite set of quantitative and qualitative criteria. That being the case, the presentation is divided into three sections, each section dwelling on a distinct historical period. The first one covers the period preceding the first world war, the second one dwells on the period between the two world wars, and the third and last section covers the post-second world war and contemporary period. Each period has its unique features in quantitative (i.e. frequency and number of expropriation incidents) and qualitative (i.e. the conception of the social function of private

property; the character and weight attached to the social justification for and the limitations against expropriation; the specific, social, economic and political milieu, both local and international, within which expropriation occurred, etc.) terms. Each period is separated from the other by decisive historical watersheds (i.e. the two world wars) the very occurrence of which is significant for purposes of delineating one period from the other.

The period prior to the first world war is generally marked by a relatively low level of international economic intercourse and a limited degree of intermigration of capital and people.[1] The expropriation of alien property in this period was, therefore, a relatively rare and incidental phenomenon. The nature of expropriation in this period was confined to a particular property (not even Category of property) and affecting only a specifically identifiable owner. The magnitude of the expropriation in this period was so limited that it did not have any significant bearing on the overall economy of either the expropriating state or the country whose national was affected by the expropriation. In this period, expropriation was undertaken as an exceptional measure derogating from the generally accepted (as between the participants) premises of the inviolability of private property and subject to strict limitation. The state parties to the disputes involving expropriation generally shared common ideologies, especially with respect to the sanctity of

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[1] Nearly all publicists in this field, including authors like Friedman, Wortley, Katzarov, Foighel and White agree with the above characterization. For the works of those publicists see chapters I and II supra. By characterizing the period as we did, we are not, of course, disregarding the considerable level of international economic intercourse that existed, during the period of the slave trade, the mercantalist and colonial periods.

private property and the function of the body politic in regulating the manners of enjoying and disposing of private property. The legal systems of those nations, built as they were on this commonly held ideological superstructure, resolved the question of expropriation in a rather uniform and identical fashion. The same period is further characterized by a feature of international law which was distinctly classical, that is, a law whose exclusive pre-occupation was one of guarantying "mere co-existence" in the face of the mutual assertion of sovereignty and biased, to be sure, in favour of the interest of the dominant powers; a law that owed its legitimacy less by force of consent and more by the sanction of the threat of naval legemony (as in the case of Britain) or hemispheric prerogative (as in the case of the United States); and a law characterized by primitive international mechanisms of resolving disputes other than the threat or use of brute force by the strong against the weak nation.

In the second period following the end of the first World War, the practice of expropriation by states increased in number and frequency. Throughout this period, the earlier kind of isolated individual instances of expropriation continued to occur along with new varieties of expropriation. These new varieties of expropriation arose as a result of a host of internal social, political and economic developments both within and outside of Europe following the War and partly because of it. The devastation and waste resulting from the war forced even liberal governments of Western Europe (U.K., France, Italy and Germany) to re-examine their traditional views on the social function of private property and the role of the body politic in matters of regulating economic activity. It was in the context of this modified outlook (with the principal tenets remaining unaffected) that a series of expropriation measures were launched, transferring the conduct and control of certain key economic activities (communications,

energy, banking and insurance) from private to public hands. Again, in the same period, the creation of new states in Eastern and Central Europe and the ascendancy to power of indigenous regimes in these states led to a series of land reforms which involved expropriation broader in scope and magnitude than those typical of the pre-war period. One of the most significant event that marked a clear departure from the earlier period and the expropriations that took place both in West, Eastern and Central Europe was the spectacular "taking" of property which followed the Mexican Revolution of 1910 and the October Socialist Revolution of 1917 in Russia. It was in this period that the new concept of "nationalization" emerged for the first time in international state practice. It was in this period that radical departures in the conception of the social function of private property were made for the first time. Another characteristic of this period was the special significance attached to measures of expropriation and the collective interest articulated by a host of nations to establish definite international legal norms to regulate the question. This trend was reflected by the effort of the members of the League of Nations to codify and restate the law of state responsibility, especially that aspect of the subject relating to responsibility arising from the treatment of aliens with respect to their property rights.[2] The costly experience of the war led nations to avoid open conflict in enforcing claims arising from expropriation and as a result, this period marked less of the extortionist techniques of sanctioning non-compliance with the then self-serving legal norms governing expropriation, and more and more resort to

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[2] "Responsibility of states for damage caused in their territory to the person or property of foreigners", IV Acts of the Conference for the Codification of International Law at 238 (Geneva, 1930). League Doc. [C.351(c). M. 145(c). 1930 V.]

judicial and arbitral settlement of claims.[3]

The third and last period is the most important of the two earlier periods both in terms of the scope and magnitude of the "takings" that occurred and from the point of view of the focus of this research. This period begins from the end of the second World War and extends to the present time. As in the after-math of the first World War, the second World War had far-reaching social, economic and political ramifications. The war-weary nations of Western Europe which suffered most from the War had to launch a series of programmes of economic reconstruction, and for so doing, they had to depart from their established tradition of respect for private property against which they were forced to make substantial inroads by way of expropriation. In the words of Georg Schwarzenberger:-

> "The disequilibrium caused by the war...the growth of economic materialism and...the general trend towards control by the state of activities formerly reserved to the individual, deeply affected national and international economies".4

The "taking" of key economic sectors (communication, energy, banking, insurance) by some west European governments during this period brought about another series of modifications in the sanctity of private property and the restricted role of the state in regulating economic activity.[5]

Again in this period, the world witnessed another series of social, political and economic revolutions in Eastern and Central Europe with the ascendancy to power of socialist

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[3] We are not, of course, suggesting that the extortionist techniques were abandoned in this period. The Mexican and Soviet experiences, in fact, show that extortionist methods were employed extensively. What is intended, here, is merely to contrast the relative use of extortion in the pre-war and inter-war periods.

regimes. These internal developments in eastern and central Europe were accompanied by a series of nationalization measures with far reaching implications on the traditional notions of property.

The aftermath of the second world war exhibited a still more significant political and economic development on a world scale. Politically, the period following the second world war saw the gradual disintegration of the colonial system and the emergence of newly independent states. Economically, the war-weary nations underwent profound economic resurgence and internal consolidation. This internal consolidation of the economies of the Western European and North American countries generated a huge wave of economic expansion culminating in the global economic integration of the peripheral economies of the various states of Africa, Latin America, Asia and the Middle East with that of the Metropoles. The process of integration was all the more facilitated through the instrumentality of the multi-national corporate entity. This global economic integration was not, however, without its social,economic and political implications for the underdeveloped countries. The objective economic logic of this global integration,

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[4] Georg Schwarzenberger, "The province and standards of International Economic Law", 2 International Law Quarterly 403 (1948).

[5] That the West-European expropriations did not, still entail a radical departure from the liberal conception of the sanctity of private property is very well explained by professor Schmitthoff in the following clear terms:-

> "The post-war 1945 Nationalization Acts in Great Britain cannot be regarded unequivocally as milestones on the road to a socialistic New Jerusalem. They are in fact compounded by an odd mixture of socialist theory, liberal expediency and political empiricism".

See, Clive M. Schmitthoff, "The Nationalization of Basic Industries in Great Britain", 16 Law and Contemporary Problems 566 (1951).

especially the nature of international division of labour and international patterns of trade, precipitated a relationship of domination and subordination between the underdeveloped countries and the principal exporters of foreign capital, leading to a vicious circle of underdevelopment of the former and an all-rounded development of the latter. This global economic integration was at the same time coupled with the process of political integration. What the countries of the Third World gained in the decolonization process they lost in the new process of neo-colonialism. It is, therefore, against this global economic integration and for an independent economic and political development that the new trend of economic self-determination began to manifest itself through a process of nationalization during the last period.

Thus, in this period, the earlier practice of isolated expropriations gradually disappear and a new form of "taking" of alien property (nationalization) begins to evolve. The property which is the object of nationalization in this period assumed, unlike the type of property mostly expropriated in the earlier periods, special importance to the overall economy of the nationalizing state. Unlike earlier periods, the alien property owner in this period is no more an individual person or a relatively small business enterprise, but a giant multinational corporation whose financial resources and international connections make it by far stronger than the economic strength of the host country itself. As we shall show later in connection with the role of the Anglo-Iranian Oil Company in Iran[6], the Suez Canal Company in Egypt[7], the International

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[6]For an extensive study of the conflict see, Bahman Nirumand, Iran: The new Imperialism in action (1969); and Benjamin Schwardran, The Middle East, Oil and the Great Powers (1955).

Telephone and Telegraph Company in Cuba[8], and recently in Chile[9], the economic and political implications of such imbalance in strength between host underdeveloped countries on the one hand, and multi-national corporations on the other, adds further special features to the operational climate within which nationalization incidends occur in the contemporary period.

Moreover, in this latter period the hitherto valid notions with respect to the sanctity of property and the circumscribed role of the body politic in regulating economic activity both of which formed the operational bases underlying the juridic norms governing "expropriation-type" takings begin to cease carrying weight in the new political, economic and juridical operational climate.

It will, therefore, be along the foregoing broad framework that we shall examine each of the three distinct periods in some detail.

1. The Expropriation of Property of Aliens Prior to the first World War

Legal historians of the concept of expropriation - the forerunner of the modern notion of nationalization - trace its

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[7] On the conflict involving the Suez Canal see, D.C. Wall, Britain and the Suez Canal (1956); see also, C.J. Schneider, "The Suez Crisis of 1956 and its aftermath" in A. Gyorgy and H.S. Gibbons, Problems in International Relations (2nd ed., 1962).

[8] For an interesting study of the conflict between the Cuban Government and the I.T.T. see Henry Felix Srebrnik, The Cuban Revolution and the United States: A case of the Nationalization procedures 1959-60 (unpublished MA thesis, Dept. of Political Science, McGill University, 1969).

rudimentary occurrences as far back as 2000 B.C. when the Wax Industry in Egypt was subject to quasi-expropriation because of the importance of this industry for the preservation of Mummies.[10] References are also made to the slave-owning society of the Greek city states in which the liberation of messian serfs of the Spartans in 370 B.C. by the Thebans was considered expropriation of the private property of the Spartans, and to which, the Spartan appologist of the institution of chattel slavery, Isocrates,was said to have referred as an act of "theft of private property".[11]

Those erratic practices notwithstanding, the concept of expropriation, even in the domain of municipal law has a relatively recent history. According to Gillian White:-

> "The idea that the sovereign could interfere with private property rights for the benefit of the community was practically unknown to the ancient world. Roman law recognized this right of the sovereign only occasionally in the provinces, where its exercise was restricted to exceptional cases. The theory of expropriation for public utility purposes originated in the Middle Ages, at a time when the concept of sovereignty had crystallized into the absolute measure of power vested in one ruler - a power that was inalienable, indivisible and from which flowed all subordinate power in the state".12

A similar observation is made by Vinding Kruse regarding the origins of expropriation in Scandinavian municipal law.

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[9] For an extensive study of the conflict between Chile and the I.T.T. see, The Bertrand Russell Peace Foundation, subversion in Chile: A case study in U.S. corporate intrigue in the Third World (1972).

[10] Adnan Kuwatly, "Introductory Statement on the problems of Nationalization", in International Democratic Lawyers: Study Circle on Nationalization 8 (Rome, May 4-5, 1957).

[11] Barker, "Greek political thought and theory in the fourth century", 6 Cambridge Ancient History 529 (1930).

[12] Gillian White, Nationalization of Foreign Property 62 (1961).

> "The legal form corresponding to the expropriation of modern times was not, as far as we know, developed in the Roman or any other ancient law. It was only established in German and Scandinavian law in the Middle Ages, particularly in the towns".13

Tracing the history of expropriation in English law, F.A. Mann refers to the Great Charter of 1215 as the earliest embodiment of rules governing expropriation subsequent to which case law provided further elaboration. In the words of Mann:

> "...from the early thirteenth century onwards property could not be taken otherwise than per legem terrae, by parliamentary legislation, by the owner's consent vicariously given in parliament".14

Whatever might have been the origin of expropriation in municipal law, it emerged into the domain of international law at a much later date. The question of expropriation of alien property came to assume its definitive international character in the formative stages of classical international law especially from the middle of the nineteenth century up to the first world war mainly as a result of an "enormous expansion of overseas investment and increasing search for foreign markets by the Great Powers" - a phenomenon characterized by capital and human migration from one part of the world to another.[15]

During this pre-war period, expropriation was an isolated and rare phenomenon. The expropriation acts in this period had few international ramifications. The disputes were mostly

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[13] F. Vinding Kruse, The Right of Property 170 (1939)

[14] F.A. Mann, "Outlines of a History of Expropriation", 75 Law Quarterly Review 196 (1959).

[15] Seymour J. Rubin, "Nationalization and Compensation: A Comparative Approach", 17 University of Chicago Law Review 459 (1949-50); see also, Nicholas R. Doman, "post-War nationalization of foreign property in Europe" 48 Columbia Law Review 1125-26 (1948).

confined to the states directly concerned and governmental pressure were the most common methods used in settling controversies issuing from expropriation.[16] The most important incidents of expropriation in this period were, according to a chronological order of happening, the case of the American ships (1819), the Sicilian Sulphur Monopoly Case of 1840, the Charlton Case of 1841, the Finlay Case of 1849, the Case of Jonas King in 1853, the case of Henry Savage in 1852, the Delagoa Bay Railway (McMurdo) case of 1891, the Turkish Wharf Case, the Pious Fund case of 1902, the case of Portugese expropriation of religious properties in 1910, the Italian and Uruguayan Life Insurance Monopoly cases of 1911-13, the Norwegian Shipowners case of 1917, the case of De Sabla (1910-1928), and the Spanish Zone of Morocco cases of 1913 to 1921.

The case of the American ships (1819) involved the seizure and confiscation of ships as well as cargo belonging to the United States by Spain during the Anglo-Spanish war of the late 18th century on the ground of violation of a Spanish government Decree of 1796 forbidding ships belonging to neutral states from entering the port of Gibraltar with the aim of stopping centraband trade in war materials by cargo ships bound for Gibraltar.[17] The American government later submitted a compensation claim for the loss of the ships and the cargo, and the dispute was finally settled in 1819 by means of the Treaty of Florida pursuant to which the Spanish government paid compensation to the shipowners.

The Sicilian Sulphur Monopoly Case (1840),[18] on the other

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[16] S.J. Rubin, Ibid.

[17] 5 John Bassett Moore, History and Digest of the International Arbitrations to which the United States has been a party 4487-4500 (1898).

[18] W. Evans Darky, International Arbitrations 779 (4th ed. 1904).

hand, involved not a strict of "taking" (although several jurists consider it as a case of indirect expropriation), but rather an incident of state interference with the enjoyment of the private property interests of aliens. The dispute arose between the Kingdom of the two Sicilies and Britain as a result of the granting in 1838, by the King of the two Sicilies, of a right of Monopoly for the extraction and sale of Sicilian sulphur in favour of a French firm, thereby, putting a stop to the commercial activity of a number of British nationals. The British government contended that the monopoly in question not only amounted to an indirect expropriation of British interests in the two Sicilies, but that it also violated a most-favoured-nation clause in a Treaty of 1816 then in force between the two countries. As a result of British pressure, the Kingdom of the two Sicilies later capitulated to British demands by revoking the Monopoly and by paying damages to the British enterprises adversely affected.

The Charlton Case (1841) involved the taking of a piece of land belonging to a certain Mr. Charlton, an American citizen, by the government of Haiti.[19] The expropriated land was purchased by the said American citizen in violation of existing laws of Haiti which forbade foreigners from owning land. Mr. Charlton was dispossessed of the land he purchased without legal proceedings and as a result the U.S. protested the improper dispossession and ultimately succeeded, largely by means of political pressure, to secure the claim of damages against the Haitian government.

The Finlay Case (1849) involved the taking, by the Greek government, of a piece of land from a certain Mr. Finlay, a

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[19] Cited in S. Friedman, Expropriation in International Law 67-68 (1953).

British national, for the purpose of turning the land to a private garden to King Otto of Greece.[20] Although no legal proceedings were instituted, the British government obtained compensation for its national by means of diplomatic pressure.

The Case of Jonas King (1853) involved an American citizen, the Rev. Jonas King, whose piece of land was expropriated by the Government of Greece subsequent to his banishment from Greece for offences against religion.[21] Although the Greek government did not refuse to pay compensation, the delay forced the American government to put pressure on the Greek government to effect prompt payment. The dispute was finally settled when the Greek government decided to grant King indemnity for the expropriated property.

The Case of Henry Savage (1852) arose in 1852 when the government of Salvador established a monopoly of ownership over gunpowder and subsequently ordered all unsold gunpowder belonging to private individuals to be removed on pain of confiscation.[22] As a result, it confiscated gunpowder belonging to a certain Henry Savage, an American citizen, who engaged in the trade of gunpowder. The Government of the U.S. claimed compensation on behalf of Savage, and in an arbitral award in 1865, it secured indemnity to its citizen from the government of Salvador.

The Delagoa Bay Railway (McMurdo) Case (1891) involved the governments of the United States and Great Britain against Portugal concerning the cancellation of a railway concession

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[20] T. Baty, International Law 85 (1909).

[21] 4 J.B. Moore, A Digest of International Law 262 (1906)

[22] 2 J.B. Moore, History and Digest of the International Arbitrations to which the U.S. has been a party 1855 (1898).

and the takeover of property owned by an American citizen who later disposed of his rights to a British Corporation.[23]

In Dec. 1883, an American citizen, Edward McMurdo, obtained a concession from the Portugese government for the construction of a railway from the port of Lourenço Marques to the frontier. As a result of the concessionary's refusal to carry out extensions demanded by the Portugese government, the Portugese authorities annulled the concession and seized the property of McMurdo. The governments of the U.S. and Britain protested against the action and claimed compensation on behalf of their adversely affected nationals. Initially, Portugal denied liability on the ground that the revocation of the concession was a public action for reasons of state which did not entail responsibility of the State. Later, however, by an agreement signed on June 13, 1891, Portugal consented to submit the case to arbitration and finally, Portugal was forced to pay about fifteen million francs to the interested parties.

The Turkish Wharf Case arose, at about the same time as the Delagoa Railway Case, in connection with the expropriation, by Turkey, of certain wharves owned by a French company which was engaged in marine trade.[24] Although Turkey was willing to offer compensation, the Government of France demanded complete restitution of the property involved, and upon Turkey's refusal to do so, it finally intervened by force and had its claims recognized by Turkey.

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[23] 2 J.B. Moore, A Digest of International Law 1866-70 (1906).

[24] Cited in J.P. Bullington, "Problems of International Law in the Mexican Constitution of 1917", 21 A.J.I.L. 697 (1927).

The Pious Fund Case (1902)

This case involved funds which were originally donated, under a trust, by Spanish subjects during the latter part of the seventeenth century and the first half of the eighteenth century for the spread of the Catholic faith in California which was then, under Spanish sovereignty.[25] The funds which were in the amount of over a million dollars were entrusted to the Society of Jesus for the purpose. Following the expulsion of Jesuits in 1767 from the Spanish Dominions by the Order of the King of Spain and the Pope, the fund devolved to the Spanish Crown. In 1842 after Mexico got independence these funds were taken over by the National Treasury of Mexico. After the cession of Upper California to the U.S. in 1848, the Mexican government refused to pay the funds to the church in Upper California and the latter complained to the U.S. to urge the Mexican government to give the funds back to the Trustees. A mixed commission for the settlement of the claims was formed under a convention of July 4, 1868. Upon failing to reach an agreement within the commission, the case was referred to an umpire and the umpire decided in favour of the U.S. The Mexican government agreed to pay the principal claim but refused to pay outstanding interests. The two governments undertook a series of diplomatic discussions and finally agreed to submit the case to an international arbitral tribunal at The Hague in 1902. The tribunal decided that Mexico was obliged to satisfy the claim including the interest accruing therefrom.

The Expropriated Religious Properties Case (1910) involved a dispute between Portugal on the one hand, and Britain, France and Spain on the other.

Following the revolution of 1910 in Portugal, all religious

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[25] James Brown Scott, The Hague Court Reports 1 (1916)

properties including those belonging to foreigners were confiscated pursuant to a Decree of October 8, 1910.[26] In those expropriations were included properties belonging to citizens of Britain, France and Spain. The interested governments held a series of negotiations to secure compensation and finally reached an agreement in July 1913 with the Portugese government to submit their case to the permanent court of arbitration. The case was brought to that tribunal which finally awarded compensation to the claimant states.

The Uruguayan and Italian Monopolies in Life Insurance (1911-13) involved a series of disputes in connection with certain laws enacted by Uruguay and Italy which created state monopoly in life insurance business.[27] The Italian law expressly provided that no compensation would be paid either to nationals or to foreigners for any injury occasioned by the law. In Uruguay, too, although there was no express provision as in the Italian law, it was tacitly understood that no compensation would be paid unless authorized by the Act. The governments of France, Great Britain, the United States, Austro-Hungary and Germany, whose nationals were engaged in the business of life insurance in Italy objected to the Italian Monopoly Act. As a result of pressure from those governments, some modifications were made in the Bill allowing foreign concerns to operate in the business subject to certain conditions. A similar pressure was exerted on Uruguay and the latter was forced to totally abandon the scheme. In both instances, the contention of the foreign governments revolved around the claim that the Monopoly Acts amounted to "indirect expropriation".

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[26] 1 U.N.R.I.A.A. 11-59 (1920).

[27] Edouard Clunet, Consultation pour les Sociétés d'Assurance sur la vie établies en Italie (1912); see also John Fischer Williams, "International Law and the Property of Aliens", 9. B.Y.B.I.L. 1 (1928).

The Norwegian Shipowners' Case (1917) involved a dispute between the Kingdom of Norway and the United States government concerning the claims of Norwegian Shipowners against the seizure of ships by the U.S.[28]

Following the declaration of war on Germany in 1917, the government of U.S. requisitioned all ships over 2,500 tons then in the course of construction. Among the ships that were requisitioned were ships that were being built for fifteen Norwegian shipowners under contracts secured by them both before and after the declaration of war. According to American law compensation was payable to the owners of the requisitioned ships. The dispute revolved, therefore, not on whether the U.S. government was obligated to pay compensation but what amount it was bound to pay.

The Norwegian shipowners claimed the value of the building contracts at the moment of requisition and consequently demanded a relatively high figure in view of the considerable increase in the cost of ships because of the war. The United States government, on the other hand, offered to pay only the value of the materials effectively requisitioned. The case was finally submitted to the permanent court of arbitration and the tribunal finally held the U.S. liable for the damages sought by Norway.

The Spanish Zone of Morocco Claims (1913-1921) involved a series of claims put forward by Great Britain on behalf of a number of British subjects and British protected persons for losses suffered and injuries sustained by them in the Spanish Zone of Morocco in the period between 1913 and 1921.[29] The events took place at the time when sovereignty over Morocco was

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[28] 1 U.N.R.I.A.A. 302 (1921).

[29] 2 Annual Digest of International Law Cases 157 (1923-24). See also II U.N.R.I.A.A. 651 (1924).

exercised by Spain by virtue of the Spanish-Morocco Treaty of Nov. 27, 1912 establishing Spanish protectorate over Morocco.

The Spanish Zone of Morocco cases involved various categories of claims. The first category consisted of claims for compensation for property loss and damage (i.e. destruction and spoilation of houses, hedges, fruit trees and crops, gardens; loss of cattle, horses, mules, goats, poultry, etc.) during, and arising from, the Moroccan rebellion and subsequent unrests of 1913. The second category of claims arose as a result of a series of Spanish takeover of private plots of land and interference with surface rights for the construction of roads, railways and terminals (especially from Tetuan to Rio Martin and to Centa; from Larache to Alcazar etc.) and for constructing airport runways.

For both categories of claims, the British government secured awards of compensation for the loss and distruction of the property of its citizens and people under its protection.

The Case of De Sabla (1910-1928) involved a dispute between the United States and Panama involving a tract of land (known as "Bernardino") in the province of Panama, originally owned by the husband of the claimant, Theodoro Joly De Sabla since 1897 until his death in 1914 after which time the claimant Mrs. Marguerite De Joly De Sabla, a U.S. citizen, succeeded to all his property and had become the owner of "Bernardino".[30]

The claim was that between 1910 and the time of the lodging of official complaint, officials of the government of Panma, though fully aware that Bernardino was the private property of the De Sabla family, treated the tract of land as though it were Government land (baldio) and granted various

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[30] VI U.N.R.I.A.A. 358-59 (1928).

kinds of rights over this land to several individuals with the effect of depriving the legitimate owners of the use of the land.

The legal basis for the action of the Panama officials were a series of public land laws enacted in Panama in the years 1907, 1913, 1917 and 1925 according to which the authorities were empowered to grant various right on government land.

The position of Panama in the dispute was that since the claimant did not object to interference with her property rights when such interference was initially made, it was proof that she relinquished her right.

The case was submitted to the General Claims Commission - established by the U.S. and Panama for the purpose - which finally resolved the dispute by holding that Panama was liable to pay compensation for the "takeover" of property.

The foregoing cases, thus, constituted the principal incidents in the international state practice of the pre-war period which either involved strict cases of expropriation of property of aliens or which were assimilated into the regime of expropriation by some jurists on the ground of the purported likeness of those incidents to actual cases of expropriation.

Given the relative rarity of expropriatory "takings" in the pre-war period, and owing, consequently, to the paucity of substantive sources of international law governing the regime of expropriation, the principles that evolved in connection with the above cases, therefore, inevitably became the singular basis for the subsequent evolution of concept of expropriation in the specific domain of international law. As we shall show later in this paper, the significance of the above cases lies in the fact that they served as a bridge in the gradual infiltration, into the strict domain of traditional international law, of

those municipal legal norms governing property relations that were prevalent within a limited "club of nations".

From a historicist perspective, then, at least two key features, namely, the nature of the parties in dispute and the type of property interests affected, could be singled out from the foregoing cases to illustrate the historical limitation and the circumscribed applicability of the norms that evolved out of those cases for disposing nationalization incidents that occur in an entirely new operational climate.

The first interesting feature that emerges from a closer examination of the above cases as a whole, is the peculiar element in the nature of the parties involved in those disputes. The majority of the cases, interestingly enough, involved disputes among and between western states, namely: Spain and the United States in the American Ships Case (1819); Britain and the Kingdom of the Two Sicilies in the Sicilian Sulphur Monopoly Case (1840); Britain and Greece in the Finlay Case (1849); the United States and Greece in the Jonas King Case (1853); Portugal Britain, France and Spain in the Expropriated Religious Property Case (1910); Italy, France, Britain, the United States, Austro-Hungary and Germany in the Italian Life Insurance Monopoly Case (1911-13), Norway and the United States in the Norwegian Shipowners Case (1917). In all those cases, therefore, not only were the parties on both sides in the dispute western states exclusively, but the actual interference against the property of aliens also occurred in a strictly western territory.

In a second group of cases, all the parties to the disputes were once again western states with the only difference that the actual interference against the property of aliens occurred in a colonial territory under the sovereignty of a western colonizing power. Under the latter category come the dispute between Portugal on the one hand, and the United States and Britain on the other in the Delagoa Bay Railway (McMurdo) Case

(1891) over an interference against property of aliens in Portugal's African Colonial Territory of Mozambique; and the dispute between Spain and Britain over claims arising in the Spanish Colonial Territory of Morocco.

In the third category of cases, the disputes were between western states on the one hand, and semi-colonial, non-western and underdeveloped countries on the other. In the latter category, we find Haiti confronting the U.S. in the Charlton Case (1841); Salvador confronting the United States in the case of Henry Savage (1852); Turkey confronting France in the Turkish Wharf Case; and Mexico confronting the United States in the Pious Fund Case (1902). Thus, in the last category of cases, not only were the disputes between western and non-western countries, but the interference against the property of aliens occurred in a non-western territory. In all the three categories of cases, the national origins of the aliens, the protection of whose interest was the subject-matter of the disputes, were invariably western. In other words, whether the dispute was between and among western states or between western and non-western underdeveloped countries, it was exclusively the property interest of western nationals that was always the centre of the disputes. It is particularly interesting to note the uni-directional flow of aliens, especially in the last category of cases, in the sense that no where do we find nationals of non-western underdeveloped countries being the object of international protection in the territory of western countries. In other words, an empirical observation of the above cases shows that the protection of the property interests of aliens in the pre-war period amounted in actual fact, and invariably, the protection of the property interests exclusively of western nationals.

The fact that the majority of the above pre-war cases involved disputes between and among western states is significant in that it shows the extent to which rules of international law governing expropriation were made, by, and for, the western

countries. The process of international "norm-creation" by and between the western states was all the more facilitated, as we shall show elsewhere in this paper, by the fact that those states shared, by reason their relatively common historical heritage anchored in Greco-Roman, Christian and western civilization and owing to their comparable level of social development, more or less identical conceptions regarding the sanctity of private property underlying their respective municipal property laws. Even in those cases where one of the parties to the dispute were such underdeveloped, non-western, semi-colonial countries as Mexico, Turkey, Panama, Salvador, and Uraguay, the independent "in-put" of the latter group of countries to the international "norm-creation" process was absolutely minimal at the time, partly because the disputes were mostly resolved through diplomatic "arm-twisting" as well as military "bullying" by the western states, and largely because, owing to the "accident" of colonial history, the municipal legal systems which were after all externally-imposed by the colonial powers themselves (in the case of Haiti by France, in the case of Mexico, Panama and Salvador by Spain, in the case of Morocco by Spain, and in the case of Mozambique by Portugal) tended, in any case, to reflect the very norms that operated in the respective municipal legal systems of the colonizing western powers. The norms to which recourse was had by the western countries to protect the property interests of their nationals, either in each others territory or in the territory of their respective colonies as well as ex-colonies, were, therefore, unavoidably the very norms which prevailed in the municipal laws of the western countries themselves. In other words, the incidents of expropriation which occurred in the pre-war period and the body of case law issuing out of them and to resolve them, naturally rested on a more-or-less homogenous conception of municipal legal norms of expropriation acceptable to a small club of western nations. As we shall show elsewhere in this paper, it is this historically-determined bias in the

assimilation of the municipal law norms of a limited club of western nations into the domain of traditional international law that characterizes the "norm-creation" process of this period, and consequently, that which accounts for the historical limitation and circumscribed relevance of that body of law for governing incidents of nationalization which arise in an operational climate characterized, among others, by the ideological plurality of the international community of nations.

The other key feature that emerges from a closer examination of those pre-war cases of expropriation is the type of property of aliens adversely affected by the expropriatory measures of the "taking" states. In the case of the American ships case (1819) few ships and their cargo were involved. In the Charlton, Finlay, Jonas King and De Sabla cases the property expropriated was a piece of land. In the case of Henry Savage the property taken was a certain quantity of of gunpowder. In the Turkish Wharf case, it was taking of some wharves that was involved. In the Pious Fund case, the property taken was a certain amount of money in cash. In the Norwegian ship owners case, the property taken involved ships in the process of construction. With the exception of the Delagoa Bay Railway (McMurdo) case, which involved the taking of railway equipment and installations, the "typical" case of "taking" in the pre-war period involved property interests, which by their very nature and monetary value were relatively small and insignificant. Although those property items represented considerable proprietory interest for the individual owners themselves, the items carried very little weight and significance in relation to the economy of either the "taking" state or the state to whose national the property originally belonged. By their very nature, the types of property interests involved had very little impact of their own on the social environment to which they were attached. In other words, compared to the types of property to which incidents of nationalization

ordinarily attach in the contemporary period, the scale of the "taking" in the pre-war period was exceedingly small in magnitude, and the type of property affected represented incomparably little economic significance.

As we shall show elsewhere in this paper, the significance of the latter feature is that, in as much as the types of property involved in the "takings" of the pre-war period constituted an important ingredient of the "factual regime" that shaped the governing law on expropriation, the relative peculiarity of the types of property thus affected had left its own distinct mark on the rules of international law that specifically applied to those types of "takings". In other words, the rules of international law governing "takings" of the pre-war-type, were as much the products of the peculiar feature of the types of property typically involved then, as they were of the historically specific social, economic and politico-juridic milieu underlying the pre-war operational climate. The implication, then, is that the old rules and norms cease to be relevant when the operational climate changes, and that is as much true for a change in the types of property targeted for nationalization, as it is for changes in the other components of the distinct "factual regime" of nationalization.

Thus, when we consider the relative peculiarity in the nature of the parties to the disputes in the pre-war period and the types of property interests adversely affected, we cannot avoid the inescapable conclusion that the applicability of those rules of traditional international law which revolved in connection with those peculiar conditions over the entirely distinct "factual regime" of nationalization incidents is circumscribed by the very nature of their historical specificity. Despite the claim by certain jurists and statemen that the body of case law which evolved in the pre-war period in connection with expropriation strictly so-called equally applies over nationalization incidents, it is our contension that the authority

of that body of case law does not extend beyond those historically determined limits.

2. Expropriation of Property of Aliens in the Inter-war Period

The period from 1914 to the Second World War witnessed profound economic and political changes in the world, among which were the founding of the first socialist state following the October Revolution of 1917 in former Tzarist Russia and the emergence of a number of new states in Eastern and Central Europe.

This period saw large scale property "takings" both in connection with the peace settlements and as a result of internal economic reorganization in several states. Side by side with those new developments, there also continued the occurrence of the isolated and incidental kinds of expropriatory "takings" typical of the pre-war period.

The expropriations in the inter-war period could, therefore, be grouped into four main categories, namely: (a) the individual and isolated types of "taking"; (b) the west European expropriations; (c) the large scale expropriations associated with the peace settlement and the Agrarian reforms that took place in eastern Europe, and lastly (d) the nationalization measures that took place in the Soviet Union and in Mexico.

A. Expropriations of the Isolated Type

The isolated and incidental types of expropriations were relatively numerous in the inter-war period. The most important incidents of this type of expropriation included the Walter Smith case involving Cuba and the U.S.; the Goldenberg case involving Germany and Roumania; the Oscar Chinn case between the United Kingdom and Belgium, the Standard Oil Company Tankers

case involving the United States and the Reparations commission; the Dickson Car and Wheel Company Case between Mexico and the United States; the Chemins de Fer du Nord Case between France and Germany; the Case of the American Tobacco Company, the McAndrews and Forbes Company case, the Singer Company Case and the Riassis case between Turkey and the United States; and lastly the George Hopkins case between the United States and Mexico.

The Walter Smith case[31] involved a claim by a certain captain Walter Fletcher Smith, an American citizen and a resident of Habana, Cuba, arising from the condemnation (expropriation) of two plots of land and buildings belonging to Walter Smith by the Municipality of Mariano of Cuba which granted a concession to a private firm, the Playa Company in 1919 to undertake the urbanization and development of the district at and around Mariano Beach, near Habana. The central issue in that case was whether the expropriation (condemnation) of the two plots of land and buildings that belonged to captain Smith by the Municipality of Mariano was justified on grounds of "public purpose or utility". Upon presentation of the complaint by the U.S. government, Cuba and the U.S. concluded an agreement to submit the case to an international Arbitrator and the Arbitrator finally ruled in favour of Walter Smith.

The Goldenberg case (1928)[32] involved a dispute between Roumania and Germany, and the claim arose from war time requisition of merchandise belonging to a certain David Goldenberg and sons,(citizens of Roumania) by the Government of Germany against

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[31] 2 U.N.R.I.A.A. 915-918 (1929);

[32] 2 U.N.R.I.A.A. 903 (1928);

payment of "approximately on-sixth of the value of the requisitioned merchandise", the contension being that the "unpaid-for" portion of the merchandize was in effect expropriated without compensation. The case was finally submitted to an International Arbitral Tribunal which decided in favour of Roumania.

The Oscar Chinn case (1934)[33] involved a dispute between the United Kingdom and Belgium, and the claim arose from a Belgian government decision requiring the reduction of tariffs charged in water transport services in the Belgian Congo (Zaire) adversely affecting a certain Mr. Chinn, a British national who operated, a river transport business on the Congo and Kasai rivers prior to the tariff reductions.

The basis of Mr. Chinn's complaint was that, at the same time as the Belgian Government reduced the tariff, it made special provision favourable to the Unatra company, another operator of water transport services whose shares were partly owned by the Belgian government, in which it undertook to refund Unatra for any losses it might incur by reason of the reductions of the tariffs, thereby, in effect subsidizing Unatra to the exclusion of other operators like Mr. Chinn, and forcing Mr. Chinn to suspend his transport business. In other words, Mr. Chinn's claim was that the Belgian government was in effect granting virtual monopoly to Unatra to the detriment of operators like Mr. Chinn, and that, therefore, the act amounted to "discrimination" against the business interests of Mr. Chinn.

Failing to secure judicial remedy in the Belgian Congo, Mr. Chinn urged the U. Kingdom to press the Belgian government

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[33] (1934) P.C.I.J., Ser. A/B, No.63 at 65.

for a settlement, and the Belgian and United Kingdom governments agreed to submit the case to the permanent court of International justice. The court in particular examined the issue of whether the case involved "discrimination", and dismissed the U.K. claim for lack of merit.

The Standard Oil Company Tankers case (1926) involved a dispute[34] between the United States and Reparations Commission over certain tankers ceded by Germany to the Allied and Associated powers after the end of the first world war pursuant to the Treaty of Versailles which provided, in paragraph (1) of Annex III - part VIII, that the German government would cede, to the Allied and Associated governments, ships and boats owned by any German national company or corporation. The Tankers originally belonged to the D.A.P.G., a German company which had its registered office in Hamburg.

The American Standard Oil Company of New Jersey claimed that, at the time of the coming into force of the Treaty of Versailles it owned all of the shares and almost all of the share warrants and debentures of the D.A.P.G., and that by virtue of its shareholdings, it was entitled to the "beneficial ownerships" of the tankers, thereby seeking indemnity for the tankers taken over by the Reparations Commission. The case was submitted to an International Arbitral tribunal, and the latter denied the claim of the American Standard Oil Company on the ground, mainly that the latter was not in fact the "beneficial owner" of the tankers in question.

The Dickson Car and Wheel Company Case (1931)[35] involved

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[34] 2 U.N.R.I.A.A. 781-82 (1926).

[35] H. Lauterpacht, Annual Digest of Public International Law cases: 1931-32, 228-229 (1938).

a dispute between Mexico and the United States, wherein the Dickson Car and Wheel Company brought a claim of unjust enrichment against the Mexican government on the ground that the latter took possession of the National Railways company of Mexico which had contractual relations with the Dickson Car Company for the delivery of car wheels pursuant to which the latter made deliveries in December 1913 and January 1914. The case was submitted to the United States and Mexican special claims commission and the claim was rejected on the ground that international law did not protect claims resting on the notion of "unjust enrichment".

The Chemins de Fer du Nord case (1929) involved a dispute between France and Germany, and it arose from a claim by a French company which, having its siège social in Paris, operated railway lines in Belgium during the outbreak of the first World War.[36] The company claimed compensation for loss of revenue arising from the seizure and operation of the railway by the German state during German occupation of Belgium. The company relied on the compensation provisions of the Treaty of Versailles and the Hague convention of 1907 concerning the laws and customs of war on land. The case was brought to the Franco-German mixed arbitral tribunal, and the tribunal finally awarded indemnities to the company.

The Case of the American Tobacco Company[37] involved a dispute between the United States and Turkey and it arose in connection with the "taking", by the Turkish Authorities,

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[36] H. Lauterpacht, Annual Digest of Public International Law Cases, years 1929 and 1930, 498 (1935).

[37] Fred Nielson, American-Turkish claims settlement under the Agreement of December 24, 1923 and supplemental agreements between the United States and Turkey 141 (1937).

of certain quantities of leaf tobacco between the years 1917 and 1918, belonging to the American Tobacco Company. The company's claim for compensation was submitted to the American-Turkish Claims Settlement Commission, and the commission awarded compensation to the claimant.

The McAndrews and Forbes Company case[38] involved a dispute between Turkey and the United States, and the claim arose from loss and destruction of movable property, the premature expiry of leases and rents and the requisition of property belonging to the McAndrews and Forbes Company by the Turkish Authorities during the first World War. The case was submitted to the American-Turkish Claims Settlement Commission, and the commission awarded compensation to the claimant.

The Singer Sewing Machine Company case[39] involved a dispute between Turkey and the United States and the claim was for the recovery of a certain sum from the Turkish Authorities for sewing machines and other property requisitioned by the Turkish authorities during the first World War as well as for a balance of the purchase price of sewing machines sold to the Turkish Ministry of war in 1914. The case was submitted to the American-Turkish Claims Settlement Commission, and the commission granted compensation to the claimant company.

The Raissis case[40] involved a dispute between the United States and Turkey, and the claim, by a certain Mrs. Spiros Raissis, an American national, was for the recovery of a certain sum from the Turkish government on the ground that her property (a lot and buildings) was destroyed by the Turkish Army

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[38] Ibid. at 97.

[39] Ibid. at 493.

[40] Ibid. at 342.

occupying Smyrna in 1922. The dispute was submitted to the American-Turkish Claims Settlement Commission, and the commission granted partial compensation to the claimant.

It was, thus, principally around the above incidents of state interference against the property of aliens that the rules of traditional international law governing expropriation further evolved in the inter-war period. As we tried to argue in connection with the incidents of expropriatory "takings" and associated cases of state interference against property of aliens that occurred in the pre-war period, here too, the particular features surrounding the nature of the parties involved and the types of property interests adversely affected account for the historical specificity of the norms that evolved in connection with the expropriatory incidents of the inter-war period. As we shall show later in this paper, it is this historical specificity of the norms that limits their relevance and applicability in the entirely new historical setting constituting the operational climate for incidents of nationalization.

B. Expropriation in Western Europe

The most significant incidents of expropriation in Western Europe during the inter-war period occurred mainly in Britain and France.[41]

Although the practice of expropriation in Britain goes as far back as the Middle Ages, it became widespread only later, particularly in the inter-war period.[42] According to Mary Bell Cairns, as early as the sixteenth century, statutes were passed which authorized the compulsory acquisition of land for public purposes and the "takings" were invariably accompanied by the payment of compensation. However, widespread "takings" began to occur in the early part of the twentieth century and the major "takings" were carried out to facilitate the provision of public transport services and their maintenance.

In 1908, for instance, the port of London Authority was set up and to it were transferred the assets and undertakings of various companies which had owned and operated docks in the River Thames. In consideration for the loss of their property, the companies received specified amounts of "portstock" as compensation.[43]

The major incidents of expropriation which took place in the inter-war period included those associated with: the formation, in 1919, of the Forestry Commission; the establishment, in 1926, of the British Broadcasting Corporation; the formation, in 1926, of the Central Electricity Board in 1926; the establishment of the London Passenger Transport Board in 1933 to which passenger transport undertakings owned by private companies and local Authorities were transferred; the establishment, in 1930, of the Coal Mines Reorganization Commission, and the promulgation later of the Coal Act of 1938.[44] According to professor Clive

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[41]The other major "takings" of considerable magnitude were those carried out by Germany subsequent to the ascendancy to power of the National Socialist (Nazi) party, and those carried out by the Fascist Regime in Italy between 1933 and the outbreak of the second world war. Although the "taking" measures by those regimes gave rise to the post-war formulations of international norms relative to restitution and compensation, most of those incidents consisted of strict cases of confiscation and not expropriation proper. The ones that occurred in Germany, in particular were anti-semetic confiscatory measures directed against the property interests of Jews. For an interesting discussion involving some of the latter type of takings, see Paul Weiden, "German confiscations of American securities", 17 New York University Law Quarterly Review 200 (1939-40); see also Monroe Karasik, "Problems of compensation and restitution in Germany and Austria", 16 Law and contemporary problems 448 (1951); see also Nehemiah Robinson, "War damages compensation and restitution in foreign countries", 16 Law and contemporary problems 345 (1951); and Seymour J. Rubin and Abba P. Schwartz, "Reforms and Reparations", 16 Law and contemporary problems 377 (1951).

[42]Mary Bell Cairns, "Some legal aspects of compensation for national assets", 16 Law and contemporary problems 596 (1951).

Schmitthoff, the owners whose property interests were affected by the expropriation measures were invariably paid compensation since the principle that compensation must be paid for assets transferred from private to public ownership formed "an integral part of the English legal and political system".[45]

In France, one of the earliest and major instances of taking in the inter-war period involved the expropriation of hydraulic power produced by non-navigable waterways. The other series of major expropriations were connected with the take-over, by the state, of war industries pursuant to a law of August 16, 1936, and the decrees of August 1936 and January 1937. By virtue of the latter laws, the ownership of plants engaged in the manufacture and trade of war material was transferred from private to public hands, and in all cases provision was made for compensation to the former owners.[46]

Although the west-European expropriations of the inter-war period did not as such raise serious international controversy owing largely to the fact that the Municipal legislations provided claims settlement arrangements which were more-or-less satisfactory to the parties adversely affected, the significance of those expropriatory practices from the historical standpoint is two-fold. In the first place, those practices, along with the incidental types of "taking" examined earlier, further served as transmitting belts in the gradual assimilation, by a

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[43] Ibid.

[44] Clive M. Schmitthoff, "The Nationalization of Basic Industries in Great Britain", 16 Law and contemporary problems 559 (1951).

[45] Ibid. at 566; The same view is held by Mary Bell Cairns, see op. cit. at 610.

[46] Mary Bell Cairns, op. cit. at 596.

more or less direct route, of those municipal law norms of the European countries relative to the institution of expropriation into the domain of traditional international law. Secondly, the fact that the state practice of the West European countries in the inter-war period exibited increasing state intringement upon private property in a hitherto unprecedented scale and frequency shows that historically, even those west-European states which formerly recognized the sanctity of private property on the basis of which the law on expropriation rested, were forced to modify their views in the course of time in the face of the changing socio-economic operational climate. Although those modifications of views were by no means far-reaching, the fact that they occurred still shows that even for the west-European countries the applicability of the old norms which they created in their mutual inter-state relations and to which they adhered, were bound to be, to one degree or another, historically restricted. In any event, to the extent that the norms which evolved in connection with the west European expropriation measures influenced the formative process of the rules of traditional international law on expropriation, that fact in itself, as we shall argue later, tends to diminish, if not, totally rule out, the universal validy of those norms under the new historical conditions characterized by the ideological and political plurality of the community of nations.

C. Expropriation in Eastern Europe

Following the end of the first world war, the newly created states of eastern Europe launched a series of "take-over" measures which affected both nationals and aliens. The takings of property aliens were carried out in two distinct contexts: first, in connection with reclamation of territory and other forms of property originally taken by the central powers, mainly by Germany, pursuant to the terms of the peace

treaties; and secondly, in connection with various agrarian reform programs carried out by the new east European states.

Property Takeovers in the Context of the Peace Settlement

While there were several takeover cases that arose in connection with the peace settlement, the major ones which involved the most controvercial issues under traditional international law were: - the case of German settlers in Poland; the Peter Pazmany University case and the Chorsow Factory case.

The case of German Settlers in Poland[47] involved a number of colonists (alien settlers) who were German nationals and who had acquired Polish nationality subsequently, and who, at the time of the dispute were domiciled in Polish Territory previously taken over by Germany. Those colonists occupied various holdings by virtue of contracts concluded between them and the German colonization commission prior to the Armistice of November 11, 1918. Regarding itself as the legitimate owner of those holdings under Article 256 of the Treaty of Versailles and, therefore, entitled to cancel the above contracts, the Polish government enacted a law on July 14, 1920 the direct effect of which was to expel those settlers from the holdings they occupied. The case was brought to the attention of the League of Nations by the German League for the protection of the rights of minorities in Poland maintaining that League of Nations had competence, by virtue of Article 12 of the Treaty of Versailles, to guarantee the protection of minorities. Accordingly, the League took up the matter and requested an advisory opinion from the permanent court of International Justice. The court, in its advisory opinion, held that the Polish action was not justified in light of the terms of the peace Treaties.

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[47] (1923) P.C.I.J., ser. B. No.6 at 6.

The case of Peter Pazmany University involved[48] a dispute between Hungary and Czechoslovakia.

Following the territorial re-arrangements resulting from the First World War, the landed estates of Vagsellye and Zniovaralja, which formerly belonged to Peter Pazmany University (otherwise known as the University of Budapest) and which as of November 1918 happened to fall within the territory transferred from Hungary to the state of Czechoslovakia, were put under the supervision of the Central Commission for the protection of the property of the Roman Catholic Church in Slovakia pursuant to a Czech ordinance of August 15, 1919. The dispute centered around the terms of Article 246 and 250 of the Treaty of Trianon which governed the manner of handling property situated in the territories affected by the rearrangements following the first World War. The case was first brought to the Hungarian-Czechoslovak Mixed Arbitral Tribunal, and the Tribunal held that the Czech government was obliged to restore, to the university, the immovable property claimed by it. Upon Appeal to the permanent court of International Justice by Czechoslovakia, the court affirmed the decision of the Arbitral Tribunal.

The case of certain German interests in Polish upper Silesia[49] involved a dispute between the governments of Germany and Poland arising from acts done by Poland in connection with the nitrate factory at Chorzow and notice of expropriation of agricultural estates belonging to German nationals residing in the territory ceded by Germany to Poland.

The facts relating to the factory at Chorzow were as

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[48] (1933) P.C.I.J., ser. A/B, No.61 at 36.

[49] (1926) P.C.I.J., ser. A, No.6 at 8-12.

follows. By a contract of March 5, 1915 between the German Reich and a German company, the Bayrishe Stickstoffwerke, it was agreed that the latter should set up and manage a nitrate factory at Chorzow on behalf of the Reich. By a second contract of December 24, 1919, the Reich sold the Chorzow factory to another company (Oberschlesische Stickstoffwerke) reserving the control and management of the factory to Bayerische (i.e., the first company). In January 1920, the name of the new company was entered in the Chorzow land register as owner of the new company. On July 1, 1922 a Polish court declared the entry in the register in the name of the new company null and void and ordered it to be struck out and the previous position restored with the effect that the Chorzow factory devolved to the ownership of the Reich. Subsequently, the registration of the title of the Polish Treasury as successor to the German state was ordered. On July 3, 1922 a Polish agent took possession of the factory. The purported bases for the Polish court's decision were Articles 256 of the Treaty of Versailles and the Polish laws of July 14, 1920 and June 16, 1922.

Regarding the agricultural estates that constituted the other German interests in upper Silesia affected by Polish action, the facts were that on December 30, 1924 a notice was served by the Polish government on some twelve German proprietors disclosing Polish intension to expropriate certain large estates situated in the ceded territory of upper Silesia. The notifications (it was alleged by Poland) were issued pursuant to Article 15 of the German-Polish convention concerning upper Silesia concluded in Geneva on May 15, 1922.

The government of the German Reich brought the case before the permanent court of International justice. The issues in the dispute in the Chorzow Factory Case were (a) Whether the factory was German private or public property; (b) Whether Poland was legally entitled to expropriate the property in

in light of the terms of the peace Treaties; (c) whether, even if it were so entitled to expropriate the property in question, it was not obliged to pay compensation to the dispossessed claimant.

The permanent court of International Justice held that the Polish action violated the Treaty of Versailles and the Geneva convention of May 15, 1922 in that the property it expropriated was not of the category belonging to the German state but rather to a private German company, and that, therefore, Poland was obliged to pay compensation.

Expropriation Measures Associated With Agrarian Reforms

The second category of expropriations arose in connection with the series of Agrarian reforms introduced by the newly established eastern and central European states such as Estonia, Lativia, Lithuania, Yugoslavia, Roumania, Czechoslovakia as well as Poland.[50] The expropriations which had the object of distributing land among the small and land less peasantry gave rise to several international disputes, of which the Hungarian Optants Case was typical.

The Hungarian Optants Case[51] involved a dispute between Hungary and Roumania, and the claim arose in connection with the "taking" of property situated in the territory originally under the sovereignty of the Austro-Hungarian Empire and later ceded to Roumania, and belonging to persons who, pursuant to the terms of the peace Treaties, opted for Hungarian nationality. The dispute arose over measures of expropriation

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[50] For a discussion of the political factors that prompted the land reform programs, see Léon Duguit, "Le différent Roumano - Hongrois et le conseil de la société Des Nations", 57 Revue de droit international et de legislation comparée 495-96 (1927).

[51] 7 Recueil Des Decisions Des Tribunaux Arbitraux Mixtes 144-146 (1928).

carried out by Roumania in connection with Agrarian reform measures applied over all owners of property without distinction as to their nationality. The protection of Hungarian nationals being specifically provided for in the Treaty of Trianon, the issue was whether, the taking of property of Hungarians by Roumania as part of the latter's Agrarian reform measures amounted to "retention or liquidation" within the terms of the said Treaty such as to render the taking illegal.

The Hungarian government brought the case before the Mixed Arbitral Tribunal, and the Tribunal finally held against Roumania that the property of the said owners should not be interfered with by the Agrarian reform measures. Later, the Council of the League of Nations reviewed the decision and arrived at a different interpretation of the terms of the peace Treaties by holding that the protection of Hungarian nationals under the peace Treaties could not prevent the general application of Agrarian programs even as against those Hungarian nationals.[52]

Aside from those takeover measures of reclamation associated with the peace settlements, the extensive expropriation measures associated with the east European Agrarian reforms exibit some interesting features. Although, as Leon Duguit[53] interestingly observed, those Agrarian reforms were taken by the east European regimes of the time to forestall "the advance of Bolshevism", and, therefore, did not as such challenge the fundamental tenets of respect for private property prevalent even among those new states, the unprecedented scale of the infringement against private property

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[52] "Report of the committee of three", 8 League of Nations official journal 1382 (1927).

[53] Leon Duguit, op. cit. at 495.

occasioned by the Agrarian reforms forced both the claimant and debtor states to depart from the traditional mechanisms of effecting compensation settlements associated with the incidental type of takings affecting single property items in that both the claimants and the debtors had to convene an international conference at the Hague between March 13 and April 2, 1930 to work out a practical way of settling the compensation claims through diplomatic channels. Owing to the scale of the expropriations, and consequently the size of the compensation claims, even the creditor states were forced to take into account the "capacity" of the taking states to pay the compensation, and as a result, the expropriating states were granted, under the settlement scheme worked out at the Hague Conference, financial aid from Belgium, Britain, France, Italy, Japan and Portugal to help those East European governments to meet their compensation obligations towards the claimants.[54]

D. Soviet and Mexican "Takeover" of Property of Aliens

The most extensive series of "takeover" incidents in the inter-war period occurred mainly[55] in the Soviet Union and Mexico. The significance of the "takings" in this category lies not only in the fact that they were quantitatively speaking pervasive in scale and magnitude, but also in the fact that they inaugurated, for the first time in the history of takeovers of property of aliens in international state practice, new conceptual departures different from takings of the "expropriatory-type" strictly so-called. As we shall argue later in this paper, the radical departure which the Soviet "takings" in particular signified, although regarded as heretical at the time by a relatively homogenous club of nations who saw themselves as the sole-makers and arbiters of the rules

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[54] S. Friedman, op.cit. at 57

of traditional international law, would soon evolve into a definite and vigorous trend following the end of the second world war. It was, thus, in connection with those latter "takings" that the concept of nationalization strictly so-called emerged for the first time.

Nationalization of Property of Aliens in the Soviet Union

Immediately following the October 1917 socialist Revolution in Tsarist Russia, the new Soviet Government launched a series of sweeping nationalization measures adversely affecting the economic interest of foreigners in land, industrial, financial and commercial enterprises.[56] The second all-Russian congress of Soviets abolished private property in land by virtue of the Decree of October 26, 1917. By a decree of 14 December, 1917, all Banks were nationalized. The Declaration of the

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[55] Other than the Soviet and Mexican cases of extensive "takeovers", we also find in this same period, the Bolivian takeover of the oil properties of the standard oil company on March 13, 1937. That oil company had been prospecting for petroleum in Bolivia by virtue of a concession granted in 1920. In taking the property valued by the company at around $17 million, the Bolivian government headed by president Toro maintained that the corporation had evaded the payment of rentals for petroleum lands. After the takeover, a Bolivian company was directed to take charge of the oil properties. The American company protested against the seizure in Bolivian local courts which denied compensation to the company. Later in 1942, after the coming to power (with U.S. support) of a new government headed by president Penaranda, Bolivia agreed to pay $1,750,000 as compensation to standard oil company for the petroleum properties taken by Toro government. For a factual account of this case see, John T. Madden, Marcus Nadler, and Harry C. Sauvain, America's Experience as a creditor nation 266 (New York, Prentice-Hall, 1937).

Rights of the labouring and exploited people issued by the Central Executive Committee of Soviets on December 19, 1917, established the Supreme Board of National Economy and empowered it to carry out further nationalizations in the domain of production, distribution and state finances. The Supreme Board of National Economy subsequently nationalized, among others, mines, sugar and oil industries. The Fundamental law on the socialization of land of September 18, 1918 replaced previous land decrees and further broadened the scope of the nationalization of property in land and other instruments (means) of production connected with land. Thus, between October 1917 and June 1920 property interests of aliens in land, banks, merchant fleets, mining concerns, sugar and oil industries were nationalized, and the nationalization laws denied, either explicitly or implicitly, the granting of compensation to both aliens and nationals.[57]

The large scale nationalizations carried out by the new Soviet government were met with strong diplomatic protests from the Allied and Associated powers as well as the neutrals. On February 13, 1918, the then U.S. Ambassador to the Soviet Union submitted a formal protest in the name of the fourteen Allied and Associated powers and six neutrals. The Soviet government

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[56] For more extensive reference, see V.I. Lenin, On Workers Control and the Nationalization of Industry (Moscow, progress publishers 1970); For the texts of the laws and declarations dealing with nationalization see, 136 International Reconciliation 417-504 (1919); see also "Report (political and economic) of the committee to collect information on Russia", Command Papers, No. 1240 at 85-91 (1921).

[57] For an account of the economic stakes involved see, Leonard J. Lewery, Foreign capital investment in Russian Industries and Commerce, in U.S. Department of Commerce, Bureau of Foreign and Domestic Commerce, Miscellaneous Series No.126 at 27 (Washington, U.S. Government Printing Office, 1923.)

refused to admit that it was obliged to pay compensation, but later agreed to pay compensation out of practical considerations, and as a result, a number of separate agreements were concluded between the Soviet government and most of the adversely affected states under global compensation settlement schemes based on concessions from all sides.[58]

Nationalization of Property of Aliens by Mexico

The social, economic and political condition prevailing in Mexico at the turn of this century brought about the 1910 Mexican Revolution, and that social and national revolution embodied two principal aspirations of the Mexican people, namely, the nationalization of the oil interests controlled mainly by foreigners, and the carrying out of an extensive land reform programme, both of which were given definite expression in the Mexican constitution of 1917.[59]

The Mexican land reform was a response to centuries old process of depriving the Indians of their communal holdings and the concentration of land in the hands of a few powerful families. The communal system of landholding under the Aztecs was followed in the Spanish colonial period by a growing tendency towards the creation of Latifundia (large estates) and haciendas. Under the long dictatorial rule of Porfirio

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[58] For an extensive discussion of the legal issues involved in the Soviet nationalization measures, see Chapter VII.

[59] For a factual account dealing with the Mexican expropriations, see "Expropriation of American-owned property by foreign governments in the Twentieth Century", 2 International Legal Materials, 1079-1081 (1963); see also, Joseph L. Kunz, "The Mexican Expropriations", 17 New York University Law Quarterly Review 342-343 (1940).

Diaz (1877-1910), what remained of the communal lands of the Indians were thrown open for sale with the result that by 1910 practically the whole land in Mexico was in the hands of a thousand powerful families of haciendados, leaving the immense majority of the population in the serf-like state of peones.[60]

The Mexican nationalization of oil resources was also a reaction against the "open-door" and liberal policy of the government of Porfirio Diaz which allowed extensive foreign control of the Mexican oil deposits. Exploration for oil began in Mexico around the year 1900 when the Mexican government under Diaz allowed American and British enterprises to carry out exploration activities. The Mexican Mining Codes of 1884, 1892, and 1909 put the exploitation of oil at the disposal of the owner of the surface land, and as a result, a number of American and British enterprises conducted their oil activities by purchasing huge tracts of land which secured for them both surface and sub-surface rights.[61]

The Mexican "takeovers" of property interests of aliens in land and the oil industry were carried out pursuant to Article 27 of the Mexican constitution. The actual takings of land began shortly after 1917 and continued in the early twenties and late thirties. Although Mexico agreed to pay compensation the amount and method of payment of compensation led to a series of controversies.[62]

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[60] Joseph L. Kunz, op. cit. at 342.

[61] For an account of the background to the oil nationalization measures, see Joseph L. Kunz, Ibid. at 359-360.

[62] For a discussion of these agreements see Chapter VII of this paper.

With respect to land formerly owned by U.S. nationals and taken by Mexico up until 1923, the U.S. and Mexico concluded the Bucarelli Agreement of 1923 according to which compensation for land measuring up to 1,755 hectares was to be paid in bonds, while compensation for acreage above that figure was to be paid for in cash, and that in the event of disagreement over the appraised valuation of the land, the owners were allowed to appeal to a general mixed claims commission. In regard to land taken after 1927, Mexico agreed once again to pay compensation on the basis of valuation to be made by a mixed claims commission. Beginning from May 1939, Mexico paid about $3 million by way of compensation to the U.S. alone for Agrarian claims which arose between August 30, 1927 and October 7, 1940, and pursuant to a convention concluded between Mexico and the U.S. on November 19, 1949 an additional sum of $3 million was to be paid by Mexico upon ratifications of the convention, and the remaining claim of $34 million was to be settled over a number of years through the annual payment by Mexico of $2,500,000 beginning from 1942 onwards.[63] The takeover of land belonging to foreigners still continued after 1940, and yet there has been no overall settlement other than few instances of individual settlements.[64]

As regards oil resources, Mexico nationalized the oil industry by a Decree of March 18, 1938. The estimated value of the property interests of foreigners in the oil industry was in the range of $450 million out of which U.S. nationals owned about $200 million. According to Mexican estimates, however, the value of the nationalized property of foreigners was in

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[63] See "Expropriation of American-owned property by foreign governments in the twentieth century" 2 International Legal Materials 1079-81 (1963).

[64] Ibid. at 1079.

the range of $262 million out of which the property of U.S. nationals was worth around $50 million.[65]

After a series of diplomatic negotiations, Mexico and the United States concluded an agreement on November 19, 1941 with respect to compensation claims of U.S. nationals in connection with the oil nationalization measures, and accordingly a mixed claims settlement commission composed of experts, one from each side, was entrusted with the valuation process. On April 17, 1942 the mixed commission submitted its recommendation, and on that basis, a sum of $23,995,991 was awarded as compensation to the U.S., out of which one-third was to be paid on July 1, 1942 and the remaining balance in five equal annual instalments at 3 per cent interest.[66]

Despite those settlements, however, the Mexican measures of "taking" brought to the foreground, as we shall see later in this paper, contentious issues in international law that lay bare the distinction between expropriation strictly so-called and nationalization proper.

From a historical standpoint, then, a number of observations could be made regarding those incidents of "takings" that occurred in the inter-war period. In the first place, the inter-war period saw a relatively large number of the incidental-type of "takings", and those "takings" formed the bases for the further assimilation, into the domain of traditional international law, of those municipal law norms relative to expropriation strictly so-called which prevailed in the few western states who played a dominant role in the international norm-creation process. That process of

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[65] Ibid. at 1081.

[66] Ibid.

assimilation was facilitated, as in the pre-war period, by the fact that the "active participants" in this particular area of international state practice, shared more-or-less identical views regarding the sanctity of private property. Alongside those incidental type of "takings", however, the relatively extensive resort to expropriation by the west European countries in the inter-war period begins to force modifications upon the traditional respect for private property by extending public control over domains that were originally reserved to private enterprise. Although those modifications did not, of course, imply any significant revision of the fundamental tenets underlying those traditional international norms relative to expropriation, they still tended to show that with changes in the operational climate, the norms must, and do in fact, change accordingly.

Again, the impersonal and general types of takings in the east European countries not only contributed their share to the process of further assimilation of municipal law norms into the domain of international law, but they also introduced, owing to their hitherto unprecedented scale, modifications upon those norms which originally evolved out of the incidental-type of "takings".

It was, however, only after the Soviet and Mexican resort to extnesive "takings" occurred that international state practice begins, as we will argue later in this paper, to show definite divergences in the norms relative "taking". Not only did the quantitative scale of the "takings" change sharply, but the very fact that those "takings" assumed a new qualitative character in the shape of nationalization proper, tended to create a new operational climate.

Moreover, the entry in this period, of the first socialist country into the international community hitherto dominated by an ideologically homogenous club of western nations, introduced

a new element of ideological plurality in inter-state relations which meant that an entirely new set of counter-norms started to force their way alongside those norms associated with the old-type of expropriatory "takings". Thus, by the end of this period, the germs of what were later to be the dominant type of property "takings", namely measures of nationalization, begin to take definite shape.

3. The Taking of Property of Aliens After the Second World War

The post-war period witnessed another series of property takings which could be grouped into three main categories.[67] The first category comprises of those "takings" carried out by the west European countries, especially Britain and France. The second category consists of those property "takings" that took place in eastern and central Europe. The third category, and the one that is central for our investigation in this paper, comprises of those measures of "taking" that were, and are still being, carried out in the underdeveloped countries of Africa, Asia, the Middle East, Latin America and the Caribbean region.

A/ Post-war West European Measures of Taking: -

Of the post-war west European "takeover" measures, those that were carried out in France[68] and Britain[69] were the most

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[67] In this section, we will not be dealing with property "takings" associated with the post-war peace settlements.

[68] For an extensive account of the French takeovers, see Byé Einaudi, et al, Nationalization in France and Italy (1955); see also S. Friedman, op. cit. at 58-62; also B.A. Wortley, op. cit. at 118.

[69] For an account of the British takeovers, see Mary Bell Cairns, op. cit. at 600; see also Clive M. Schmitthoff, op. cit. at 557.

important ones both in terms of their scale and magnitude, as well as in their indirect bearing on the further evolution of the international legal norms relative to "taking".

In France, the national council of anti-fascist resistance had already adopted, as early as 1941, a programme "for the return to the nation, by nationalization of the principal means of production".[70] In his war speech of April 24, 1944, General De Gualle promised, for post-war France, the implementation of the principle of "a new economic and social law with the disqualification of the former privileged classes, the independence of the state in relation to private capital, worker's participation in management, etc."[71]

The first principal measure of taking in France involved the Houillères Nationales Du Nord et du Pas-de-Calais. By virtue of an ordinance of December 13, 1944 (later extended, by the law of May 17, 1946, over all types of mineral fuel), the major coal resources of the country were nationalized. By an ordinance of January 16, 1945, the Société Anonyme des Usines Renault was dissolved, and the entire assets and liabilities of that company was transferred to the state.[72] By an ordinance of May 29, 1945, the ownership of all the shares in the Société Anonyme de Moteurs Gnôme et Rhone were transferred to the state.[73] By law of December 2, 1945 (later supplemented by an order of July 19, 1946) the Bank of France was taken over. At the same time, four other Banks - Credit Lyonnais, Comptoir d'Escompte, Société General and Bank Nationale pour le Commerce et l'Industrie - were taken over. The law of April 8, 1946 transferred the assets of all undertakings engaged in the production and transport of gas as well as electricity in France and the colonies to the state

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[70] Translated text reproduced in S. Friedman, op. cit. at 58.

[71] Ibid.

enterprises, Gas de France and Electricité de France. On April 24, 1946 about 34 major insurance enterprises passed into state ownership. By an ordinance of June 26, 1945 the French government took over air transport enterprises and by a law of June 16, 1948 the Compagnie Nationale Air France was established to take over the entire assets of the former Air France, Air Bleu and Air France Transatlantique.

Leaving aside the strictly confiscatory cases, the French measures of takings exibited some important features. The first key feature of those takings was that, although they had the manifest appearance of involving fundamental economic reforms they proved to be "no more than ordinary measures of planning within the framework of the traditional [capitalist] economy".[74] The implication of this feature in so far as the French takeovers had their indirect influence on international state practice, is that they tended, to some degree, to transport, into the domain of international law, those norms carried over from the old type of expropriatory takings by the force of juridic accretion. Secondly, the French takings involved, owing to the extensive scale of the measures themselves and the limited "capacity", and resources of the French government which then just emerged on the soil of war-torn France, only partial

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[72] It should be noted, however, the taking of Renault was strictly a case of confiscation, since it was primarily intended to penalize Renault's collaboration with the Nazi occupation forces. In addition to Renault, the French government also confiscated such enterprises as Berliet Engineering Firms, Tobis Films, the Alliance Cinématographique, the Société Francolor, and the Société Nationale des Entreprises de la Presse, see S. Friedman, op. cit. at 59; see also B.A. Wortley, op. cit. at 118.

[73] The takeover of Gnôme et Rhone was again, a strict case of confiscation.

[74] Byé Einaudi, et al, op. cit. at 84.

compensations the modalities of payment of which had to be "adjusted" to the dictates of the new operational climate. In other words, the amount of compensation, the period within which payment was effected, and the mode of payment did not necessarily tally[75] with those "classical" standards of "adequacy", "promptness" and "effectiveness" which France, as a member of the small club of western states which "made" and "unmade" traditional international law, would have been expected to strictly follow. It, thus, meant that even liberal France had to modify its position in regard to "takings" of the post-war variety. The third interesting feature of the French takings was that foreign interests were accorded a more favourable treatment than French nationals although that was not necessarily out of legal considerations, but rather out of considerations of expediency.[76] France's policy was prompted not only by the fact that the foreign holdings affected by its measures of "taking" were not very extensive any way, but also by the consideration that in treating foreign property interests favourably it expected to receive reciprocal treatment for its interests in foreign countries which were then quite extensive.[77]

The British experience was in many ways similar to France. After the second world war, and subsequent to the takeover of power by the Labour government, Britain, like France, carried out a series of takings to meet the urgent need of reconstruction of the war-torn economy. The British takeovers mainly involved such key economic sectors as communication enterprises, Banks and Energy-related concerns.

By virtue of the Civil Aviation Act of 1946, Britain took

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[75] For a discussion of the French compensation terms, see S. Friedman, op. cit. at 62.

[76] Ibid.

[77] Ibid.

over commercial aviation. Pursuant to the Cable and Wireless Act of 1946, telecommunications enterprises were taken over. By virtue of the Bank Act of 1946 it took over the Bank of England. By virtue of Coal Act, it transferred the coal industry to state control. In 1947, by virtue of the Electricity Act, it took control over enterprises engaged in the production and distribution of electricity. In the same year, it enacted the Transport Act by virtue of which it took over enterprises engaged in road and inland water transport, railways and canals. By virtue of the Gas Act of 1948 it took over enterprises dealing with the production and distribution of gas. By means of the Iron and Steel Act of 1949, it transferred to state control and operation the iron and steel sector.

Like the French takings, the British takeovers were not as such intended to fundamentally alter the underlying tenets of the British economic system. However, owing to the size and scale of the taking involved, even Britain was forced to modify its traditional attitude regarding the standard and modalities of compensation. Although the British government recognized the obligation to pay compensation, it deviated from the classical standards of "adequacy", "promptness" and "effectiveness" in settling the actual payment of compensation. Compensation was mostly effected by means of government stock redeemable only a number of years after the occurance of the actual taking.

Seen historically, then, the French and British takings reveal their own specificity. In both cases, the sweeping measures of taking, unprecedented as they were in countries with strong legal traditions of respect for private property, were dictated both by the relative strength and influence of the labour movement at the time, and the overriding need for reconstructing the war-torn economies of France and Britain. In other words, the unprecedented infringement on the domain of private enterprise in the two countries was forced upon

those countries by changes in historical circumstances in many ways atypical of those that ordinarily surrounded the incidental and isolated types of "takings" of the pre-war and inter-war periods. In the face of the changes in historical circumstances, even those two countries which in the past advocated strict adherence to an Orthodox international standard of treatment for property of aliens, had to accommodate themselves to certain modifications in the classical rules governing "takings" of the incidental-type.

Those modifications notwithstanding, the French and British state practices still carried over those fundamental tenets of French and British municipal property laws relative to expropriation into the domain of international law. The latter process of assimilation of French and British municipal law norms into the domain of international law was facilitated by the fact that the claims settlement formulae adopted by France and Britain involved virtually no international controversy for the simple reason that the adversely affected states were themselves western countries which shared "a common understanding" with France and Britain, regarding "the requirements of international law".

B/ Post-War Nationalizations in Eastern Europe

Other than the west European takings, the post-war period also witnessed extensive measures of nationalization of property of aliens in Eastern Europe. Again, the historical specificity of the nationalization measures in Eastern Europe is that they were not only responses to the extensive distruction and dislocation of the East European economies as a result of the second world war, but they were also, and that is indeed their peculiarity, associated with the emergence of an entirely new social system in the whole region. In other words, those nationalizations were above all the result of the ascendancy to power

of socialist regimes in Roumania in March 1945; in Yugoslavia in January 1946; in Bulgaria in November 1946, in Poland in February 1947; in Hungary in June 1947; and in Czechoslovakia in February 1949.[78]

In Eastern Europe, more than any where else, the war between 1939 and 1945 involved a large scale disruption of private property rights as a result of Nazi occupation and plunder. Following the occupation of Eastern Europe, the Nazis carried out wholesale confiscations as a consequence of which the ownership and control of almost all industrial and financial undertakings in the various occupied states passed into the hands of a few large German enterprises. Moreover, by virtue of a general plan adopted by the German occupation forces, local industries in the occupied countries were liquidated and regrouped to furnish financial backbone to the German war effort. Thus, it was inevitable by the end of the war that an enormous quantity of property appropriated by the Nazis and their nationals was awaiting reclamation in the liberated states. The restoration, immediately after the end of the war, of the formerly privately-owned property to the previous owners was, however, virtually impossible owing to the practical difficulty and complexity of ascertaining dispossession and effecting fair restitution. Instead, the pressing need of the large scale reconstruction of the war-torn economies favoured the whole sale transfer of the property into the hands of the new states. At the same time, the ascendancy to power of socialist regimes gave further impetus to the policy

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[78] For an extensive discussion on the background to the East European nationalization measures, see S.L. Sharp, The Nationalization of Key Industries in Eastern Europe (1946); see also, Samuel Herman, "War Damage and Nationalization in Eastern Europe" 16 Law and Contemporary problems 500 (1951); also S. Friedman op. cit. at 32-34.

of large scale nationalization in Eastern Europe. The main incidents of nationalization, thus, proceeded as follows in Poland, Czechoslovakia, Yugoslavia, Bulgaria, Hungary and Roumania.

In Poland, the major nationalization move was taken pursuant to the Polish Act of Nationalization of January 3, 1946 and the supplementary Decree of April 1, 1946. By virtue of that act Poland took over major industrial, mining, transportation, banking, insurance and commercial undertakings falling within a defined scale of operation.[79] A total of seventeen branches of the Polish economy consisting of mines, the oil industry, electricity undertakings, enterprises producing industrial and domestic gas, water works, foundries, armament works, cookeries, sugar factories, refineries, alcohol distilleries, breweries, yeast factories, mills, oil plants, cold storage undertakings, large and medium textile industries and printing works were covered by the nationalization measure. Between February and October 1947 the nationalization measures were further extended and broadened to include enterprises not covered by the laws of January and April 1946. According to a statement[80] released by the Polish government on September 30, 1946, excluding strict cases of confiscation[81] directed

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[79] Nagorski, "The Legislation of the Polish Peoples' Republic, 1945-1957" 2 Law in Eastern Europe 31-39 (1958).

[80] 15 U.S. Department of State Bulletin 654 (1946).

[81] The confiscatory takings related to industrial, mining, transport, banking, insurance and commercial undertakings belonging to the German Reich and the former Free City of Danzig, nationals of the German Reich, German and Danzig legal persons established under private and public law, companies controlled by German nationals or by the German or Danzig administration or persons having fled to rejoin the enemy. See, Samuel Herman, op. cit. at 510-11.

against enemy property, about 404 firms were taken over by Poland during the initial stages of the nationalization alone.

Although the exact figure representing foreign interests adversely affected by the Polish nationalization measures is not known with precision, the extent of the stake involved can be gauged by the level of foreign investment in the national economy of pre-war Poland. According to a study made by Leon Godenberg and Laure Metzger, in 1937, out of a total of 1,066 active joint stock companies, 391 had foreign participation with foreign capital amounting to 1,294,300,000 Zlotys ($244,600,000) or 40.1 per cent of their total capital.[82] Foreign investments were primarily concerned in the mining and petroleum industries, and to a lesser extent in the textile, chemical, public utility, communication and transportation industries. Foreign participation was also prominent in limited liability companies and business partnerships. Out of a total of 3,590 limited liability companies about 403 had foreign shareholders, and out of a total of 17,085 partnerships, close to a thousand held foreign interests. In those limited liabilities and partnerships where foreign interests were involved, the percentage of foreign capital was considerable in that it represented a value of 103,800,000 Zlotys ($19,600,000) or 32.7 per cent of the total capital owned by all the limited liability companies and partnerships in Poland put together.[83] Again, according to the then Polish Minister of Industry, Hilary Minc, on the eve of the nationalization measures, 52.5 per cent of the capital in the mining and metalurgic industries, 87.5 per cent in oil production, 66.1 per cent in electrical power stations and water works, and 59.1 per cent in insurance

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[82] Leon Goldenberg and Laure Metzger, "The Polish Nationalization Law" 15 Department of State Bulletin 654 (1946).

[83] Ibid.

societies were owned and controlled by foreign interests.[84]

In the face of the huge economic interest of foreigners adversely affected by the Polish nationalization measures, a series of controversies followed regarding matters of compensation. As we shall show later in this paper, Poland finally paid some compensation after a series of negotiations with the various interested governments, particularly those of the U.S., the U. Kingdom, Switzerland, France, and Belgium. The compensation payment was effected in the form of a lump-sum settlement agreements in the conclusion of which strictly economic and political, and not legal, considerations were taken by Poland.

In Czechoslovakia, the nationalization measures formed an important element of the Kosice programme of the Czech Anti-Nazi National Front which had the object of placing the entire monetary system, the key industries, insurance businesses and all sources of enemy under the control of the government so as to make them available for the reconstruction of the war-torn Czech economy.[85]

Like the Polish takings, the Czech nationalizations were carried out in two main steps, the first one was carried between 1945 and 1946 and the second one following February 1948. The first series of measures were taken by virtues of Decrees issued on February 28, 1945, and later formally ratified by the provisional popular Assembly on October 28, 1946. Decree No.100/45 nationalized major industries such as mining, power,

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[84] Hilary Minc, The Nationalization of Industry in Poland (1946).

[85] Regarding the background for the Czech nationalization measures, see President Benês, "Why did we nationalize our Industries", 24 Central European Observer 357 (1947).

iron and steel, chemicals, armament and munitions, paper, textiles and leather.[86] Decree No.101/45 nationalized basic branches in the Food industry. Decrees No.114 to 126 were promulgated between May and June 1948 further extending the nationalization measures to wholesale trade, foreign trade, travel bureaus, printing establishments , major restaurants and hotel establishments, mineral springs , metal glass and porcelain enterprises, brickworks, and the film industry.[87] The Czech measures of taking involved nationalization proper as well as confiscation of property previously held by the German Reich or Hungary or by physical or legal persons who were nationals of those two states.

Being of a general impersonal character, the Czech nationalization measures affected the interests of foreigners and Czech nationals alike, and according to rough estimates, United States nationals alone lost property interests valued between 30-50 million dollars as a result of the 1946 nationalization measures.[88] According to Weston[89] and Lewis,[90] the Czech nationalization measures affected about 39.4 million

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[86] For the text of the nationalization laws see, S.L. Sharp, The Nationalization of Key Industries in Eastern Europe - (1946); see also pertinent text of the code of Laws and ordinances of the Czechoslovak Republic cited in Samuel Herman, op. cit. at 514.

[87] S.L. Sharp, Ibid.; see also N.R. Doman, "Compensation for nationalized property in post-war Europe" 3 The International Law Quarterly 334 (1950); also K. Katzarov, The Theory of Nationalization 56-57 (1964).

[88] N.R. Doman, "Post-War Nationalization of Foreign Property in Europe" 48 Columbia Law Review 1145 (1948).

[89] B.W. Weston, "Post-War French International Claims Practice, Czech claims" 10 Virginia Journal of International Law 229 (1970).

[90] C. Lewis, Debtor and Creditor Countries: 1938-1944 54 (1945).

dollars worth of long-term French investment in Czechoslovakia as well as an almost equivalent amount belonging separately to nationals of the United Kingdom and Switzerland. The overall magnitude of the property affected by the Czech nationalization measures could be seen from the report of the Czech government according to which by the end of 1947, about 8,279 enterprises employing 1,070,434 persons and doing an annual business of more than 17 billion Czech crowns were nationalized.[91]

Like the Polish takings, the Czech nationalization measure also gave rise to a series of controversies regarding matters of compensation. As we shall show later in this paper, Czechoslovakia finally concluded a number of lump-sum agreements with the affected foreign states. In all the cases involved, the amount of compensation paid by Czechoslovakia did not strictly correspond with the value of property nationalized nor did it tally with the amounts claimed by the various affected states.

As in Poland and Czechoslovakia, the new post-war government of Yugoslavia also enacted a series of laws transferring various categories of property to state ownership.[92] The initial Yugoslav nationalization measures were carried out in two major stages. The first series of measures were taken on the basis of the Law on Nationalization of Private Economic Enterprises of 6 December 1946, and the second series of nationalization measures were carried out pursuant to the supplementary law of 29 April 1948.[93] Later still, Yugoslavia carried out a third series of nationalization measures between 1948 and 1958, the most important of which being the nationalization of

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[91] Cited in R.N. Doman, supra at 334.

[92] For the text of the Yugoslav nationalization decrees, see 3 collection of Yugoslav laws (Beograd, 1963). It should be noted that the Yugoslav constitution of Feb. 2, 1946 laid the basis for the nationalization measures.

buildings for rent and building lots carried out pursuant to the law of December 26, 1958.[94] By virtue of the law of December 6, 1946 about 42 different categories of industrial undertakings were nationalized. Again pursuant to the law of April 29, 1948 the initial nationalization measures were further broadened to include 11 additional categories of private undertakings embracing some 3,100 different enterprises.[95]

Although no precise data is available regarding the exact monetary value of all the property interests of foreigners affected by the Yugoslav nationalization measures, it is possible to appreciate the size of the stakes involved by referring to estimates relating to U.S. and British interests alone. According to an official note from secretary Marshall of the U.S. to the Ambassador of the Federal Peoples Republic

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[93] Ibid. at 3. Aside from strict cases of nationalization, the Yugoslav takings also included confiscation of enemy (German) property and the property of those who collaborated with the enemy. By a Decree of November 22, 1944, all property of the German Reich and its citizens, all property belonging to persons of German origin with the exception of those who fought in the National Army of liberation or those who were citizens of neutral states and did not act as enemies during German occupation, and all property of war criminals and their accomplices was confiscated. Those confiscations were further extended by the law of September 1945 (relating to economic collaboration with the enemy); and by the law of August 1945 (concerning large agricultural estates and mining priviliges). By way of the confiscatory measures, between 70-80 Yugoslav industries were transferred to the state. For an account of the confiscations see, Samuel Herman, op. cit. at 515-16; see also S. Friedman, op. cit. at 42-43.

[94] For the text of the law see, "Nationalization and Expropriation" 3 Collection of Yugoslav Laws 70-71 (Beograd, 1962).

[95] Samuel Herman, op. cit. at 517.

of Yugoslavia delivered on January 14, 1948, the initial U.S. estimate of the total monetary value of U.S. interests affected by the first series of Yugoslav nationalization measures was in the range of $42,300,000 of which $41,300 was for industrial enterprises, $700,000 for real estate and $300,000 for agricultural property.[96] The Yugoslav estimate of British interests amounted in the range of $32,000,000 dollars while British estimates put the same interests at about 3 times that of the Yugoslav estimate.[97]

As in Poland and Czechoslovakia, the Yugoslav nationalizations raised a series of controversies which led to protracted negotiations.[98] Finally Yugoslavia concluded lump-sum settlement Agreements with most of the adversely affected states.

In Bulgaria, most of the nationalization measures were carried out between the second-half of 1946 and the end of 1948.[99] By virtue of the Bulgarian law of June 27, 1946 all private insurance enterprises were nationalized. The law of April 28, 194 nationalized enterprises connected with the

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[96] 18 U.S. Department of State Bulletin 117 (1948); The Yugoslav side estimated U.S. interests around 5 million, see Yugoslav Note of January 2, 1948 to Secretary Marshal, Ibid. According to another estimate, as of 1937 total investment in industrial, mining and forestry enterprises in Yugoslavia amounted to 18.6 billion Yugoslav dinnars out of which one-third belonged to foreigners. United States interests alone amounted to 4.25 billion dinnars. See Henry J. Clay, "Aspects of settling claims under the Yugoslav Claims Agreement of 1948" 43 Georgetown Law Journal 589 (1955).

[97] See S. Friedman, op. cit. at 44-45.

[98] For a discussion of the issues involved, see Chapter VII of this paper.

production and trade of tobacco. Pursuant to the Law of 24, December 1947, all major private industrial and mining enterprises were nationalized. By virtue of the law of December 27, 1947, all Banks were nationalized. The law of March 8, 1948, nationalized all enterprises dealing with the production and trade of oil and oil products: The law of April 18, 1948 nationalized all sizable urban property (i.e. lands and buildings). The law of December 27, 1948 establishing state monopoly of foreign trade, nationalized about 2,228 commercial firms engaged in the import trade and about 883 engaged in the export trade.

As in Poland, Czechoslovakia and Yugoslavia, the Bulgarian nationalization measures raised controversies as regards the question of compensation, and finally Bulgaria paid compensation pursuant to a number of lump-sum Settlements Agreements concluded with the interested foreign states.[100]

In Hungary, sweeping measures of nationalization were carried out between 1945 and 1950.[101] The Hungarian Land

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[99] For reproductions of the texts of the Bulgarian nationalization laws, see Ivan Sipkov, "post-war nationalizations and alien property in Bulgaria" 52 A.J.I.L., 469 (1958); see also, Joyce Gutteridge, "Expropriation and Nationalization in Hungary, Bulgaria and Romania", 1 International and Comparative Law 14 (1952).

[100] For a discussion of the issues involved, see Chapter VIII of this paper.

[101] For the text of the Hungarian nationalization laws and an extensive discussion dealing with them, see, Joyce Gutteridge, op. cit. at 14-17; see also, N.R. Doman, "post-war Nationalization of foreign property in Europe", 48 Columbia Law Review 1153-54 (1948); also Alfred Drucker, "The Nationalization of United Nations property in Europe", 36 Transactions of the Grotius Society 92-93 (1951).

Reform Decree No.600 of March 15, 1945, nationalized large estates. Law number 25 of April 29, 1948 nationalized about 641 industrial enterprises employing more than 100 persons each as well as enterprises generating electric current. Decree No.20 of December 28, 1949 further nationalized those industrial enterprises employing more than 10 persons, and those included printing and metal works, mills over a certain capacity, electrical as well as transport undertakings. In addition to the above general decrees, specific industries were nationalized by three separate legislations. The Hungarian law No.13 of June 7, 1946 nationalized coal mining. Law No. 20 of September 2, 1946 nationalized power stations and electrical works, and Act No.13 of February 13, 1948 provided for the take-over of Bauxite mining and Aluminium production. The Hungarian law No.30 of December 1, 1947 provided for the nationalization of banks.

It should be noted that initially, the Hungarian nationalization legislations expressly exempted interests of foreigners from the nationalization measures in view of the fact the Treaty of Peace concluded between the Allied powers and Hungary required the latter to restore, free of all encumberances and charges, all property rights and interests of the United Nations and its nationals, to the respective parties.[102] The exemption provisions applied to property acquired before the date of the armistice between Hungary and the allied powers, i.e. January 20, 1945. Later, however, with the exception of Soviet property interests in Hungary, the exemptions provided to foreigners were rescinded, thus, subjecting property of foreigners to the Hungarian nationalization measures.[103]

As we shall show later in this paper, Hungary concluded

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[102] N.R. Doman, Ibid.

[103] Alfred Drucker, op. cit. at 93.

a number of lump-sum Compensation Agreements with the adversely affected parties after a protracted series of diplomatic negotiations.

In Roumania, the nationalization measures were launched between 1946 and 1948.[104] In 1946, Roumania nationalized transport enterprises and in January 1947 it took over the Banking Business. The principal Roumanian takeovers were, however, effected by virtue of the law of June 11, 1948 which nationalized about 77 types of industrial, financial, insurance, mining and transport enterprises. Although exact figures regarding the monetary value of the property interests of foreigners adversely affected by the Roumanian nationalization measures are not available, it is not hard to estimate the magnitude of the financial stake of foreigners in light of the fact that in the industrial sector alone, foreigners owned about 24 per cent of the property holdings in Roumania on the eve of the nationalization measures.[105]

As in the rest of the East European takeover measures, the Roumanian nationalizations gave rise to a series of controversies which were later resolved through the conclusion of lump-sum settlement agreements between Roumania and each of the interested foreign states.

Thus, from the historical standpoint, the significance of the East-European nationalization measures is two fold. In the first place, even by the scale of quantitative criterion alone, the magnitude of property takings was so unprecedented that those nationalization incidents could not be resolved, as

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[104] For a detailed account regarding the Roumanian nationalization measures, see Joyce Gutteridge, op. cit. at 23; N.R. Doman, op. cit. at 1124; see also S. Friedman, op. cit. at 48-49.

[105] S. Friedman, op. cit. at 48.

we shall show later in this paper, within the "narrow mold" of those rules of classical international law which evolved in relation to takings of the incidental and isolated "expropriatory-type". The fact that the extensive scale of the property takings were dictated by the need of reconstructing the East-European war-torn economies, thus, in part account for the historical specificity of the East European nationalization measures. Secondly, and most importantly, the East European nationalizations introduce a new qualitative element into international state practice in this particular field in that the takeover measures were carried out by regimes whose entire view on matters of property relations was totally different from those states who "made" and "unmade" the norms of traditional international law after the image of their internal municipal property laws. In other words, the factual incidents of nationalization in Eastern Europe occurred coincidentally with the emergence of real ideological and political plurality among the international community of nations which was hitherto characterized by relative homogeneity. Hence, in so far as the East European state practice had its share of influence in shaping the evolution of the international law of "taking", its significance is that shows that with changes in the operational climate, the old norms relating to "taking" must inevitably change as well.

C/ Post-war Nationalization Measures by Underdeveloped Countries

The nationalization of property of aliens by underdeveloped countries in the post-war period is unprecedented and pervasive in terms of its magnitude, scope and frequency of occurrence. The series-after-series of nationalization measures that were set into motion as part of the overall process of political and economic decolonization as well as by the dictates of the economic imperative of overcoming underdevelopment in the underdeveloped countries of Africa, Asia, the Middle East, the

Caribbean region, Central and Latin America indeed finds no historical parallel in the "miniscule" property takings of either the pre-war or inter-war periods.

While the fifties saw relatively few nationalization measures, the pace of taking sharply accelerated in the sixties and early seventies.

The principal nationalization measures in the underdeveloped countries between the end of the second world war and 1962 were, in chronological order, those taken by Iran (1951); Bolivia (1952); Guatemala (1953); Egypt (1956); Argentina (1958); Indonesia (1958); Brazil (1959); Cuba (1959 and 1960); again Brazil (1962) and Ceylon (1962).[106]

In May 1951, the Iranian government headed by Dr. Mossadegh enacted a law nationalizing the oil industry in Iran, thereby cancelling the 1933 oil concession and dissolving the Anglo-Iranian oil company. As we shall show later in this paper,[107] the Iranian nationalization measure gave rise to a series of international controversies between the Iranian and United Kingdom governments. The failure of the negotiations between the Anglo-Iranian oil company and the Iranian government led the United Kingdom government to institute proceedings against Iran before the International Court of Justice. The British government requested the court to declare that Iran was duty-bound to submit the dispute with the Anglo-Iranian oil company to international arbitration instead of resorting to a unilateral action of revocation of the oil concession, and, to determine the legality of the Nationalization Act itself.

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[106] "Expropriation of American owned property by foreign governments in the Twentieth Century", 2 International Legal Materials 1087-1091 (1963).

[107] For a detailed account of the facts and the issues involved in the Iranian nationalization measures, see Chapter VII.

In addition, the United Kingdom government filed a second suit in the international Court of Justice to effect interim measures of injunction pending final decision. In response, the Iranian government disputed the jurisdictional competence of the I.C.J. to entertain the British claim. In the meantime, diplomatic negotiations were carried out between the Iranian government the United Kingdom government, with the U.S. acting as intermediary. Those negotiations failed and further negotiations were held under the auspicies of the International Bank for Reconstruction and Development. Again those negotiations failed. The Anglo-Iranian oil dispute, thus, remained unsettled until Dr. Mossadegh was overthrown by a coup engineered and supported by the U.S. and British governments.[108] the rise of General Zahedi to office in 1953 resulted in a change in Iran's oil policy and this change finally culminated in the consortium Agreement of September 1954.[109]

In Bolivia, the government nationalized, on October 31, 1952 the country's tin mines and other properties belonging to three major companies - patino, Aramayo and Hochschild.[110] In June 1953, Bolivia concluded an interim Agreement with the companies in which it agreed to make partial compensation payments based on the price of tin and out of proceeds of tin

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[108] For an informative account of the role of the United Kingdom and the U.S. governments, in the overthrow of Dr. Mossadegh's government, see Bahman Nirumand, Iran: The New Imperialism in Action (1969).

[109] For a detailed examination of this Agreement, see, Farma A. Farman, "The oil Agreement between Iran and the International Oil Consortium: The law controlling", 34 Texas Law Review (1955).

[110] "Expropriation of American-owned property by foreign governments in the twentieth century", 2 International legal Materials 1087-1088 (1963).

sales pending the final determination of the total compensation sum to be paid. Accordingly, during the next 8 years, Bolivia paid to the three companies a compensation sum totalling $20 million dollars. In August 1961, the Bolivian government declared a moratorium on the compensation payments until a final Agreement could be worked out with the companies on the total amount due. In January 1962, the Bolivian state corporation and patino agreed to a further compensation of $4.2 million dollars, the actual payment of which was to begin in January 1, 1965.

In Guatemala, the Arbenz Government which came to power in 1951 carried out a sweeping agrarian reform programme by enacting the law of June 19, 1952. Consequently, beginning from March 5, 1953 Guatemala took over about 234,000 acres of land belonging to a subsidiary of the U.S. United Fruit Co.[111] The Guatemalan government offered compensation in the form of "agrarian bonds" maturing in 25 years with 3 per cent interest on the value of the land as determined for tax purposes prior to the "taking". The U.S. government protested against the method of fixing the amount of the compensation on the ground that it did not constitute a fair evaluation. In the meantime, the U.S. government intervened militarily in Guatemala, overthrew the Arbenz government, and installed a government to its liking. The new government rescinded the takeover measures, and restored the property back to the United Fruit Company.

In Egypt, the government headed by president Nasser issued the decree of July 26, 1956 nationalizing the Universal Company of the Suez Maritime Canal which was largely owned by the British government and private stockholders in France, with some U.S. stock ownership.[112] The nationalization Decree provided for

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[111] Ibid. at 1088.

[112] Ibid. For a detailed examination of the issues involved in this case, see Chapter VII.

compensation in accordance with the value of the shares in the Paris stock exchange on the day before the nationalization, with actual payment to commence after all assets and properties of the Suez Canal Maritime Company were transferred to the state. The British and French governments strongly protested against the cancellation of the canal concession, and a serious international crisis followed the invasion of Egypt by the combined forces of France and Britain on the one hand, and that of Israel on the other. U.N. efforts to settle the problem failed, and finally, with the good offices afforded by the World Bank, the Egyptian government and the Suez shareholders concluded the compensation Agreement of July 13, 1958 according to which Egypt agreed to pay 28,300,000 Egyptian pounds by way of compensation, and in addition allowed the shareholders to retain all external assets of the company by renouncing its claims over the latter.

In Argentina, the Municipal government of Toberia in Buenos Aires province took over the property of a subsidiary of the American and Foreign Power Co. on July 7, 1958.[113] In November 1958, the Argentinian government and the company concluded an Agreement according to which compensation was to be paid on the basis of evaluation of the property by Argentinian courts. The Argentinian court's evaluation was issued on April 26, 1961 and, consequently the company agreed to be paid pursuant to that evaluation.

In Indonesia,[114] the Sukarno government nationalized Dutch-owned property interests, particularly shipping enterprises, agricultural estates, gas and electric undertakings pursuant to

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[113] Ibid. at 1088-89.

[114] For a factual account of the Indonesian takings, see 5 Netherlands International Law Review 227-236 (1958); For the text of the laws, see 6 Netherlands International Law Review 291 (1959).

a law of December 31, 1958. The Indonesian decision to nationalize Dutch enterprises was closely linked to the dispute between the Netherlands and Indonesia over the territory known as Irian Barat (Western New Guinea). After the overthrow of the Sukarno government, and largely as a result of it, Indonesia concluded the compensation Agreement of September 7, 1966 with the Netherlands pursuant to which it undertook to pay 600 million Dutch guilders by way of compensation to Indonesian nationals affected by the nationalization measure.

In Brazil, there were two major takeovers, in this early period, the first one, on May 11, 1959 when the governor of the State of Rio Grande do Sul took control over property in that Brazilian state belonging to the American and Foreign Power Co., and the second one, on February 16, 1962 when the same state took control over the property of a subsidiary of the International, Telephone and Telegraph Company.[115]

In 1963, the Brazilian government entered into compensation payment arrangements with both the American and Foreign Power Company as well as the subsidiary of the International Telephone and Telegraph Company on terms satisfactory to those companies.

In Cuba, as we shall show in some detail later in this paper,[116] a series of nationalization measures were carried out between 1959 and 1960 following the fall of the government of Batista and after the coming to power of a new regime on

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[115] 2 International Legal Materials, 1089 (1963).

[116] See Chapter VII.

January 1, 1959.

The first series of measures were effected through the Agrarian Reform Act of March 17, 1959 by virtue of which the Cuban government took over large estates and plantations owned mostly by U.S. nationals. The second series of nationalizations which were effected pursuant to the law of July 6, 1960 and the Resolutions of August 6, 1960; September 17, 1960 and October 24, 1960, transferred all American-owned enterprises into state ownership. The third series of nationalizations which were carried out pursuant to the laws of October 13, 1960 completed the process of takeovers by transfering, into state ownership, all major industries and the banking business.

The Cuban nationalization laws provided for compensation, and with the exception of U.S. nationals in respect to which no agreement has been made so far, the Cuban government concluded a number of agreements with some of the foreign states whose nationals were adversely affected by the Cuban nationalization measures.

In Ceylon, the government established pursuant to a law of May 5, 1961, the para-satal Ceylon Petroleum Corporation in order to carry on the oil business, and for that purpose, to acquire property and equipment belonging to private oil companies whenever needed, against the payment of compensation determined by a special Ceylonese Tribunal.[117] Pursuant to the law of April 27, 1962 Ceylon nationalized 83 gasoline stations and other oil facilities, owned by two American companies, Esso and Caltex. After protracted negotiations, Ceylon finally paid compensation to the interested parties.

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[117] For a factual account of the Ceylonese Nationalization Measures see, 2 International Legal Materials 1090-91 (1963); see also C.F. Amerasinghe, "Ceylon: Oil Expropriations" 58 A.J.I.L. 440-450 (1964).

The sixties and early seventies saw still more frequent and large scale partial as well as total nationalization measures in the underdeveloped countries.

The principal[118] nationalization measures in the last two decades include: the nationalization, in 1966-67 by Zaire, of the copper industry operated and owned by the Union Minière de Haute Katanga; the nationalization, on October 9, 1968, by Peru of the La Brea and Parinas oil fields and industrial installations operated by the International Petroleum Company;[119] the nationalization on October 17, 1969 by Bolivia of the operations and properties of the Bolivian Gulf Oil Company (BOGOC), a wholly-owned subsidiary of the Gulf-Oil Corporation;[120] the partial nationalization (i.e. 51 per cent) in 1969, of the Copper Industry by Zambia; the nationalization by Algeria, on February 24, 1971, of the property of the Société d'Exploitation des Hydro Carbures de Hassi R'Mel (SEHR) and all mining interests held by all foreign companies in Nord In Aménas, Tin Fonyé Sud, Alrar Est, Alrar Oest, Nezla Est, Bridès, Toual, Rhourde Chouff and Rhourde Adra as well as the mining interests held in the gas derived from the deposits in Gassi Touil, Rhourde Nous, Nez la Est Zarzaitine and Tiguentourine;[121] the

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[118] For a factual account regarding those nationalizations see, Permanent Sovereignty over Natural resources: Report of the Secretary General, U.N. Doc. A/9716 at 4-20 (1974).

[119] For the text of the Peruvian Nationalization Decree see 7 International Legal Materials 1257-59 (1968).

[120] For the text of the Bolivian Nationalization Decree, see 10 International Legal Materials 175-178 (1971).

[121] For the text of the Algerian nationalization ordinance and implementing Decrees, see 10 International Legal Materials 847-854 (1971); For a discussion of the issues involved see, A.C. Zoller, "Algerian nationalizations: The legal issues", 6 Journal of World Trade Law, 33-57 (1972).

nationalization on August 26, 1971 of natural-gas-related operations by Venezuela;[122] the nationalization, in July 1971, of the operations and property of the Demarara Bauxite Company (Demba), the subsidiary of Alcan by Guyana;[123] the nationalization of the holdings of three major copper companies Anaconda, Kennecott and Cerro, by the Chilean government of Salvador Allende on July 11, 1971;[124] the nationalization, on December 7, 1971, by Libya of the British Petroleum Exploration Company (Libya Ltd.;[125] the nationalization, in January 1972, by Guinea of all assets of foreign companies connected with the distribution and sale of petroleum products; the nationalization, on June 1, 1972, of the operations and assets of the Iraq Petroleum Company by the Government of Iraq;[126] the nationalization, in 1973, of fishing operations by Peru; the partial nationalization (i.e., up to 51 per cent) on September 1, 1973, of all major oil companies by Libya; the partial nationalization (i.e. an increase of state participation from

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[122] For the text of the Venezuelan Natural Gas Nationalization Act, see 11 International Legal Materials 180-182 (1972).

[123] For an interesting discussion on the Guyanese nationalization of the Bauxite industry, see C.H. Grant, "Political Sequel to Alcan Nationalization in Guyana: The International Aspects", 22 Social and Economic Studies 249-271 (1973).

[124] For the text of the Chilean nationalization laws see 10 International Legal Materials 1067, 1235, 1240 (1971); 11 International Legal Materials 149-152 (1972). For an extensive discussion of the issues raised by the Chilean nationalization measures, see Chapter VII.

[125] For the text of the Libyan nationalization law, see 11 International Legal Materials 380-382 (1972). For an interesting discussion of the legal issues raised see, G.W. Haight, "Libyan nationalization of British Petroleum Company Assets" 6 International Lawyer 541-547 (1972).

[126] For the text of the law, see, 11 International Legal Materials 846-848 (1972).

25 per cent to 60 per cent) on January 29, 1974 of the holdings of the Kuwait Oil Company (KOC) by the government of Kuwait; the partial nationalization, in March 1974, of the holdings of the Abu Dhabi Petroleum Company by the United Arab Emirates in the form of increasing the state participation to 60 per cent; the partial nationalization, in May 1974, of all the holdings of foreign oil producing affiliates involving the increase of state participation up to 55 per cent; the partial nationalization, in June 1974, of the holdings of the Arabian-American Oil Company (ARAMCO) by Saudi Arabia in which the latter acquired 60 per cent ownership; and the nationalization on January 1, 1974 of the operations and assets of the Cerro Copper Company by the Government of Peru.

Although it is not within the scope of this paper to examine, on a case-by-case basis, the scale of the takings in each separate country, it may still be useful, from a historical standpoint, to give an overall and general picture of the magnitude and character of the property takings in under-developed countries in the post-war period on an aggregate basis in order to illustrate the historically peculiar circumstances under which those nationalization measures occur.

According to a study made in 1974 by the U.N. Secretariat, between 1960 and mid-1974, there were about 875 reported cases of major nationalization measures in 62 underdeveloped countries.[127] Among those 62 countries where there has been at least one major case of nationalization of foreign enterprises, the majority carried out few nationalizations, while relatively few countries were responsible for the majority of the nationalization cases. According to the same survey, about 60 per cent of the underdeveloped countries with 5 or less nationalization cases each accounted for only one-tenth of the total number nationalization cases, while about 16 per cent of the countries

[127] Permanent Sovereignty over Natural Resources: Report of the Secretary General, U.N. Doc. A/9716, Annex, at 1 (1974).

with 31 or more nationalization cases each accounted for over two-thirds of all the reported nationalization cases.[128] In other words, while many underdeveloped countries resorted to some form nationalization of foreign enterprises, only relatively few underdeveloped countries actually carried out extensive and comprehensive nationalization programmes in the post-war period.

As Table 1 (herein attached) illustrates, out of the 62 underdeveloped countries which carried out at least one nationalization measure each, 37 of them, namely Abu Dhabi (United Arab Emirates), Bangladesh, Bolivia, Brazil, Central African Republic, Chad, Colombia, Costa Rica, Dahomey, Democratic Yemen, Ecuador, El Salvador, Gabon, Gambia, Guatemala, Guinea, Guyana, Haiti, Iran, Kenya, Kamer Republic (Cambodia), Kuwait, Lebanon, Liberia, Madagascar, Nepal, Pakistan, Panama, Philippines, Qatar, Saudi Arabia, Senegal, Swaziland, Syria, Togo, Trinidad and Tobago and Venezuela, accounted for less than 5 nationalization cases each. Five other underdeveloped countries, namely Malawi, Malaysia, Mexico, Morocco and Sierra Leone each carried out between 6 and 10 cases of nationalization measures. Another five underdeveloped countries, namely, Zaire, Ghana, Iraq, Somalia and Congo (Bazaville) each carried out between 11 and 15 cases of nationalization. Argentina, Nigeria and Peru each carried out between 16 and 20 cases of nationalization measures. Burma alone carried out between 21 and 25 cases of nationalization measures. Within the same period, Libya alone carried out between 26 and 30 cases of nationalization. The remaining 10 underdeveloped countries, namely Algeria, Chile, Egypt, India, Indonesia, Sri Lanka, Sudan, Uganda, Tanzania and Zambia each carried out 31 or more cases of nationalization measures, thus, representing the highest number of nationalization cases per country.

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[128] Ibid.

Table 1. Nationalization or take-over of foreign enterprises, by country, 1960 to mid-1974
(Number and percentage)

Item	Total	Number of cases						
		1-5	6-10	11-15	16-20	21-25	26-30	31 or more
Countries								
Number.....	62	37	5	5	3	1	1	10
Percentage..	100	60	8	8	5	2	2	16
Cases								
Number.....	875	85	33	62	54	23	27	591
Percentage..	100	10	4	7	6	3	3	68
		Abu Dhabi (United Arab Emirates) Bangladesh Bolivia Brazil Central African Republic Chad Colombia Costa Rica Dahomey Democratic Yemen Ecuador El Salvador Gabon Gambia Guatemala Guinea Guyana Haiti Iran Kenya Khmer Republic Kuwait Lebanon Liberia Madagascar Nepal Pakistan Panama Philippines Qatar Saudi Arabia Senegal Swaziland Syrian Arab Republic Togo Trinidad and Tobago Venezuela	Malawi Malaysia Mexico Morocco Sierra Leone	Congo Ghana Iraq Somalia Zaire	Argentina Nigeria Peru	Burma	Libyan Arab Republic	Algeria Chile Egypt India Indonesia Sri Lanka Sudan Uganda United Republic of Tanzania Zambia

Source:
Permanent Sovereignty over Natural Resources: Report of the Secretary General, U.N. Doc. A/9716, Annex at 2 (1974).

The regional distribution of nationalization incidents indicates (see Table 2 attached herein) that Africa South of the Sahara accounted for the highest number of nationalization cases both in absolute as well as percentage terms in relation to other regions, namely West Asia and Africa North of the Sahara, South and South-East Asia and the Western Hemisphere. Between 1960 and mid 1974, Africa south of the Sahara, for instance, accounted for 39 per cent of the nationalization cases in all regions, while West Asia and Africa North of the Sahara accounted for 26 per cent, South and South East Asia 22 per cent, and the Western Hemisphere 13 per cent. In terms of rate of increase, the Western hemisphere represented the highest rate of increase between the sixties and the seventies. While the Western hemisphere, for instance, represented 8 per cent of the total nationalization cases in all regions that were carried out between 1960 and 1969, the same region accounted for 20 per cent of the nationalization cases that took place between 1970 and 1974. Africa, South of the Sahara represented the second highest rate of increase between the two periods, in that while it accounted for 30 per cent of the total nationalization cases that were carried out between 1960 and 1969, its share of the total increased to 49 per cent for the period between 1970 and 1974. On the other hand, the share of South and South-East Asia tends to show a relative decline, in that while that region represented 29 per cent of the nationalizations cases between 1960 and 1969, in the period between 1970 and 1974, it accounted only 14 per cent of the total. Taken as a whole, therefore, Africa South of the Sahara accounted for the highest percentage of the nationalization cases (39 per cent) while the western hemisphere by contrast represented the lowest percentage of the nationalization cases (13 per cent) for the period between 1960 and 1974. It is also interesting to note that, taken as a whole the number of nationalization incidents not only increased steadily in absolute terms, but the number also showed a rapid rate of increase in that while the average

Table 2. Nationalization or take-over of foreign enterprises, by region, 1960 to mid-1974

(Number and percentage)

Region	1960-1969	1970-1974	1960-1974
Africa south of the Sahara			
Average number per year	13.8	45.6	23.7
(Percentage of all regions)	(30)	(49)	(39)
West Asia and Africa north of the Sahara			
Average number per year	15.2	16.7	15.7
(Percentage of all regions)	(33)	(18)	(26)
South and south-east Asia			
Average number per year	13.0	12.9	13.0
(Percentage of all regions)	(29)	(14)	(22)
Western hemisphere			
Average number per year	3.5	18.2	8.0
(Percentage of all regions)	(8)	(20)	(13)
All regions			
Average number per year	45.5	93.3	60.3
(Percentage of all regions)	(100)	(100)	(100)

Source:

Permanent Sovereignty over Natural Resources: Report of the Secretary General, U.N. Doc. A/9716, Annex at 6 (1974).

number of nationalization cases per year was about 45 in the period between 1960 and 1969, the number of nationalization cases per year for the period between 1970 and 1974 was about 93, thereby, more than doubling in the last period.

In terms of the sectoral distribution of the nationalization measures (by region) in underdeveloped countries, the same survey reveals (See Table 3 attached herein) that, nationalization affecting the natural resource sector accounted for over one-third of the total cases.[129] The natural resource sector together with the banking and insurance business, accounted for the bulk of all the nationalization cases in all regions. According to the figures in Table 3, nationalization (in all regions) in the mining, petroleum and agriculture sectors (i.e. those constituting natural resources) together accounted for about 37 per cent of the total cases, while banking and insurance represented 30 per cent of the cases. In Africa South of the Sahara, for instance, natural resource-related nationalizations accounted for 38 per cent of the total in the 1960-1974 period, while banking and insurance, alone represented 23 per cent; the manufacturing sector 15 per cent; trade 6 per cent; and public utilities 7 per cent. In West Asia and Africa North of the Sahara, natural resource-related nationalizations accounted for 32 per cent of the total, while banking and insurance represented 39 per cent, manufacturing 18 per cent; trade 3 per cent and public utilities 1 per cent. In South and South-East Asia, natural-resource related nationalizations accounted for 44 per cent of the total, while banking and insurance represented 47 per cent, manufacturing 4 per cent, trade 4 per cent and public utilities 2 per cent. In the western hemisphere, natural-resource-related nationali-

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[129] Ibid at 5.

Table 3. Nationalization or take-over of foreign enterprises, by sector, 1960 to mid-1974

(Percentage)

Region and period	All sectors	Sector								
		Mining	Petroleum[a]	Agriculture	Manufacturing	Trade	Public utilities	Banking and insurance	Others	[b] Mining, petroleum and agriculture
Africa south of the Sahara										
1960-1969	100	12	1	31	25	10	8	13	-	44
1970-1974	100	6	17	11	8	3	6	30	19	34
1960-1974	100	9	10	19	15	6	7	23	11	38
West Asia and Africa north of the Sahara										
1960-1969	100	1	13	-	23	3	2	48	10	14
1970-1974	100	-	67	-	8	3	-	20	3	67
1960-1974	100	1	31	-	18	3	1	39	8	32
South and south-east Asia										
1960-1969	100	2	6	45	3	6	2	35	-	53
1970-1974	100	-	21	-	5	-	-	74	-	21
1960-1974	100	2	11	31	4	4	2	47	-	44
Western hemisphere										
1960-1969	100	20	31	3	3	-	37	3	3	54
1970-1974	100	21	2	1	50	1	11	9	5	24
1960-1974	100	21	11	2	36	1	19	7	4	34
All regions										
1960-1969	100	6	9	23	16	6	7	30	4	38
1970-1974	100	7	23	6	16	2	5	30	11	36
1960-1974.....	100	7	16	15	16	4	6	30	7	37

Source:

U.N. Doc. A/9716, Annex, at 8 (1974).

Note:

a/ Including refining and distribution.

b/ Including cases for which a sector could not be determined

zations accounted for 34 per cent, while manufacturing represented 36 per cent, trade 1 per cent, public utilities 19 per cent, banking and insurance 7 per cent. Among the natural-resource-related nationalization incidents, petroleum-related nationalizations in particular show a sharp increase in the early seventies compared to the sixties in all regions with the exception of the western hemisphere. In Africa, South of the Sahara, for instance, petroleum related nationalizations represented only 1 per cent of the total (in that region) in the 1960-69 period, while in the 1970-74 period they accounted for 17 per cent of the total nationalizations in the same region. In west Asia and Africa north of the Sahara, petroleum-related nationalizations accounted 13 per cent of the total in the region in the 1960-69 period, while its share increased to 67 per cent of the total in the same region for the 1970-1974 period. Similarly, in South and South-East Asia, petroleum-related nationalizations represented 6 per cent of the total in the region in the 1960-69 period, while in the 1970-74 period they accounted for 21 per cent of the total nationalizations in the same period.

The sectoral distribution of nationalization measures by country group (see Table 4 attached herein) in the same U.N. survey reveals that in those countries which carried out few nationalization cases (i.e. cases below average), petroleum-related nationalization accounted for 33 per cent of the total, while public utilities represented 19 per cent, mining 18 per cent, manufacturing 11 per cent, banking and insurance 9 per cent, agriculture 5 per cent, and trade 2 per cent. In the same category of countries with few nationalization incidents, petroleum,mining and agriculture (i.e. natural resource-related nationalizations) together accounted for 56 per cent of their total nationalization cases which means indirectly that those natural resources constituted the most vital sources of live-

Table 4. Nationalization or take-over of foreign enterprises, sectoral distribution by country group, 1960 to mid-1974

(Percentage)

All countries		Countries with number of cases below the average		Countries with number of cases above the average	
Sector	Percentage	Sector	Percentage	Sector	Percentage
Banking and insurance.....	30	Petroleum a/.....	33	Banking and insurance	56
Manufacturing....	16	Public utilities..	19	Manufacturing.....	18
Petroleum a/	16	Mining	18	Agriculture	17
Agriculture	15	Manufacturing.....	11	Petroleum a/	11
Mining.....	7	Banking and insurance.....	9	Mining	4
Public utilities.	6	Agriculture.....	5	Trade	4
Trade	4	Trade.....	2	Public utilities..	2
Others b/.....	7	Others b/	3	Others b/.....	8
TOTAL	100	TOTAL	100	TOTAL	100

Source:
U.N. DOC. A/9716, Annex, at 10 (1974).

Note:
a/ Including refining and distribution.

b/ Including cases for which a sector could not be determined.

lihood for those countries. On the other hand, in those countries where numerous nationalization measures were taken (i.e. representing number of cases above the average), banking and insurance - related nationalizations accounted for 36 per cent in the 1960-74 period, while manufacturing accounted 18 per cent; agriculture 17 per cent; petroleum 11 per cent, mining 4 per cent; trade 4 per cent and public utilities 2 per cent. In the latter group of countries, therefore, natural resources - related nationalizations represented a relatively smaller percentage (32 per cent) of the total number of nationalizations carried out by those same countries.

The pattern of distribution of nationalization measures by major foreign investor countries affected again reveals some interesting features. According to the figures in Table 5 (attached herein), the three major investor countries, namely the United States, the United Kingdom and France together accounted for 78 per cent of the total value of the stock of foreign investment in all regions of the underdeveloped countries. Out of the total number of nationalization cases affecting foreign interests, 25 per cent of the cases affected property that belonged to U.S. nationals; 42 per cent of the cases affected property that belonged to U. Kingdom nationals; and 11 per cent of the cases affected property that belonged to French nationals. While the U.S. ranked first in terms of value of stock of foreign investment in underdeveloped countries (i.e. 50% of the total), the United Kingdom was the most affected by the nationalization measures (i.e. 42% of the total number of cases). In terms of the regional distribution of stock of foreign investment, United States interests ranked first in west Asia and Africa north of the Sahara (i.e. 57 per cent of the total) as well as in the western hemisphere (i.e. 64 per cent of the total), while United Kingdom interests ranked first in Africa south of the Sahara (i.e. 30 per cent of the total) as well as in south and south-east Asia (i.e. 42 per cent). In terms of regional distribution of property interests affected, the United Kingdom was affected the most in

Table 5. Distribution of value of stock of foreign direct investment a/ and cases of nationalization or take-over, b/ by major foreign investor country

(Percentage)

Foreign Investor Country	Africa south of the Sahara c/				West Asia and Africa north of the Sahara d/				South and south-east Asia				Western hemisphere				All regions			
	Foreign direct investment	Cases	Countries		Foreign direct investment	Cases	Countries		Foreign direct investment	Cases	Countries		Foreign direct investment	Cases	Countries		Foreign direct investment	Cases	Countries	
		All	Below the average	Above the average		All	Below the average	Above the average		All	Below the average	Above the average		All	Below the average	Above the average		All	Below the average	Above the average
United States ...	21	12	14	10	57	20	41	13	36	20	50	17	64	86	85	86	50	25	38	21
United Kingdom...	30	45	32	50	27	34	19	39	42	68	20	74	9	3	8	1	20	42	23	47
France	26	5	15	1	5	32	17	37	7	1	5	-	3	1	-	1	8	11	12	11
Others e/	23	38	38	38	11	14	22	11	15	11	25	9	24	10	8	11	22	22	27	21
All countries....	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100

Source: U.N. Doc. A/9716, Annex, at 12 (1974)

Note: Since nationalization or take-over in one case can affect investors in several countries, the total number of investors affected (945) is higher than the total number of cases. Cases involving several owners in one investor country have not been included in this category.

a/ End 1967.

b/ 1960 to mid-1974.

c/ Including, for the stock of foreign direct investment values, North Africa.

d/ Excluding, for the stock of foreign direct investment values, North Africa.

e/ Including cases for which an investor country could not be ascertained.

nearly all regions with the exception of the Western Hemisphere. In Africa South of the Sahara, U. Kingdom interests affected accounted 45 per cent of the cases, as opposed to 12 per cent in the case of the United States, and 5 per cent in the case of France. Similarly, in West Asia and Africa north of the Sahara, the United Kingdom interests affected accounted for 34 per cent of all the cases, as opposed to 20 per cent in the case of the United States, and 32 per cent in the case of France. Again, in south and south-east Asia, U.K. interests affected accounted for 68 per cent of the total, as opposed to 20 per cent in the case of the United States and 1 per cent in the case of France. On the other hand, the U.S. ranked first in the western hemisphere both in the concentration of stock of foreign direct investment as well as in the extent of property loss as a result of nationalization measures. The U.S. interests represented 64 per cent of the total stock of foreign investment in the western hemisphere, as opposed to 9 per cent in the case of the U. Kingdom and 3 per cent in the case of France. In terms of extent of loss of property interests as a result of nationalization, out of the total number of nationalization cases, 86 per cent affected U.S. interests, 3 per cent affected U.K. interests and 1 per cent affected French interests.

The pattern of distribution of nationalization measures by the number of investors affected (see Table 6 attached herein) further amplifies the extent to which and where each of the major foreign investor countries were affected the most by the nationalization measures. Out of a total of 945 investors affected by the 875 nationalization cases that took place between 1960 and 1974 in 62 underdeveloped countries, the majority, i.e. 42 per cent of the investors affected, were United Kingdom nationals, while U.S. nationals accounted for 25 per cent, and French nationals accounted for 11 per cent. Seen over a period of time, the percentage of relative loss of property interests as a result of nationalization appeared to be on the decline for U. Kingdom interests while it seemed to be on the increase for U.S.

Table 6. Nationalization or take-over, distribution by major foreign investor country, 1960 to mid-1974

(Number and percentage)

Region and period	Total number of investors affected[a/]	Investors countries (percentage)				
		All countries	United States	United Kingdom	France	Others[b/]
Africa south of the Sahara						
1960-1969	140	100	5	53	4	38
1970-1974	224	100	16	41	5	38
1960-1974.....	364	100	12	45	5	38
West Asia and Africa north of the Sahara						
1960-1969	160	100	16	46	31	6
1970-1974	105	100	26	16	33	25
1960-1974	265	100	20	34	32	14
South and south-east Asia						
1960-1969	134	100	18	75	-	7
1970-1974	62	100	26	55	2	18
1960-1974	196	100	20	68	1	11
Western hemisphere						
1960-1969	34	100	94	3	-	3
1970-1974	86	100	83	3	1	13
1960-1974	120	100	86	3	1	10
All regions						
1960-1969	468	100	19	53	12	16
1970-1974	477	100	31	30	10	28
1960-1974	945	100	25	42	11	22

Source: U.N. Doc. A/9716, Annex, at 14 (1974).

Note:

a/ Since nationalization or take-over in one case can affect investors in several countries, the total number of investors affected is higher than the total number of cases. Cases involving several owners in one investor country have not been included in this category.

b/ Including cases for which the investor country could not be identified, which may include some of the major investor countries, except for the United States for which information is fairly complete.

nationals. As the figures in Table (6) clearly illustrate, in the period between 1960-1969 investors from the U. Kingdom accounted for 53 per cent of the total number of investors affected, while in the same period U.S. investors accounted for 19 per cent of those affected, and French investors accounted for 12 per cent of those affected. On the other hand, in the period between 1970 and 1974, the percentage of investors affected increased from 19 per cent to 31 per cent in the case of U.S., while the percentage of investors affected declined from 53 per cent to 30 per cent, in the case of the United Kingdom, and from 12 per cent to 10 per cent in the case of France.

In terms of regional distribution of extent of property loss measured by the percentage of the number of investors affected (see Table 6), the United Kingdom ranked first in terms of property loss (45 per cent) in Africa south of the Sahara, in west Asia and Africa north of the Sahara (34 per cent) as well as in south and south-east Asia (68 per cent). In other words, with the exception of the western hemisphere in which the loss of British investors was only 3 per cent of the total number of investors affected, the United Kingdom investors were affected the most in all other regions. On the other hand, although the relative property loss of the U.S. as a result of nationalization is on the increase in nearly all regions, i.e. in Africa south of the Sahara, west Asia and Africa north of the Sahara, and in south and south-east Asia, its relative property loss is the highest in the western hemisphere, accounting for 86 per cent of the total number of investors affected in that region.

The pattern of distribution of the number of investors affected by major investor country and according to economic sector (see Table 7 attached herein), further indicates the sectoral concentration of property loss resulting from the nationalization measures carried out in underdeveloped countries

Table 7. Nationalization or take-over of foreign enterprises, by major investor country and by sector, 1960 to mid-1974

(Percentage)

Investor country affected	Total foreign investors affected in all sectors	Sector								
		Mining	Petroleum a/	Agriculture	Manufacturing	Trade	Public utilities	Banking and insurance	Others b/	Mining, petroleum and agriculture
United States....	25	45	40	6	36	26	40	11	15	30
United Kingdom...	42	22	17	84	16	40	26	58	60	41
France.....	11	6	17	2	20	14	14	4	20	10
Others c/.....	22	27	25	8	27	20	20	27	5	19
Total foreign investors.....	100	100	100	100	100	100	100	100	100	100

Source: U.N. Doc. A/9716, Annex, at 15 (1974).

Note: Same number of investors affected as in annex table 7 above.

a/ Including refining and distribution.

b/ Including cases for which a sector could not be ascertained.

c/ Including cases for which an investor country could not be ascertained.

between 1960 and 1974. As the figures in Table (7) show, United State investors were affected the most in the mining (45 per cent), petroleum (40 per cent), manufacturing (36 per cent and public utilities (40 per cent) sectors, while their loss of property in the Agricultural sector (6 per cent) and the banking and insurance sectors (11 per cent) were relatively modest. On the other hand, the extent of property loss measured by the percentage of investors affected was the highest for U.K. investors in the agriculture sector (84 per cent), in the trade sector (40 per cent) and banking and insurance sector (58 per cent of the total). The sectoral concentration of property loss for the major foreign investor countries also reflects indirectly that U.S. investment concentrated mostly in the mining and petroleum sectors while U.K. investment concentrated mostly in the banking and insurance sector as well as in the agricultural sector, thereby, explaining in part the economic reasons why the rate of property loss over a period of time tended to increase in the case of U.S. investors, while it tended to decline in the case of U. Kingdom investors.

In light of the foregoing overall picture regarding nationalization measures in underdeveloped countries, then, a number of remarks could be made so as to bring into sharp focus some of the specific features in those nationalizations which account for their historical peculiarity compared to the property takings that occurred in the pre-war and inter-war periods.

The first marked feature that emerges from the nationalization measures that took place in the underdeveloped countries, especially those that were carried out between 1960 and 1974 is their unprecedented scale, magnitude and frequency.

According to the U.N. survey we examined above, in the period between 1960 and 1974 alone 62 countries carried out a total of over 875 cases of nationalization measures affecting about 945 investors, the majority of which were nationals of the

U.S., the United Kingdom and France. Although a precise estimate of the total value of investment affected by those nationalizations is not available (to the author's knowledge), the immensity of the scale of property-taking can be roughly gauged from the estimated book value of the nationalization cases involving U.S. investors alone. According to the U.N. survey examined above, the book value of the nationalization cases involving U.S. investors, which accounted for only one-fourth of all the nationalization cases that occurred between 1960 and the end of 1973, amounted to $3.5 - $4.5 thousand million dollars.[130] Compared to the property takings that occurred in the pre-war and inter-war periods, the scale and magnitude of the property taking in underdeveloped countries in the post-war period, thus finds no quantitative parallel. In terms of frequency of taking, the contrast is even more marked. As we tried to show by reference to Tables (1) and (2) above, not only were the nationalization measures, taken as an aggregate, incomparably frequent in contrast to the property takings of the inter-war and post-war periods, but the rate of taking was also more markedly frequent on a country-by-country-basis, in the case of the underdeveloped countries than that which occurred in the pre-war and inter-war periods in the case of single "taking-states". The frequency of "taking" on a country-by-country basis as reflected in Table (1) above, for instance, shows that 37 underdeveloped countries fell under the category of 1-5 cases of nationalization; 6 underdeveloped countries fell under the 6-10 category; 5 countries fell within the 11-15 bracket; 3 within the 16-20 bracket; 1 within the 21-25 bracket; 1 within the 26-30 bracket; and 10 underdeveloped countries each carried out 31 or more nationalization cases. Therefore, in terms of frequency of

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[130] Permanent Sovereignty over Natural Resources: Report of the Secretary General, U.N. Doc. A/9716, Annex, at 1 (1974).

"taking" too, the property taking of the post-war period finds no parallel in the inter-war and post-war periods.

The second marked feature that clearly distinguishes the property takings by underdeveloped countries in the post-war period from those of the pre-war and inter-war periods is the type of property involved in the taking. Unlike the types of property interests affected in the pre-war and inter-war periods, especially in connection with the "incidental-type" of takings, the property takings in the underdeveloped coutries involved entire economic sectors which constituted vital nerve centres of the national economy of the taking state. As we tried to illustrate by reference to Table (3) above, the type of property interest which became the target of nationalization in the post-war period is not merely a single item of property or even one economic sector alone, but entire sectors encompassing the mining, petroleum, agriculture, manufacturing, trade, public utilities, banking and insurance as well as a host of other primary and tertiary economic sectors. Even those relatively "extensive" expropriation measures carried out by some of the west-European countries during the inter-war period as well as in the post-war period were, comparatively speaking, confined mostly to the public service and public utilities sectors, and never encompassed the kind of economic sectors that became the common target of nationalization in underdeveloped countries. The peculiarity of the nationalization measures by underdeveloped countries in the post-war period in terms of the type of property targeted for taking lies, therefore, in the fact, that unlike the takings in the pre-war and inter-war periods, the property interest involved carried a special strategic significance to the taking state socially, economically and politically. In other words, by its very nature and character, the type of property involved represented the economic life-line of the taking underdeveloped country.

The third marked feature of the nationalization measures

in the underdeveloped countries in the post-war period that distinguishes them from property takings in the pre-war and post-war periods is that, the taking states on the one hand, and the adversely affected states on the other are differentiated in such a way and are divided from one another along such a historically and economically defined demarcation line that a clear pattern emerges in the way their conflicting interests are mutually counter-posed in the nationalization countroversy. The pattern consists in the fact that the taking underdeveloped states tended, in the majority of cases, to nationalize property belonging to nationals of their former colonizers or neo-colonizers. As we tried to show by reference to Tables (5) (6) and (7), a clear pattern emerges from the relative proportion of the stock of foreign direct investment affected by the nationalizations in the various regions and the nationality of the investors affected, in that the United Kingdom and France, for instance, suffered the maximum property loss in regions which were formerly their colonial foothold, while the United States, as a late-comer in the scramble for colonies, suffered the maximum loss only in the western hemisphere, which region has always been, since the Monroe Doctrine, the reserved backyard of U.S. neo-colonial control and a special area of U.S. sphere of influence. From the standpoint of this paper, the significance of this peculiarity of pattern in the relations between the taking states and the adversely affected states, consists in the fact that, unlike the takings in the pre-war and inter-war periods which were haphazard in many ways, and did not follow a particular pattern, the property takings in the underdeveloped countries carry the unique element of "redress" for the plunder of the past, and consequently, the "takings" take the added character of an exercise of "restoration" of resources in the context of the overall process of de-colonization and de-neo-colonization.

The fourth peculiar feature of the nationalization measures in underdeveloped countries consists in that, as

concrete manifestations of international state practice, those nationalization measures involved not only the participation of many actors (62 countries) compared to the pre-war and inter-war periods, but they also involved the participation of states representing heterogeneous socio-economic systems marked by a plurality of ideological and political outlooks on matters of property rights as well as on the role of the state in regulating economic activity. In other words, the direct involvement of an uprecedent number of new and different states (hitherto excluded from playing an active and independent role in international state practice) in the process of carrying out state measures affecting nationals of other states in the international arena, being a feature peculiar to the property "takings" by underdeveloped countries in the post-war period, will have, as we shall show later, its own bearing in modifying those traditional norms relative to "taking" which evolved at a time when the sole actors were a small club of "civilized" nations.

As we tried to point out at the beginning of this chapter, it is our contension that those rules of traditional international law which evolved in connection of the expropriatory "takings" of the pre-war and inter-war periods have limited relevance to "nationalization-type" takings, and that, in fact, those rules do not apply over nationalization cases arising in the underdeveloped countries for the simple reason that those rules evolved in connection with "takings" which arose within historically-specific operational climates, and that when the specific operational climate changes, the norms that govern the new situation must be accordingly different. We, therefore, maintain that the above four features which distinguish property takings by the underdeveloped countries in the post-war period from those of the pre-war and post-war periods, and which give them their own historical peculiarity constitute, together with other factors, the new operational

climate in response to which new and corresponding norms are in the process of evolving. As we shall show later in this paper, the unprecedented scale, and magnitude of the ordinary type of taking in the post-war period should, for instance, be treated as a peculiar feature constituting the new operational climate since, among other things, takings of such an unprecedented magnitude cannot be reasonably governed by traditional norms of compensation which evolved in connection with single items of property representing a relatively "miniscule" monetary value. Similarly, those traditional rules of international law which evolved in connection with the pre-war and inter-wartakings were shaped as much by the scale of the property ordinarily involved in the taking process as by the type of property targeted for taking. As we shall show later by reference to specific instances, the type of property ordinarily involved in post-war nationalization by underdeveloped countries can, therefore, hardly fit within the "conceptual mold" of those traditional norms of taking that only knew certain types of property interests which represented virtually no strategic economic significance either to the taking state or to the state whose national was affected by the taking. In other words, when the type of property which becomes the target of taking changes in character, the traditional norm which was fashioned to govern the old type of property inevitably proves unfit to govern the new type of property. Hence, a clear lack of concordance between the old norm and the new operational climate results.

Again, the third peculiar feature characterizing property taking by underdeveloped countries in the post-war period, signifies a new operational climate in the sense that, unlike the ordinary type of taking of the pre-war and inter-war period, the property takings by underdeveloped countries constitute a special kind of taking because: (a) the takings are carried out by victims of colonialism and neo-colonialism; (b) the takings are in effect directed against nationals of the former colonial

and neo-colonial overlords of the taking states; and (c) the property interest that is the target of nationalization is mostly acquired under the special protection of a colonial and neo-colonial umbrella formerly provided by the colonizing or neo-colonizing power; and (d) the measure of "taking" occurs in the specific context of de-colonization and de-neo-colonization, and as part of the overall process of "redressing" for the plunder of the past.

And lastly, the fourth peculiar feature of the nationalization measures in underdeveloped countries in the post-war period, namely that those nationalization measures occur at a time when the new states were just "entering" into the international community of nations as independent actors, and that those nationalization measures themselves constitute manifestations of participation in international state practice by the new entrants, raises the legitimate question of whether those traditional norms relative to taking which evolved at a time when the international community of nations was in effect closed to the peoples of the new states should bind the new states which did not participate in their formulation.

Thus, when all those features are considered together, they tend to show that the changes in the operational climate not only render those traditional international norms that evolved in connection with the old operational climate unfit and inapplicable over contemporary nationalizations in underdeveloped countries, but they also tend to show the direction along which, and the specific avenue through which, new and appropriate norms governing the contemporary type of takings should be expected to evolve.

It is our contension in this paper that the forums of the United Nations constitute such an avenue for the formulation of norms governing nationalizations of the new-type. The forums of the United Nations are appropriate for such a purpose, first of

all, because they allow a broader and wider participation of states in the international norm-creation process, and in doing so, overcome the characteristic "narrowness" and "exclusiveness" of the pre-war and inter-war international mechanism of norm creation which was "Eurocentric" in the views and practices it embraced and the interests it reflected. Secondly, the U.N. forums are better fit for the formulation of norms governing nationalization of the new type because they are probably the only international forums in the contemporary period where even a minimal degree of international and universal consensus can possibly evolve among a community of nations that represent different socio-economic and political systems and correspondingly varied ideological and juridical outlooks. In other words, in an international community of nations characterized by plurality of socio-economic and political system with divergent outlooks, the U.N. forums constitute probably the only avenues for working out, to the extent possible, even those minimal points of common agreement, that can give rise to norms capable of commanding universal validity and authority. And thirdly, the U.N. forums are better fit for the creation of norms of general import in the sense that they allow a wider room for expressing the "consent" of many states to norms-in-the-process-of-creation, and in this respect, they overcome the inherent limitations of nearly all other mediums with which the norm-creation process of international law is familiar. The idea, for instance, that a rule of international law becomes binding on state (A) because that rule gets support from earlier precedents involving states (X) and (Y); or that a rule becomes binding on state (B) because that rule is supported by Treaty practice involving states (C) and (D); states (E) and (F); as well as (G) and (H); or that a rule becomes binding on state (A) because celebrated jurists of country (X) and country (Z) so testify; or that certain states, in their past practice, acted in this or that manner, are in many ways wrought with several limitations. In each case, the obvious limitation is that the

state which is being asked to be bound by the rule in question is not given the opportunity to express its "consent" in the creation of the rule in question. Hence, in an era where, owing to the plurality of the international community of nations with divergent socio-economic, political systems and conflicting interests, the element of "consent" assumes an added significance in the international norm-creation process, the U.N. forums become all the more better suited for the formulation of binding norms of general import precisely because they allow a relatively wider opening, for a great number of states, to give or to withdraw their consent to norms-in-the-process-of-creation.

In light of the changes in the operational climate within which nationalizations of the new-type unfold, one of the principal themes of the subsequent chapters of this paper will, therefore, be to uncover the juridical implications of the corpus of consensus relative to problems of nationalization that evolved with the U.N. machinery during the last three decades.

CHAPTER IV

Economic Realities Pertaining to the Status of Sovereignty Over Natural Wealth and Resources in Countries of the Third World

In this section of the paper, we will be presenting a broad and generalized discussion of the peculiar economic problems (both general and specific) relating to underdeveloped countries. It is believed that such a background would facilitate a proper understanding of the economic operational climate under which nationalization commonly occurs in the contemporary period and the economic conditions that tend to justify it. Besides, a proper understanding of the economic conditions of the countries of the Third World would serve as a basis for appreciating the essence of the various works of the United Nations and its organs whose formulations are a direct response to these same economic conditions. In presenting some of the peculiar economic problems of the underdeveloped countries we will be focusing on those aspects having a strong bearing on permanent sovereignty over natural resources and those in response to which the various organs of the United Nations formulated norms and guidelines, by way of resolutions, in line with which member nations are expected to act. Thus, the presentation is divided into two major sections. The first one will be dealing with the general features of the peculiar economic problems of the underdeveloped countries of the Third World with special stress on those aspects pertaining to the status of sovereignty over natural resources. The second one will be concerned with the specific features of the peculiar economic problems of the countries of the Third World. Here, the attempt will be to examine the extent of foreign investment and pattern of international flow of private capital, on the one hand, and the economic adverse effects and impact arising from the operation of multi-national corporations in countries of the Third World, on the other.

Inasmuch as the economic problems peculiar to the under-

developed countries of the Third World possess both general and specific features, the resolutions of the various organs of the U.N. whose juridical implications partly form the object of this study, are enunciated in response to both categories of problems.

Among those resolutions relating to the general features of the peculiar economic problems of the countries of the Third World mention may be made of those connected with the two International Development Strategies formulated by the U.N. since 1960. The General Assembly of the U.N. at its sixteenth session on Dec. 19, 1961, passed Resolution 1710 in which it designated the years between 1961-1970 as the first "United Nations Development Decade".[1] In that Resolution, the General Assembly noted that "the economic and social development of the economically less developed countries is not only of primary importance to those countries but is also basic to the attainment of international peace and security", and further pointed out that "in spite of the efforts made in recent years, the gap in per capita incomes between the economically developed and the less developed countries has increased and the rate of economic and social progress in the developing countries is still far from adequate".[2] Among other things, it called upon member states to intensify, within the First Development Decade, their efforts with the aim of attaining an accelerated "progress towards self-sustaining growth" of the economies of the underdeveloped countries, and in addition, requested the Secretary General to develop proposals so as to make possible "the achievement and acceleration of sound self-sustaining economic development in the less developed countries through industrialization, diversification and the development of a highly productive agricultural sector".[3] Ten years after the formulation of the

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[1] 16 U.N. General Assembly, Official Records, supp. 17, U.N. Doc. A/5100 at 17 (1962).

[2] Ibid.

First Development Decade, the United Nations General Assembly at its twenty-fifth session on Oct. 24, 1970, proclaimed, in its Resolution 2626 (XXV) "The Second United Nations Development Decade" which was to begin on January 1, 1971.[4] In that Resolution, the General Assembly expressed, among other things, its dissatisfaction with the limited success of the development efforts made during the first United Nations Development Decade in that "the level of living of countless millions of people in the developing part of the world is still pitifully low. These people are often still undernourished, uneducated, unemployed and wanting in many other basic amenities of life. While a part of the world lives in great comfort and even affluence, much of the larger part suffers from abject poverty and in fact the disparity is continuing to widen. This lamentable situation has contributed to the aggravation of world tension".[5] Among the stated objectives of the Second U.N. Development Decade, the Resolution clearly set out the proposition that "full exercise by developing countries of permanent sovereignty over their natural resources will play an important role in the achievement of the goals and objectives of the Decade". The same Resolution emphatically stated that "developing countries will take steps to develop the full potential of their natural resources".[6]

The significance of the U.N. Development Strategies and the Resolutions formulating them lies, as far as this research goes, in the fact that they tend to create, by implication, an International Consensus with respect to a specific modality of effecting the kind of development sought by the international

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[3] Ibid. at 18.

[4] 25 U.N. General Assembly, Official Records, Resolutions, supp. 28, U.N. Doc. A/8028 at 39-49 (1971).

[5] Ibid. at 40.

[6] Ibid. at 48.

community - namely that of the exercise of sovereignty over natural resources by such means, among others, as nationalization. In other words, these Resolutions, along with others, form the object of our study to the extent that they carry definite juridical implications regarding the exercise of sovereignty over natural resources by way of nationalization.

In focusing on the general features of the peculiar (i.e. peculiar to the countries of the Third World as against others) economic problems of the countries of the Third World and the responses by the various organs of the U.N., to those problems, we are arguing that, as far as the countries of the Third World are concerned, the right to resort to nationalization does not issue solely from the possession of mere sovereignty alone, but also and in addition from the authority of U.N. backing extended particularly to those Third World countries by reason of their specific predicament of "underdevelopment". In other words, by treating the peculiar economic problems of the underdeveloped countries, we are trying to show the underlying economic reasons that prompted the U.N. to give an additional basis of support for nationalization by Third World countries by virtue of their special capacity of being "undeveloped" or "underdeveloped".

The other class of Resolutions whose juridical implications we will be examining in subsequent chapters are a direct response to the specific features of the peculiar economic problems of underdeveloped countries. The peculiar economic problems with which these latter Resolutions are concerned relate to the extent of foreign involvement in the exploitation of natural resources in the underdeveloped countries. On the one hand, it is the prevailing dominance of foreign control and ownership of the natural resources of the underdeveloped countries which led the U.N. organs, since the 1950's, to give full recognition to the permanent sovereignty of the underdeveloped countries over their natural resources.[7] On the other

hand, it has been the adverse effect of the operations of multinational corporations on the social and economic well-being of the underdeveloped countries that led the various organs of the U.N. to initiate attempts to control and curb the undesirable impact of the activities of multinational corporations in underdeveloped host countries.[8]

With the foregoing broad framework, we shall now examine both the general and specific features of those economic problems peculiar to the underdeveloped countries.

A. General Economic Features Peculiar to the Underdeveloped Third World Countries and having a Strong Bearing on Permanent Sovereignty over Natural Resources

The economic problems peculiar to the underdeveloped Third World countries pertaining to the status of permanent sovereignty over natural resources could be treated in light of certain key parameters furnished by the U.N. Secretariat in a study made in 1962 regarding this same subject matter.[9] These parameters include the degree of economic diversification, the direction and pattern of trade, the state of balance of payments and transfer of profits, the rate and prospect of capital formation, the state of capital flow and the effect of economic association. The bearing that those parameters have on the status of sovereignty over natural resources may call for

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[7] For a summary of the activities of the U.N. in the area of permanent sovereignty over natural resources up until 1962, see U.N. Secretariat, The Status of Permanent Sovereignty over Natural Wealth and Resources, U.N. Doc. A/AC. 97/5/Rev.2, at 3 (1962).

[8] For an extensive account on U.N. activities in regard to multinational corporations, see U.N. Secretariat, Department of Economic and Social Affairs, Multinational Corporations in World Development, U.N. Doc. ST/ECA/190 (1973); see also, U.N. Secretariat, Department of Economic and Social Affairs, The Impact of multinational corporations on Development and on International Relations, U.N. Doc. E/5500/Rev.1 (1974).

some explanation.

These parameters generally reflect an international factor in an otherwise national economic problem. Each of those factors are important indicators of the practical extent of "sovereignty" in so far as there is dependence or reliance upon outside markets or suppliers. In view of the fact that there is fluctuation in demand, in production and consequently in prices in respect of most commodities, especially those of the primary products category, a country's economy will be greatly affected by the extent to which it can overcome both short-term fluctuations affecting any one of its products and long term changes in demand.[10] Indicators such as balance of payments, transfer of profits, capital formation and flow of capital, therefore, bear directly on "Economic Sovereignty" since they reflect the degree of local control over resource exploitation as well as the extent of local benefit from such resource exploitation.[11] In the following discussion, then, we shall try to show the economic problems peculiar to countries of Africa, Latin America and Asia by using some of those parameters as tools of illustration. We wish to submit at the outset, however, that insofar as the object of this study is not to get into an exhaustive country-by-country economic investigation, our presentation is necessarily general and oversimplified.

Africa

According to a study made by the U.N. Secretariat, one of the peculiar economic problems common to most of the under-

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[9] See U.N. Doc. A/AC. 97/5/Rev.2, op. cit. at 164-165.

[10] Ibid. at 165.

[11] Ibid.

developed countries of Africa continued to be the glaring lack of economic diversification, and undue reliance upon the export of few cash crops or primary natural resource products as a result of which the economies of those countries became highly vulnerable to erratic fluctuations in the price of their export commodities.[12] Although some countries had less non-diversified economies than others, the pattern of non-diversification was still prevalent in most African countries. The same study surveyed a number of countries, and listed them according to their degree of non-diversification. According to the finding of that survey, Egypt, Ethiopia, Gambia, Ghana and Sudan fell within the category of the most non-diversified type of economy, in that each depended heavily upon single-commodity exports, in the case of Egypt on raw cotton, in the case of Ethiopia on coffee, in the case of Gambia on ground nuts, in the case of Ghana on cocoa, and in the case of Sudan on raw cotton.[13] Among those countries listed as under less-non-diversified economies, Liberia depended heavily on rubber, iron ore and palm kernels; Zambia on copper; Zimbabwe on tobacco; Sierra Leone on palm kernels, iron ore and diamonds.[14]

In terms of the direction and patterns of trade the problem was equally chronic. Here, the nature of the problem is reflected by the extent to which the trade of the various countries of Africa, especially that of the ex-colonies, is

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[12] Ibid. at 165. Here, of course, we are not overlooking the various attempts made by the countries of Africa in the sixties as well as seventies to mitigate the problem of international price fluctuations by participating in international commodity agreements for the purpose of stabilizing those fluctuations.

[13] Ibid. at 165.

[14] Ibid at 165-166.

concentrated within those restricted currency or market zones built around the nuclei of the economies of the former colonizing countries. The wide disparity in the level of the economic development of the trading partners further shaped the pattern of trade in such a way that the countries of Africa remained, in the main, suppliers of primary products and buyers of the industrial products of the advanced trading partners. The terms of trade that prevail under the existing conditions of international division of labour are such that industrial products and commodities command relatively higher prices in the international market relative to primary products. Thus, the countries of Africa are adversely affected by the existing direction and pattern of trade and remain tied to what the Hungarian economist, Tamas Szentes calls, a system of "Relational dependance".[15]

According to the same U.N. survey, the balance of payments of most African countries exibited serious deficit problems a result of excess imports over exports, and those countries tended to accommodate the continuing deficit problems by means of short-term palliatives such as the financing of imports through government borrowing.[16] Even in those African countries where the balance of payment situation indicated apparent surpluses, the same survey showed that those surpluses were bound to be short-lived owing to the fact that they tended to

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[15] Tamas Szantes, The political economy of underdevelopment (Budapest, 1971). For an interesting discussion of world trade patterns along the same lines, see Pierre Jalée, The Third World in the World Economy (1969); also Pierre Jalée, The Pillage of the Third World (1968); see also Samir Amin, Accumulation on a world scale (1974).

[16] See U.N. Doc. A/AC. 97/5/Rev. 2, op. cit. at 169-172.

occur as a result of temporary bonanzas in export earnings following erratic rises in the price of certain commodities in the international market.[17]

The rate and state of capital formation in many African countries was, according to the survey, equally unsatisfactory, and in so far as domestic capital formation is a crucial element in capital accumulation, the fact that many African countries showed a poor rate and state of capital formation meant a diminished prospect of economic development for them.[18] In fact, the finding of the U.N. study, showed that in most African countries "there is a virtual absence of domestic capital formation, and economic operations - whether public or private are dependant upon transfers from abroad and upon re-investments of profits from foreign capital".[19]

According to the U.N. survey, the state of inflow of capital in the form of foreign investment in Africa has been particularly heavy in the natural resource exploitation sector. Accordingly, those countries of African which possessed rich natural resources (i.e., oil and non-ferrous metals) such as Zaire, Zimbabwe, and Zambia attracted the largest amounts of foreign private capital, and other areas of foreign capital concentration included the Saharan area, the Republic of Guinea, Gabon and Congo (Brazaville).[20] The implications of a huge

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[17] Ibid.

[18] Ibid. at 172-175.

[19] Ibid. at 173. Although the above finding was for the decade beginning from 1950, the situation remained generally the same even in the sixties. For a relatively recent assessment of the situation, see U.N. Secretariat, Department of Economic and Social Affairs, World Economic Survey in 1971: Current Economic Developments, U.N. Doc. E/5144 (1973).

[20] U.N. Doc. A/AC. 97/5/Rev. 2, op. cit. at 176.

influx of private foreign investment for the exploitation of natural resources, particularly mineral and petroleum resources as far as the African economies are concerned are, of course, quite serious. While the long-term effect is the ultimate depletion of irreplaceable natural resources, in the short-term, it tends, as we shall argue in a moment, to create economic "enclaves" in the African economies with only marginal benefits to the latter by way of limited state revenue and employment opportunities.

Latin America

The peculiar features that characterized the African economies, namely lack of diversification, problems of balance of payments, and meagre capital formation, etc. equally apply to the underdeveloped countries of Latin America. If there is any particular feature which has a more pronounced impact, in Latin American countries than in those of Africa, it is probably the relatively heavy inflow of foreign capital in the Latin American economies. Practically all of south and Central America is composed of sovereign states and virtually all of them have been formally independent for well over 100 to 150 years. Theoretically at least, those Latin American countries would be expected, by virtue of their formal independence, to have at their disposal a full range of mechanisms for exercising control over their natural wealth and resources. In reality, however, the region had been open to foreign economic domination as a result of a huge influx of foreign capital starting from those early days when most of those Latin American countries won their formal political independence.

According to the U.N. study mentioned earlier, foreign interest focused on Latin America initially as a potential market, and it was only later that the region became a haven for the direct exploitation of agricultural and mineral resources by foreign capital that later extended still further into the

tertiary and service sectors.[21] The same study shows that, in terms of the volume of overall foreign private capital inflow to underdeveloped countries, Latin America represented a bigger share. In the fifties, the inflow of foreign private capital into Latin America went to Venezuela as a result of that country's petroleum potentials which attracted a sizeable share of the foreign private investment that went into Latin America.[22] The net effect of the huge inflow of private foreign capital has been,among other things, the "siphoning-off" of huge surplus profit and interests for capital from Latin America in the form of remittances by the foreign investors. According to the U.N. study, remittances of profits and interests from Latin America, for instance, increased by $660 million between 1947 and 1957 alone, and a large proportion of that increase was borne by Venezuela.[23] Just as in the petroleum industry, the U.N. survey shows that remittances of profits from mining in the fifties, which was heavily concentrated in few republics, were relatively large, and they were borne mainly by Mexico, Peru and Chile. A large proportion of the profits made by foreign private investment in Latin America was transferred to the United States, and the rest went to western Europe.[24]

Asia and the Far East

Again, the underdeveloped region of Asia and the Far East is one consisting of formally independent states theoretically capable of exercising control over the disposal and exploitation of their natural resources. In actual fact, however, the exploitation of the mineral and plantation resources which form

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[21] Ibid. at 186-187.

[22] Ibid. at 187.

[23] Ibid. at 189.

[24] Ibid. at 190.

the economic backbone of those countries remained, for a long time, largely in foreign hands.[25]

Aside from the problem of foreign dominance over the mineral and plantation economies of the underdeveloped countries of Asia and the Far East, the region is also characterized by a low level of domestic capital formation (i.e. accumulation). According to the above U.N. study, with the only exception of the people's Republic of China which was able to achieve a high rate of domestic capital formation "by exercising vigorous control over consumption and by a vigorous expansion of fixed capital formation in the public sector", most of the underdeveloped countries in the region had a markedly low rate of gross fixed capital formation.[26]

The U.N. survey shows, moreover, that the countries in this region were also adversely affected by their competitive position, as against other regions in the Third World, in sharing the limited world market for their primary export commodities, and that was especially true in the case of crude petroleum and mineral exports like tin.[27] The relative share of the world market for the products of some of the countries in this region was particularly reduced drastically due to the emergence of new competitors in the production of petroleum in other countries outside this region, such as Iraq, Saudi Arabia, Kuwait, etc. In the area of mineral export too, especially tin, the region's share of world market was reduced because of the relative increase in the shares of such African and Latin

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[25] Ibid. at 194-197.

[26] Ibid. at 195.

[27] Ibid. at 196-197.

American countries as Zaire and Bolivia.[28]

Furthermore, the countries of Asia and the Far East, like those of Africa and Latin America, suffer from the economic problems of lack of diversification, deteriorating balance of payment difficulties, and meagre capital formation. The economic problems of this region are further aggravated by a disproportionate rate of population pressure relative to the available resources in the region.

In the face of the above economic state of affairs, the social implications of those peculiar economic problems of the underdeveloped countries[29] of Africa, Latin America and Asia naturally assumed grave dimensions involving mass unemployment, recurrent disaster from famine, rampant illetracy, and a disastrous level of health situation for the overwhelming majority of the inhabitants in those regions.

Those peculiar economic problems of the underdeveloped countries, however, remain unresolved despite the concerted effort of the international community to promote economic development in those countries during the last twenty-five years. In the words of Sean Gervasi, "the so-called development process which has been underway, which has been promoted by the international community in the last 25 years has not touched the lives of the mass of the population".[30] According to Gervasi, the development process of the last 25 years has instead resulted in enormous inequality in income distribution. In Argentina which is one of the richest of the underdeveloped countries, for instance, the poorest 40 per cent of the population receives less than 18 per cent of the total income. In

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[28] Ibid. at 197.

[29] Since the situation in the underdeveloped countries of the Middle East exhibits a more or less similar feature as the other regions, we did not see fit to deal with it here. For an account regarding this area, see Ibid at 197-200.

Nigeria, the richest one-fifth of the population receives approximately 60 per cent of all income. In the Philippines, the poorest three-fifths of the population receives less than 25 per cent of total income. Those facts indicate that "the vast majority of the people in the typical developing country live in what can only be called grinding poverty. Whatever the average level of income per capita may be, if the distribution of income is highly unequal, the mass of the population must be living at far lower levels".[31] The same conclusion was reached by the Secretary General of the U.N. in a recent study which pointed out that:

> "It is recognized in developing countries that while, on the average, per capita national income has been increasing in recent years, the per capita incomes of the poorer sections of the population have in many cases remained far from adequate to sustain a minimum standard of living. Often the annual increase in average income has not had a visible impact on the poor half or one fourth of the population".32

According to Gervasi, one of the root causes for the poor performance of the development effort in the underdeveloped countries of the Third World stemmed from the continuing dependency of these countries on, and their total integration to, the metropolitan economies even after the decolonization process. Most of the developing countries of the world were at one time

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[30] Sean Gervasi, "The impact of private foreign investment on the developing countries", 3 Multinational Corporation and United States foreign policy 339 (1973), in Hearings on the overseas private investment corporation (OPIC) before the sub-committee on multinational corporations of the committee on Foreign Affairs, U.S. senate, 93rd congress, 1st session, (1973). The reference is to a testimony given by Sean Gervasi - consultant to the U.N., during senate Hearings held on July 18-20; 30-31 and August 1, 1973.

[31] Ibid. at 354.

colonies by the countries of Western Europe. The economies of those countries were originally 'developed' in response to the needs of these colonial powers. According to Gervasi, the underdeveloped countries have, therefore, embarked upon a concerted policy for modernization from a very special starting point. By the time the international community began to assist in the development process, these countries were already tied to a defined set of economic relationships with the economies of their former colonial masters. This economic relationship did not substantially change after formal decolonization. In the other words of Gervasi, in many cases "the old relationships simply assumed new forms. The major powers surrendered political power to the people of the colonies. But it was power of the more abstract kind, perhaps even symbolic. The real power resided in the elaborate system of indirect controls which spanned a whole spectrum from education through power over political parties to control over the economy".[33] In short, at the beginning of the development effort i.e. the period subsequent to the end of the second world war, the ex-colonies were very nearly economic satellites of the wealthy industrial powers in most cases and this has rendered a rationalized development process in these underdeveloped countries unworkable.

A somewhat similar observation was made by Gerald Meier in his critical assessment of the performance of the First United Nations Development Decade that lasted between 1961 and 1970.[34]

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[32] U.N. Secretariat, The problem of mass poverty and unemployment in Developing countries: Note by the Secretary General, U.N. Doc. E/5343 at 3 (1973).

[33] S. Gervasi, op. cit. at 367.

[34] Gerald M. Meir, "Progress and problems of the Development Decade", 15(4) Social and Economic Studies 285 (1966).

According to Meier, the first development decade achieved very little in terms of improving the social well-being of the vast majority of the people of the Third World. During the last twenty years economic growth for the countries of Asia, Africa and Latin America taken together, proceeded at a rate of close to four per cent. Although this rate of growth appears relatively high, a number of factors make the progress much less impressive. When one relates the aggregate growth rate of four per cent to population growth which has been between 2 and 2½ per cent in the underdeveloped countries, the rate of real economic growth comes down to 1½ or 2 per cent on the average. According to Meier's findings, real per capita income increased by only 1.3 per cent per annum in Latin America and by only 1.1 per cent in Africa between 1957 and the middle of the First Development Decade. During the first half of the Development Decade there had actually been a decline of per capita income in absolute terms in Argentina, Paraguay, Indonesia, Lebanon and Morocco.[35] Whatever modest growth was achieved has been highly uneven and has in fact perpetuated or accentuated a number of inequalities. Even within those countries that had good overall records, there has been relatively less progress in removing the inequality of income between the employed and the underemployed, between the rural and the urban population. The inequality of income and wealth between the very poor 95 per cent and the very rich 5 per cent of the population has in fact continued to widen.

Another aspect of the poor performance of the development efforts has been in the agricultural sector. Agricultural output has in general increased only a little faster than population. In Latin America, food production per head has been at a stand still for the last decade. South Asia has been increasingly changing from a surplus to a deficit region in food production.

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[35] Ibid at 286.

This weak performance of the agricultural sector has been pervasive and is one of the most difficult of development problems.[36]

The trade sector is equally deteriorating. As far as the countries of Africa, Latin America and Asia are concerned there has generally been a lag in the export sector. Over the last two decades World trade had expanded at a higher rate than ever before but most of this expansion has been in trade between the advanced countries and in exports from and to the under-developed countries, while the export earning of the under-developed countries have risen only slowly. According to Meier, in 1966 for instance, about half of all world trade was carried on between the developed countries themselves, and over the past decade the value of exports from the developed countries rose about twice as fast as those from the underdeveloped countries. The share of the developing countries in world trade declined steadily from almost one-third in 1960 to only one-fifth around the mid 1960's.[37] From the early fifties to the mid-sixties for instance, export from developed to underdeveloped areas rose by $6.3 billion while, in the reverse direction, the exports from underdeveloped countries increased by only $2 billion. The problem for the underdeveloped countries has not only been one of a quantitative lag in the volume of trade, but also one that results from a highly unstable and "changing terms of trade". In a recent finding, UNCTAD estimated that in the early seventies the average annual loss from adverse changes in the terms of trade alone amounted to approximately 40 per cent of the total aid to the developing countries.[38] The

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[36] Ibid. at 287.

[37] Ibid.

[38] Sean Gervasi, op. cit. at 369.

net result of these tendencies has been that the typical underdeveloped country continues to suffer from serious deficits in its trade account.

Meier notes that the growth pattern in the underdeveloped countries has also a general deforming effect on the geographic distribution of the development process. The new centres of growth within the developing countries have tended to be geographically concentrated and this has resulted in growing regional inequalities within many underdeveloped countries. Thus, the problem of "enclaves" has remained an acute economic problem in these Third World countries.[39]

And lastly, Meier characterizes the general development process as one in which there has been a heavy reliance on foreign borrowing, foreign economic assistance and the dominance of foreign capital in the underdeveloped countries.

The foregoing peculiar economic problems of the countries of Africa, Asia and Latin America have generally precipitated certain definite tendencies on the part of the governments of these countries. With the aim of mitigating some of these peculiar problems of underdevelopment and in order to ensure a rationalized and balanced development process the governments of these countries have been forced in recent years, to formulate on the one hand, comprehensive national development plans within which the public sector was intended to play a dominant role and a tighter government control over the key sectors of the economy and especially over the exploitation of natural resources, on the other. In this new drive to strengthen the public sector and to assert sovereignty over natural resources, resort to nationalization has become an integral part of the development policies of the government of underdeveloped countries.

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[39]Gerald Meir, op. cit. at 287.

B. Specific Economic Factors Pertaining to the Status of Sovereignty over Natural Resources in the Underdeveloped Countries

In this section we will examine the extent of foreign investment and the pattern of international flow of capital on the one hand, and the economic adverse effects arising from the operations of multi-national corporations in the underdeveloped countries, on the other.

The extent of foreign investment in, and the pattern of the international flow of capital to, the underdeveloped countries have an important bearing on the status of the sovereignty of those countries over their natural resources in so far as they determine the degree to which an underdeveloped country has actual control over its resources, and the extent to which it benefits from the exploitation of its resources. The operations of multi-national corporations equally bear on "sovereignty" in so far as they involve competing corporate and national interests in the appropriations of the benefits accruing from resource exploitation.

Before we examine each of those peculiar economic features pertaining to the status of sovereignty over natural resources, it may be useful to give a short explanation of what is meant by permanent sovereignty over natural resources and its relations to nationalization.

According to a recent exposition by the U.N. Secretariat,[40] permanent sovereignty over natural resources is one among the many attributes of economic independence. "Sovereignty" in this context, is understood, as "the right of each state to dispose fully of its natural resources through the organization of such economic structures as it sees fit, including the right

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[40] U.N. Secretariat, Permanent Sovereignty over Natural Resources, U.N. Doc. E/5425, at 13 (1973).

to determine the scope and character of direct foreign investment and its modalities".[41] The question of sovereignty and its exercise become problematic from the point of view of international law because they arise in the context of an "internationalized" production and distribution process. In exercising the right of sovereignty, countries may opt to invite external agents to develop and exploit their natural resources. They may choose to determine the precise scope and character of direct foreign investment and its modalities and to obtain an equitable share of the benefits. The exercise of sovereignty could still assume another form. The countries exercising sovereignty might choose to retain full control over the utilization of these resources and such control could be effected by taking full ownership of both the natural resources themselves and the means of production and distribution attached to those resources. Thus, it is inherent in the right of the exercise of sovereignty over natural resources that a state may "undertake nationalization measures if and when these are considered to be necessary and in the best national interest".[42] The concern of international law in this respect is one of giving legal recognition to permanent sovereignty over natural resources and that of ensuring compliance with, and respect for, the exercise of that right particularly by those states whose citizens are adversely affected by such measures.

Thus, by focusing on the specific features of the peculiar economic problems of underdeveloped countries, our purpose is to argue that resort to nationalization should be seen as a natural response to resolve the problems arising from the dominance of foreign capital and the economic adverse

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[41] Ibid.

[42] Ibid.

effects of the operations of multi-national corporations.

1. Extent of Foreign Investment and Data relating to the International Flow of Foreign Capital

According to a study made by the U.N. secretariat in 1968, the underdeveloped countries of Africa, South and Central America, the Middle East, Asia and the Far East accounted for about one-third of the total book value of foreign direct investment in the world.[43] Half of the total foreign direct investment in underdeveloped countries was in the development of natural resources, a little less than one third in manufacturing and the rest in trade, public utilities, transport, banking, tourism and other services. In the Middle East, which accounts for about 9.4 percent of the total foreign direct investment in underdeveloped countries, petroleum accounts for approximately 90 percent of the total stock of foreign investment.[44] In South America, which accounts for 36 percent of the total direct foreign investment in the underdeveloped countries, 39 percent of foreign investment is in manufacturing, 28 percent in petroleum and 10 percent in public utilities. In Africa, which represents 20 percent of the total foreign direct investment going to underdeveloped countries, 39 percent is in petroleum, 20 percent in mining and smelting and 19 percent in manufacturing. In Asia, which accounts for 16 percent of the total direct

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[43] U.N. Secretariat, Department of Economic and Social Affairs, Multinational Corporations in World Development, U.N. Doc. ST/ECA/190, at 18 (1973). It should be pointed out that the amount of foreign capital in underdeveloped countries has changed since that study was issued.

[44] Ibid. The distribution of stock of foreign direct investment in underdeveloped countries is based on rough estimates made by the organization for Economic Co-operation and Development (OECD), see OECD, Stock of Private Direct Investments by DAC countries in Developing countries, end 1967 (Paris, 1972).

investment in underdeveloped countries, manufacturing has attracted 30 percent, petroleum 22 percent and agriculture 18 percent of the total foreign investment stock within the region. In Central America, which represents 19 percent of the total direct foreign investment in underdeveloped countries, 31 percent goes in manufacturing, 16 percent in petroleum and 13 percent in trade.[45]

Most of the stock of direct foreign investment is concentrated in a few underdeveloped countries. Only a limited number of underdeveloped countries have a stock of direct foreign investment of more than $1 billion. Thus, Argentina, Brazil, India, Mexico, Nigeria, Venezuela and certain Caribbean islands (Leeward Islands, Windward Islands, Bahamas, Barbados and Bermuda) account for 43 percent of the total stock of investment in developing countries. According to estimates of the OECD for 1967, the stock of direct foreign investment in another group of 13 undeveloped countries (Algeria, Libya, Jamaica, Panama, Trinidad and Tobago, Chile, Columbia, Peru, Iran, Kuwait, Saudi Arabia, Malaysia and the Philippines) amounted between $500 million and $1 billion accounting for about 30 percent of the total stock of direct foreign investment of underdeveloped countries.[46] The pattern of concentration in the distribution of stock of direct foreign investment is closely related to the sector in which foreign investment is predominant. In Africa, Central and South America and in Middle East countries such as Algeria, Libya, Nigeria, Zambia, Jamaica, Netherlands Antilles, Trinidad and Tobago, Peru and Venezuela, Iran, Kuwait and Saudi Arabia, foreign direct investment is predominant in the extractive sector. In all those countries, the stock of investment in either petroleum or

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[45] Ibid. at 18-19.

[46] Ibid.

mining exceeds $200 million. In several other underdeveloped countries manufacturing is the predominant sector, more than $200 million being invested in manufacturing in Argentina, Brazil, India, Mexico and the Philippines. In India and Malaysia investment in agriculture exceeds $200 million.[47]

The direct foreign investment in the underdeveloped countries is largely owned by the United States, Britain, France, Federal Republic of Germany, Japan, the Netherlands, Canada and Belgium. The United States' interests represent over half of the total stock of foreign direct investment in the Third World.[48] The extent of U.S. interest varies from region to region. In regions such as Central and South America, for instance, U.S. interests account for almost two-thirds of the total stock of foreign direct investment in the region. The rest of the stock in Central and South America is accounted by British interests (9%), that of Canada (7%) and that of the Netherlands (5%). In Africa, on the other hand, United States interests account only for one-fourth of the total stock while Britain predominates with 30 percent and France coming next with 26 percent. Belgium, the Netherlands, and Italy account for 7, 5 and 4 percent respectively. In the middle East the United States accounts for 57 percent, Britain for 27 percent and the Netherlands and France for approximately 5.5 percent each. In Asia, Britain has the largest share of 41 percent,

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[47] Ibid. at 19.

[48] For an elaborate discussion on the extent of U.S. interest in direct foreign investment, see, Peter P. Gabriel, "Adapting the United States Investment Guarantee Programme to the Realities of the Third World", 3 Multinational Corporations and United States Foreign Policy at 86 (1973), Testimony during Hearings on the overseas private investment corporation (OPIC) before the sub-committee on multinational corporations of the Foreign Relations Committee, U.S. Senate, 93rd Congress, first session, July 18, 1973.

while the United States interests account for 36 percent, France 7 percent and the Netherlands 5 percent. It may be interesting to note, in passing, that the voting behaviour of the foregoing grouping of west European and North American states in the various organs of the U.N. on issues relating to permanent sovereignty over natural resources very much correlates with the economic stake they have in the underdeveloped countries.

For a better understanding of the extent of foreign capital investment in that sector where there has been a relatively pronounced influx of direct foreign investment (i.e. the extractive sector) we shall examine in some detail, the general distribution of concession agreements, in the petroleum and mineral extraction industries in Africa, Latin America, the Middle East, Asia and the Far East.

Concession Agreements for the Development of Natural Resources in Underdeveloped Countries[49]

According to a U.N. study completed in 1962, foreign companies held numerous concessions in various underdeveloped countries for the exploitation of mineral and petroleum resources.[50]

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[49] The reason we examine concession agreements going back to the 1950's is partly because some of those concessions remained in effect in the sixties and early seventies until they were rescinded by nationalization acts, and also because some of the earlier U.N. resolutions with which we are concerned in this paper were direct responses to the state of foreign capital involvement in the form of concessions in operation in the fifties. The following presentation regarding concession agreements is exclusively based on the information contained in, U.N. Doc. A/AC. 97/5/Rev. 2 (1962) op. cit.

Mineral Resources other than Petroleum

One of the most significant concessions in Africa in the 1950's was the concession relating to the exploitation of manganese ore deposits in the Republic of Gabon.[51] The concessionaire to this venture was the Compagnie Minière de l'Orgoué (COMILOG) - a company incorporated in the Republic of Gabon and owned by the Compagnie des Minerais de Fer Magnétique de Moktael - Hadid (a French Company having a share of 14 percent), the Société Auxilaire de Manganèse de Franceville (a French Company having a share of 15%), the Bureau Minier (a French Government Minerals Development agency having 22 percent) and the United States Steel Corporation and its subsidiary (owning 9 percent).

In Latin America there were several concessions held by foreign capital during the 1950's. In Chile[52] where the exploitation of mineral resources was open to foreign enterprise, foreign capital played a significant role in mineral exploitation. About 95 percent of the country's output of copper was mined by three U.S. controlled enterprises. About half of the output of copper came from the Chuqui-Camata deposits exploited by the Chile Exploration Company - a subsidiary of Anaconda Copper Company. About one-third of the output came from the

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[50] For a detailed examination of particular concession agreements in different regions in the underdeveloped countries see, Henry Cattan, The evolution of oil concessions in the Middle East and North Africa (1967) Muhamad A. Mughraby, permanent sovereignty over oil resources: A study of Middle East oil concessions and legal change (1966); Benjamin Shwadran, The Middle East, oil and the great powers (1973); Theodore H. Moran, "The evolution of concession agreements in underdeveloped countries and the U.S. national interest" 3 Multinational Corporations and United States foreign policy op. cit. at 290 (1973).

[51] U.N. Doc. A/AC. 97/5/Rev. 2, supra.

[52] Ibid.

operation of the Braden Copper Company - a subsidiary of Kennecott Copper Corporation. The other principal producer was the Andes Copper Mining Company - a subsidiary of Anaconda Copper Company. During the same period, 90 percent of Chile's output of nitrates was produced by foreign enterprises. The United States-Controlled Anglo-Lautaro Nitrate Company accounted for 60 percent of the production, while 30 percent was accounted for by British controlled enterprises and the remaining 10 percent by Chilean and small foreign enterprises. Concession rights for the exploitation of high grade iron ore deposits were held by a subsidiary of the U.S.-owned Bethlehem Steel Corporation.

In Columbia[53] foreign direct investments concentrated in the mining of gold, silver, platinum and emeralds. British concessionaires dominated in the production of gold, silver and platinum. About 75 percent of the output of gold was operated by British, Canadian and United States owned foreign enterprises.

In Ecuador[54] the major foreign investor in mining, during the 1950's, was a United States controlled company exploiting sulphur deposits.

In Peru,[55] foreign capital primarily from the United States was heavily involved in the exploitation of mineral resources. According to a U.N. study, out of a total of 29,000 mining workers in Peru by the end of the 1950's, about two-thirds were employed by foreign owned enterprises. The largest mining concern in Peru was the Cerro de Pasco Corporation (a United States controlled enterprise) which accounted for about

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[53] Ibid.

[54] Ibid.

[55] Ibid.

half of the copper and zinc ores, about one-fourth of the lead and one-third of the silver outputs in Peru. A copper mining subsidiary of the American Smelting and Refining Company and another United States-owned enterprise were also engaged in the production of silver and lead around the northern coast of Peru (at Chilite) and in Southern Peru around Teguapala. Moreover, the Utah Construction Company (a United States enterprise) was engaged in the exploitation of iron ore deposits around Marcona in Peru. In addition another foreign corporation accounted for the entire output of Peruvian Vanadium which then represented about a quarter of the world production of vanadium.

In Venezuela[56] major investments in iron ore mining were made by two large United States enterprises - the Bethlehem Steel Company (at Elpao) and the United States Steel Corporation (at Cerro Bolivar).

In Jamaica,[57] the production of bauxite was controlled by Kaiser Bauxite Company, Reynolds Jamaica Mines Ltd. and Alumina Jamaica Ltd. all of which were subsidiaries of American and Canadian Companies. Moreover, the Aluminum Company of America and Harvey Aluminum of America engaged in the exploitation of bauxite resources in Jamaica. Gypsum Mining was carried out by Jamaica Gypsum Ltd., a subsidiary of the United States Gypsum Company.

In the Fiji Islands,[58] in the Pacific Ocean, mineral resource exploitation was controlled by foreign enterprises. The largest companies active in the Fiji Islands were the Emperor Gold Mining Ltd. (a wholly-owned subsidiary of an

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[56] Ibid.

[57] Ibid.

[58] Ibid.

Australian Company) which operated a large gold mine and Aluminum Laboratories Ltd. (a Canadian company) exploiting bauxite resources. The other principal foreign enterprises operating in the Fiji were Consolidated Manganese and Mining Co. Ltd. (wholly owned by Metal Traders Inc. of New York) which was the main manganese ore producer and Banne Brothers Ltd. (a Japanese firm) engaged in mining copper, manganese and iron ore deposits.

Petroleum Resources

Middle East:

One of the most significant foreign capital concentrations in the production of petroleum in the Middle East in the 50's was in Iran.[59] The Iranian Oil Industry was governed by a number of agreements between the Government of Iran, on the one hand, and various foreign-private companies, on the other. The Foreign Oil Companies which signed the Consortium Agreement of 20 March 1954 were Gulf Oil Corporation, Socony Vacuum Oil Company Inc. (later called Socony Mobil Oil Company Inc.) Standard Oil Company (New Jersey), Standard Oil Company of California, the Texas Company, Anglo-Iranian Oil Company Ltd. (later called the British Petroleum Company Ltd.), N.V. de Bataafsche Petroleum Maatschappij and the Compagnie Française de Petroles - a consortium representing American, British, French and Dutch interests.[60]

The other important foreign involvement in the petroleum production in Iran, outside the area covered by the Consortium

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[59] Ibid.

[60] For a detailed discussion of the Iranian Consortium Agreement of 20 March 1954, see Abolbashar Farman Farma, "The oil Agreement between Iran and the International Oil Consortium: The law controlling", 34 Texas Law Review 259 (1955).

Agreement was based on the agreements concluded, subsequent to and in accordance with the Iranian Petroleum Act of 1957, with Agip Mineraria (Azienda Generale Italiana petroli) and the Pan American Petroleum Corporation and Sapphire Petroleum Ltd.

The Iranian-Agip Mineraria Agreement related to operations in the continental shelf in the northern part of the Persian Gulf, the Eastern slopes of the Central Zagros Mountains and along the Gulf of Oman. It provided for the creation of the Sociéte Irano-Italianne des petroles (SIRIP) - a joint stock company with equal capital subscription from AGIP and the National Iranian Oil Company (NIOC) on behalf of Iran which will undertake operations for the exploration and production of crude oil and other natural hydrocarbons and the sale of by-products.

The Iranian Pan-American Agreement provided for a "joint-structure" relationship between the parties (i.e. without the creation of a separate juridical entity) in which the exploration, exploitation, transport and sale of petroleum was to be undertaken by a non-profit joint stock company - the Iranian Pan American Oil Company (IPAC) - to be created to act as an agent of the joint structure. Ownership in the petroleum produced was to be vested equally in both parties to the "joint structure".

The Iranian-Sapphire Petroleum Agreement also made provision for a "joint structure" relationship and the operations were to be conducted through the Agency of a non-profit-making joint stock company - the Iran Canada Oil Company (IRCAN) - to be established for that purpose.

The other significant foreign capital concentration in the Middle East in the fifties was in Iraq.[61] Prior to 1952,

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[61] U.N. Doc. A/AC 97/5/Rev.2, supra.

oil exploration in Iraq was mainly conducted by three major companies - The Iraq Petroleum Co. Ltd. (originally known as the Turkish Petroleum Company Ltd.) operating under an Agreement of 14 March 1925; the Mosul Petroleum Company Ltd. operating under an Agreement of 20 April 1932 between the Government of Iraq and the British Oil Development Co. Ltd.; and the Basrah Petroleum Co. Ltd. operating under an Agreement of 29 July 1938.

In 1952, in a new set of Agreements between the government of Iraq and the three companies, the earlier profit sharing arrangements were revised giving the government of Iraq an equal share.

Again, the other important foreign concession concentration in the Middle East was in Saudi Arabia.[62] The Saudi Arabian Petroleum operation was mainly covered by the Arabian American Oil Company (Aramco) concession. The principal Agreement for this concession dates back to 29 May 1933 in which the government of Saudi Arabia and the Standard Oil Company of California (SOCAL) agreed by which SOCAL was given exclusive rights over the area consisting of a greater portion of Eastern Saudi Arabia extending to the islands and territorial waters including the westerly edge of the Dahana and the area extending to the northern and southern boundaries of Saudi Arabia. For the purpose of the operation, SOCAL created the California - Arabian Standard Oil Company (CASOC). In 1939, the area of operation was further extended. In 1944, CASOC changed its name to Arabian American Oil Company (Aramco). Again in 1948 Aramco's area of operation was further extended. As of 1955, holdings in Aramco consisted of 30 percent Standard Oil of California (SOCAL), 30 percent Texas Company, 30 percent Standard Oil Company (new Jersey) and 10 percent Socony Mobil Oil Company.

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[62] Ibid.

Another case of foreign concession concentration in petroleum exploitation in this region has been in Turkey.[63] In Turkey, in the early 50's, about twenty foreign enterprises held concessions to exploit petroleum products. Side by side with the granting of concessions, the government of Turkey established, by a law of 1954, the Turkish National Petroleum Company (TPAO) - a mixed company with 49 percent private participation. Since 1954 Turkey's policy has been to enable the state to retain a certain measure of control and participation in the exploitation of petroleum products while at the same time allowing considerable room for foreign concessionaires.

Africa[64]

In the 50's, foreign concessions in petroleum exploitation concentrated mostly in North Africa, especially Algeria.[65] In Algeria, as early as 1959 foreign concerns held concessions to conduct petroleum exploitation ventures in the Erg Oriental region of Algeria. The concessionaires were mainly the Compagnie ESSO Saharienne (S.A.F. - an associate of Esso Sahara Inc. of Delware), the Compagnie Francaise des Pétroles (Algerié) and the Société de participations pêtrolières (petropar). Under another concession issued in 1959, the Phillips Petroleum Company (U.S.A.), the Compagnes des Pétroles France - Afrique (COPEFA) and the Ominium de recherche et exploitation pétrolière (Omnirex) conducted exploration

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[63] Ibid.

[64] For a discussion of recent facts regarding direct foreign investment see, Mohammed Haslim Awad, "Improving the multi-national image", African Development, April 1974, at 70-71; see also, Robert A. Pastor and Antoine W. Van Agtmael, "Multinationals and Africa", African Development, December 1974, at 15.

[65] U.N. Doc. A/AC. 97/5/Rev. 2, supra.

operations over the area covering the Hassai Chanmbi region of Algeria. At about the same time, the Phillips Petroleum Company (U.S.A.) and the Société Nationale des pétroles d'Aquitaine held concessions to explore petroleum in the Erg-el-Agreb region of Algeria.

Latin America

In Latin America, the most significant petroleum concessions concentrated in Argentina, Columbia, Peru and Venezuela.

In Argentina,[66] petroleum resources were discovered as far back as the first decade of the twentieth century. It was during this period that Argentina established the Yacimentos Petroliferos Fiscales (YPF) - a government petroleum agency which played an important role in the development of petroleum resources. At the same time, however, especially after the enactment of the Argentina Petroleum Law of 1935 various foreign enterprises held concession rights to explore and exploit petroleum deposits. The low level of operation between 1935 and 1956, the increasing demand for petroleum products for home consumption, the high cost of importing petroleum and the government's need for more revenue, led the Argentina government to allow for a heavy influx of foreign capital for the development of petroleum resources.[67] This drive for foreign capital culminated in the enactment of a new petroleum law in Nov. 1958. Consequently, several concessions were issued in 1958 and 1959 by YPF. The most important of those concluded in 1958 were with C.M. Loeb, Rhoades and Co., Pan American International Oil Company (a subsidiary of Standard Oil Co. of Indiana), Union Oil Co. of California, Esso Sociedad Anomina Petroleum Argentina (a subsidiary of Standard oil of New Jersey)

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[66] Ibid.

[67] Ibid.

and Shell Argentina, Ltd. (a subsidiary of Shell Oil Ltd. and Royal Dutch.)

In Columbia[68] the major petroleum concessions were held by the Royal Dutch Shell Group, the Texas Company and the Socony - Vacuum Oil Company. According to the same U.N. study, out of a total petroleum output of 38.7 million barrels in 1952, the above three accounted for 26.1 million.[69] The share of those enterprises increased in proportion to the increase in total output in subsequent years.

Similarly, in Peru[70] the exploitation of mineral resources largely remained in foreign hands. In 1952, about 70 percent of the total petroleum output in the country was produced by the International Petroleum Company - a subsidiary of Standard Oil Company of New Jersey. During the same period about 28 percent of the country's total petroleum output was produced by a British-owned concern operating in the Labrtos and El Alto regions. The government owned Empressa Petrolera Fiscal and a joint United States - Peruvian private enterprise operating in the Zarritas field near the Ecuadorian border and in the upper Ucayalli River area respectively, produced about 2 percent of the total output. Since the enactment of a petroleum law in March 1952 seventeen companies (seven United States, five Peruvian, two Canadian, one US-Argentina, one Argentine-Peruvian and one US-Peruvian) held concessions to explore and exploit petroleum deposits.

Again in Venezuela,[71] the development of petroleum resources remained under foreign control. In 1950, of the

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[68] Ibid.

[69] Ibid.

[70] Ibid.

[71] Ibid.

total foreign investment in the development of the petroleum industry, 55.5 percent was held by U.S. interests, 29.2 percent by Dutch interests and 13.6 percent by British interests.

Asia and the Far East

In Asia and the Far East the situation was similar to that of Africa, Latin America and the Middle East. Here, the most significant concentration of foreign concessions during the 1950's was in India and Indonesia.

In India,[72] the government initially (i.e. on the eve of its second five year plan in 1956) decided to place the Petroleum Industry in the public sector but later renounced its policy, on the eve of its Third Five Year Plan, in favour of the participation of foreign enterprises in the financing of petroleum development. Through the Indian Oil and Natural Gas Commission (INGC) the government made arrangements to create partnerships with various exploration companies such as the Brumah Oil Company, including the granting of concessions to foreign enterprises.

In Indonesia,[73] few big international companies controlled the development of petroleum resources especially before the country's independence. Immediately following independence in 1949, Indonesia suspended the granting of new concessions until the enactment of a new petroleum legislation. The new petroleum law did not, however, appear until 1960. According to the new petroleum law enacted in 1960, existing concessions were to remain in force for a limited period while the exploitation of oil and gas in new areas would only be undertaken

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[72] Ibid.

[73] Ibid. at 216.

under state control. Three state enterprises were consequently established but the law allowed the state enterprises to appoint, by means of contracts, foreign private corporations to undertake petroleum exploitation activities on behalf of the state.

The pattern, scale and form in which foreign interests excercised control over the economies of underdeveloped countries did not, of course, remain static. While the foregoing account tried to give a general picture regarding the degree of foreign control of resources in the underdeveloped countries in the fifties, it should be noted that in the sixties and seventies the extent of foreign control has not only been reasonably checked, but the forms under which foreign capital operated had also began to show some changes. While the fifties were, for instance, characterized by the "concession form" of foreign capital involvement, in the sixties and seventies, the "joint-venture form" increasingly became the dominant form in which foreign capital still continued to play an active role in "partnership" with various para-satal economic agencies established for that purpose by several underdeveloped countries.[74]

According to an up-dated study[75] made by the U.N. Secretariat in 1970 involving a close survey of the state of natural resource exploitation and control in 26 underdeveloped countries, 16 of which were from Africa, 5 from South and Central America and the Caribbean, 4 from the Middle East and 1 from Asia, it

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[74] For a case study of some of the operational joint-venture arrangements see, Wolfgang G. Friedmann and Jean-Pierre Beguin, Joint International Business Ventures in Developing Countries: Case studies and analysis of recent trends (1971).

[75] U.N. Secretariat, permanent Sovereignty over Natural Resources: Report of the Secretary General, U.N. Doc. A/8058 (1970).

again becomes quite clear that foreign economic involvement was still prevalent regardless of the specific form in which it operated.

The 16 African countries covered by the study included Algeria, Central African Republic, Zaire, Gabon, Ghana, Guinea, Ivory Coast, Liberia, Libya, Madagascar (Malagasy), Mauritania, Congo Brazaville, Sierra Leone, Togo, the United Arab Republic (Egypt) and Zambia.

In Algeria[76] foreign capital, and particularly French capital continued to play a considerable role in the petroleum sector. The Franco-Algerian Agreement of 29 July 1965 provided the overall framework for Franco-Algerian collaboration which was implemented by means of the machinery which created the Association Co-operative pour chercher et exploiter en commun les Hydrocarbures de l'Algerie (ASCOOP). Under the latter scheme, the French government represented by SOPEFAL (a subsidiary of the government-owned company, enterprise des recherches et des activités petrolieres (ERAP), and the Algerian side represented by the National Algerian company for the transportation and marketing of Hydrocarbons (SONATRACH), jointly collaborated in the production and marketing of Algerian's petroleum resources. Another foreign interest represented by the Getly Petroleum Company also collaborated with SONATRACH in a joint-venture scheme. Canadian Shell, Continental Oil, and Union Stockyard likewise collaborated with SONATRACH within the framework of the Algerian Liquid Methane Company (CAMEL). Such French interests represented by the Compagnie Générale de Géophysique, the Compagnie Française de Prospection Sysmique, Geofrance, the Compagnie Française de Pétroles (Algérie) (CFPA), and the Compagnie de Recherche et d'exploitation des petroles du Sahara

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[76] Ibid. at 62-65.

(CREPS) also played considerable role in specific areas of exploration and drilling operations involving Algerian petroleum resources.

In the Central African Republic,[77] the French Commissariat à l'energie atomique concluded the Agreement of July 17, 1968 with the Government of that African country pursuant to which a mining company jointly owned by the Central African Government, the Commissariat à l'energie atomique and another french company, the Compagnie Française des Minerais d'uranium was formed on April 29, 1969 for the purpose of exploiting uranium deposit near Bakouma, 300 miles east of the capital, Bangui. In the company, thus established, that is in the Compagnie des Mines d'uranium de Bakouma (URBA), the French Commissariat held 40 percent interest, another french company held another 40 percent, and the government of Central African Republic held only 20 percent.

In Zaire,[78] which is known for its rich mineral resources (i.e., 75 percent of the world's diamond production, 69 percent of the world's cobalt production, 9 percent of the world's tin production, 8 percent of the world's copper production, 5 percent of the world's manganese production, 3 percent of the world's zinc production, and 2 percent of the world's gold production), foreign capital held considerable interests in the country's mineral wealth. Up until 1967, United Kingdom interests represented by the British Congo Diamond Distributors, enjoyed total monopoly in the production and marketing of Zaire's diamonds. The Union Minère du haut Katanga which was owned largely by such foreign companies as Tangannika Concessions Limited, the Société Générale de Belgique, and

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[77] Ibid at 68.

[78] Ibid. at 70-72.

the Compagnie du Katanga, representing Belgium, French and British interests, held virtual monopoly over the production and marketing of Zaire's copper, cobalt, zinc, gold, platinum, silver as well as copper resources until its concession right was terminated by the Government of Zaire on December 24, 1966. Again, when a new mining company, the Générale Congolaise des Minerais (GECOMIN), was created in 1966, a number of foreign private interests held 40 percent of the equity in the new company. Under a technical co-operation Agreement concluded on February 17, 1967 between GECOMIN and a subsidiary of the Union Miniere, the Belgian firm Société Generale des Minerais (SGM), foreign interests were again re-entrenched in the operation of those activities formerly held by Union Miniere. Under still another mining Agreement concluded in December 1967 between the Zaire government and the Japanese Nippon Mining company, a jointly-owned company the Société pour le Developpement Industriel et Minier du Congo (SODIMICO) was established, in which Nippon's subsidiary, the Congo Development Company, held 85 percent of the equity interests in SODIMICO. In addition, the Société Miniere de Lueshe (SOMILU), owned partly by Union Carbide of the United States, exploited niobium deposits; the Ente Nazionale Idrocarburi, an Italian state-owned company, engaged in the prospecting of uranium deposits; and the French bureau de recherches geologiques et mineres conducted prospecting in the north and eastern parts of Zaire.

In Gabon,[79] (which is the third largest producer of manganese in the world (i.e., 7 percent)), the manganese deposits at Moanda was being exploited since 1962 by the Compagnie Minière de l'Ogoué (COMILOG), whose equity was owned jointly by 4 foreign companies, the United States Steel Overseas Capital Corporation (49 percent), the Bureau de Recherches

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[79] Ibid. at 76-78.

Géologiques et Minieres of France (22 percent), the Société Auxiliare du Manganés de Franceville of France (15 percent) and the Compagnie de Mokta of France (14 percent). Again, in the same African country, the uranium mines at Mounana were exploited by the Compagnie des Mines d'uranium de Franceville (COMUF) which was owned entirely by 7 French companies. The Société des Mines de Fer de Makamba (SOMIFER), whose shares were jointly owned by Bethlehem Steel Corporation of the United States (50 percent); various European steel companies (west German,10 percent; French, 9 percent; Italian,3.5 percent; Belgium 2 percent; and Netherlands 0.5 percent); a number of French financial companies such as COMIFER, Suez, Banque de Paris et des Pays Bas (13 percent), as well as the French Bureau de Recherches Géologiques et Minières (12 percent). Again, in the field of petroleum production, the Société ELF des Petroles d'Afrique Equatoriale (ELF-SPAFE), which was largely owned and controlled by French interests, exploited the petroleum deposits around Ozouri and Pointe Clairette.

In Ghana,[80] (which relies for 18 percent of its exports on gold, diamonds, manganese and bauxite) the largest gold-mining enterprise, the Ashanti Goldfields Corporation Limited, was, since 1969, largely owned (80 percent) by Lonrho Ltd., a London-based company. Ghana's rough diamonds, of which Ghana is the world's second largest producer, was operated since 1922 largely by three United Kingdom companies the largest of which is the Consolidated African Selection Trust (CAST). In the area of bauxite production, the main operator has been the British Aluminium Company Ltd. The Volta Aluminium Company (VALVO) which operated the Tema Aluminium Smelter, that opened in 1967, was owned largely (90 percent) by Kaiser Aluminium of the United States. In the field of oil exploration, six companies owned largely by foreign interests

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[80] Ibid. at 78-80.

began operations since December 1968.

In Guinea,[81] up until 1961 and before the concession was annulled, the exploitation of bauxite deposits on the island of Los was carried out by the Société des Bauxites du Midi, a subsidiary of Aluminium Limited of Canada (ALCAN). In still another region, bauxite deposits were being exploited by the Compagnie Internationale pour la Production de l'Alumine (FRIA) which was owned by 2 French companies, Pechiney Compagnie de Produits Chimique et Electrométallurgiques and the Société d'electrochimie et d'electrométallurgie et des aciéres d'Ugine (Ugine-Kuhlmana). Later, the French company FRIA invited British, Swiss, United States and West German interests to participate and form a joint consortium in which Olin Mathieson Chemical Corporation of United States controlled 48 percent of the interests, the French company, Pechiney Ugine held 25 percent interest, the British Aluminium Company Ltd. held 10 percent, the Swiss Aluminium Industrie Aktiengesellschaft held another 10 percent, and the West German Vereinigte Aluminium Werke held 5 percent. In still another area, in the Boke region, the exploitation of bauxite was carried out since 1963 under a joint venture arrangement between the government and a U.S. company, Harvey Aluminium Inc. of Los Angeles in which the latter controlled 51 percent of the venture. Later, in 1968 Harvey Aluminum invited other foreign companies and formed an international consortium (HALCO) involving Harvey Aluminum (20 percent), ALCAN of Canada (27 percent) ALCOA of the United States (27 percent) Pechiney-Ugine of France (10 percent) Vereinigte Aluminium Werke of West Germany (10 percent) and Montecatini of Italy (6 percent). Australian, Italian and U.S. interests also held considerable interests in the Compagnie du Minerai de fer de Guinée (MIFERGUI) which was engaged in the

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[81] Ibid. at 80-84.

prospecting of iron deposits in the area of the Nimba Mountains in Guinea.

In Ivory Coast,[82] the extraction of Manganese from deposits at Grand-Lahon (180 kms from Abidjan, the capital) was being carried out since 1960 by a French enterprise, the Compagnie de Mokta. The prospecting of iron deposits at Bangolo was also done, since 1968, by a United States firm, Pickands Mather and Co. International.

In Liberia,[83] whose iron production accounted for 70 percent of the country's total export, mainly 4 companies largely owned by foreign interests exploited the iron deposits in different regions of that country. The deposits in the Nimba mountains were, for instance, operated jointly by Bethlehem Steel (25 percent) of the U.S. and the Liberian-American-Swedish Co. (LAMCO) holding 75 percent of the interests. 50 percent of the interests in LAMCO were owned by Liberia Iron Ore Limited, a Canadian holding company under the control of a Swedish syndicate, and the overall management of the operations were under the Grangesburg company of Stockholm.

The iron deposits in the Bong range was exploited by the Bong Company on behalf of the German-Liberian Mining Corporation, 50 percent of whose interests were held by a German venture, the Gewerkschaft Exploration controlled by the Thyssens.

Foreign interests, mainly that of the United States, also played considerable part in the exploitation of iron deposits in the Bomi hills and Mano river regions which were operated respectively by the Liberian Company Ltd. and the National Iron Co. Ltd.

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[82] Ibid. at 107.

[83] Ibid. at 111.

In Libya,[84] a joint venture was created in 1968 between the Government-owned Libyan General Petroleum Corporation (LIPETCO) on the one hand, and two French firms, the Société Nationale des Pétroles d'Aquitaine (SNPA), and the Enterprise de Recherches et d'activités Petrolieres (ERAP), on the other, for the exploration and exploitation of oil with the majority interest held by the french firms.

In Malagasy,[85] the exploitation of chromite deposits were carried out since 1966 by the Compagnie Minière d'Andriamena (COMINA) in which 80 percent of the interests were held by 4 French companies - the Ugine-Kuhlmana (55 percent), Péchiney (10 percent), the Compagnie Financière pour l'outre-mer (10 percent) and the Compagnie de Mokta (5 percent), the government holding only the remaining 20 percent of the interests.

In Mauritania,[86] the exploitation of iron deposits was carried out by the Société Anonyme des Mines de Fer de Mauritanie (MIFERMA) which was owned almost wholly (the government holds only 5 percent) by foreign interests, namely the French Bureau de Recherches Géologique et Minieres (23 percent), a United Kingdom Steel Company (BISC) (19 percent), the Rothchilds and other financial groups (17 percent), an Italian Steel Company (FINSIDER) owning 15 percent, a group of French steel companies such as Usinor, Denain-Anzin etc. owning 14 percent, and a west German Steel Company (Thyssen) owning 5 percent.

Again, in the exploitation of the copper deposits in that same country, foreign interests were equally dominant. The

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[84] Ibid. at 111-113.

[85] Ibid. at 113-114.

[86] Ibid. at 114-115.

Société des Mines de Mauritanie (SOMINO) which carried out the exploitation of copper was owned, to the extent of 75 percent, by foreign interests, namely Charter Consolidated (54 percent), the Paris Mining Group Penarroya (7.5 percent), the French Bureau de Recherches Geologiques et Minières (7 percent), the Banque de Paris et des pays Bas (4.3 percent) and the Compagnie Française pour l'outre-mer (2.2 percent). Similarly, in the joint venture established in 1967 between the Mauritania government and the French firm, Péchiney-Saint Gobain, which created the Société d'exploitation Minière et de Recherches de Mauritanie (SOMIREMA), for the exploitation of rare earth deposits, 80 percent of the holdings in the joint venture were owned by the French industrial complex, Péchiney-Saint Gobain.

In Congo (Brazaville),[87] the exploitation of potassium deposits in the Holle-Saint-Paul area was carried out, since 1965, by the Compagnie des Potasses du Congo (CPC), about 85 percent of whose holdings were owned by 3 French firms - the Bureau de Recherches Geologiques et Minière (36 percent), the Entreprise Minière et Chimique (36 percent), and the ELF - Société des Petroles d'Afrique Equatoriale (about 13 percent).

In Sierra Leone,[88] the marketing and exporting of diamonds was carried out, beginning from 1969 onwards, by the Diamond Corporation West Africa Ltd. (DICOR), which was owned and controlled by foreign interests.

In Togo,[89] the phosphate deposits which make up that country's largest export product, were exploited by the Compagnie Togolaise des Mines du Bénin (COTOMIB), over 80 percent of whose holdings were owned by French (43 percent) and U.S. (37 percent) interests.

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[87] Ibid. at 119.

[88] Ibid. at 125.

[89] Ibid. at 127-130.

In the United Arab Republic (Egypt)[89], foreign firms held considerable interests in the oil industry. Up until 1952, a number of foreign oil companies, mainly Royal Dutch Shell controlled the industry. Between 1957 and 1968, the major petroleum producer in Egypt was the Compagnie Orientale des Pétroles d'Egypte (COPE), which represented a joint venture between the government and the Italian government-owned company, the Ente Nazionale Idrocarburi (ENI). The exploration and exploitation of oil in still another area, the Western Desert, was carried out since 1963 under a joint venture between the Egyptian government and a U.S. firm, the Phillips Petroleum Company, in which the latter owned 50 percent of the holdings. The exploration and exploitation of oil in the Delta and the Khalique El Zeit regions were carried out since 1963 by the International Egyptian Oil Company (IEOC), whose holdings were jointly owned and controlled by the Italian company, Ente Nazionale Idrocarburi (ENI) and the Compagnie Orientale des Pétroles d'Egypte (COPE). In another region in the Western Desert, the Pan-American Oil Company held exclusive exploration and exploitation rights since 1964. In the Gulf of Suez, a United States Corporation, the Pan-American VAR Oil Company, held 50 percent of the interests in a joint venture arrangement made with the Egyptian government in 1964 for the purpose of exploring and exploiting petroleum resources. Similarly, the Pan-American Oil Company (AMCCO), held an exclusive interest, since 1969, in the exploration and exploitation of oil in the Nile Valley.

In Zambia[90] (which is the world's third largest copper producer), the copper industry was operated, up until August 1969, exclusively by foreign firms, mainly the Anglo-American Corporation (owned by British and South African interests) and

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[89] Ibid. at 127-130.

[90] Ibid. at 131-132.

the Roan Selection Trust (owned largely by the American Metal Climax and other U.S. interests). In 1970, a joint venture arrangement was made in which the Zambian para-satal agency, the Industrial Development Corporation (INDECO) held 51 percent of the interests in two new companies created for the exploitation of copper, and in those two companies, 49 percent of the holdings were owned by foreign interests, mainly British, South African and that of the United States. Again in that same African country, the Italian government-owned company, the Ente Nazionale Idrocarburi (ENI) held 49 percent of the holdings in an oil refinery set up pursuant to a joint venture arrangement concluded with the Zambian government in 1969.

The state of foreign interest and control in the 5 countries of South and Central America as well as the Caribbean, i.e. in Argentina, Chile, Cuba, Jamaica and Mexico, as surveyed by the same U.N. study, again reveals a more-or-less similar pattern.

In Argentina,[91] foreign firms held a considerable interest in the production of petroleum under labour and service contracts concluded between the foreign companies and the Argentinian Para-Satal Agency, the Yacimientos Petroliferos Fiscales (YPF). In a number of exploration and production contracts concluded particularly since 1967, foreign, especially U.S. oil companies, held a significant stake in the Argentinian oil industry.

In Chile,[92] where the country's major foreign exchange earner is copper, foreign firms held virtual control over the exploitation of the copper industry up until 1964, when a

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[91] Ibid. at 65-68.

[92] Ibid. at 68-69; A full account regarding the role of foreign interest in the Chilean industry is given elsewhere in this paper.

process of "Chileanization" which took place between 1964 and 1969 reduced their share of the interest in the copper industry from near total (in most cases up to 80 percent) to 49 percent participation. The major foreign firms which held substantial interests in the Chilean copper industry were the U.S. copper companies, Kennecott, Anconda, and Cerro, as well as the French firm, Le Nickel.[93] Up until 1967, for instance, the U.S. firm, Kennecott owned 100 percent of the interests in the El Teniente mine and it was only in that year that its interests were reduced from 100 percent to 49 percent. Again, up until 1969, the U.S. firm Anaconda, owned 100 percent of the interests in the Chuquicamata and El Salvador mines, and it was only in that year that its holdings were reduced to 49 percent participation. Up until 1971, the U.S. firm Anaconda owned 75 percent of the holdings in the Exotica mines and it was only after the 1971 Chilean nationalization measures that it lost all its holdings in the exotic mines to the Chilean government. Again, up until 1971, the U.S. firm, Cerro, owned 70 percent of the holdings in the Rio Blanco mines after which time its holdings were totally nationalized. From 1967 to 1971, the U.S. copper company, Kennecott held 49 percent of the holdings in the El Teniente mines after which time its holdings were nationalized. Likewise, the French firm Le Nickel owned 86 percent of the holdings in the Cia Disputanda de Los Condes mines up until 1971, after which time its share was reduced to 42 percent.

In Cuba,[94] up until the July 1960 nationalization measure, a number of foreign companies, especially U.S. and British ones, controlled the Cuban oil refining industry. Prominent among those were such subsidiaries of U.S. firms as the Texaco

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[93] For a breakdown of the interests see U.N. Doc. A/9716, Annex (1974) op. cit. at 19.

[94] U.N. Doc. A/8058 (1970), op. cit. at 72-75.

Company (West Indies) Ltd., the Esso Standard Oil Company and the Sinclair Cuban Oil Company, as well as the British controlled Shell de Cuba S.A.

In Jamaica,[95] which is the second largest bauxite exporter in the world (next to Australia), the exploitation of the bauxite and alumina industry was controlled mainly by such U.S., British and Canadian firms as Alcan Aluminium Limited (Alcan), the Aluminium Company of America (Alcoa), the Kaiser Aluminium and Chemical Corporation, the Revere Copper and Brass Company, the Reynolds Metals Company and the Alumina Partners, representing a consortium of the Kaiser, Reynolds and Anaconda companies.

In Mexico,[96] although the degree of (direct) foreign interests in the Mexican oil industry was reduced to a minimum subsequent to the nationalization of the industry back in 1938, and the entrusting of the industry under the direct control of the Petroleos Mexicanos (PEMEX), a para-satal government agency, foreign firms still held considerable interests in drilling (i.e., risk contracts - contractos riesgo) and marketing contracts from the 1949-50 period up until 1967. It should be noted, however, that the virtual direct control excercised by the Mexican parasatal agency, PEMEX, over the oil industry and the relatively marginal role of foreign interests in the form of direct or portfolio investment in the Mexican industry is misleading in that it conceals the credit-form of foreign involvement in the Mexican oil industry which is mediated through PEMEX. In fact, to the same degree that direct or portfolio foreign investment decreased in the Mexican oil industry, the credit-form of foreign economic involvement

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[95] Ibid. at 107-108; see also U.N. Doc. A/9716 (1974), op. cit. at 8-10.

[96] U.N. Doc. A/8058 (1970), op. cit. at 116-118.

had increased since 1950. According to the U.N. survey of 1970, PEMEX's operations were financed by loans from such United States Banks as the Export-Import Bank of Washington D.C., the Chemical Corn Exchange Bank, the Chase Manhattan Bank, the Hanover Bank, the Bank of the South West (U.S.) and the First National Bank of Boston.

A more-or-less similar picture also emerges from the same U.N. survey regarding the state of foreign economic involvement in the exploitation of natural resources in the 4 Middle Eastern countries, i.e., Iran, Iraq, Kuwait and Saudi Arabia, closely studied.

In Iran,[97] since the turn of the century and up until the 1951 oil nationalization measure, the petroleum industry was controlled almost totally by foreign interests, initially by William Knox D'Arcy, a British national, and later by the Burmah Oil Company (a British firm) and still later, by the British government itself which held 56 percent of the holdings in the Anglo-Persian Oil Company (later named the Anglo-Iranian Oil Company Ltd.) which exploited the Iranian petroleum industry up until 1951.

After the aborted nationalization of the oil industry, and following the overthrow of the Mossadiq government, sixteen (foreign) international oil companies forming a consortium continued to exploit, refine and market Iran's oil under the agreement of October 20, 1954 concluded with the National Iranian Oil Company (NIOC), by forming two operating companies for the purpose. The 16 foreign oil companies involved in the consortium were; British Petroleum Company Ltd. (40 percent), the Royal Dutch Shell Group (14 percent), the Compagnie Française des Pétroles (6 percent), Standard Oil

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[97] Ibid. at 92-100.

Company of New Jersey (7 percent), Standard Oil Company of California (7 percent), Texaco Incorporated (7 percent), Gulf Oil Company (7 percent), Socony Mobil Oil Company (7 percent), the Iricon Agency Ltd. consisting of 8 U.S. oil companies (5 percent).

Again, in the exploitation of oil in other regions of Iran, involving at least 7 separate joint venture arrangements, and 3 different service contracts concluded between 1957 and 1969, foreign interests held substantial interests.

In the joint venture between the Iranian para-satal agency NIOC and Agip Mineria concluded in August 1957, for instance, the latter Italian company held 50 percent of the interests in the Société Irano-Italienne des Pétroles (SIRIP) which represented the joint venture.

Again, in the joint venture formed in June 1958 between the Iranian NIOC and the Pan-American International Oil Company, (a subsidiary of standard oil company of Indiana), the U.S. oil company secured 50 percent of the holdings in the Iranian-Pan-American Oil Company (IPAC) representing the joint venture.

In another joint venture formed in February 1965 between the Iranian NIOC and 4 other foreign controlled companies, namely the Atlantic Exploitation Company, the Murphy Middle East Oil, the Iranian Sun Oil and the Union Oil of Iran, 50 percent of the total holding of the LAPCO joint venture was held by foreign interests, with each of those four companies controlling 12.5 percent of the total holding.

In a joint venture formed again in 1965 between the Iranian NIOC and Shell, the latter held 50 percent of the holdings in the joint venture (DOPCO).

In the joint venture formed in the same year, between NIOC and SOFIRAN, a French company jointly owned by the

Enterprise de Recherches et d'activités Petrolières (owning 80 percent of SOFIRAN) and the Société Nationale des Pétroles d'Aquitaine (ERAP), the foreign-owned SOFIRAN held 50 percent of the holding in the joint venture (PPC).

Again, in another joint venture concluded during the same year (1965), between NIOC and 7 foreign controlled companies, namely, Cities Service Co. Inc., Kerr-McGee Corp., Atlantic Richfield Company, Skelly Company, Sunray DX Oil, Superior Oil Company and Tidewater Oil Company, the foreign owned companies held 50 percent of the joint venture (IROPCO).

In two other joint ventures concluded in 1965 between NIOC and 3 foreign companies to form IMINOCO, and between NIOC and 7 other foreign companies to form PEGUPCO, the foreign partners held 50 percent of the holdings in the joint ventures.

In addition to those substantial interests in the above joint ventures, 3 foreign companies, the Entreprises de Recherches et d'activites Pétroleures (ERAP), AREPI (a consortium of 5 European oil companies, i.e. French, Italian, Spanish, Belgian and Austrian), and the Continental Oil Company, held significant interests by way of service contracts in the exploration and exploitation of Iranian petroleum resources since 1967.

In Iraq,[98] which relies almost wholly on the export of its oil resources, the exploration of the oil industry has been almost exclusively in foreign hands in the period between 1925 and 1938, in which 4 foreign, mainly British controlled oil companies, namely the Iraq Petroleum Company (IPC), the British Oil Development syndicate (BOD), the Mosul Petroleum Company and the Basrah Petroleum Company Ltd. (BPC) held almost exclusive operational rights over Iraq's entire oil resources.

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[98] Ibid. at 101-106.

By 1938, the Iraqi Petroleum Company, which was the principal exploiter of Iraq's oil and all its other affiliates were controlled by 6 foreign companies, namely, British Petroleum (23 percent), Shell (23 percent), the Compagnie Française de Pétroles (23 percent), Standard Oil of New Jersey (12 percent), Socony (12 percent) and Gulbenkian (5 percent). Although Iraq's share of the profits from the operation of the IPC constantly increased, the foreign holding in the IPC remained more-or-less the same up until 1964. After the formation of the Iraqi National Oil Company (INOC) in 1964, and the annuling of the old concession under which the foreign controlled Iraqi Petroleum Company operated, foreign interests still continued to play a considerable part in handling service and marking contracts, the most important of which involved the French Entreprise de Recherches et d'Activités Pétroleurs (ERAP) which began its operations in 1968.

In Kuwait,[99] whose oil recources constitute the life-blood of the country's economy, the exploitation of oil was almost totally controlled, in the period between 1934 and 1960, by foreign companies, mainly: the Kuwait Oil Company (KOC) which was owned jointly(on a 50-50 percent basis) by Gulf Oil of the United States and British Petroleum; the American Independent Oil Company (AMINOIL) which was owned by eleven United States oil companies; and Arabian Oil Company whose holdings were controlled by Japanese interests. Although after the creation, in 1960, of the Kuwati para-satal agency, the Kuwait National Petroleum Company, the government began to play a direct role gradually in the exploitation of oil industry, foreign firms still continued to hold a dominant control in the Kuwaiti oil industry.

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[99] Ibid. at 108-110.

In a joint venture created in 1961 between the Kuwaiti government and Shell Petroleum Development Limited for the purpose of exploiting off-shore oil, for instance, 80 percent of the holdings were controlled by the foreign firm.

Again, under a 1968 concession agreement, Hispanoil, a firm owned and controlled by Spanish interests, held substantial interests in the exploration and exploitation of oil resources in those areas of Kuwait formerly held by the Kuwait Oil Company (KOC) and later relinquished in 1963.

In Saudi Arabia,[100] which relies almost exclusively on its oil resources for its export earnings, the oil industry remained virtually under the control of foreign oil companies since 1933 and up until the late 60's.

Initially, under a concession agreement of May 29, 1933, the Standard Oil Company of California (SOCAL) held almost exclusive rights over the exploration and exploitation of Saudi oil resources, for which purpose it established the California-Saudi Arabia Standard Oil Company (CASOC). In 1936, another U.S. oil firm, the Texaco company (TEXACO) got 50 percent of the holdings in CASOC. In 1944, CASOC changed its name and became the Arabian-American Oil Company (ARAMCO), and three years later, in 1947 2 more U.S. companies Standard Oil Company of New Jersey and Socony Mobil Oil Company acquired 30 percent and 10 percent of the holdings in ARAMCO respectively, thus, leaving 30 percent of holdings each for SOCAL and TEXACO.

In another area, consisting of the Saudi-Arabian half of the on-shore neutral zone between Kuwait and Saudi Arabia, another foreign firm, the Pacific Western Oil Corporation (which later became Getty Oil Company) held concessions under an agree-

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[100] Ibid. at 119-125.

ment of February 20, 1949.

Again, under a concession Agreement concluded on 10 December 1957, another foreign firm, the Japanese Trading Company Ltd. secured exclusive interests in the exploration and exploitation of oil in the off-shore area of the Saudi-Kuwait Neutral Zone.

In 1958, the Arabian Oil Company, owned and controlled largely by Japanese concerns also held concession interests in still another region of Saudi Arabia.

Even after the Saudi para-satal agency, the General Petroleum and Minerals Organization (PETROMIN) was established in 1963, to play a direct role in the exploitation of the oil industry, foreign interests still continued to hold substantial interests in the Saudi oil industry. Under an agreement concluded in December 1967 between the Saudi para-satal agency (PETROMIN) and the Italian firm, AGIP-Saudi Arabia which was owned by Ente Nazionale Idro-Carburi (ENI), AGIP secured exclusive concession interests in the south-eastern part of Saudi Arabia with the understanding that AGIP and PETROMIN would, in the future, form a joint venture for the exploitation of the oil in that area, including the establishment of a petro-chemical plant to be operated jointly on a 50-50 percent basis.

In the only Asian country surveyed by the same U.N. study, i.e. Indonesia,[101] the overall picture regarding the state of foreign control in the vital natural resource sector reveals a more-or-less similar pattern. In that country, foreign interests were dominant not only in the oil industry, but also in the area of diamond production, copper and nickel

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[101] Ibid. at 84-91.

production, the production of rubber and timber.

Up until 1960, the exploitation of Indonesia's oil resources was virtually controlled by three main foreign oil companies namely Caltex, Shell and Stanvac which were owned by U.S., British and Dutch interests. Following the establishment, in 1960, of three state oil enterprises, PERTAMIN, PERMIGAN and PERMINA by the Indonesian government, the foreign firms continued to operate under service contracts and "contract of work" arrangements made with the Indonesian state enterprises, thus, retaining a substantial interest in Indonesia's oil industry. Accordingly, in 1963 the foreign firms, Caltex Pacific, California Asiatic Oil, and Texaco Overseas Petroleum concluded a "contract of work" arrangement with the Indonesian state oil company, PERTAMIN. Similarly, Shell Indonesia concluded a "contract of work" arrangement with another Indonesian state oil enterprise, PERMIGAN. In the same year, Stanvac Indonesia entered a similar arrangement with still another Indonesian state oil enterprise, PERMINA. Although the Sukarno government's oil policy was to gradually reduce the role of foreign interests in the country's petroleum industry by phasing out their concession rights, by buying their interests in the facilities for the production and refining of the oil industry, and by increasing the role of the state enterprises, those foreign firms still continued to hold substantial interests even during the Sukarno period. Up until December 1965, for instance, the British and Dutch-controlled Shell Indonesia owned the pladju refinery. Similarly, the Dutch-controlled oil company, Stanvac Indonesia owned, up until January 1970, the refinery in Sungai Gerong (south Sumatra) and the oil installations of the Tandjung Urban Sea Terminal. Again, in the early sixties, Japanese interests, represented by the Kobayashi group which owned the north Sumatra Oil Development Corporation (NOSEDECO), played a substantial role in Indonesia's oil industry through the

provision of credits, machinery and equipment as well as technical services to those Indonesian state enterprises engaged directly in the exploitation process. After the overthrow of the Sukarno government, and with the opening up, once again, of the oil industry to foreign firms, several other oil companies began to acquire substantial interests, especially after 1968.

Under a producting-sharing arrangement concluded with the Indonesian state oil enterprise PERMINA in April 1968, the International Oils Exploration (N.L.) of Australia, for instance, acquired interests in the Indonesian oil industry. Similarly, under an agreement concluded in July 1968, with the Indonesian state oil enterprise, PERTAMIN, the French oil firm, the Compagnie Française des Petroles (CFP) secured substantial interests for the exploration and exploitation of oil in the Djamki area of south Sumata. Under another production-sharing agreement concluded in October 1968 with PERTAMIN, a subsidiary of the Italian Ente Nazionale Idrocarburi (ENI), AGIP, acquired substantial interests in the exploration and exploitation of oil in the Western tip of West Irian. Under similar arrangements, several other foreign oil firms such as the Cities Service Company, the Union Oil Company of California, Mobil Oil Corporation, Gulf Oil Corporation, British Petroleum, Shell Phillips Petroleum Company, Continental Oil Company, the Japan Petroleum Exploration Company, the Kyushu Oil Company (Japan) and Frontier Petroleum Company, had acquired substantial interests in the oil industry since 1968.

The extent of foreign interests in the mining sector since 1968 has been equally substantial. Under a "contract of work" concluded in 1968 with the Indonesian government, a Dutch-owned company, the Netherlands Diamant Maatschappij of Amsterdam, for instance, secure substantial interests in the cutting, polishing and selling of Indonesian Diamonds.

Similarly, another foreign firm, Freeport Sulphur, held substantial interests in the exploration and exploitation of copper in west Irian. The foreign firm, International Nickel, likewise, held interests in the exploitation of Indonesia's nickel deposits in the region of Sulawesi. Still another Dutch-owned firm, the NV Biliten Maatschappij held interests in the exploitation of tin deposits in the on-shore and off-shore areas around the Indonesian region of Singkep' Bangka. Again, under an agreement concluded in March 1969, a foreign firm owned by a consortium of Canadian, Dutch and United States interests, the PT Pacific Nikkel Indonesia, held vast interests in the exploration and exploitation of Nickel deposits in West Irian.

In the field of rubber production, the major Dutch and Belgian enterprises which lost their rubber plantations as a result of the Sukarno government's nationalization policy, were given back their estates between 1966 and 1968 by the Suharto government which was installed through foreign support. Those included the Belgian rubber plantations of Socfin, Sipeg and Plantagen AG in the areas of Atjeh, North Sumatra and West Java.

In the area of Timber production, a foreign firm from the Phillipines owned by U.S. interests held substantial interests in the exploitation of forestry resources in North Sumatra and the Rian Archipelago as well as in the wood-processing industry under a joint venture arrangement with the Indonesian firm, the Sumatra International Timber Company. Another foreign firm, the Mitsubishi Kaisha of Japan held interests in the exploitation of the Indonesian forestry industry under a joint venture scheme with an Indonesian firm, the Kaju Indonesian Company. Still another foreign firm, the Dutch-owned Fijout held substantial interests in the exploitation of the forest resources in the Riau Archipelago under a joint venture arrangement with a local firm, the Indonesian

Mines Company.

From the foregoing general survey, then, it becomes clear that through out the fifties and sixties, foreign interests held substantial interests in the exploitation of the key natural resources of the underdeveloped countries of Africa, Latin America, the Caribbean area, the Middle East and Asia. Although, seen in a dynamic setting and over a span of three decades, the extent and form of foreign involvement had changed considerably, especially in the seventies, foreign interests still continued to hold key positions to various degrees and under different forms in the underdeveloped countries. It is, therefore, mainly in reaction against the dominance of foreign interests in the key economic sectors of the underdeveloped countries that widespread resort to extensive nationalization measures by underdeveloped countries had to follow. The foregoing over all picture regarding the economic operational climate under which resort to nationalization by underdeveloped countries is ordinarily carried out will not, however, be complete without some understanding of the mechanisms of operation of the multinational corporation which is the principal vehicle and agent that actually carries out the economic activities of foreign interests in the underdeveloped countries.

In the following discussion, we shall try to develop the above picture still further by showing how the conflict between the multinational corporation and the host country triggers nationalization.

2. Multinational Corporations[102] and the Underdeveloped Third World Countries: Multinationals in General

The exercise of sovereignty over natural resources by way of nationalization, is almost always directed against the corporate entity which, under contemporary conditions, is the principal instrumentality in conducting direct foreign investment

in countries of the Third World.

The world has witnessed, in the last quarter century, the emergence of the multi-national corporation as a major phenomenon in international economic relations. Its huge size and wide geographical spread, the multiplicity of its activities, its control over vast resources around the world which it uses and transforms to further its profit and growth objectives have brought about serious social, economic and political implications both in home and host countries.[103]

Before we examine the economic behaviour of the typical multinational corporation and the implications of its behaviour to the economy of the under-developed host countries, it may be useful to point out some of the distinct features of multi-national corporations in general.[104] One of the distinct features of multi-nationals is their large size. The very size of these corporations compared to the national economies of the underdeveloped countries, implies relative preponderance in terms of economic power. Closely related to their large size, the multi-national corporations exibit a predominantly

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[102] The "multinational corporation" could be defined in various different ways. In this paper, it should be understood in the sense in which the economic and social council of the U.N. defined it in its Resolution 1721 (LIII), i.e. as an enterprise which controls assets-factories, mines, sales offices and the like-in two or more countries. For an elaborate definition see, U.N. Secretariat, Multinational Corporations in World Development, U.N. DOC. ST/ECA/190 (1973) Supra, at 1.

[103] For a discussion of U.N. concern in the activities of the multinational corporation particularly in underdeveloped countries, see, U.N. Secretariat, Department of Economic and Social Affairs, The impact of Multi-national Corporations on Development and on International Relations, U.N. DOC. E/5500/REV.1 (1974).

[104] Ibid. at 7.

oligopolistic character in that the markets within which they operate are characterized by few sellers and buyers. Another feature of multi-national corporations is their control over a sizable cluster of branches and affiliates. Still another characteristic of multi-national corporations is that they are in general the off-shoots of the economies of developed countries within which the parent companies are located. Eight of the ten largest multi-nationals in the world are based in the United States. All in all, the United States alone accounts for about a third of the total number of foreign affiliates, and together with Britain, the Federal Republic of Germany and France, it accounts for over three-quarters of the total.[105] The high degree of concentration of the origin of multi-national corporations in the developed countries is even more clearly revealed by the total global distribution of the stock of direct foreign investment. Of the total estimated stock of direct foreign investment of about $165 billion, most of which is owned by multi-national corporations, the United States accounts for more than half, and over four-fifths of the total is owned by four countries - the United States, Britain, France and the Federal Republic of Germany.[106] Another important feature of multi-national corporation is the pattern of their geographical spread and distribution. While the distribution in the operation of multi-national corporations in the underdeveloped countries is smaller than in developed countries (only about a third of the total), the relative significance of those operations to the economies of the underdeveloped countries is incomparably high. Another feature in the distribution pattern is that parent firms belonging to those developed countries which, in the past, had colonial holdings (Portugal, France, Britain, Italy and Belgium), tended to have more of their affiliates in ex-colonial countries of the Third World.[107] Thus, two thirds of the French and

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[105] Ibid.

[106] Ibid.

Belgian affiliates in underdeveloped countries are mostly in French-speaking Africa. Similarly, a substantial number of affiliates belonging to British parent companies have spread over those British ex-colonies now members of the Commonwealth. One third of the British affiliates are in the underdeveloped countries and of these, 40 percent are in English-speaking Africa and 32 percent in Asia. Aside from the special distribution features occasioned by colonial ties (a factor significant in itself, in the study of nationalization in some ex-colonies like Indonesia), the distribution pattern is generally marked by a wide spread of North American, West European and Japanese affiliates in the Third World. A little more than one-quarter of the U.S. affiliates are located in the underdeveloped countries. Central and South America account for about 70 percent of the number of United States affiliates in underdeveloped countries, with the rest more or less equally distributed among Africa, Asia and the Middle East. According to a recent finding by Robert A. Pastor of Harvard University, American multinationals have increased their ventures in Africa through their European subsidiaries and affiliates.[108] Pastor observes that "the oil embargo, shortages in food and raw materials and soaring commodity prices "are some of the reasons for the recent focus on Africa. In a speech before the African-American Chamber of Commerce, Donald B. Easum, the Assistant Secretary of State (U.S. government) for African Affairs, for instance, strongly indicated the direction of U.S. interests in the 1970's by stressing that Africa is "a veritable storehouse of mineral wealth" possessing 42 percent of the world's cobalt, 34 percent of its bauxite and 17 percent of its copper and with an iron ore deposit of twice that of the U.S.[109] According to Pastor

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[107] Ibid.

[108] Robert A. Pastor and Antoine W. Von Agtmael, "Multinationals and Africa", African Development, December 1974 at 15.

[109] Ibid.

"as the United States grows increasingly dependent on imports of raw materials, Africa's mineral wealth becomes more attractive".[110] In the early seventies, virtually all of the major U.S. oil companies and their subsidiaries were engaged in drilling operations in fifteen different African countries. Alcan was starting production in a bauxite mine in Boke, Guinea. Kaiser Aluminum was operating in Ghana. Iron Ore attracted Bethlehem Steel (U.S.) to Gabon and Pickards Mather (U.S.) to the Ivory Coast. SMOCO (minerals) and Leon Templesman of the U.S. were involved in a gargantuan copper venture in Zaire. Preliminary U.N. reports of the nickel deposit in Burundi described as "one of the largest resource discoveries in the world" had lately attracted several American multi-nationals.[111] The interest of U.S. multi-nationals is not limited only to oil and mineral exploitation. Lang Engineering was setting up integrated sugar complexes in the Ivory Coast and Mauritania; a U.S. subsidiary had started a joint venture in Senegal to grow vegetables and flowers; General Mills was involved in shrimp fishing off the Cameroon Coast. No less than six banks had recently opened offices in Kenya, and Bankers Trust, CITICORP, and Morgan Guaranty - all U.S. enterprises - had started operation in Nigeria.[112] Aside from U.S. affiliates in Africa, Japan has sixty percent of its affiliates in Central and South America and Asia. There is also a heavy concentration of affiliates of the Federal Republic of Germany in Central and South America. Of the total stock of British direct investment, 38 percent is in underdeveloped countries of which sixty percent is spread over Asia and Africa, 26 percent over Central and South America

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[110] Ibid.

[111] Ibid.

[112] Ibid.

and 13 percent in the Middle East.[113] Canadian and Swiss affiliates tended to concentrate mostly in Central and South America.

The sectoral distribution of multi-nationals in the underdeveloped countries is marked by heavy concentration in extractive industries followed by manufacturing and recently in the service sector, especially in Banking, Tourism and Consulting.

As far as control and ownership patterns go, multi-national corporations tended to exercise effective control over their foreign affiliates through complete or majority ownership and sometimes also from a minority position. According to a U.N. finding, at least 80 percent of the United States affiliates and 75 percent of British affiliates are either wholly-owned or majority controlled. Except for Japanese multi-nationals, it was found out that majority ownership and control of affiliates appears to be the predominant feature of most multi-nationals.[114]

The significance of the foregoing features and their bearing on our topic of study need some amplification. The large size of the multi-national corporation and the huge economic power it wields (commands) relative to the national economies of the underdeveloped countries within which it operates creates situations where the latter lacks the necessary leverage of power to control and regulate its activities. This is especially true as far the host country's

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[113] See U.N. Secretariat, Multinational Corporations in World Development, U.N. DOC. ST/ECA/190 (1973), Supra, at 12.

[114] Ibid. at 12-13.

ability to exercise sovereignty over natural resources is concerned. The oligopolistic nature of multinational corporations is again an additional factor giving them the strength to manipulate, for their own ends and from a dominant position in the international production and distribution process, the allocation of resources, the level of resource output and exploitation and the mode of appropriation accruing from resource exploitation in the host countries within which they operate. The fact that the multinational corporation tends to have several geographically distributed, sectorally specialized and vertically-integrated affiliates over which it possesses both control and ownership again gives it added capabilities of manoeuver in its relation with the host underdeveloped country. In other words, the control of strategic or key sectors of the host country's economy by the affiliates of the multi-national corporation, over whose decision-making processes the parent multi-national corporation has virtual control, restricts the overall capacity of the host underdeveloped countries to formulate and enforce fundamental policies to meet their national economic and social objectives.

The fact that practically all multi-nationals in the countries of the Third World are either American or European or Japanese corporations and that their activities indirectly cater for the economic needs of these countries tends to create a situation in which host country action towards (against) the multi-nationals provokes a serious reaction from their home countries.[115] In other words, the economic stakes involved in the operations of multi-nationals are such that the diametrically opposed interests between host and home countries tend to generate a potential source of international conflict and tension between nations. It is this potential source of conflict between host countries on the one hand, and the intertwined interests of home countries and the corporate economy, on the

other, that prompted the Economic and Social Council of the U.N. in July 1972, the International Labour Conference in 1971, the Third Session of the United Nations Conference on Trade and Development (UNCTAD) in 1972, the Fourth Conference of Heads of States or governments of non-aligned countries held at Algiers in 1973, the Conference of Commonwealth Heads of Governments held in Ottawa in August 1973, the Meeting of Latin American Foreign Ministers at Bogota in 1973 and the Intra-American meeting of Foreign Ministers held at Mexico City in Feb. 1974, to seriously study the matter and mitigate the source of conflict.

The additional significance of the intertwined interests of the corporate economy and that of the home countries of Western Europe, North America and Japan again lies in the fact that it lays bare the underlying economic reasons why this grouping of nations tend to articulate, in the various organs

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[115] A typical attitude expressed by a home country government of multinationals towards action by host underdeveloped countries against multinationals is borne by the following message from the U.S. president, Richard Nixon, to the U.S. Congress delivered on April 21, 1971 in connection with U.S. foreign assistance policy towards the third world.

> "[It] is for each country to decide the conditions under which it will accept private foreign investment, just as it is for each investor to decide which conditions are adequate to attract its investments. We as a government only ask that the investments of our citizens be treated fairly and in accordance with international law. In nearly all cases they have been. However, unjust acts, by a country towards an American firm cannot help but adversely affect our relationship with that country. As president, I must and will take such acts into account in determining our future assistance and overall policy towards such a country".

Cited in 3 Multi-national corporations and United State Foreign Policy (1973), Supra, at 104.

of the UN, a more or less homogeneous stand with regard to the treatment of direct foreign investment in host countries and on questions relating to permanent sovereignty over natural resources and the various attributes of its exercise. In other words, the ownership pattern of multi-nationals and their economic ties with the home country have, as we shall show in subsequent chapters, important bearing over the voting behaviour of the home countries as it manifests itself in the process of developing consensus within the U.N. machinery regarding the formulation of international development strategies and the recognition of permanent sovereignty over natural resources.

Within the above overall framework, we shall now examine the typical behaviour of the multi-national corporation and its impact on the host country's economy in the specific area of natural resource exploitation in underdeveloped countries.

The National Economic System of the Host Country VERSUS The Corporate Economic System: A Micro-view of the Mechanics of Conflict:-

A proper understanding of the impact of multi-national corporations on the economic well-being of underdeveloped host countries must begin by an identification of the distinct regimes of the national economic system of the host country within which multinationals (i.e. their subsidiaries or affiliates) are physically located as contra-distinguished from the corporate economic system to which the subsidiary or affiliate (operating in the host country) of a multinational is an integral part, and with which it has a definite organic relationship.

The conflict between the multinational corporation and the underdeveloped country in which the multi-national operates stems, needless to say, from the diametrically opposed interests

that each seeks to advance. While the interest of multi-national corporation, for instance, impells it to maximize its profits and repatriate as much of it as possible out of the country, the interest of the underdeveloped country hosting the operation of the multi-national is, on the other hand, to get as much of the share of the profit as possible for itself by way of taxes, etc, and to see to it that the profit is re-cycled and retained within the economy of the host-country itself. Again, the interest of the multi-national impel it to employ the minimum possible number workers to carry out its operations with the maximum use of its own labour-substituting capital inputs, while the interest of the underdeveloped host country is to see that the multi-national corporation creates as many jobs and work opportunities as possible to the local labour force. While it may be in the interest of the host underdeveloped country that the operations of the multi-national corporation use local inputs, it is mostly in the economic interest of the multi-national to purchase its inputs through intra-firm transactions from another subsidiary owned by the same parent company and doing business outside the host country in question. This conflict is, therefore, the inherent outcome of the interplay of the needs of two distinct economic regimes, namely that of larger national economic regime of the host country and that of the autonomous corporate economic regime that functions both within and without the national economy of the host country.

In order to show the mechanics of conflict between the two distinct regimes, we employ, as a means of exposition, the analytical model[116] provided by, and the characteristic findings of, the noted mineral-economist and expert on multi-nationals, Norman Girvan, in his extensive empirical study of the behavior of multi-nationals corporations in the aluminium, petroleum and copper industries in the underdeveloped countries of what Girvan calls, "Hinterland America", i.e., Venezuela,

Chile, Surinam, Guyana, Jamaica, Trinidad and Tobago and the Dutch Antilles.[117]

According to Girvan, in order to understand the mechanics of conflict between the host underdeveloped country and a subsidiary of a multinational corporation operating in that host country, it is, first of all, necessary to understand the characteristic feature of the national economy of the typical host underdeveloped country, on the one hand, and the nature of the "organic relationship between the subsidiary and the parent company in contemporary vertically integrated multi-national firms" which determines the behavior of the subsidiary or affiliate operating in the host country, on the other.[118]

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[116] Various authors have, in the past, dealt with the impact of multi-nationals corporations on Host Country Economies of underdeveloped countries from various narrow and specialized angles. Some have concentrated on such subjects as transfer pricing, and still others dealt with the question from the strict standpoint of the impact of multinationals on the problem of economic diversification. The following studies are typical. Sanjaya Hall, "Transfer pricing and multinational corporations", Monthly Review, December, 1974 at 36; see also Edwin Charle, "The concept of neo-colonialism and its relation to rival economic systems", 15(4) Social and economic studies, 329(1960); Edwin Charle, "Neo-colonialism and capitalism: A reply", 17(1) Social and economic studies 92 (1968); Jay Mandle, "Neo-imperialism: A reply" 16(3) Social and economic studies, 321(1967); M. Meir, "Legal and economic problems of private foreign investment in developing countries" University of Chicago Law Review,(1966); Walter [illegible] Chudson, "Africa and the multi-national enterprise", in H.R. Hahlo, et al, Nationalism and the Multinational Enterprise: Legal, economic and Managerial Aspects, 136 (1973); see Sean Gervasi, Supra; also Peter Gabriel, Supra; for an extensive source on the literature in this field see also, Dag Hammarskjold Library, Trans-national Corporations: A select bibliography (1975). Compared to the above approaches, Girvan's model seems to be reasonably broad and adequate for our purpose of exposition.

Basing himself on an empirical study of what he calls "Hinterland America", Girvan observes that the national economy of the host underdeveloped country is characterized: (a) by its marked "Export-orientation" in that the resource industry operated by a subsidiary of a multi-national is not "internally-integrated" with the rest of the national economy, and remains largely an "enclave"; and (b) the host country depends almost exclusively on that particular "export-oriented" resources industry for its foreign exchange receipts, for tax revenues and for the creation of employment opportunities to its local labour force.[119] In other words, according to Girvan, whatever economic activity exists in that host underdeveloped country is largely, if not exclusively, sustained by the activities and operations of the multi-national corporation handling that resource industry, which means that the host country's economy depends on foreign demand for its resource industry, on externally-determined prices for its export commodity, and above all, on the decision-making process of the multinational corporation which operates that resource industry.

On the other hand, the subsidiary of a multi-national corporation operating the resource industry in the host country, functions in line with the distinct needs and interests of the

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[117] Norman Girvan, "Multi-national Corporations and Dependant underdevelopment in Mineral-Export Economies", 19(4) Social and Economic Studies 490-526 (1970).

[118] Ibid. at 491. For an extensive description of the structure of the typical multi-national corporation in its horizontally and vertically integrated form, see, Alfred Chandler, Strategy and Structure (1966).

[119] Norman Girvan, Ibid. at 490.

parent multi-national to which it belongs, and acts in harmony with the corporate economic system to which it forms a part.

In order to observe clearly the mechanics of conflict between the host country and the subsidiary of multinational that operates in that host underdeveloped country, it is necessary to identify the place which the subsidiary occupies in the "vertically integrated" overall structure of the parent multi-national, as well as the specialized function of that subsidiary in the chain of economic operations conducted by the parent multi-national as a whole.

According to a study made by Alfred Chandler, the typical "vertically-integrated" multi-national has a four-tier structure[120] consisting of, from top downwards, (a) a general office, which co-ordinates, appraises and determines the multi-national's overall policies and plans, and allocates resources to a number of quasi-autonomous and reasonably self-contained Divisions within the multi-national firm; (b) a Division which handles a "major product line or carries on the firms activities in one large geographic area" and headed by a division's central office that in turn administers, a number of Departments; (c) a Department which is responsible for the administration of a distinct and specialized function such as the production of raw materials, manufacturing, marketing, purchasing, engineering, research, finance, etc., and headed by a Departmental headquarters which co-ordinates, appraises and plans for a number of field units; and (d) at the lowest level, a field unit which runs a production plant or a branch or district sales office, a purchasing office, an engineering research laboratory, an accounting or other financial office, etc.

According to Chandler, the decision-making process in

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[120] Alfred Chandler, Strategy and Structure, 11 (1966)

the vertically-integrated multi-national strictly follows the four-tier structure in that: (i) "the general office makes the broad strategic or entrepreneurial decisions as to policy and procedures and can do so largely because it has the final say in the allocation of the firms resources - men, money and materials - necessary to carry out these administrative decisions and actions and others made with its approval at any level";[121] (ii) "the departmental and divisional offices may make some long-term decisions, but because their executives work within a...framework determined by the general office, their primary administrative activities... tend to be tactical and operational";[122] and (iii) the field unit which are primarily involved in the carrying on of day-to-day activities, have only operational duties, "carried out within the framework of policies and procedures set by departmental headquarters and the higher office".[123] The chain of command structure and division of specialization of functions within the typical multi-national corporation can be shown graphically by using Chandler's interesting chart(attached herein). The chart shows a three-tier structure from the divisional level downwards involving a uni-divisional firm that is ordinarily engaged in either one of the oil, copper or aluminum exploiting industries. As the arrows in the chart indicate, instructions flow downwards from divisional headquarters to the Departmental Headquarters, and finally down-the line to the field units. The instructions from the Divisional level to the Departments involve matters dealing with co-ordination of mining, refining, fabrication and marketing, and those from the departmental level to the field units deal with, among others,"operational outputs and shipment decisions" which implement those instructions

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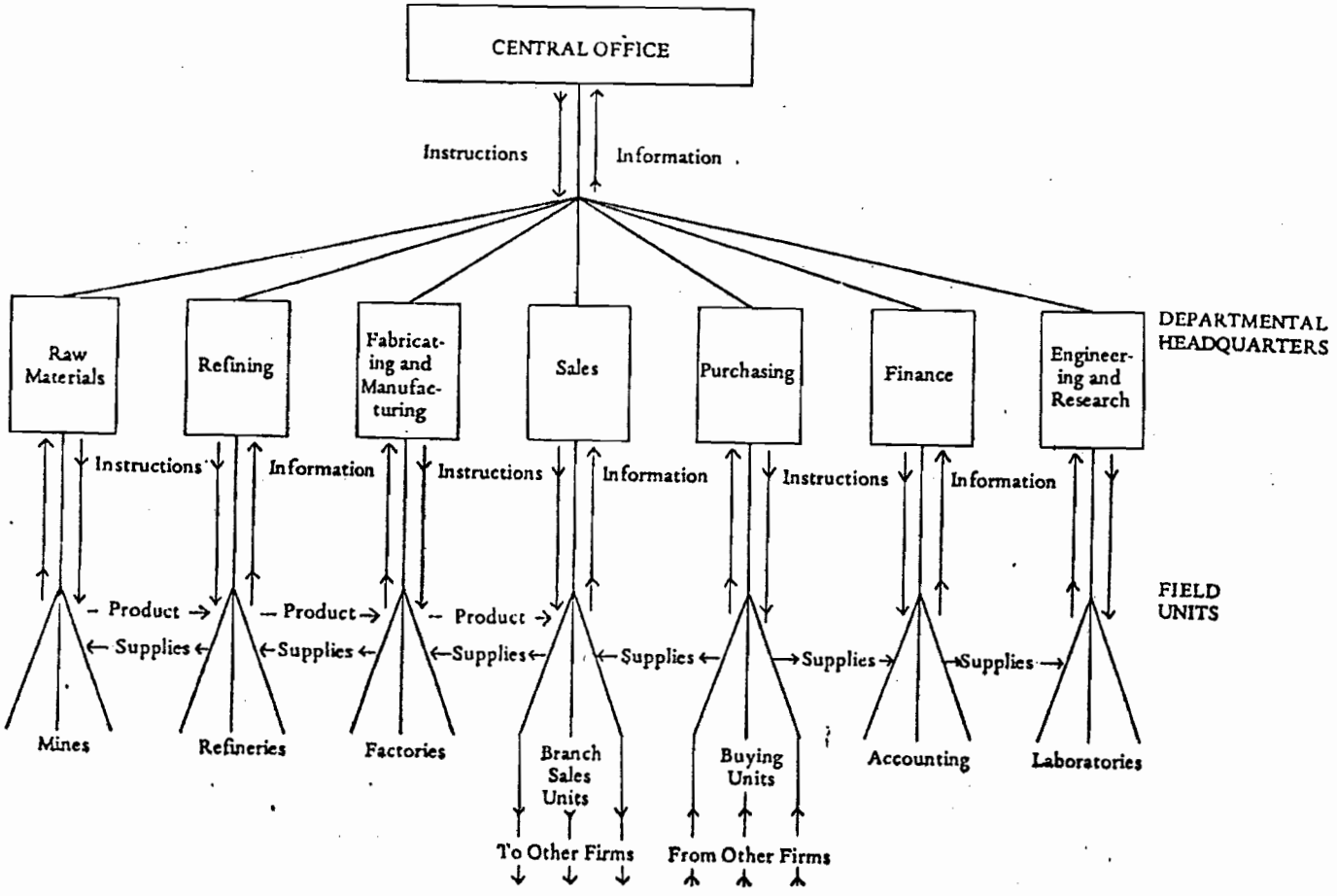
[121] Ibid. Emphasis ours

[122] Ibid. Emphasis ours

[123] Ibid. Emphasis ours

TABLE SHOWING ADMINISTRATIVE AND COMMODITY FLOWS

FOR THE VERTICALLY - INTEGRATED, UNI-DIVISIONAL FIRMS



Source:

Norman Girvan, "Multi-national Corporations and Dependant Underdevelopment in Mineral Export Economies", 19 Social and Economic Studies 510 (1970).

from the divisional level.

The question, then, is to identify where exactly the typical subsidiary of a typical multi-national corporation operating in the field of natural resource exploitation in a typical underdeveloped country, fits in the overall operational structure of the multinational.

According to Norman Girvan's empirical study of the actual relationships of the raw-material producing subsidiaries which operated in the mineral-export industries of the countries of "Hinterland America", with the parent multinationals of which they were constituent parts, the raw material producing subsidiary located in the host underdeveloped country, was almost always placed, in the four-tier structure, at the lowest tier, i.e., at the level of the field unit.[124] According to Girvan's findings, the copper-producing subsidiaries in Chile as well as the crude-oil and bauxite mining subsidiaries in the Caribbean, fell in the latter category.[125] The implication, then, of Chandler's structural model of the multi-national Corporation and Girvan's empirical findings as far as our investigation is concerned is that, in the natural resource exploitation field: (a) the subsidiary of a multi-national functioning in a host underdeveloped country represents merely a field unit for the multinational corporation (b) the subsidiary in question which is engaged in the raw material production process forms only a part of a larger raw material production department of the overall multi-national, which embraces other raw material producing field units located in other countries; (c) the raw material producing function of the subsidiary in question, forms only one part of a chain of operations of a multi-stage process ranging, (particularly in the field of mineral resource

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[124] Norman Girvan, op. cit. at 500.

[125] Ibid.

exploitation) from the mining stage to the refining stage, from refining to industrial processing, and from processing to marketing, and in which the other processes mostly take place outside of the country in which the subsidiary in question operates; and lastly (d) the general office and divisional headquarters of the parent multinational (and in some cases, the departmental headquarters as well) under which the subsidiary in question conducts its operations, are almost always located outside the country which hosts the subsidiary in question.

According to Girvan, the pivotal point that accounts for the conflict between the host country and the typical raw material producing subsidiary, is therefore, the fact that many of the important decisions affecting the subsidiary are almost always "taken externally".[126] Girvan's study reveals, for instance, that "the level, price and destination of output; the sources, prices and possible specifications of inputs; and the techniques of production utilized"[127] as well as "the rate and direction of change" in the subsidiary's activities, i.e., "the rate of new investment and expansion of capacity", etc., are all decided by the general office or the divisional centre located outside the subsidiary's host country.[128]

The actual operation of the mechanics of conflict between the host country and the subsidiary operating in the host country is illustrated in Girvan's study by focusing on two key determinants of the level of output of the mimeral-export industry located in the host country, namely how (a) the multinational parent company allocates its needed raw material production between different raw material producing

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[126] Ibid. at 504.

[127] Ibid.

[128] Ibid.

subsidiaries located in different host countries; and (b) how the parent multi-national allocates its products as well as its financial and research resources between different "end-products" processed in different countries.

(a) Determination of Distribution of Raw Material Production Between Different Raw-Material Producing Subsidiaries as a Source of Conflict

One of the key determinants of the level of output of the mineral export industry by raw material subsidiary (Y) operating in host underdeveloped country(X), and which triggers conflict between subsidiary (Y) and host country (X) involves the determination by the parent firm, of the geographical distribution of production between different raw material subsidiaries, including subsidiary (Y). According to Girvan, the principal factor that the parent multi-national takes into account in determining the distribution of production between its different raw material producing subsidiaries located in different countries is, "the structure of relative cost (including taxes) in the different subsidiaries".[129] Ordinarily, according to Girvan, the parent firm would be inclined "to allocate its raw material production so that the sum total of 'tax-paid' costs of all subsidiaries represents the least costly way of obtaining the sum total of the raw materials it needs to support its end product output".[130] The partent firm's consideration of "relative cost" for regulating the distribution in the level of production in different subsidiaries is, however, sometimes qualified by the firms need of "maintaining a fairly wide geo-political spread of raw material supplies" for reasons such as political risks, speculation, etc, and regardless of the factor of "relative

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[129] Ibid. at 496.

[130] Ibid.

cost" advantage.[131] In other words, whether the level of production by subsidiary (Y) in host country (X) should remain constant, should increase or decrease, and if so, at what rate, would be determined, in large part, by the parent firm's own broader "cost" and profit considerations in which the subsidiary has very little say. According to Girvan's empirical findings, the standard pattern in "Hinterland America" has been "for the [parent firm] to maintain a certain geo-political spread of raw material production, and to allocate over time the bulk of incremental production in one or a small number of particular low-cost sources as its raw material needs grow".[132]

Another characteristic behavior which Girvan has observed in the allocation and distribution mechanism of the multinational is the parent firm's deliberate policy of constant mobility to seek new sources of raw materials "in order to widen its option, to reduce its competitors' option and to displace depleted resources", in which case, the parent firm's overall policy always envisages, "the planned displacement of any existing source of supply".[133] On the basis of his extensive empirical investigation, Girvan, for instance, observes the following with respect to oil multi-nationals.

> "The history of the oil companies provides the most sharply defined cases of planned displacement of supply sources. American oil companies shifted incremental production from the United States to Mexico in the early twentieth century, from Mexico to Venezuela between the 1920's and 1940's, from Venezuela to the Middle East in the 1950's and 1960's, and will shift progressively to Africa and Alaska in the 1970's".134

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[131] Ibid.

[132] Ibid. at 496-497.

[133] Ibid. at 497.

[134] Ibid.

According to Girvan, the same pattern is discernible in the behavior of the copper and aluminium operating multi-nationals.

> "Anaconda and Kennecott located incremental output in Chile from the 1920's to the 1940's, and then shifted back to the United States sources when they got into trouble with the Chilean government. Alcoa and Alcan shifted from the U.S. to Guyana and Surinam for their bauxite supplies from the 1920's to the 1940's, to Jamaica and the Dominican Republic after the second world war, and will shift increasingly to Australia and Africa in the 1970's".135

As we will try to show later, it is the adverse implication on the level of output of subsidiary (Y) in host country (X) resulting from the above changes and variations in "incremental" production as well as "the planned displacement" of existing supply source that actually triggers the conflict between subsidiary (Y) and host underdeveloped country (X).

(b) Allocation of the Parent Firm's own Resources Between Different "End-Products" as a Source of Conflict

The other key determinant of the level of output of a raw material producing subsidiary of a multi-national corporation engaged in a multi-stage resource exploitation process, and that which creates a conflict between the subsidiary and the host country, is the parent firm's mechanism of allocating its raw material products as well as its financial and technical resources between different "end products" in its overall chain of operations. According to Girvan, given the multi-national's goals of securing long term profits and continued expansion, it behaves in such a way that it tends to specialize "in a particular commodity when [the commodity's] growth rate is high, and then shifting incremental resources out of that commodity as its growth rate

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135 Ibid.

levels off or falls, into another commodity which is then experiencing its period of rapid growth".[136] Again, on the basis of his empirical investigation, Girvan observes the following with respect to multi-nationals specializing in the petroleum as well as mineral resource exploiting industries.

In the petroleum industry, for instance, Girvan observes that:

> "First, the companies shifted incrementally from Kerosene to Gasoline in the early part of the century as electric lighting displaced the Kerosene lamp and as the automobile revolution created a rapidly growing market for gasoline. Then, since 1950 they have shifted incrementally into petro-chemicals as the rate of growth of demand for gasoline levelled off in the United States and the demand for petrochemicals has grown rapidly".137

Similarly, in the copper industry:-

> "Anaconda, Revere Copper and Kennecott all acquired stakes in the Aluminium industry in the post-second world war period, as this commodity ate hungrily into the incremental market for metals".138

It is interesting to note that in the oil industry, the shift has been to "jointly produced commodities" which means that the parent firm was using its own" existing production facilities, and the shift in the case of the copper industry has been to "competing commodities", thereby, enabling the parent firms to make use of its own "existing marketing facilities".139

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[136] Ibid. at 498.

[137] Ibid.

[138] Ibid.

[139] Ibid.

Moreover, what further compounds the problem for the host country is that the shifts in the "end product" line of the parent firm is itself influenced actively by the parent firm itself which uses its own "research and development" efforts and advertising (marketing) facilities for the purpose of changing demand patterns and by developing new technological means to serve the new end products.[140] Thus, according to Girvan:-

> "[The parent firms'] technological and propaganda efforts necessarily include activities designed to promote products which are jointly produced with, or compete to, their main product lines. By such means they help ensure themselves against the losses, and help assure themselves of the benefits from long-term shifts in technology and/or demand which affect the entire industry. The logic of all this is that part of the firm's planning must include the planned incremental displacement of its main product line with another one, and that there have been, in the past, periods when the firms have both planned and carried out such displacements".141

Thus, the parent firm's mechanism of allocating the output between different raw material subsidiaries, the phenomenon of "planned displacement of supply source", as well as shifts in the "end product" line of the firm, determine both the short term and long term level of output of the mineral export industry, on which the host underdeveloped country depends almost exclusively for its economic survival. To the extent that those changes bring about adverse variations in the level of output of the mineral export economy, the host underdeveloped country becomes vulnerable to their negative effects.

The place which the subsidiary occupies in the overall

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[140] Ibid.

[141] Ibid. at 498-499.

structure of the multi-national corporation is, therefore, the key (according to Girvan) to an understanding of the adverse effects of the corporate economic system on the export-oriented economy of the host underdeveloped country. According to Girvan:-

> "...it is inherent in the [above dynamics of the corporate system] ... that the survival and growth of the corporate economy as a whole transcends the survival and growth of any one subsidiary and sometimes of any one product line as well..."142

In short, the internal mechanisms of operation of the corporate economic system is such that the performance of the raw material-producing subsidiary located within a given host country and providing much of the economic dynamic to the latter could always be sacrificed by forces over which the host country has no full control, and because of which no definite development projections could be made with the export oriented industry's economic output in view.

Thus, the above situation being the kernel of the overall problem, the next question to examine is in what specific ways the subsidiary's "organic link" with the partent multi-national adversely affects the national economy of the host underdeveloped country.

In his empirical study involving the underdeveloped countries of "Hinterland America", Girvan has observed four major negative manifestations on the economy of the countries surveyed which are directly imputable to the adverse effects resulting from the subsidiary's organic link" with its parent firm and its distinct role in the process of the operation of the dynamics of the corporate economic regime. Those manifestations are:

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142 Ibid. at 511.

(a) The operations of the subsidiary in the host underdeveloped country generally involve "few purchases of local agricultural and manufactured goods".143

(b) The operation of the subsidiary uses more capital inputs relative to labour inputs, and as a result the total labour force employed and the total wage bill paid out to the local labour force is relatively low compared to the large supply of labour available for employment;144

(c) Profits and depreciation allowances constitute a high proportion of the value of the industry's output, and as a result a large proportion of the industry's output is repatriated outside the country in the form of dividends or depreciation allowances; and even when some of the surplus is recycled for re-investment, it is invested not in another industry within the host country so as to contribute to some degree of diversification, but instead remains within the export-oriented industry itself.145

(d) As a result of the above factors, the value of the export-oriented industry's output "returned" to the national economy of the host underdeveloped country is exceedingly small.146

According to Girvan, the fact that a subsidiary operating the export-oriented industry of a host underdeveloped country makes few purchases of local agricultural and manufactured inputs is a direct consequence of the "institutional integration" of the subsidiary with the multinational corporate system and its "lack of integration" with the national economy of the host underdeveloped country.[147] As regards the supply of inputs and capital equipment, Girvan maintains that "there is every reason to expect that such goods will be supplied to the subsidiary by the headquarters

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[143] Ibid. at 512.

[144] Ibid.

[145] Ibid.

[146] Ibid.

[147] Ibid. at 513.

of the parent firm, and will be obtained from metropolitan sources", not only because "some of the inputs may be produced by the parent firm itself, as a result of its horizontal integration", but also because "the purchase of materials and capital equipment for all subsidiaries will in all probability be centralized by the firms central office, in order to effect economies and to standardize the processes used and the goods produced at each stage of the output", in which case, "it is perfectly natural that the firm will use well-established metropolitan suppliers".[148] Moreover, according to Girvan, "the transport of [the inputs from outside] to the subsidiary ... may involve little or no real cost to the firm in so far as they can be shipped on the company's own empty ships on the return journey after off loading the raw material from overseas".[149]

The absence of "linkage between the export-oriented industry and local manufacturing" in the host underdeveloped country results, according to Girvan, not only from the virtual absence of purchases of local inputs, but also and principally, from the fact that the raw material produced by the subsidiary is processed neither into end-products nor intermediate goods within the host country itself.[150] If either end products or intermediate goods were processed within the host country itself instead of being done elsewhere, they would have stimulated internal linkages and created a "multiplier effect" in the national economy of the host underdeveloped country. Instead, the pattern has been to locate the processing of end products mostly in the home

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[148] Ibid.

[149] Ibid. Girvan gives Anaconda and Kennecott as examples where the parent firms use their shipping subsidiaries for transport of inputs to Chile and Jamaica.

[150] Ibid. at 514.

country of the parent multi-national itself.[151] According to Girvan's empirical findings:-

> "Both Anaconda and Kennecott built electrolytic copper refineries in the United States to process blister copper from their Chilean subsidiaries, in the post-war period. Alcoa and Alcan Aluminium Ltd. built and expanded alumina and aluminium plants in the United States and Canada to process bauxite from the Guiynas. Jersey Standard and Shell built huge refineries in Aruba and Curacao to process their Venezuelan crude".152

In Girvan's opinion, the above pattern in the choice of location for the processing of end-products as well as intermediate goods is in the final analysis determined "by the needs of the corporate economies", and as a result, it is only natural that the potential of the export-oriented resource industries to serve as a "growing point" for the national economy of the host country is twarted.

Secondly, the "capital-intensive" character of the subsidiary's operations relative to the host country's national economy and its low absorption of labour inputs is still another adverse condition working against the economy of the host underdeveloped country. According to Girvan, the problem is not only that the export-industry's production process is capital-intensive right "at the outset" but also that it becomes "increasingly" so "overtime". In Girvan's opinion:

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[151] Ibid. at 515. Girvan notes that the locational determinant of intermediate processing could sometimes be the tariff advantages afforded by Metropolitan governments for the import of raw materials to encourage home processing and consequently job-creation. He cites in particular, Japanese multi-nationals as example to show the influence of tariffs on choice of location of processing.

[152] Ibid.

> "The virtually total failure of the mineral-export industry to adapt to the relatively labour-abundant, capital scarce nature of the Hinterland economies becomes perfectly understandable [in light of] the factor-endowment situation of the corporate economy of which each producing unit is an organic part. Capital is relatively plentiful and cheap to the multi-national corporation; first because of its large use of depreciation allowances and retained earnings for new investment, and second because it has direct access to the highly developed capital markets of the Metropoles.
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> ...
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> [In short] , the price of capital relative to that of labour to the firms does not represent the social opportunity cost of using capital relative to labour in the Hinterland".153

Thirdly, the surplus accruing from the export-oriented industry is not invested in other sectors within the national economy, but it is either repatriated out of the host country in the form of dividends and "capital costs" or re-invested within the industry itself, and that again is due, according to Girvan, to the fact that "the surplus is in reality tied to the needs and strategy of the corporation as a whole".[154] Girvan observes that:

> "How much [of the surplus and where the parent firm] decides to reinvest... depends on the determined expansion of end product capacity and the determined location of new raw material capacity. What is not reinvested in the given raw material subsidiary is available not to the national economy, but to the corporate economy. Hence it is allocated in a manner consistent with the firm's strategy, between different raw material subsidiaries, different refineries, fabricators, sales and other departmental units, different end-products, and dividends, debt deductions and additions to working capital".155

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[153] Ibid. at 515-516. It is important to note that as the proportion of capital input is increased faster than labour input, say through increasing "mechanization", the surplus appropriated by the foreign proprietor relative to "returns" to the national economy would tend to increase because it would mean an enlarged "organic composition of capital" in factor input which would benefit the owner of capital more than the country which provides the labourers.

Thus, as a result of the cummulative effect of the foregoing factors, the total value of the export-oriented industry's output "returned" to the economy of the host underdeveloped country by way of local purchases, wages and taxes tend to be very small relative to the total output of the industry and the benefits reaped by the multi-national corporation owning and controlling most of the interest of the subsidiary. In short, not only does the subsidiary in the host country remain an alien body operating for the sole pursuit of the parent firm's interests, but under the conditions of the above mechanisms of operation of the subsidiary within the framework of the vertically integrated, multi-product, and multi-stage multi-national corporation, the export-oriented sector also fails to serve as a catalyst for the diversified development of the national economy of the host country, and instead, remains a mere "enclave" better integrated with the corporate economic regime than with the host country's national economy.

The next and last question, then, is whether there is anything that the host underdeveloped country can do, short of nationalization of the export-oriented resource industry itself, in order to eliminate or even substantially mitigate, those adverse effects of the corporate economic network which controls the host-country's vital economic life-line.

Among other options which the host country is likely to consider and one which most underdeveloped countries actually try initially,[156] is an attempt to increase the national share of the export-oriented industry's "returned" value by means of increasing government taxes on the operations of the

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[154] Ibid. at 516.

[155] Ibid.

[156] Ibid. at 517 (Emphasis ours).

subsidiary. But before we show the ultimate futility of such type of government attempts to eliminate the problem or even mitigate it substantially on the basis of the empirical findings of Girvan in his investigation of the result of "government invention" (short of nationalization) in such underdeveloped countries as Chile, Venezuela, Trinidad and Tobago as well as Jamaica during the last twenty to thirty years, we would like to bring into focus once again and for purposes of better exposition, the relatively vital role which the export-oriented industry plays in the national economy as opposed to its importance to the corporate economic regime.

For the host country, which is characterized by a predominantly "export-oriented" economy, the resource industry serves as a principal source of foreign exchange, and the taxes collected from the operations of the industry are the major source of the host-country's government revenue. According to Girvan, this means, therefore, that "the maintenance and growth of the levels of investment, domestic output and consumption become structured around the imports of capital, intermediate and consumption goods financed by the foreign exchange provided by the industry's 'returned value'", and secondly, that "the maintenance and growth of the level of national income become...dependant...on the current and capital expenditure of the government, a large part of which is financed by the industry's tax payments".[157] Moreover, the possibility for the transformation of the host country's economy "come to lie not with the direct effects of the industry on the economy, but rather with the success of the government's economic development policies, which are implemented by expenditures whose size and growth become critically

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[157] Ibid. at 518.

dependant on the industry's tax payments".[158]

By contrast to the host country's high degree of dependance on the raw material producing subsidiary located in its territory which directly or indirectly provides it with a large part of its strategic commodity export and national income, the subsidiary is, to the corporate economic regime, merely one out of a number of other such subsidiaries located in different countries and providing to the parent firm only part of its raw material inputs that feed its global network of "end-product" outputs.[159] In other words, the dependance of the national economic system on the one hand, and the corporate economic system on the other hand, on the operations of the subsidiary located in the host country are unequal, and "inherently asymmetrical".[160]

The host country's national economy is more dependant on the subsidiary than the multi-national parent firm is, on its own constituent element. According to Girvan, there are a number of reasons why the parent firm is less dependant on one particular raw material-producing subsidiary operating in one single host country.

> "First, most companies draw their raw materials from a number of different geo-political supply sources, and negotiate with the political authorities of each one separately. [By contrast, the host country] depends on one or at best a small number of subsidiaries... Second, the profits 'imputed' to the raw material subsidiary by the parent firm form only a part of its total profits imputed at different stages of production, and the location of the different components of its total profits can be shifted from stage to stage and therefore from country to country with a large degree of corporate freedom. While it is true that there are other sources of tax revenue for the national economy in all the

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[158] Ibid.

[159] Ibid. at 518-519.

[160] Ibid. at 519.

> mineral export national economies, no other single industry has a taxable capacity of the size and growth potential of the mineral export industry".161

According to Girvan, it is still "at the level of the long term growth and development" process that the asymmetry of dependance becomes all the more marked. In his words:

> "...While the strategic planning of the parent corporation ensures that its continued growth does not depend on the life of any one raw material subsidiary or even on any one product, the attempts of the governments to achieve the same thing for the national economy have invariably met with limited success".162

In light of the above situation, empirical studies show that the initial direction which several host countries with "export-oriented" resource industries take, is to try to increase taxes on the operations of the export-oriented industry with the aim of using the government revenue, thus, acquired for the purpose of stimulating the agricultural and manufacturing sectors of their economy, so as to reduce gradually the economy's heavy dependance on the export-oriented resource industry and to secure a reasonable momentum of growth which can be internally and independently sustained. With that broad strategy in view, they try to channel the tax revenue:[163]

(a) To raise the output of, and initiate new activities in the agricultural and manufacturing sectors;

(b) Substitute imported inputs with local (domestic) outputs especially in the manufacturing sector; and

(c) Eventually develop new export lines to phase out the heavy reliance on one or few export commodites.

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[161] Ibid.

[162] Ibid.

[163] Ibid.

The question, then, is whether, in the face of the inherent obstacles resulting from the peculiar mechanisms of operation of the corporate economic system, those governments actual succeed in surmounting the obstacles and achieve their objectives.

According to Girvan's empirical findings, a number of adverse factors in the relations between the export-oriented sector on the one hand, and the agricultural and the manufacturing sectors, tend to set in and frustrate the attempts of host governments to raise the output of the agricultural and manufacturing sectors.

The first set of those adverse factors fall under what Girvan calls "external diseconomies of the mineral industry in relation to agriculture and forestry".[164] These consist of: (a) Adverse impact on the supply of land to the agricultural sector; (b) reduction of the supply of labour from the agricultural sector; and (c) adverse impact on the demand pattern for agricultural products.[165]

It is in the nature of the relationship between the agricultural sector and the raw material based, export-oriented industry that the latter deprives the former of an abundant supply of land otherwise necessary for agricultural growth and expansion. According to Girvan's findings, for instance,

> "Both the aluminium and the oil companies are in the habit of holding large areas of the national territory with proven or probable reserves of the desired material. [Their] objectives are of course to maximize the long-term availability of raw materials to the parent firm and to minimize their availability to competitors, objectives which frequently give rise to holdings far in excess of what is used by the firm over a long period of time.

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[164] Ibid. at 520.

[165] Ibid. at 520-21.

> Such holdings significantly reduce the actual or potential national acerage which is held or used principally for purposes of agriculture and forestry".[166]

The export-oriented industry secondly creates "external diseconomies" in relation to agriculture by "attracting" the agricultural labour force without at the same time fully employing the "attracted" pool of labour. Again, according to Girvan:-

> "The relatively high wages paid by the companies and the quasi-urban areas established by them for extractive and administrative activities attract a heavy migration from the agricultural areas... The result is that labour for the traditional low productivity, low income agricultural activities becomes in increasingly short supply at the going wage rate [in the farms] ... Farm workers and the young members of the farm family prefer to seek employment in the mining areas [and the cities] , or simply prefer to be unemployed, rather than work for what are now considered to be...low returns".167

Thirdly, the "export-oriented" industry also adversely affects "the pattern of commodity demand for agricultural products" in that the relatively well-paid employees of the export-oriented industry tended to develop a food consumption pattern in which the staples "traditionally produced by peasant farmers become progressively less important", and instead "products associated with metropolitan urban and suburban life styles, such as processed and pre-cooked foods" which the traditional agricultural sector cannot easily produce, replace the demand for the staple food.[168]

The second set of adverse factors which the export-oriented

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[166] Ibid. at 520.

[167] Ibid.

[168] Ibid. at 521. Girvan cites Jamaica as an example to show the changes in the pattern of food consumption.

industry creates consist of its "external diseconomies" in relation to the manufacturing sector of the host country's economy.[169] Those "external diseconomies" operate against the manufacturing sector in a number of ways.

First of all, the vertically-integrated structure of the corporate economic system prevents the possibility of "creating a whole network of backward and forward linkages centered on the processes and products of the industry" and involving "the production of capital and intermediate goods supplying the needs of and using the products of the industry".[170] In preventing that process, it is actually and directly preventing the possibility of stimulating a dynamic manufacturing sector around the export-oriented resource industry itself. According to Girvan, the situation is dictated by the needs of the corporate system itself.

> "The standardization of processes and products and the minimization of costs required by the corporate economic system mean that the purchase of all important supplies is centralized at the Purchasing Department or its equivalent in the Metropole, and almost certainly obtained from Metropolitan suppliers; the gearing of raw material capacity in the Hinterland to processing capacity in the Metropole means that Hinterland output is not free to be processed locally. In other words, the possibilities of utilizing the resource as a basis of backward and forward linkages within the national economy are restricted by its already existing use as a basis of backward and forward linkages within the corporate economy".171

Secondly, the export-oriented resource industry creates "external diseconomies" in the manufacturing sector by exerting an upward push on wage rates.[172] According to Girvan:

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[169] Ibid.

[170] Ibid.

[171] Ibid. at 521-22; For a similar observation, see Stephen Hymer, "Multinational Corporations and uneven development", in Economics and World Order - (J. Bhagwati, ed. 1970).

> "The relatively high wage rates in the (export-oriented industry) tend to set the pattern of wage rates throughout the economy", and this "exerts a continual upward pressure on wage-rates in manufacturing where the capital/labour ratio, and therefore the average labour productivity, is lower, and the weight of wages in total production, costs higher".173

According to Girvan, the "external diseconomies" of the export-oriented industry on the manufacturing sector create adverse conditions at three distinct levels and in three different ways. In the first place, the upward pressure on wage rates throughout the economy tends to increase production costs for the manufacturing sector, thereby crippling its "ability to successfully compete with imports and achieve the overall objective of substantial import-substitution".[174] Secondly, "the structure of higher labour costs" tends to aggravate the tendency of substitution of capital inputs for labour inputs "already inherent in the dependence of Hinterland economies on metropolitan technology and corporations", thereby, severely diminishing the employment-creating prospect of the manufacturing sector.[175] Thirdly, by "creating enclaves of (relatively) high-income (earning) ... employees", the export-oriented industry tends to encourage a "structure of demand" for manufactured goods that are in the nature of "relatively expensive consumer durables such as motor cars and household equipment", i.e., "precisely the kinds of goods which ...is most difficult for indigenous manufacturing using indigenous technology and indigenous inputs, to undertake in the early

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[172] Ibid. at 522.

[173] Ibid.

[174] Ibid.

[175] Ibid. For a similar view, see also, Dudley Seers, "The mechanism of an open petroleum economy", 13 social and economic studies, (1964).

[176] Norman Girvan, Ibid. at 522.

stages of its development".[176]

In short, a viable manufacturing sector is hardly possible side-by-side with the vertically-integrated export-oriented sector, and in the face of the stiffling pressure of its "external diseconomies". According to Girvan's findings, what usually appears in the host country's economy "by the name of manufacturing is [in actual fact] a set of 'tariff-hopping' assembly plants established by metropolitan companies and based on their capital, intermediate goods and technology".[177]

The foregoing intrinsic limitations to the effective stimulation of the agricultural and manufacturing sectors in most underdeveloped countries continue to be tolerated for a while, however, and persist for some time without precipitating an immediate and acute economic crisis because, as Girvan observes, they are cushioned, in the short-run, by the temporary "abundance" and "bonanzas" of foreign exchange provided by the export-oriented industry.[178] In other words, the temporary "abundance" of accruing from the "export-oriented" resource industry, especially during certain seasonal "peak" prices for the export commodity, would continue to overshadow the stifled low performance of the manufacturing and agricultural sectors, the continued depletion of the irreplaceable and scarce natural resources, and disguise the widespread poverty and rampant unemployment in the host country, thereby, "keeping the economy going". However, this tendency would continue to prevail only as long as the "export-oriented" resource industry, on which the government of the host country relies heavily, continues to expand. Empirical evidence shows, however, that the latter would not continue to expand indefinitely.

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[177] Ibid. at 522-23.

[178] Ibid. at 523.

According to Girvan:-

> "...the very factors which make [the export-oriented resource industry] important to the national economy- the high rate of growth of output and the growth of the tax take - are those which make it necessary for the [parent multi-national controlling the subsidiary that operates in the host country] ... ultimately to shift the location of new capacity elsewhere".179

Inevitably, the consequent reduction in the rate of growth of the output of the "export-oriented" resource industry would directly lead to a decline in the amount of taxation revenue and foreign exchange receipts indirectly accruing to the host underdeveloped country. According to Girvan, this would ultimately put a brake "on the most important propulsive mechanism of the [national economic] system", namely, "the growth of public spending" on the one hand, and a check against its "most permissive mechanism", i.e., the "growth of imports", on the other.[180] When that happens, as it often does in actual fact in underdeveloped countries, the host underdeveloped country may still try, as most have tried, to devise short term solution to get out of the situation.

As Girvan's findings with respect to the experience of Chile and Venezuela in the fifties and sixties show, the government of the host underdeveloped country may (since it can hardly exercise control over the growth of public-spending or imports in so far as the "revenue source" is concerned, without triggering serious economic and political repercussions) try to resort to either one of two things, namely, either foreign public borrowing or increasing taxes on the export-oriented resource industry operated by the subsidiary of the externally located parent multi-national corporation.[181]

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[179] Ibid. at 524.

[180] Ibid.

[181] Ibid. at 524-25.

Experience has shown that foreign public borrowing cannot be a lasting solution because credits are not available indefinitely, even if they are, they would not only involve political and economic "strings" attached to them, but they would also tend to create onerous financial burdens that could be hard to shoulder cummulatively and indefinitely.[182]

The other short term alternative to which the government of the host country might try to resort could be to get as much surplus out of the "export-oriented" industry by way of increasing taxation. It is, however, precisely this option that forms the linch-pin of conflict between the host-country and the multi-national corporation.

The attempt of the host country's government to "squeeze" increased taxes out of the operations of the subsidiary of the multi-national corporation would, thus, bring the otherwise simmering conflict between the national economic system and the corporate economic regime into the open. According to Girvan, the attempt to "squeeze" the surplus out of the multi-national operations touches the core of the corporate economic system's vital interests, and the conflict would therefore tend to be played out around that issue because:-

> " [The government's] attempt to increase revenues leads inevitably to the more basic questions of control over production, accounting, pricing, and marketing, since the variables determining the size of the net profits to which the tax rate is applied, are to a large extent under the control of the corporation itself. In the first place, the company starts out with considerable leeway over the size of the depreciation, depletion and amortization allowances which it deducts from its income in declaring taxable profit. For example, whether exploration and development expenditures are capitalized or treated as operational costs, what rate of depreciation or depletion will be used whether and what kind of investment and depletion allowances will apply.

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[182] Ibid.

> Secondly, the [parent multinational] begins with almost total control over the price used to value the product, which is essentially an intra-firm accounting item for tax minimization purposes. The government eventually discovers that apparently minor changes in [the corporation's] accounting [and pricing] procedures can make as big a difference in its tax take as relatively large changes in the percentage rate of tax on profits".[183]

The inevitable logic of this conflict would, then, lead as it did in a number of underdeveloped host countries, the host government to assert either a right to participate in the decision-making process of the operations of the "export-oriented" resource industry (i.e. in the accounting, pricing, and marketing process) so as to influence the level of "tax-take" available to it, or to take full control and ownership of the industry by means of nationalization, and run it itself.

As the experiences of "Chileanization" through government participation in Chile, has shown, and as the futility of its Venezuelan counter-part, the motto of "Sembrar el Petroleo" (i.e. the "sowing" of the petroleum revenue acquired through government intervention for stimulating the Venezuelan economy)[184] has confirmed, the option of improving the condition of the host country's economy through government participation would still have its inherent limitations because the corporate link with the subsidiary would still continue, although not to the same degree, to exert its adverse influence on the joint undertaking.[185]

The unavoidable choice that would, thus, remain open as a last resort to the host government, and to which several underdeveloped countries were pushed, would be to take full control

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[183] Ibid. at 525.

[184] Ibid. at 511.

and ownership over the resource industry, cut the industry's corporate links, and re-orient its operations according to an autonomously-determined and "internally-integrated" economic programme. It is important to note, however, that the peculiar economic problems of the underdeveloped countries would not miraculously disappear simply because measures of nationalization are carried out, nor will they be mitigated and finally resolved unless the measures of nationalization are supplemented by corresponding changes of re-organization and nationalization in the agricultural, manufacturing and financial sectors.[186] In the words of Girvan, although "nationalization is not a sufficient condition for the elimination of the structural dependance of the national economic system on the [export-oriented resource industry], it is certainly a necessary one".[187]

In the foregoing discussion, then, we tried to examine some of the general as well as specific economic problems peculiar to the underdeveloped countries as those problems revolve around the status of sovereignty, in those countries, over natural resource control, use and economic disposal. In doing so, the thrust of our treatment of that central question proceeded along two main directions.

On the one hand, our attempt has been: (a) to furnish a reasonably comprehensive (albeit simplified) picture of the

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[185] For the opposite argument in support of the claim that government participation through joint-ventures are both workable and commendable, see, Wolfgang Gaston Friedman and Jean Pierre Béguin, Joint International Ventures in Developing Countries: Case studies and analysis of recent trends (1971).

[186] Norman Girvan, op. cit. at 526.

[187] Ibid.

overall economic operational climate under which nationalization ordinarily occurs in the specific context of underdeveloped countries; (b) to identify the nature of the economic problems that make it inevitable; and lastly (c) to show the economic justification for resorting to it as a last measure. In the process, we tried to point out that the lack of economic diversification and dependance on the export of one single commodity or few primary products (agricultural or mineral), deterioration in the direction and patterns of trade and in balance of payments problems, the slow rate of capital formation and accumulation, the huge influx of foreign capital and the adverse impact of the activities of multinational corporations, together and cummulatively, constitute the characteristic manifestations of the economic problems peculiar to the underdeveloped countries. We also attempted to show how those peculiar economic problems tended to precipitate (and no doubt by triggering popular pressure) a drive, on the part of governments of underdeveloped countries, to work out national development plans within which the public sector would play a dominant role and to tighten government control over key natural-resource related industries, and how, as an integral part of this new drive to strengthen the public sector and to assert sovereignty over natural resources, resort to nationalization emerged as an inevitable development.

On the other hand, in as much as the main object of this paper is to examine the juridical implications of the works of the United Nations with respect to nationalization, our discussion regarding the peculiar economic problems of the underdeveloped countries, has been fashioned in such a way as to show that the resolutions of the U.N. that we shall be examining in subsequent chapters are actual responses to those economic conditions prevailing in underdeveloped countries spelled out in this chapter. In other words, by bringing those economic conditions in sharp focus, we are trying to set the

stage for arguing that the corpus of international consensus which evolved within the U.N. system, is not only a direct response to those economic problems, but it is also meant to resolve them. Moreover, by bringing into sharp focus the characteristic features of the peculiar economic problems prevailing in the underdeveloped countries in response to which the U.N. sought solutions, our purpose, as it will be clear subsequently is to furnish an economic interpretative basis for uncovering the juridical essence as well as implication of those U.N. resolutions, which in their outward facade, might readily appear to embody mere political platitudes of little or no juridic consequence.

PART III

Substantive International Norms, Principles and Rules Governing "Taking" Under International Law:-

The substantive international norms and principles governing the "taking" of property of aliens under international law, as they form the object of our investigation in this paper, centre around five basic problems, namely, the state's right to "take" property belonging to foreigners; prior restraints, if any, that a state must comply with in order to carry out a legally sound act of "taking"; the obligation, if any, of the taking state to pay compensation for property "taken"; the norm, if any, relative to the amount, manner and modalities of compensation payment; and the manner of dispute settlement as well as the problem of obligation to respect (or not to frustrate) nationalization measures. In the following chapters, we will deal with each of those subject matters in some detail and separately.

CHAPTER V

The State's Right to "Take" Property Of Foreigners: The Juridic Basis for the Act of "Taking"

In any study of the substantive norms, principles and rules governing nationalization under international law, the immediate question that presents itself for investigation is the juridic basis upon which the state's right to resort to nationalization rests. In the specific context of this paper whose principal focus will revolve around the legal problem surrounding the "taking" of property of aliens by states in underdeveloped countries, the aim of our investigation of the juridic basis for the act of "taking" is two-fold. Since the legal controversies stemming from nationalizations in underdeveloped countries are almost always clouded by the implicit

and underlying assumptions of some states and jurists that the rules of traditional international law that evolved in connection with "takings" of the strictly "expropriation-type", equally apply over those entirely distinct types of "takings" that fall within the factual regime of nationalization proper, our first aim is to point out the difference between expropriatory takings and nationalization by reference to the different juridical basis upon which each type of taking rests, so as to argue that the rules which were pertinent to expropriations strictu sensu cannot be extended over "nationalization-type" takings in underdeveloped countries. Secondly, and at the same time, our aim is to show that "nationalization-type" takings by underdeveloped countries in particular, find their juridic basis, apart from the mere possession of sovereignty, in the consensus of international opinion that evolved within the U.N. machinery over the last three decades.

The following chapter is, therefore, divided into two major sections. The first section will contrast "expropriatory-takings" as against "takings" of the "nationalization-type" by examining the difference between the two categories of "takings" in terms of the slightly distinct juridical basis upon which each rests. By pointing out the difference in the juridic basis on which each type of "taking" rests, we intend to refute the claim that the traditional international law rules that governed "expropriatory" "takings" also apply over "takings" of the "nationalization-type".

In the second section, we will try to show the emergence of what we call a "promotive" or "enabling" positive norm within the U.N. norm-creation machinery, on the supportive basis of which underdeveloped countries are particularly entitled to resort to nationalization. It is our contention in this paper, that the international consensus of opinion that evolved within the U.N. machinery in this field over the last three decades,

creates a number of legally binding juridic norms, one of which serves as a distinct basis for resort to nationalization by underdeveloped countries.

SECTION I

The Juridical Basis for the Act of "Taking" of Property of Aliens: Incidents of Expropriation and Nationalization Contrasted

In the preceding chapters, we tried to point out that the difference between the institutions of expropriation strictly so-called and nationalization proper is, in large measure, accounted by the fact that each institution evolved under different conceptual, historical and socio-economic operational climates. With that broad framework in mind, we shall now try to show how and why "expropriation type" takings differ from "takings" of the "nationalization-type" in terms of the juridic basis upon which each category of taking rests.

Long before the international community encountered problems arising from property takings of the "nationalization-type", acts of "takings" of property of aliens in the form of expropriation strictly so-called were regulated by a system of traditional international law rules. Among those well-established rules of expropriation were those concerned with matters of legal competence to resort to expropriation of property of aliens.

The legal competence of a state to expropriate property of aliens (i.e., the juridical basis for the act of "taking") derives, under customary international law, from the special feature of the sovereignty of that state.[1] According to Gillian White, legal sovereignty consists in the supreme power of the state over all persons (both aliens and nationals) and

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[1] Isi Foighel, Nationalization: A study in the protection of Alien property in International Law, 42-43 (1957).

things within its jurisdiction.[2] In the words of Oppenheim:

> "According to the rule, quidquid est in territorio est etian de territorio, all individuals and all property with the territory of a state are under its dominion and sway, and foreign individuals and property fall at once under the territorial supremacy of a state when they cross its frontier".3

In other words, the legal power of a state to expropriate property situated within its jurisdiction stems from the sovereignty of that state. More specifically, the sovereignty of a state that enables it to expropriate property derives from the territorial jurisdiction of that state. According to Foighel:-

> "The starting point for the rights and duties in the family of nations must be found in the fundamental rule of distribution of competence, the principle of territorial jurisdiction, according to which a state is competent, and solely competent, to do within its territory those acts which actually or potentially are done in the exercise of the governmental power of the state".4

Several jurists[5] agree that, historically the right of the sovereign to expropriate private property emerged in the Middle Ages. According to Schulz, the concept of expropriation was, for instance, almost unknown altogether under Roman law, and incidents of expropriation rarely occurred in the practice

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[2]Gillian White, Nationalization of Foreign Property, 35 (1961).

[3]1. L. Oppenheim, International Law: A Treatise 286(8th ed., 1955).

[4]Isi Foighel, op. cit. at 42-43.

[5]See Gillian White, op. cit. at 32; see also F.A. Mann, "Outlines of a history of Expropriation" 75 Law Quarterly Review 188(1959); also, Fritz Schulz, Principles of Roman Law 161-162 (1936); and J. Walter Jones, "Acquired and guaranteed rights" Cambridge legal essays (1926).

of the Roman Emperors. Among such rare instances, Schulz mentions how the Roman Emperor Augustin had to request the Roman senate to be granted authority to take building materials (i.e., sands, stones, wood, etc.) from neighbouring lands to have a number of acqueducts repaired.[6] According to the same author, Augustus refrained from resorting to expropriation when building his forum, the Foro d'Augusto, despite the difficulties his architect encountered in accommodating the structure in the limited available space.

According to Gillian White, the institution of expropriation emerged "at a time when the concept of sovereignty had crystallized into the absolute measure of power in one ruler - a power that was inalienable, indivisible and from which flowed all subordinate power in the state".[7] Initially, during the Middle Ages, it was not clear whether it was by reason of the right of ultimate ownership or some other juridic basis that the sovereign exercised the right of expropriation.[8] According to Martinus, one of the Glossators of the Twelfth Century, the sovereign in the person of the Emperor, enjoyed the right of expropriation by virtue of the ultimate ownership in all things within its domain.[9] On the other hand, a contemporary of Martinus, another of the glossators, Bulgarus maintained that "above private ownership there stood only a superiority on the part of the state which was sometimes expressly called a mere jurisdictio et protectio and which, even when it was supposed to be a sort of dominium, a sort of over-ownership, was still treated in a purely 'publicistic'

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[6]Fritz Schulz, op. cit. at 161.

[7]Gillian White, op. cit. at 32.

[8]F.A. Mann, op. cit. at 191-192.

[9]Ibid.

manner".[10] Gierke maintains that "it was out of this superiority that men developed the theory...of a right of expropriation, by virtue whereof the state, whenever reason of state demanded this, might modify private rights or abrogate them".[11] Similarly, J. Walter Jones, in his study of the evolution of the state's power of expropriation, arrived at an identical conclusion. According to him, initially, in the feudal age, the basis of the state's power of expropriation had a "proprietory core", as being a dominium of the same general character as the dominium of the individual, but a dominium eminens because, in case of conflict, it prevailed.[12] Later, however, "it threw off its proprietory associations and, except in the Anglo-Saxon countries, the term dominium emineus gave way to ius emineus, denoting merely one among many expressions of a more general power, vested in every ruler as such and to be exercised solely in the public interest".[13] It was the gradual crystallization of this general power, or sovereignty, as an attribute of a state (a corporate body rather than a person or body within the state) that later formed the non-proprietory and political basis for the exercise of expropriation.[14] Again, F.A. Mann argues that "it is by virtue of its sovereignty, by public or constitutional law rather than by virtue of ownership that the supreme authority in the state has the power to take private property".[15] Thus, it was along the latter line that the state's power of expropriation evolved in the municipal legal systems of the Western

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[10] Otto Gierke, Political Theories of the Middle Ages 79 (1938).

[11] Ibid.

[12] J. Walter Jones, Historical Introduction to the Theory of Law 134-135 (1940).

[13] Ibid. at 134.

[14] Ibid. at 134-135.

[15] F.A. Mann, op. cit. at 192.

nations as of the Middle Ages before its assimilation into international law. It is important to note at this stage that municipal legal theory both in the continent and in England[16] assimilated the juridical basis for the power of expropriation, through, among other processes, the reception of Roman law as it developed by the later glossators.

Although municipal legal theory evolved the institution of expropriation as of the 12th century, it was only later that the juridic basis for the power of expropriation became a question of concern to international law. At least three distinct and important juridic processes had to evolve before international law began to be concerned with the question of expropriation. The first process was the emergence of the principle of the territoriality of law which manifested itself in the latter part of the Middle Ages.[17] Before this period, the principle of the personality of law prevailed according to which "each tribe lived under its own law and the personal rights and the acts of the individual and his legal status were regulated and judged according to the code of the tribe or nation to which he belonged".[18] According to Borchard, "in the later Middle Ages, various influences led to a transition from the principle of the personality of law to that of the territoriality of law".[19] The consequence of this shift from the principle of the personality of law to the territoriality of law was that "the alien became subject to the local

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[16] As far as English Law is concerned, the impact of Roman law in this particular respect must have been the result of the early reception, see H.R. Hahlo, The South African Legal System, 504-508 (1968).

[17] Edwin M. Borchard, The Diplomatic Protection of Citizens Abroad or the Law of International Claims 5 (1916).

[18] Ibid. at 4.

[19] Ibid. at 5.

law, and his property situated in the local state became liable to expropriation".[20]

The second process that had to evolve before expropriation became a subject of interest in international law was the emergence of the concept of nationality in legal theory. In the absence, then, of the concept of nationality which forms the basis for diplomatic protection, the alien whose property was expropriated "could not call upon his state of origin to protect his interests" and "was merely limited to the remedies afforded by the local law".[21] According to Borchard, it was only after nationality as a distinct concept emerged at the end of the Thirty Years War at the Peace of Westphalia that the alien received diplomatic protection.[22] Even after the concept of nationality emerged in legal theory, authors like White maintain that "a further 140 years elapsed before diplomatic protection became generally practiced, that is, it did not operate much before the French Revolution".[23]

Along side the emergence of the territoriality principle, the concept of nationality and that of diplomatic protection there evolved a process, on the one hand, of a gradual assimilation of Municipal legal theory relating to the juridic basis of the power of expropriation into the formative processes of international law and a further elucidation, on the other, of notions of expropriation in relation to international law by jurists such as Grotius and Pufendorf.[24]

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[20] Gillian White, op. cit. at 33.

[21] Ibid. at 33-34.

[22] Edwin M. Borchard, op. cit. at 7.

[23] Gillian White, op. cit. at 34.

[24] See F.A.Mann, op. cit., at 192; see also Samuel Pufendorf, "De Juri Natural et Gentium Libri Octo", in The Classics of International Law, 1285-1286 (James Brown Scott ed. 1934).

Being one of the founders of classical international law, Grotius was one of the earliest jurists to enunciate the principle that the sovereign exercises expropriation on the basis of "the jus eminens which the community has over persons and things for the sake of the common good".[25] According to F.A. Mann, "Grotius' pronouncements are reflected in the later writers on natural law and have to this day determined American terminology, and it may well be that, in this field too, his work has had decisive influence".[26]

Once international legal theory incorporated the institution of expropriation its concern has been not so much with the juridical basis for the power of expropriation of property of aliens as with the limitations and safeguards against the exercise of the power of expropriation i.e. the protection of the alien owner. In other words, the fact that sovereignty serves as a basis for the power of expropriation is almost taken for granted in juridic theory, state practice, international case law and custom.

For our purpose, however, it is not sufficient to maintain that the legal basis for the power of expropriation is sovereignty, since sovereignty in its general and diffuse sense, is equally invoked as a basis for exercising the power of nationalization. In order to grasp the distinction between expropriation and nationalization in terms of the legal basis for undertaking each act, it is necessary to investigate and identify the precise content and nature of sovereignty involved in the carrying out of each act.

As we tried to show in earlier chapters, the institutions of expropriation and nationalization are distinguished, among

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[25] F.A. Mann, op. cit. at 192.

[26] Ibid.

other things, by their historic specificity in the sense that the former emerged at a much earlier time and under circumstances different from those surrounding the latter institution. It is our contention in this section, that this time gap in the emergence of the two institutions accounts for the fact that the content of sovereignty which served as a basis for expropriation did not remain the same by the time the institution of nationalization emerged in state practice, and that, therefore, the latter derives its juridic basis from sovereignty with a different content.

The difference in the "nature" and "content" of sovereignty as it applies to the two institutions stems from the philosophical (ideological) underpinnings underlying the changing notion of sovereignty in the process of the emergence and evolution of the two institutions.

At the time of the earliest recognition of the power of the sovereign to expropriate private property, the notion of sovereignty was conceived within an overall medieval philosophical framework of natural law.[27] The medieval doctrine of natural law was a continuation of the works of Legists and Descetists based on the texts of Roman Law and Canon Law and those of divines and philosophers.[28] Originally to the Greeks, natural law or the law of nature as they called it consisted of a belief that "there are certain legal principles and institutions so firmly rooted in the general scheme of things that they represent something inherent in all ordered social existence".[29] To the Greeks (especially the pythagorians and stoics) the whole universe was conceived" as a cosmos or

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[27] Otto Gierke, op. cit. at 78-79.

[28] Ibid. at 75.

[29] J. Walter Jones, Historical Introduction to the Theory of Law 98 (1940).

ordered whole, governed by a creative force called by them nature or God or the universal law; and particular things were believed to be an emanation from the universal through the operation of this law".[30] This idea of the law of nature was later developed by Roman jurists such as Cicero who conceived it as "some sort of objective and universal order, emanating from divine reason...holding sway over God as well as men".[31] Later still, Medieval jurists[32] further refined the concept of natural law as being a law "implanted by God in natural reason for the attainment of earthly ends..."[33] It was in the second half of the 16th Century, at the close of the Middle Ages that Bodin, in his "Six Livres de la Republique" (1577),[34] formulated a broad theoretical basis for sovereignty which had its philosophical anchorage in the Medieval doctrine of natural law.[35] According to Bodin, sovereignty did not only imply "superiority or suzerainty" (puissance souveraine) but also "the absolute and perpetual power in a state".[36] At the same time, however, Bodin endorsed the Medieval doctrine that "the sovereign who makes the human laws is not on that account free to disregard the law of nature and of God".[37] The Medieval doctrine of natural law

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[30] Ibid.

[31] Ibid. at 99.

[32] The philosophical basis for this medieval doctrine was developed in the writings of St. Thomas Aquinas. For an interesting discussion of the influence of Greek and Roman thought on the natural law theory of Thomas Aquinas, see, D.J. O'Connor, Aquinas and Natural Law, 57-79 (1967).

[33] Otto Gierke, Supra at 75-76.

[34] Jean Bodin, Six Books of the Commonwealth—(M.J. Tooley transl. 1937).

[35] J. Walter Jones, Historical Introduction to the Theory of Law 81 (1940).

[36] Ibid.

[37] Ibid. at 86.

shaped Bodin's theory of sovereignty in at least two fundamental respects. In the first place, it implied that the source of sovereignty is a divine mandate the exercise of which was "subject to the law of God and of nature, and to certain human laws common to all nations".[38] Secondly, it recognized a system of private rights which have their basis in divine law as implanted by God in natural reason to the detriment of which sovereignty cannot be exercised.

Defining the limits of the exercise of sovereignty and pointing out the immunity of certain private rights from sovereign intrusion, Bodin had the following to say:-

> "A sovereign prince is not subject to the laws of the Greeks or any other alien power, or even those of the Romans, much else to his own laws, except in so far as they embody the law of nature which...is the law to which all kings and princes are subject. Neither Pope nor Emperor is exempt from this law, though certain flatterers say that they can take the goods of their subjects at will. Both civilians and canonists have repudiated this opinion as contrary to the law of God. They err who assert that in virtue of their sovereign power princes can do this. It is rather the law of the jungle, an act of force and violence. For as we have shown above, absolute power only implies freedom in relation to positive laws and not in relation to the law of God. God has declared explicitly in his law that it is not just to take or even to covet, the goods of another...Since then the prince has no power to exceed the laws of nature which God himself, whose image he is, has decreed, he cannot take his subjects property without just and reasonable cause that is to say by purchase, exchange, legitimate confiscation, or to secure peace with the enemy when it cannot be otherwise achieved".39

Thus, the natural-law-basis of Bodin's theory of sovereignty implied that "before the state existed the Lex Naturalis already prevailed as an obligatory statute, and that immediately or mediately from this flowed those rules of right to which the

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[38] Jean Bodin, Supra at 28.
[39] Ibid. at 35.

state owned even the possibility of its own rightful origin".[40] Although the influence of Bodin on later notions of sovereignty cannot be overstated, it is still important to note the key link provided by his theory between Greco-Roman juridic thinking and that of municipal legal theory in Western Europe between the 17th and early 20th Centuries. It is precisely this link that accounts for the fact that the "content" of sovereignty associated with the institution of expropriation, strictu sensu, had it ideological roots in the philosophical currents prevailing in Western Europe in the latter part of the 16th and early 17th Centuries.

According to Walter Jones the influence of Bodin's thinking was "immediate and widespread".[41] In the continent, particularly in Holland, jurists like Althusius, propounded a new variant of Bodin's theory of sovereignty, in which they maintained that sovereignty rested upon agreement between "freely associating groups".[42] The thinking of Althusius was one of the earliest attempts to merge the concept of natural law and social contract (popular sovereignty) and create a new hybrid philosophical foundation for the theory of sovereignty.[43] While Althusius' new theory based sovereignty on popular consent and agreement thus partly, dismissing Bodin's divine mandate theory, he still shared with Bodin the idea that there existed a system of private rights imported from natural law for the protection of which civil government became necessary.[44] For

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[40] Otto Gierke, Supra at 75.

[41] J. Walter Jones, Supra at 86.

[42] Ibid.

[43] For an account on the influence of Althusius on the theory of social contract, see Otto Gierke, Althusius, 76-122 (3rd ed. 1913).

[44] Ibid at 86-87.

Bodin, sovereignty emanated from divine mandate. For Althusius sovereignty rested on popular consent. The end served by sovereignty and the limits to its exercise under both jurists was defined by the same philosophical imperatives of natural law. Although there existed a wide gulf between the thinking of Bodin and Althusius in terms of political theory (the former being an arch apologist of French absolutism of the latter 16th century and the latter representing the then emerging current of republicanism), the implication of their difference as far as the institution of expropriation went, was inconsequential since both shared a common conception of a system of private property rights that derives its existence from the mystical realm of natural law and the enjoyment of which sets a limit to the exercise of sovereignty by the state.

Tracing the influence of Bodin's theory of sovereignty in England, Walter Jones points out how it permeated in the thinking of Hobbes, Blackstone, Bentham and Austin.[45]

According to Hobbes, the basis of sovereign' authority was to be found in the law of nature and that the object of civil society was to guarantee order in an otherwise "perpetual war of all against all" in what he calls a state of nature from the chaos of which the need for a common superior (sovereign) emerged.[46] The need for civil society under a sovereign is to guarantee a harmony in the enjoyment of rights that pre-exist the civil society itself. Like Bodin, Hobbes conceived of a system of private rights emanating from natural law and the protection of which formed the raison d'etre of civil society under a sovereign. For both thinkers, the scope of those private rights became both the ultima ratio for the existence of sovereign authority and the ultimate limit of its exercise.

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[45] Ibid. at 88.

[46] Thomas Hobbes, Leviathan, Part I, Chapter 15 (1937).

In his Commentaries, Blackstone further refined Bodin's notion of natural law as a basis for, and limit of, sovereignty. According to Blackstone, "no human laws are of any validity, if contrary" to natural law.[47] Moreover, valid laws "derive their force and all their authority mediately or immediately from" natural law.[48] In his discourse on the nature of laws in general and on property, in particular, Blackstone recognized the existence of certain natural rights, the protection of which became the object of civil society and the limit to the exercise of sovereignty. Referring to what he called natural rights he went on as follows:

> "Those rights then which God and nature have established and are therefore called natural rights such as are life and liberty, need not the aid of human laws to be more effectually invested in every man than they are; neither do they receive any additional strength when declared by the municipal laws to be inviolable. On the contrary, no human legislature has power to abridge or destroy them unless the owner shall himself commit some act that amounts to a forfeiture".49

Speaking on the origin of property, Blackstone further states:-

> "Necessity began property: and, in order to ensure that property, recourse was had to civil society, which brought along with it a long train of inseparable concomitants; states, government, laws, punishments and the public exercise of religious duties".50

As for Bodin, so also for Blackstone, positive law emanating from the sovereign was subordinated to divine law as reflected in natural law - a conception to which Bentham referred, (no doubt with utter contempt) as a "theological

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[47] 1 George Tucker, Blackstone's Commentaries, 41 (1969).

[48] Ibid.

[49] Gareth Jones, The Sovereignty of the Law: Selections from Blackstone's Commentaries on the Laws of England, 40 (1973).

[50] Ibid. at 123-124.

galimatias".[51]

In the course of the evolution of the concept of sovereignty, then, came John Locke with the idea that sovereignty rested on a contract between the governing and the governed and that the exercise of sovereignty must be in accordance with the original compact requiring the sovereign to protect personal security, personal liberty and private property. Rousseau further elaborated another variant of the contract theory, and claimed that legitimate government rested upon it. Both Locke and Rousseau recognized that the compact which forms civil government had the ultimate purpose of securing the enjoyment and protection of certain private rights whose existence pre-date civil society. In the thinking of both theorists, the enjoyment of those pre-existing rights set the outer defining limit to the exercise of sovereignty.

Still later, Jeremy Bentham, in his discourse on the theory of legislation, subjected Blackstone, Hobbes, Locke and Rousseau to harsh criticism in that their political theories rested on "fiction".[52] Referring to the three variants of the contract theory in Hobbes, Locke, and Rousseau, Bentham asserts that "not only we find no trace of them in history, but everywhere we discover proofs to the contrary".[53] According to him "the true political tie is the immense interest which men have in maintaining a government. Without a government there can be no security, no domestic enjoyments, no property, no industry. It is this fact that we ought to seek the basis and reason of all governments whatever may be

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[51] Jeremy Bentham, A comment on the commentaries: A criticism of William Blackstone's commentaries on the law of England, 45-46 (1928).

[52] Jermey Bentham, Theory of Legislation, 71-74 (2nd ed. 1871).

[53] Ibid. at 73.

their origin and their form; it is by comparing them with their object that we can reason with solidity upon their rights and their obligations, without having recourse to pretended contracts which can only serve to produce indeterminable disputes".[54] Bentham's theory of government and sovereignty rested on the two borrowed notions of the "principle of utility" and that of the principle of 'the greatest Good of the greatest number".[55] For Bentham, "every law is an evil, for every law is an infraction of liberty. Government...has but the choice of evils. In making that choice what ought to be the object of the legislator? He ought to be certain of two things: first, that in every case the acts which he undertakes to prevent are really evils, and second, that these evils are greater than those which he employs to prevent them. He has then two things to note - the evil of the offence and the evil of the law; the evil of the malady and the evil of the remedy".[56] For Bentham, the legitimate basis of government is neither divine mandate nor social contract, but rather utility. Although Bentham's theory of utility differed from Bodin's theory of natural law as well as the contract theory, all three shared a common conception of personal rights, including property rights, existing independent of and outside civil government and defining the maximum outer limits of the content of sovereignty.

Historically, the emergence, at different times, of each of those theories[57] signifies a gradual change in the content of sovereignty in relation to private rights, in the sense that

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[54] Ibid. at 74.

[55] According to Walter Jones, the first principle was borrowed from Hume, and the second from Priestley. See Supra at 93.

[56] Jeremy Bentham, Theory of Legislation, 48 (2nd ed.).

the immunity of private rights from sovereign interference has gradually lessened, and the scope of the exercise of sovereignty has broadened, thereby, resulting in the increasing violability of private rights, including the right to own and enjoy private property.

Under Bodin's theory of sovereignty which rested on natural law and divine mandate, the scope for the exercise sovereignty was, for instance, relatively restricted while the immunity of private rights, including property rights, from sovereign interference, was relatively secure.

Under the theory of social contract, increasing encrouchments over private rights were possible since the broadened exercise of sovereignty found some legitimation, despite the counter-force of laissez faire, laissez passé, from the notion that the sovereign represented a "popular will".

The trend towards the broadening of the content and scope of sovereignty still became all the more pronounced with the emergence of the utilitarian school which made the exercise of sovereignty subject only to the principle of "greatest happiness" for the "maximum number" of people (purportedly, that is), and as a result, in roads against private rights, including property rights, were licensed relatively loosely.

Despite the slight changes in the content of sovereignty which each of those theories brought about, however, it is important to bear in mind that all of them, i.e. the natural law and divine mandate theory; the social contract theory, and the utilitarian theory, had a common ideological affinity in the sense that they jointly formed the core of what might be called western Liberal politico - juridic thought relative to the content of sovereignty as it affected private property rights.

It is our contention that the content of sovereignty which

later became the basis for the institution of expropriation, strictu sensu, was the one which had its roots in the amalgum of those three theories that formed the core of western liberal politico-juridic thought regarding sovereignty. In the same way as most of the municipal norms and rules pertinent to expropriation were gradually assimilated from the municipal legal systems of the western nations into the domain of traditional international law, so also was the content of sovereignty, as it found its expression in the amulgum of those three dominant theories in western liberal politico-juridic thought, borrowed and assimilated into the domain of traditional international law at the same time as the factual incidents of expropriation became an international phenomenon, and during the early stages in the formative process of the rules of traditional international law.

The content of sovereignty that formed the basis for "takings" of the expropriatory-type, did not, however, remain the same by the time when those factual incidents of "takings" of the "nationalization-type" emerged for the first time in international state practice during the second decade the twentieth century.

By the time the institution of nationalization became an international phenomenon, the nature and content of sovereignty had changed radically owing largely to the influence of the "entry" of the new Soviet state into the hitherto homogeneous international community of states. The fact that the earliest nationalization measure was taken by the new Soviet government following the October socialist Revolution of 1917, meant that the old content of sovereignty that was rooted in the philosophical assumptions of those theories which formed the core of western liberal politico-juridical thought, and which historically served as a basis for "expropriation-type" takings, could not serve as a basis for the new type of "taking" carried out by the new socialist state which did not

share the fundamental tenets of western liberal politico-juridical thought relative to the content of sovereignty.

The first socialist experiment in the nationalization practice of the Soviet Union following the October Revolution of 1917, coupled with the sweeping nationalization measures in the East-European socialist countries following the Second World War, thus, introduced a new conception in the content of sovereignty as a basis for resorting to the entirely new "nationalization-type" takings.

The plurality of conception regarding the content of sovereignty among the international community of nations was further broadened when, subsequent to the Second World War, underdeveloped countries began to resort to sweeping measures of nationalization by invoking sovereignty, the precise sense and content of which was still different from both the western-liberal connotation of sovereignty as well as that of the socialist countries.

Seen from the mere formal point of view, the nature and content of sovereignty which became the basis for resort to nationalization, by socialist countries might readily appear, at least on the surface, to be similar to the nature and content of sovereignty as understood in western liberal politico-juridic thought. Indeed, from formal definitional rendering, one can hardly see a substantial difference between the legal definition of sovereignty by Soviet jurists, for instance, and that of western liberal jurists. At a superficial level, the standard definition of sovereignty given by such western

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[57] For an interesting discussion regarding various theories expounding different contents of sovereignty, see Saba Habachy, "Content of sovereignty", in the southern Legal Foundation, Symposium on private investors abroad, 89-121 (1965); see also, Neil Clark Godfrey, "The content of sovereignty: Comparing Pacta Sunt Servanda", in the southern legal foundation, Symposium on private investors abroad: Problems and solutions in international business in 1968, 213-221 (1968).

jurists as Paul Guggenheim,[58] or Oppenheim,[59] for example, may in fact appear identical with the definition of sovereignty provided by such Soviet Jurists as G.I. Tunkin,[60] I.D. Lebin,[61] or N.A. Ushakov.[62] A rather loose and general definition of sovereignty by Tunkin and Ushakov, for instance, merely implies "a state's territorial supremacy and independence in international affairs", which on the surface, can hardly be objectionable to a western jurist.

Upon closer observation, however, it becomes clear that the nature and content of sovereignty as understood by jurists of socialist countries is entirely and qualitatively different from that of western jurists.

According to the Soviet jurist Ushakov, for example,

> "Sovereignty is not a formal legal category. It reflects the real qualitative features of the state which are manifested in real social relationships.
>
> ...
>
> [The] concept of sovereignty as a political and legal feature of the state may be [understood] only if one bears in mind the fact that the social essence of the sovereignty of a given state is ultimately determined by its socio-economic structure.
>
> The sovereignty of states with differing socio-economic systems has a different social basis. In this sense, the sovereignty of socialist states differs fundamentally from that of bourgeois states".63

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[58] 1 Paul Guggenheim, Traité du droit international public, 173 (Geneva, 1953).

[59] L. Oppenheim, Supra.

[60] G.I. Tunkin, Fundamentals of present-day International Law: A Textbook, 15 (Moscow, 1956).

[61] I.D. Levin, Sovereignty, 102-103 (Moscow, 1948).

[62] N.A. Ushakov, "International Law and Sovereignty" in, Contemporary International Law, 97 (G.I. Tunkin ed. 1969).

[63] N.A. Ushakov. Ibid. at 98. [Emphasis ours].

Alluding indirectly to the argument that nationalization by socialist countries is based on a qualitatively different content of sovereignty, Ushakov further makes the following observation:-

> "The sovereignty of a capitalist state is an expression of the rule of the bourgeoisie which protects private capitalist property and the system of exploitation of the working classes with the aid of the state.
>
> The abolition of private ownership of the means of production and their transformation into the property of the entire people lead to the establishment of a qualitatively new, socialist type of state and alter the socio-political nature and significance of sovereignty".64

Counter-posing the understanding of sovereignty in socialist jurisprudence as against the philosophical underpinnings of sovereignty under western liberal politico-juridic thought (especially that of the "social contract"[65] school of western juris prudence), Ushakov maintains that:

> "...[A] state's supremacy is the consequence of the fact that there is no other power over it which could establish or restrict its powers and demand its subordination.
> ...

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[64] Ibid. at 98-99.

[65] According to Jean Jacques Rousseau, for instance, sovereignty rested on "social contract". In his own words:

> "Just as Nature gives each man absolute power over all his members, so does the social treaty give the political body absolute power over all the members of the latter, and it is this same power which, directed by general will, is called... sovereignty". See, 3 J.J. Rousseau, Du Contract Social: ou, principes du droit politique, 372 (Paris, 1964). Translation by Ushakov, Ibid. at 100. [Emphasis ours].

> The state's supremacy and sovereignty are not rooted in any outer force but in the material living conditions of society at a certain stage of its historical development which engender the need for establishing a state with all the attributes of its public power".66

As regards the relationship between the exercise of sovereignty on the one hand, and the restrictions on sovereignty by rules of international law on the other hand, Ushakov again brings out the distinct content of sovereignty as understood by socialist countries. According to him:

> "... [The] sovereignty of a state finds expression in two inseparably linked qualities - its territorial supremacy, and its independence in international affairs.
> ...
> The state is independent of the power of the other states. It exercises its internal and external functions and defines its own domestic and foreign policies. Consequently the state's independence manifests itself in two ways: in the state's independence in home affairs and in its independence in foreign affairs.
> ...
> The state's independence in its internal affairs (internal independence) presupposes full freedom in the socio-political organization of society, that is, in the establishment of the state's social and political system and law and order.
> ...
> There is essentially no legal restrictions on internal independence. International law does not and cannot govern social relations within a state, for that is the exclusive prerogative of the state itself.
> ...
> In the sphere of foreign policy, a state's freedom is restricted by the need to observe the rules of international law.
> ...
> The rules of general international law are the product of agreement among states".67

From the above formulation of the relationship between international law and state sovereignty as understood by

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66 N.A. Ushakov, Ibid. at 100.

67 Ibid. at 99-104.

socialist countries, it appears that the right to resort to nationalization falls under that attribute of state sovereignty which Ushakov calls the "internal independence" of the state, by virtue of the "exclusive prerogative" of which it organizes its "social and political system" in the way it deemed fit. Again, the content of sovereignty in relation to international law is defined in such a way that the only limitations or qualifications, if at all to the exercise of the right to resort to nationalization recognized by socialist countries, appear to be those prescribed by the rules of general international law that are the product solely of "agreement" among the concerned states. In other words, those qualifications to the exercise of sovereignty that are not agreed upon by the state concerned, do not constitute valid international law limitations to state sovereignty.

Thus, the content of sovereignty as understood by socialist countries not only differed, in its philosophical underpinnings, from the nature and content of sovereignty as understood in western liberal politico-juridic thought, but it also possessed a unique and distinct element in the way in which it became a basis for socialist nationalization. Its unique quality, and distinctiveness attaches more specifically to the "sensitiveness" of the socialist countries to the fact that the internal socio-economic and political organization of their society is qualitatively different from that of other states, and that therefore, inter-state relations involving them could only proceed upon recognition of that fundamental fact.

On the other hand, the nature and content of sovereignty as commonly understood by underdeveloped countries, especially when it is invoked as a basis for nationalization, still carries a slightly distinct connotation which is different from the way sovereignty is understood both in the western liberal politico-juridical tradition as well as in socialist jurisprudence.

Before we consider the precise sense in which its distinctiveness lies, however, it may be useful to cite some concrete examples from the nationalization practice of few underdeveloped countries, namely, Iran, Egypt and Cuba to show the overall context in which those underdeveloped countries expressly invoked their sovereignty as a basis for resorting to nationalization.

In connection with the Iranian nationalization measures which we shall examine in subsequent chapters in some detail, we see, for example, the interesting statement of May 8, 1951 from the then Iranian prime Minister, Dr. Mussadiq, to the British foreign secretary, Mr. Morrison, in which the Iranian prime Minister asserted Iran's right to resort to nationalization in the following words:-

> "It is the sovereign right of every nation to nationalize its industries.
> ...
> [Even if agreements or concessions were concluded with private persons or companies] they cannot form a barrier against the exercise of national sovereign rights... The Iranian nation wishes to exercise its sovereign rights and to undertake the exploitation of its own oil resources".68

The same point was again repeated in an official Note of May 20, 1951 from the Iranian Finance Minister addressed to the representatives of the nationalized Anglo-Iranian oil company in connection with Iran's rejection of international arbitration. In that Note, the Iranian Finance Minister remarked as follows:

> "... the nationalization of industries derives from the right of sovereignty of nations, and other governments... have in various instances availed themselves of this same right.
> ...

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[68] Documents on International Affairs: 1951, at 478-479 (Denise Folliot ed. 1954). [Emphasis ours].

> [The] fact of nationalization of the petroleum industry... derives from the exercise of the right of sovereignty of the Iranian nation..."69

Again, in an Aide-mémoire from the Iranian Finance Minister dated May 30, 1951 and addressed to the representatives of the Anglo-Iranian Oil Co., it was once more stressed that the law nationalizing the oil industry "derives from the right of sovereignty of the Iranian nation in choosing and determining the method of utilization of national industries...".[70] The same point was again made by Iran in its reply to the pleadings of the United Kingdom at the International Court of Justice, in which it pointed out that Iran resorted to nationalization" on the strength of the Iranian people's sovereign right",[71] and that the British government was interfering "in a matter which...results from Iranian right of sovereignty...".[72] In a speech made before the U.N. security council by the Iranian Prime Minister, Dr. Musaddiq on October 15, 1951, the same theme again emerged as follows:

> "The oil resources of Iran, like its soil, its rivers and mountains are the property of the people of Iran. They alone have the authority to decide what shall be done with it, by whom and how. They have never agreed to share that authority with anybody else or to divide their ownership of all or part of that property or what it produces with anyone. They have not submitted and will not submit their authority in that regard, or the exercise of it, to review or judgement by any persons or body outside Iran. That ownership and that authority are inalienable. They are part of the foundations on which stand our national sovereignty and our admitted equality among the other sovereign states of the community of nations and the body in which it is organized, the United Nations".73

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[69] Ibid. at 486.

[70] Ibid. at 492.

[71] Anglo-Iranian oil company case (United Kingdom V. Iran) I.C.J. Pleadings 677 (1952).

[72] Ibid. at 679.

In that same speech the Iranian Prime Minister emphasized again and again that "it is the clear right of every people to determine the path in which the nation shall go",[74] and that "nationalization of the country's basis industries is undoubtedly [Iran's] sovereign right".[75]

Similarly, an identical pattern emerges in the Egyptian nationalization practice where the Egyptian government headed by the late President Nasser, persistently invoked the sovereignty of Egypt as a basis for the nationalization of the Suez Canal. In his famous speech delivered at Alexandria on the 26th of July 1956, announcing the takeover of the maritime operations of the Suez Canal company, the Egyptian president stressed that the Suez Canal "which is situated in Egyptian territory, which goes through Egyptian territory, [and] which is part of Egypt",[76] was, from then on, nationalized; and that in doing so "Egypt has fully exercised her sovereignty".[77] Addressing himself particularly to what he regarded as groundless British protests, the Egyptian president again emphasized in the same speech that in resorting to the nationalization of the Suez maritime operations, his country was in fact exercising "a right which stems from the very core of Egyptian sovereignty...".[78]

The Egyptian government held a similar position in its

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[73] Documents on International Affairs: 1951, at 540 (Denise Folliot ed. 1954).

[74] Ibid. at 546.

[75] Ibid. at 542.

[76] Documents on International Affairs: 1956, at 113 (Denise Folliot ed. 1959).

[77] Ibid. at 119.

[78] Ibid. at 120.

statement of 12, August 1956 in connection with its rejection of the invitation of August 2, 1956 extended to it jointly by the British, French and U.S. governments to attend the London conference on the Suez Canal. In that official statement Egypt again pointed out that "the decision to nationalize the Suez Canal company is a decision taken by the Egyptian government in [the] exercise of [its] right of sovereignty" [79] and that the convening of the conference amounted to "the denial of [Egypt's] sovereignty over the canal which is an integral part of its territory", and branded the proposal to create an International Authority over the operations of the canal as a disguised attempt to enforce "collective colonialism" on Egypt.[80]

Again, in the Indonesian nationalization practice, we observe that the Indonesian government repeatedly and expressly invoked sovereignty as a basis for its nationalization measures directed against property of Dutch nationals. In its official Note of April 8, 1959 addressed to the Netherlands government, the Indonesian government, for instance, maintained that "as a sovereign state, the Republic of Indonesia has the right to decide independently on the nationalization of the private property of aliens".[81] The same point was again repeated in a supplement to the Indonesian Act No. 86 of 1958 nationalizing Dutch-owned enterprises, in which it was maintained, by way of explanation of the spirit of the nationalization law, that

> "the government of Indonesia as a sovereign government... is continuously endeavouring to accelerate the realization of the foundations of a national economy" by carrying out the nationalization measures "against Netherlands enterprises".82

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[79] Ibid. at 170.

[80] Ibid. at 171.

[81] 54 A.J.I.L. 485 (1960).

[82] 6 Netherlands International Law Review 293 (1959).

Likewise, we also find several instances in the Cuban nationalization practice where the Cuban government repeatedly invoked Cuban sovereignty as a basis for its nationalization measures. The Cuban nationalization law of July 6, 1960, for instance, provided in its preamble that the nationalization measure was carried out not only by virtue of that country's sovereignty, but also for the purpose of the "defence of (Cuba's) national sovereignty".[83] As we shall show in another connection in this paper, the same theme again emerges from two major speeches by Fidel Castro, one[84] made during a rally in Havana on October 26, 1959, and another[85] before the General Assembly of the United Nations, on September 26, 1960.

Similarly, the Chilean government of Salvador Allende repeatedly invoked Chile's sovereignty as a basis for the 1971 Chilean nationalization measures involving the takeover of the copper industry. Article 2, paragraph (17) of the Amendment to Article 10, section (10) of the Political Constitutions of Chile, for instance, provided that the nationalization measure was being carried out "in the exercise of the sovereign and inalienable right of the (Chilean state) freely to dispose of its natural wealth and resources...".[86] In a statement entitled "the recovery of basic resources is a sovereign decision reflecting the feelings of all Chilean people: The copper industry will be nationalized in conformity with the powers inherent in a constitutional state", and released by the New York Times on January 1971, the Allende Government expressly invoked Chile's sovereignty as a basis

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[83] See Chapter VII.

[84] Reproduced in, Fidel Castro Speaks, 51-66 (Martin Kenner and James Petras, ed. 1969).

[85] Ibid. at 4-32.

[86] 10 International Legal Materials 1068 (1971).

for the nationalization of the copper industry.[87] The same theme was repeated again by the then Chilean foreign Minister, Clodomiro Almeyda, in his statement of October 1, 1971 before the plenary meeting of the 26th session of the U.N. General Assembly in which he pointed out that his country's nationalization measure was taken in "the exercise of [Chile's] sovereign right to recover for the country its natural resources..."[88] In his opening speech before the Third Session of UNCTAD in Santiago de Chile on April 13, 1972, president of Chile, once more referred to Chile's sovereignty as a basis for his country's nationalization of the copper industry.[89] The Chilean president again repeated the same point in his Address to the plenary meeting of the 27th session of the U.N. General Assembly on December 4, 1972.[90]

The distinctive feature of the nature and content of sovereignty as understood by the underdeveloped countries is that, owing to the peculiar historical experience of colonial or neo-colonial rule under which they were subjected in the past, sovereignty to them in particular, imports the additional element of "independence from foreign domination". The latter dimension of sovereignty becomes all the more clear upon contrast with the nature and content of sovereignty as understood both in western liberal politico-juridic thought, as well as in socialist jurisprudence.

As we tried to show earlier, the distinctive characteristic

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[87] The New York Times, January 1, 1971 at 72.

[88] 26 General Assembly, Official Records, 1948th plenary meeting, at 15 (1971).

[89] 1 UNCTAD, Third session, Report and Annexes, 351-355 (1973).

[90] 27 General Assembly, Official Records, 2096th plenary meeting, at 1-2 (1972).

of sovereignty in Western liberal politico-juridic thought is that it is an outgrowth of the duel between the right of the individual on the one hand and the power of the state, on the other,and as a result, it retained, even in the domain of traditional international law into which it was assimilated from the municipal jurisprudence of the western nations, that distinct feature which makes it a relational-concept between the state and the individual alien.

In contrast to the notion of sovereignty as understood in underdeveloped countries, western liberal politico-juridic thought on sovereignty does not, for obvious historical reasons, reflect that dimension of sovereignty which imports the additional element of "independence from foreign domination".

The notion of sovereignty as understood by underdeveloped countries is still different from the concept of sovereignty under socialist jurisprudence, in that while sovereignty in the former is a relational-concept importing the element of "independence from foreign domination", in the latter case, sovereignty as a relational-concept is more of an expression of (i.e. defence of) the qualitative distinctness of the internal socio-economic and political system on which a given socialist state is founded as opposed to other types of states.

In short, although sovereignty is a relational-concept in all cases, the main ingredient which defines sovereignty in inter-state relations in each case is different. The main ingredient of the content of sovereignty as understood by underdeveloped countries , is the element of"independence from foreign domination". The distinct ingredient of the content of sovereignty in western liberal politico-juridic thought is, on the other hand, the protection of the individual alien from the arbitrary power of the sovereign. The main ingredient of

sovereignty under socialist jurisprudence is the element of guarantee against outside interference in the internal affairs of the qualitatively new socialist social system.[91]

It is, therefore, our contension in this paper that unlike the institution of expropriation strictly so-called which evolved at a time when the content of sovereignty was solely defined on the basis of the philophical assumptions of western liberal politico-juridic thought, the factual incidents of nationalization unfolded at a time when the content of sovereignty began to carry different connotations to the different grouping of states that make up the new international community of nations, namely the western countries, the socialist countries and the underdeveloped countries. In other words, not only is the content of sovereignty that was historically associated with the institution of expropriation strictu sensu entirely different from the nature and content of sovereignty on the basis of which nationalization proper began to be carried out, but it is also our contension that modern international law lacks a common conception of sovereignty as would form a basis for nationalization. As we shall try to show in the next chapter, for instance, it is this lack of common conception of sovereignty that partly accounts for the international controversy surrounding the question of whether underdeveloped countries which

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[91] It is interesting to note that the socialist countries not only claim that their concept of sovereignty as it relates to socialist nationalizations is different from the western liberal concept of sovereignty, but they also distinguish the latter from that concept of sovereignty invoked by underdeveloped countries to carry out nationalization measures. See G. Vilkov, "Nationalization - Sovereign right of independent Nations", 9 International Affairs, at 64-68 (Moscow, 1963).

resort to nationalization measures are obliged to respect those traditional rules of "prior restraints" to "taking" that evolved in connection with "takings" of the "expropriatory-type".

In light of the absence of a common conception of sovereignty under general principles of modern international law that commands universal acceptability, it will be the theme of the second section of this chapter to argue that the consensus of international opinion that evolved within the U.N. machinery over the last three decades can be relied upon, in and of itself, particularly by the underdeveloped countries, as an independent juridic basis for resorting to nationalization measures. In other words, it is our contension that underdeveloped countries need not invoke their state sovereignty (i.e. in the peculiar way in which they understand it) to carry out a legally sound act of nationalization since, as we shall show subsequently, they can rely on the juridic authority of the consensus of international opinion issuing from the U.N. machinery, in order to do so.

SECTION II

U.N. Norms as a Basis for Nationalization of Property of Aliens by Underdeveloped Countries

Ever since its establishment back in 1945, the United Nations Organization has been one of the broadest representative international forums for the development of consensual norms promoting the right of underdeveloped countries to resort to the nationalization of property of aliens.

In line with the organization's declared purpose of promoting co-operation "in solving international problems of an economic, social, cultural, or humanitarian character and in promoting and encouraging respect for human rights",[92] the

U.N. organization has been responsible for the formulation, through its main deliberative organs such as the General Assembly (in plenary meetings as well as in various committees, in particular, the second, third, and sixth committees, including its permanent body, the UNCTAD) and the economic and social council, of policies and norms in the field of economic development, human rights and inter-state relations that tended to promote and support nationalization measures by underdeveloped countries.

In the following section of this chapter, we will be examining those U.N. resolutions pertaining to the right of underdeveloped countries to nationalize property of aliens under three separate headings, namely:

(1) U.N. Resolutions in the field of economic development;
(2) U.N. Resolutions in the context of the advancement of human rights; and lastly
(3) U.N. Resolutions regulating international behavior in inter-state relations.

Under the first heading, we will be dealing with: (i) the norms of permanent sovereignty over natural resources as they evolved within the U.N. forums over the last three decades, and (ii) the norms governing international trade relations as well as those enunciated in connection with the new international economic order.

Under the second heading, we will be concerned with those U.N. works in the social field of human rights, especially those dealing with the principle of economic self-determination.

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[92] Article (1) paragraph (3) of the charter. See, Basic Documents of the United Nations 2 (2nd Rev. ed. Louis B. Sohn, ed. 1968).

Under the last heading, we shall be dealing with those legal principles enunciated by the U.N. for governing relations between states according to the U.N. charter.

1. U.N. Efforts in the Field of Economic Development

The U.N. concern with the problem of economic development during the last thirty years stems from the organization's declared aims and purposes as set out in the charter. According to preambular paragraph 4 of the charter, member nations pledge "to promote social progress and better standards of life in larger freedom" and to that end "to employ international machinery for the promotion of economic and social advancement of all peoples".[93] Chapter 1, Article 1, sub-section 3 of the charter further provides, as one of the purposes of the United Nations, the achievement of "international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion".[94] Article 13(b) of the charter empowers the General Assembly to "initiate studies and make recommendations" for the purpose of "promoting international co-operation in the economic, social, cultural, educational and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion".[95] Again, Article 55 of the charter provides that "with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of

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[93] Ibid. at 1.

[94] Ibid. at 2.

[95] Ibid. at 5.

equal rights and self-determination of peoples, the United Nations shall promote (a) higher standards of living, full employment, and conditions of economic and social progress and development; (b) solutions of international economic, social...and related problems...";[96] and pursuant to Article 56, "all members pledge themselves to take joint and separate action in co-operation with the organization for the achievement of the purposes set forth in Article 55".[97] Article 62 assigns, to the Economic and Social Council, the responsibility to "make or initiate studies and reports with respect to international economic, social...and related matters and make recommendations with respect to any such matter to the General Assembly, to the members of the United Nations, and to the specialized agencies concerned".[98] Again, by virtue of Article 98 of the charter,[99] the U.N. Secretariat is entrusted with the responsibility of carrying out secretarial functions to the General Assembly and the Economic and Social Council to facilitate the fulfillment of the tasks entrusted to the latter by virtue of Articles 13 and 62 of the charter.

It is, therefore, in line with the foregoing charter provisions that the various organs and sub-organs of the U.N. Organizations formulated norms and principles in connection with permanent sovereignty over natural resources, international trade relations and the new international economic order that tended to promote and support nationalization by underdeveloped countries.

(i) U.N. Resolutions pertaining to permanent sovereignty

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[96] Ibid. at 14.

[97] Ibid.

[98] Ibid. at 15.

[99] Ibid. at 22.

over natural resources as a basis for nationalization by underdeveloped countries:

The principle of permanent sovereignty over natural resources was proclaimed by the General Assembly of the United Nations as far back as 12 January 1952, and has been re-affirmed ever since in a series of U.N. Resolutions up until the middle of the seventies. Before we examine in some detail, and in chronological order some of the most important U.N. Resolutions on permanent sovereignty over natural resources, however, we would like to clarify the notion of "permanent sovereignty" to avoid possible ambiguities and confusion, and define, with some precision, what we mean by "natural resources" in the context of this paper. Moreover, we wish to explain, right at the outset, how the option by underdeveloped countries to resort to nationalization comes under the overall umbrella of permanent sovereignty over natural resources.

The notion of "permanent sovereignty" easily lends itself to confusion owing, partly, to the problematic qualification of "sovereignty" by the word "permanent". The difficulty, or more appropriately the ambiguity, implied by the word "permanent" consists in the fact that it imports the sense of "permanence in time". In fact, the Bulgarian delegate, Mr. Julev, speaking in connection with a draft resolution on permanent sovereignty in 1966, noted at one point that his delegation understood "permanent sovereignty over natural resources to mean the exercise of a permanent right over those resources", thus implying a right in perpetuity.[100] Although the earliest proponents of this word did not attach any

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[100] 21 U.N. General Assembly, Official Records, Second Committee Meetings, 198 (1966).

definite meaning to it, it becomes clear from subsequent deliberations in the Second Committee of the General Assembly that in addition to the element of "perpetuity", the word "permanent" was understood as meaning "effective". Thus, for the purpose of this research we may construe the phrase "permanent sovereignty" to mean "effective perpetual sovereignty". It should be noted that the element of 'perpetuity" not only implies that the sovereignty in question is non-relinquishable, but also that whenever it is encumbered with obligations at will, it can be regained at any time.

Apart from terminological ambiguity, the notion of "permanent sovereignty" still lends itself to another serious conceptual confusion. Perhaps not without reasons, "permanent sovereignty over natural resources" may sometimes connote "ownership of natural resources". It must be stressed, however, that "permanent sovereignty over natural resources" within the context of U.N. resolutions, is not synonymous with "ownership of natural resources". If "permanent sovereignty" meant "ownership", the state owning the resources could, for instance, in no way claim control, by way of nationalization, over activities connected with the resources but not constituting the resources themselves. To illustrate the point, if "permanent sovereignty" were synonymous with ownership, state (A) owning fish resources would not be able, by virtue of its ownership of the fish resources alone, to seize property (fishing boats, etc.) connected with the exploitation of the fish; or state B owning a natural water passage (a canal) would not be able to nationalize distinct property rights in shipping activities over the canal it owns. In other words, it is not by virtue of the ownership of the natural resources within its territory per se, but rather by virtue of its sovereignty over the natural resources within its jurisdiction that a state can nationalize property of aliens.

According to a working definition provided by the U.N. Secretariat, permanent sovereignty over natural resources:

> "Comprehends the right of each state to dispose fully of its natural resources and to determine how best to utilize those resources through the organization of such economic structures as it sees fit..."[101]

In other words, permanent sovereignty consists in the power or right of a state, (in this case, a state in an underdeveloped country) to determine the manner of natural resource control and exploitation within its territory. Thus, permanent sovereignty attaches not merely to the natural resources alone, but also to the economic and environmental activities connected with those natural resources.

The notion of permanent sovereignty over natural resources implies the availability of several options for a given state to choose between in the manner of exercising control over the use and exploitation of its natural resources, and those options include, among others;

(a) The power of the state to allow the entry of foreign investment in the exploitation of natural resources and to regulate the activities and operations of the foreign investors thereafter; or the power to forbid altogether the entry of foreign investment; or

(b) The right to participate, in the form of joint ventures, with other foreign investors, in the exploitation of natural resources; or

(c) The power to take full control and ownership, by way of nationalization, of economic activities connected with the exploitation of natural resources located within the state's jurisdiction.

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[101] U.N. Secretariat, Permanent Sovereignty over Natural Resources, U.N. Doc. E/5425 (1973).

The right to resort to nationalization is, therefore, one aspect of the several attributes of the exercise of permanent sovereignty, and one option among several other options available to a state in the exercise of permanent sovereignty over its natural resources.

The other source of possible confusion that requires some clarification is the scope of "natural resources" that falls within the domain of permanent sovereignty. For our purposes in this paper, "natural resources" may be understood as land and water resources; mineral and energy resources; all biological resources both living and non-living found in nature and having either a direct economic use or an ecological function useful to man; all physical natural resources capable of being controlled, modified or developed and therefore, owned; and all amenity resources and locational resources having either a panoramic or an economic function.[102]

The exercise of permanent (effective) sovereignty over natural resources, therefore, attaches not only to the resources mentioned above but also to those economic and environmental activities integrally linked with those resources. Thus, the exercise of permanent sovereignty over land (surface and subterranean) resources, for instance, extends over the land as well as over economic activities carried on the land. The same goes for mineral exploitation, fishing, commercial aviation, tourism, inland shipping and international canal operation, each of which is integrally linked to one or another

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[102] For a detailed definition provided by the committee on Natural resources established by the economic and social council see, Committee on Natural Resources, first session, provisional Agenda Item 4, U.N. Doc. E/C.7/2/Add.2 at 1-4 (1971).

type of natural resource endowment.

The other problematic question concerning the concept of "permanent sovereignty over natural resources", relates to locational limits of the resources and activities thereon over which sovereignty can be exercised by a given state. It is generally true that a state can exercise sovereignty only over those resources and activities attached thereon located within its territorial boundaries. The problem in international law, however, is the lack of agreement among states, especially in the area of air space, territorial waters and contiguous zones, as to the limits of territorial claims. Moreover, the territorial limits for the exercise of permanent sovereignty over natural resources is complicated in certain circumstances owing to the spacially mobile character of the resources themselves, as in the case of a moving surface water originating from or passing through a country and touching on the territory of another country, or migratory wild life moving seasonally between adjoining territories of different sovereigns, or as in fluid mineral resources lying over a similar geological structure extending between adjoining territories of two or more sovereigns, or living biological resources lying in an adjoining water belt claimed by more than one sovereign.

Although the locational problems of those resources affect the right of states in the exercise of sovereignty over those resources, we will not be dealing with those complex problems here because of the limited scope of this paper. As far as this paper is concerned, we shall, therefore, confine the treatment of the exercise of permanent sovereignty in relation to those natural resources located within those minimal territorial limits over which the sovereignty of a state is recognized without question.

With the foregoing framework in mind, we shall examine

some of the major U.N. resolutions on permanent sovereignty over natural resources in so far as they relate to nationalization.

Here, we shall examine each resolution separately as well as in relationship with other resolutions with the aim of showing the overall evolution, over a period of time and in dynamic setting, of the norms that emerge from the affirmation of permanent sovereignty over natural resources by the U.N.

First, we shall examine each major resolution on permanent sovereignty over natural resources so as to show that the resolution in question recognizes resort to nationalization as an attribute of the exercise of permanent sovereignty over natural resources.

Secondly, we shall try to specify the subject of the right by arguing that each of those resolutions on permanent sovereignty lend recognition and support not to all nationalization measures carried out by all states as such, but rather principally to those resorted to by underdeveloped countries. We will try to show that this differential treatment of nationalization measures by underdeveloped countries stemmed from the peculiar situation surrounding the status of sovereignty over natural resources in those countries and their special capacity of "underdevelopment" (wit: the discussion in Chapter IV of this paper) both of which formed the central object of U.N. concern in each of the resolutions on permanent sovereignty over natural resources.

Thirdly, we shall try to show that each of those resolutions lent recognition to, and promoted, nationalization measures by underdeveloped countries with the specific aim of helping those countries achieve economic development and ensure their independence from alien domination.

In order to get a closer look at the above three aspects of each of the U.N. resolutions on permanent sovereignty over natural resources, we shall probe beyond the façade of the wording of the resolutions and examine the socio-economic studies preceding and giving rise to the resolutions; the evolution, within the various sub-organs of the U.N., of the draft texts that led to the final versions of the resolutions; the explanatory and interpretative statements made by official representatives of different governments in the course of the debates in the various U.N. forums; as well as the explanation of votes and texts of amendments put forward during the U.N. deliberations.

Our overall purpose in this section, is, therefore, first of all to argue that the U.N. resolutions on permanent sovereignty provide an independent supportive (promotive) basis for underdeveloped countries to resort to nationalization. By "independent" supportive basis we mean: (a) that under-developed countries can rely on the juridic force of this promotive norm alone, and, therefore, need not rely on sheer sovereignty (i.e., sovereignty as understood and defined under traditional international law) as such as a basis for resorting to nationalization; and (b) that as an independent juridic basis for resorting to nationalization, the promotive norm in question, provides underdeveloped countries with something which sheer sovereignty as understood and defined under traditional international law is incapable of providing. While one may be tempted to argue, for instance, that it matters little whether underdeveloped countries carry acts of nationalization by virtue of sheer sovereignty or on the supportive basis of the promotive norm emanating from the U.N. resolutions, our purpose in singling out the promotive norm as an independent supportive basis for resorting to nationalization is, on the contrary, to show that it in fact matters. As we will try to show in connection with the problems of "prior-restraints" to

"taking" and the question of compensation, it does matter in regard to the consequences of "taking" whether underdeveloped countries resort to nationalization by virtue of sheer sovereignty as understood and defined under traditional international law or on the basis of the promotive norm emanating from the U.N. resolutions on permanent sovereignty over natural resources. In other words, by arguing that the promotive norm emanating from U.N. resolutions serves as an independent juridic basis for underdeveloped countries to resort to nationalization, we will be arguing, at the same time, that those acts of "taking" by underdeveloped countries tend to be free from the encumberances with which "takings" based on sheer sovereignty are ordinarily ladden under traditional international law.

Secondly, we will argue that the other juridic significance of the U.N. resolutions on permanent sovereignty over natural resources in so far as they support and promote nationalization measures by underdeveloped countries is that, they introduce the novel idea, in contemporary international law, of differential treatment of factually unequal sovereign states varying in their economic needs, conditions and strengths, by differentiating them in terms of their rights and obligations towards one another in their relationship as sovereign states. This novel idea, we will argue, marks a radical departure from traditional international law in that it tends to refine, to a higher level, the notion of sovereign equality by seeking to bridge the gap between factual inequality between states on the one hand, and their formal (legal) equality on the other hand, by according special treatment to underdeveloped countries. As we shall show in subsequent chapters, the according of special treatment to the underdeveloped countries finds its reflection in the way the U.N. resolutions promote nationalization measures with the least encumberance to the act of "taking".

U.N. Resolutions on Permanent Sovereignty as Bases for Nationalization

Ever since the concept of permanent sovereignty over natural resources emerged back in 1952, the option of underdeveloped countries to resort to the nationalization of property of aliens has been recognized by the U.N. as one of the possible modalities of exercising their sovereignty over natural resources. The notion of permanent sovereignty over natural resources was enunciated, for the first time, in General Assembly Resolution 523(VI) of January 12, 1952, and has been reaffirmed ever since in General Assembly Resolution 626(VII) of December 21, 1952; General Assembly Resolution 1314 (XIII) of December 14, 1958; General Assembly Resolution 1515 (XV) of December 15, 1960; General Assembly Resolution 1803 (XVII) of December 14, 1962; General Assembly Resolution 2158 (XXI) of 25 November 1966; General Assembly Resolution 2386 (XXIII) of December 19, 1968; General Assembly Resolution 2626 (XXV) of October 24, 1970; General Assembly Resolution 2692 (XXV) of December 11, 1970; General Assembly Resolution 3016 (XXVII) of December 18, 1972; General Assembly Resolution 3171 (XXVIII) of December 17, 1973. As we will show in a moment, each of those Resolutions not only envisaged resort to nationalization as one possible mode of exercising permanent sovereignty over natural resources, but through them the U.N. also supported and promoted nationalization measures by underdeveloped countries in order to enable those countries achieve economic development and free themselves from alien economic domination.

General Assembly Resolution 523(VI)[103] as a Basis for Resort to Nationalization

The General Assembly of the U.N. adopted, at its sixth

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[103] For the text of this Resolution See Appendix A-1 of this paper.

session on January 12, 1952, Resolution 523(VI) entitled: "Integrated Economic Development and Commercial Agreements" in which it enunciated, for the first time, the now famous principle of permanent sovereignty over natural resources. In that Resolution, the General Assembly proclaimed that:-

> "The underdeveloped countries have the right to determine freely the use of their natural resources and that they must utilize such resources in order to be in a better position to further the realization of their plans of economic development in accordance with their national interests..."104

The first preambular paragraph of General Assembly Resolution, thus, enunciated what was later to be one of the most controvercial propositions in the U.N. forums during the last two and half decades, namely the promotive policy statement to the effect that underdeveloped countries may resort to nationalization of foreign operated enterprises connected with the exploitation of their natural resources.

In the context of that resolution, "the right to determine freely the use of natural resources" meant that the state in an underdeveloped country possessed the power to decide the manner in which the natural resources located within its jurisdiction are to be exploited, administered, controlled and owned, and that included the right to permit the entry and operation of foreign enterprises in the exploitation of natural resources; the right to regulate the activities of such foreign enterprises; the right to participate directly in the management, control and ownership of such enterprises; the right to forbid altogether foreign enterprises from engaging in the exploitation of natural resources; and finally,

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104 Ibid. See also, 6 U.N. General Assembly, Official Records, supp. 60, at 20, U.N. Doc. A/2119 (1952) (Emphasis ours).

the right to have exclusive control, management and ownership in the operation of natural resource exploitation by means of nationalization. Upon closer examination of that Resolution, it becomes clear that its purpose as well as effect is not the mere enunciation of those rights in the abstract, but its concern was instead one of support for the practical and actual exercise of those rights.

Although Resolution 523 (VI) was couched in general terms it becomes evident, from the drafting history of the resolution that the right to nationalization was contemplated as one of the options included in "the right to determine freely the use" of natural resources. Resolution 523 (VI) initially originated from a Polish draft which was submitted before the Second Committee of the General Assembly for consideration at its 173rd-175th meetings.[105] In the course of the deliberations of the Second Committee, an amendment was submitted by the United States representative to the Polish draft, and it was in the process of that discussion over the U.S. amendment to the Polish draft that the exact content of the Polish draft,[106] which was ultimately adopted as Resolution 523 with only minor changes, became clear.

The salient feature of the Polish draft was that the underdeveloped countries should exercise their "full right" to determine freely the use of their natural resources; that until then those countries were not, in fact, able to exercise their "full right"; and that from then on, the natural resources

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[105] 6 U.N. General Assembly, Official Records, supp. 3 at 21, U.N. Doc. A/1884 (1952).

[106] 6 U.N. General Assembly, Official Records, Annexes, Agenda Item 26, at 29, U.N. Doc. A/C 2/L.81 and corr.1 (1952).

of the underdeveloped countries must be utilized for the fulfilment of the plans for economic development of those countries and in accordance with their national interests. The Polish draft text that later became Resolution 523 (VI) was particularly directed against the pre-1951 state and manner in which the natural resources of underdeveloped countries were controlled, owned and exploited. The state of natural resource exploitation in the underdeveloped countries was at the time characterized by the predominance of foreign capital channelled in the form of direct foreign investment, facilitated by long-term concession agreements which allowed virtually no freedom for host underdeveloped countries to exercise actual control over natural resources. Thus, in proposing that the underdeveloped countries should exercise their "full right" to determine freely the use of their natural resources, the Polish draft contemplated not only the right to impose regulations and control over natural resources, but also the right to resort to nationalization if and when deemed necessary by the underdeveloped countries themselves. The U.S. amendment,[107] to the Polish draft, on the other hand, proposed that the natural resources of the underdeveloped countries should be utilized not solely "in accordance with the national interest" of those countries," but also "in the interest of an expanding world economy". The implication of the U.S. amendment to the Polish draft as far as the nationalization option of underdeveloped countries was concerned was that, even if it might be in the "national interest" of underdeveloped countries to carry out nationalization measures, resort to nationalization should be regarded as impermissible since it had the effect of being prejudicial to the "interests of an expanding world economy" which required the free movement of capital in the form of direct foreign investment. In other

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[107] U.N. Doc. A/C.2/L.120 (1952) Ibid.

words, the U.S. amendment was trying to exclude the nationalization option from "the right to freely determine the use of natural resources", on the ground that nationalization tended to discourage the flow of direct foreign investment to underdeveloped countries, and would, therefore, become prejudicial to the "interest of an expanding world economy".[108] Thus, while the Polish draft resolution contemplated the possibility of resort to nationalization, the U.S. amendment tended to confine "the right to determine freely the use of natural resources" of underdeveloped countries (at the most) to the mere power of regulating the operations of foreign capital, thereby, excluding the option to resort to nationalization.

In the course of the deliberations of the second committee, a joint draft subamendment[109] to the U.S. amendment was submitted by the representatives of Egypt, India and Indonesia, and the effect of that subamendment was to re-assert the primacy of "the national interest" over the so-called "interests of an expanding world economy", and to make it clear, as one of the co-sponsors put it, that "the right to exploit their natural resources (belonged) to the underdeveloped countries themselves".[110] The implication of the joint Egyptian, Indian and Indonesian sub-amendment as regards the option to resort to nationalization was that, regardless of its prejudicial effect on "the interests of an expanding world economy", the paramount "national interest" of underdeveloped countries still warranted U.N. support for resort to nationalization as one of

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[108] 6 U.N. General Assembly, Official Records, second committee, 173rd meeting (1952).

[109] 6 U.N. General Assembly, Official Records, Annexes, Agenda Item 26, at 30, U.N. Doc. A/C 2/L.124 and Corr. 1 and 2 (1952).

[110] 6 U.N. General Assembly, Official Records, second committee, Summary Record of Meetings, 174th meeting, at 175 (1952).

the modes of exercising sovereignty over natural resources. In other words, the joint sub-amendment submitted by Egypt, India and Indonesia did not basically detract from the original Polish draft which envisaged resort to nationalization as one of the several options open to underdeveloped countries.

Still at a later stage in the deliberations of the second committee, a series of other sub-amendments were further submitted separately by Chile; jointly by Denmark, Iceland, Norway and Sweden; and jointly by France, Greece and the United Kingdom, proposing minor changes in the joint Egyptian-Indian-and Indonesian sub-amendment. Owing to the confusion that resulted from the submission of numerous sub-amendments, it was decided to consolidate the separate sub-amendments into a single amendment to the original Polish draft. While the resulting amendment[111] which was jointly sponsored by Chile, Denmark, Egypt, France, Greece, India, Indonesia, the United Kingdom and the United States, deleted, according to the co-sponsors, only the "propagandistic" features of the original Polish draft, it "did not basically alter any of the ideas" contained either in the Polish draft or the joint Egyptian, Indian and Indonesian sub-amendment.[112] The revised and consolidated amendment was finally accepted by the representative of Poland on the understanding that it did not substantially change the content of the original text, and the Polish draft, as amended was adopted unanimously by the second committee.[113]

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[111] 6 U.N. General Assembly, Official Records, Annexes, Agenda Item 26, at 32, U.N. Doc. A/C.2/L. 128 (1952).

[112] 6 U.N. General Assembly, Official Records, Second Committee, Summary Record of Meetings, 175th meeting, at 181 (1952).

[113] 6 U.N. General Assembly, Official Records, Annexes, Agenda Item 26, at 39, U.N. Doc. A/2052 (1952).

The draft resolution was then transmitted to the General Assembly and it was finally adopted by the Assembly as Resolution 523 (VI) without further discussion.[114] Although the final text was couched in a conciliatory tone, the resolution still retained the essence of the original Polish proposal which lent recognition and support to resort to nationalization as a possible option in the exercise of permanent sovereignty over natural resources by underdeveloped countries.

It should be noted, that the interesting feature of General Assembly Resolution 523 (VI) is not merely that it lent support to resort to nationalization, as one of the possible modalities of the exercise of sovereignty over natural resources, but also that it did so specifically and primarily to those measures of nationalization carried out by underdeveloped countries. In other words, the central object of concern underlying General Assembly Resolution 523 (VI) was the peculiar problem associated with the utilization and disposal of natural resources in underdeveloped countries, and it was to resolve those problems, that the resolution licensed, as it were, the possible resort to nationalization by underdeveloped countries.

The "centrality" of the underdeveloped countries in General Assembly Resolution 523 (VI) becomes manifest from a closer reading of nearly every paragraphs of the Resolution. Starting from the title of the Resolution which focused on the economic development of underdeveloped countries, every paragraph both in the preambular as well as operative sections of the Resolution dealt specifically with the economic problems associated with the natural resources of underdeveloped

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[114] 6 U.N. General Assembly, Official Records, Summary Records of Plenary Meetings, Agenda Item 26, 360th meeting, at 338 (1952).

countries, and sought a possible course of action to ameliorate those problems so as to help the underdeveloped countries achieve economic development.

The differential treatment accorded particularly to underdeveloped countries by way of the Resolution's implicit support to nationalization measures carried out by them becomes manifest from the drafting history of Resolution 523 (VI) in which the "centrality" of the economic problems peculiar to underdeveloped countries was clearly recognized.

General Assembly Resolution 523 (VI) was largely a response to the annual economic report of the economic and social council covering the period from 16 August 1950 to 21 September 1951. The Report,[115] which was one of the many annual reviews of the world economic condition prepared by the council pursuant to Article 15 of the U.N. Charter and General Assembly Resolutions 118 (II) and 406 (V), included a survey of the economic conditions of the underdeveloped countries during 1949 and the first half of 1950. According to the council's survey, the underdeveloped countries encountered serious difficulties in "obtaining...funds required for their economic development" and that "if the gap between their living standards and those of the developed countries were to be narrowed in the not-too-distant future, a very rapid rate of economic growth on the part of the underdeveloped countries [was] required".[116] The twelfth session of the economic and social council which examined the above economic report noted the peculiar economic problems confronting the underdeveloped countries and stressed "the importance of promoting the economic development of the underdeveloped countries", in its recommendation to the General Assembly.[117]

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[115] 6. U.N. General Assembly, Official Records, supp. 6, at 18, U.N. Doc. A/1884 (1952).

[116] Ibid. at 19.

Thus, the council's annual report as well as its Resolution 341 (XII) both of which served as background bases for General Assembly Resolution 523 (VI), made the economic problems peculiar to underdeveloped countries and their speedy solution the central object of their concern.

The Polish draft which later became General Assembly Resolution 523 (VI) was, therefore, partly a response to the special concern shown by the economic and social council to the economic problems peculiar to underdeveloped countries in the above annual report to the General Assembly.

The "centrality" of underdeveloped countries in the Polish draft was even more direct and express in that, upon submitting its draft resolution before the second committee, the Polish representative had made it clear that his delegation was solely concerned with the way the natural resources of the underdeveloped countries were exploited, controlled and owned. The Polish draft text was in fact predicated on the express allegation that the natural resources of the underdeveloped countries had not been used, then, for the development needs of those countries, and that instead, they have been used for the purpose of the armament race, and that furthermore, the then prevailing political and economic conditions did not permit the underdeveloped countries to exercise their right to freely determine the use of their natural resources.[118] Similarly, the debate in the second committee regarding the Polish draft revolved exclusively around the central problem of natural resource use and control particularly in underdeveloped countries.[119] When the Polish draft was later adopted, with

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[117] Ibid. at 20.

[118] 6 U.N. General Assembly, Official Records, Second Committee, Summary Record of Meetings, 173rd meeting, at 171 (1952).

minor changes, as General Assembly Resolution 523 (VI) the latter, thus, retained the "centrality" of the underdeveloped countries as the object of its concern, and consequently, the resolution's implicit support for resort to nationalization particularly by underdeveloped countries, signifies a differential treatment of underdeveloped countries by the United Nations by reason of their special capacity of underdevelopment.

General Assembly Resolution 626 (VII)[120] as a Basis for Nationalization

The General Assembly of the United Nations again adopted, at its seventh session on December 21, 1952, Resolution 626 (VII) entitled: "Right to Exploit Freely Natural Wealth and Resources". In that Resolution, the Assembly noted "the need for encouraging the underdeveloped countries in the proper use and exploitation of their natural wealth and resources" (preambular paragraph 1), and affirmed that "the right of peoples freely to use and exploit their natural wealth and resources... is in accordance with the purposes and principles of the charter of the United Nations" (preambular paragraph 3).

Although General Assembly Resolution 626 (VII) no where expressly mentioned resort to nationalization as an aspect of the "right to exploit freely natural wealth and resources", both the drafting history of the resolution and the background deliberations of the second committee of the General Assembly leading to the adoption of the final text of Resolution 626 (VII) clearly show that in "encouraging the underdeveloped countries in the proper use and exploitation of their natural wealth and resources", the U.N. gave its implied support to resort to

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[119] Ibid. at 171-173.

nationalization by underdeveloped countries as one of the modalities of the exercise of their "right to exploit freely" their natural wealth and resources.

That Resolution 626 (VII) implicitly envisaged resort to nationalization as an aspect of the exercise of "the right to exploit freely natural wealth and resources" can be shown, first of all, by reference to the fact that Resolution 626 (VII) originated from a Uruguayan draft submitted before the second committee of the General Assembly on December 6, 1952, whose central theme was the need of U.N. support for nationalization measures carried out by underdeveloped countries. The Uraguayan draft explicitly provided that the underdeveloped countries "should have the direct possession of their natural wealth", that "the nationalization of this wealth is in keeping with the provisions of Chapter 1, Article 1, paragragh 2 of the United Nations Charter", and that member states of the United Nations "should recognize the right of each (underdeveloped country) to nationalize and freely exploit its natural wealth".[121] Upon submission of the above draft resolution, the representative of Uruguay, alluding to the desirability of resort to nationalization, pointed out to the second committee that "the one problem directly connected with the financing of the economic development of the underdeveloped countries (is) the free exploitation of their own wealth", and that "if the economic and political liberation of peoples was sought, measures would have to be taken to enable them to exploit their natural resources themselves and for their own benefit".[122] The

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[120] For the text of Resolution 626 (VII) see Appendix (A-2) of this paper.

[121] 7 U.N. General Assembly, Official Records, Annexes, Agenda Item 25 at 7, U.N. Doc. A/C. 2/L.165 and corr. 1 and 2 (1952).

Uruguayan representative, then, brought to the attention of the second committee, Uruguay's nationalization experience as a concrete example of the possible measures that underdeveloped countries might wish to take as an aspect of the exercise of their right to exploit freely their natural wealth and resources. According to the Uruguayan delegate, his country had, for instance, "nationalized the public utilities and some basic industries, in particular the electric power industry, transport, the telegraph and telephone services, the water supply services, post installations, insurance, the fuel, alcohol and cement industries, fisheries, etc.[123] The representative of Uruguay finally pointed out that the purpose of the draft proposal which he was submitting was to call for U.N. support to, and protection of, those underdeveloped countries who might choose to resort to nationalization. Thus, both from the express provision of the draft text submitted by Uruguay and the explanatory statement of the representative of Uruguay, it is amply clear that U.N. support for the exercise of "the right to exploit freely natural wealth and resources" in Resolution 626 (VII), included implicit support for nationalization measures as well.

That General Assembly Resolution 626 (VII) envisaged U.N. support for nationalization measures as an aspect of support for the exercise of "the right to exploit freely natural wealth and resources" again becomes clear from the Bolivian amendment to the Uruguayan draft text that later became, after some modifications, Resolution 626 (VII). The changes proposed by the Bolivian amendment[124] were that while the Uruguayan original draft recommended that member states of the U.N. should "recognize" the right, among others, to resort to nationalization,

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[122] 7 U.N. General Assembly, Official Records, Second Committee, Summary Record of Meetings, 231st Meeting, at 253-54 (1952).

[123] Ibid at 523.

the Bolivian amendment instead sought "respect" for the exercise of that right, the rationale for the amendment being that since the right to resort to nationalization was an attribute of sovereignty it needed no U.N. recognition, and that instead, it was "respect" for its exercise that should be sought. The interesting aspect of the Bolivian amendment is that it further reinforced the Uruguayan draft resolution's concern with the need for U.N. support to acts of nationalization by underdeveloped countries. The Bolivian representative spelled out that point clearly when he remarked that "by its recent proclamation of the nationalization of its Great Tin mines", Bolivia had taken a practical step in the direction envisaged by the Uruguayan draft resolution.[125]

In the course of the discussion on the original Uruguayan draft text and the Bolivian amendment to it, at least three[126] divergent views and tendencies were discernible among the participants in the second committee. On the one hand, there were those like the representatives of Uruguay, Bolivia, Iran, Mexico, Poland, the U.S.S.R., Ecuador, Iraq, Argentina, Yugoslavia, Guatemala and Chile, who backed, without substantial reservation, the proposal that the U.N. should extend its support to acts of nationalization measures that might be carried out by underdeveloped countries in the exercise of their "right to exploit freely their natural wealth and resources". On the other hand, the representatives from Haiti, Ethiopia, Turkey and Saudi Arabia, held the "moderate" view in that while they agreed, in principle, to the need for U.N. support to

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[124] 7 U.N. General Assembly Official Records, Annexes, Agenda Item 25, at 7, U.N. Doc. A/C 2/L 166 (1952).

[125] 7 U.N. General Assembly, Official Records, Second Committee, Summary Record of Meetings, 231st Meeting at 254 (1952).

[126] 7 U.N. General Assembly, Official Records, Second Committee, Summary Record of Meetings, at 255-289 (1952).

possible acts of nationalization by underdeveloped countries, they insisted, at the same time, that the resolution should be "couched in moderate terms" and that the exercise of the right to resort to nationalization if and when it occurred should be clearly qualified so that the resolution supporting nationalization might not frighten away and discourage foreign private investors. Still a third group, comprising mainly of representatives of capital-exporting countries, and particularly those from Sweden, the United Kingdom, France, the Netherlands, South Africa, New Zealand, Canada, Denmark, Australia and the United States strongly opposed, under this or that pretext, both the original Uruguayan draft text as well as the Bolivian Amendment, thereby, advocating the exclusion, altogether, of the option of resort to nationalization from the possible range of modalities of exercising "the right to exploit freely natural wealth and resources".

In light of the reservations of the moderates and the strong opposition of the capital-exporting countries to the Uruguayan draft resolution and the Bolivian amendment, the representatives of Uruguay and Bolivia jointly submitted a revised draft text[127] with slight changes in wording. The change introduced in the revised draft text was, among others, the omission of an explicit reference to "nationalization".

The revised draft text dropped the explicit reference to "nationalization" not so much to exclude altogether, the option of resort to nationalization as a possible modality of the exercise of "the right to exploit freely natural wealth and resources", but merely not to make it appear that resort to nationalization was the only or the principal mode of exercising

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[127] 7 U.N. General Assembly, Official Records, Annexes, Agenda Item 25, at 7, U.N. Doc. A/C 2/L.165/Rev.1 (1952).

that right.

That the revised draft text jointly submitted by Uruguay and Bolivia did not imply the total exclusion of the option of resort to nationalization is evidenced by the statement of one of the co-sponsors of the revised draft text, namely the Bolivian representative . Upon introducing the revised draft text, the Bolivian delegate in fact gave a lengthy account of Bolivia's own experience in matters of nationalization in which he pointed out that "for the first time in its history the Bolivian people had fully experienced a feeling of economic independence after the nationalization of its vast tin mines in April 1952".[128] Elaborating on Bolivia's experience and alluding to its relevance for the adoption of the revised draft resolution before the second committee, the same delegate pointed out the following:-

> "Under the leadership of Patino, the International Tin Monopoly had amassed tremendous wealth from the soil of Bolivia as well as Thailand, the Belgian Congo, Nigeria, Burma, and Malaya. Patino had created for himself and his successors a vast cartel which... originated in the Salvadora tin mine and which he has extended to incorporate important tin corporations in the United States, the United Kingdom, Germany, Thailand, Switzerland, Panama, Indonesia and elsewhere. That world wide tin empire had been built at the expense of the misery of Bolivia's workers and at the cost of Bolivia's development. The resultant wealth had not helped Bolivia's advancement but had merely added to the riches of the already industrialized and prosperous countries".129

The Bolivian delegate pointed out further that it was in the interests of its survival as a political and national entity that his country had to nationalize its basic economic

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[128] 7 U.N. General Assembly, Official Records, Second Committee, Summary Records of Meetings, 234th Meeting, at 265 (1952).

[129] Ibid.

resource.[130] Concluding his remark, the Bolivian delegate voiced the common feeling of many underdeveloped countries by pointing out that, in the past, small and weak countries were at the mercy of powerful financial interests, but that since the end of the second world war, the small and medium nations had ultimately found an appropriate forum in the U.N. to articulate their point of view, and seek protection and support from the U.N. in the process of taking such legitimate measures as nationalization.

The significance of the above remark by the co-sponsor of the revised draft resolution is that it confirms once again the point that although the revised draft text did not make express reference to nationalization as such, it still lent implicit support to nationalization as a mode of exercising "the right to exploit freely natural wealth and resources".

At a latter stage in the deliberations of the second committee, two separate amendments to the revised draft resolution were submitted by the representatives of the United States[131] and India.[132]

Apart from qualifying the exercise of the right to resort to nationalization, the U.S. amendment did not, as such, totally exclude the option of resort to nationalization as a possible modality of exercising "the right to exploit freely natural wealth and resources". Whatever effect the U.S. amendment was intended to have on the nationalization option, it still did not stand on the way since it was rejected by 28

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[130] Ibid. at 267.

[131] 7 U.N. General Assembly, Official Records, Annexes, Agenda Item 25, at 7-8, U.N. Doc. A/C.2/L.188 (1952).

[132] Ibid. at 8, U.N. Doc. A/C.2/L.189 (1952).

votes to 17 with 5 absentions in the second committee. As for the Indian Amendment, it did not, apart from "moderating" the language of the revised draft text, substantially change the essence the joint Uruguayan-Bolivian revised draft resolution. It was in fact because the Indian Amendment actually retained the essence of the revised draft resolution, that the sponsors of the revised draft text finally endorsed it, in which case it was incorporated into the draft text. Thus, the revised draft resolution as modified by the Indian Amendment was finally adopted by 31 votes to 1 with 19 absentions in the second committee.[133] It was then transmitted to the General Assembly, and after minor modification in wording, was adopted by 36 votes to 4 with 20 abstentions.[134] Thus, on the basis of the foregoing examination of the drafting history of Resolution 626 (VII), it can be safely concluded that the U.N. not only recognized resort to nationalization as one of the legitimate modes of exercising "the right to exploit freely natural wealth and resources", but it also lent its full support to acts of nationalization whenever they occurred.

The significance of General Assembly Resolution 626 (VII)

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[133] 7 U.N. General Assembly, Official Records, Second Committee, Summary Record of Meetings, 237th Meeting, at 282 (1952). It is interesting to note that while the U.S. delegation voted against the draft resolution, the delegations from Norway, Sweden, South Africa, the United Kingdom, Australia, Belgium, Canada, Denmark, France, Greece, Israel, Netherlands and New Zealand abstained. As we shall show subsequently, the correlation of votes generally follows a consistent pattern in that while most of the capital-exporting countries tended to either abstain or vote against the U.N. resolutions on permanent sovereignty over natural resources, most underdeveloped countries and socialist countries mostly voted in favour of those resolutions. The natural explanation for the voting behavior of the capital exporting countries can be found in their economic stakes regarding which we made an extensive discussion in Chapter IV of this paper.

does not, however, lie solely in the fact that it recognized resort to nationalization as one of the possible modalities of exercising "the right to exploit freely natural wealth and resources". Its additional and key significance is that, its support of nationalization measures attaches particularly to those carried out specifically by underdeveloped countries. In other words, General Assembly Resolution 626 (VII) was concerned with support for those acts of nationalization measures carried out specifically by the underdeveloped countries, by reason of the fact that the special situation of those countries warranted differential treatment.

Although the "centrality" of the underdeveloped countries is explicitly recognized in the first two preambular paragraphs of Resolution 626 (VII), that fact seems to be blurred by the "generality" of the wording of preambular paragraph 3 and the two operative paragraphs of Resolution 626 (VII) where reference was made to "all states" as beneficiaries of U.N. protection in the area of permanent sovereignty over natural resources. While it might very well be that the "generality" of the wording was chosen for purely formal reasons, there can be little doubt that the resolution's central object of concern was almost exclusively the state of natural resource use and control in underdeveloped countries.

It was in fact partly the failure to grasp the "centrality" of the underdeveloped countries in the resolutions, and the false assumption that the resolution's protection extended to "all states", that led some delegations to argue either that the U.N. was "interfering" in the internal affairs of states and, therefore, lacked competence to concern itself with the matter, or that the resolution was superfluous because it was allegedly "restating" a right to which "all states" were already entitled by virtue of their sheer sovereignty. If indeed, as some delegations claimed, the resolution's support for nationalization attached to all states in general, and not

specifically to a particular category of states distinguished from others by their peculiar economic features which call for special U.N. concern, Resolution 626 (VII) would surely have been outrightly uncalled for since no particular justification would have warranted U.N. concern with the matter in the first place. Again, if, as some delegations asserted, the resolution's support for nationalization were merely a "re-statement", in the abstract, of a right which all states without distinction were entitled by virtue of their sovereignty alone, it would have been plausible to maintain, as some delegations actually did, that the resolution was indeed superfluous. A closer study of the drafting history of the resolution shows, however, that both claims have no foundation whatsoever. In the first place, the resolution did not concern itself with support for all acts of nationalization carried out by any state. As the original sponsors of the draft text (which later became Resolution 626 (VII)) made it clear all along, the resolution was particularly concerned with nationalization measures by underdeveloped countries. Moreover, the resolution did not merely "restate" the right to resort to nationalization in the abstract and in general, but was instead concerned with its exercise by a certain category of states. Furthermore, Resort to nationalization by underdeveloped countries were accorded U.N. support not necessarily because they were acts of sovereign states as such, but because they were measures taken by a particular category of states whose condition of "underdevelopment" warranted special treatment by the U.N. in view of the latter's economic and social functions under the charter. Consequently, since it is not in virtue of their sovereignty as such that the U.N. lends support to underdeveloped countries in their resort to nationalization but rather by reason of their underdevelopment, other states cannot avail themselves of the protection and support which the "promotive" norm implicit in Resolution 626 (VII) was meant to afford. We, therefore, maintain that the significance of

General Assembly Resolution 626 (VII) lies not only in the fact that it serves as a supportive basis for resort to nationalization, but also in that, by extending support particularly to those nationalization measures carried out by underdeveloped countries, it tended to accord differential treatment in favour of underdeveloped countries by reason of their special capacity of "underdevelopment".

General Assembly Resolution 1515 (XV)[135] as a Basis for Nationalization:

The General Assembly of the U.N. once again adopted, at its fifteenth session on December 15, 1960, Resolution 1515 (XV) entitled: "concerted action for economic development of economically less developed countries", in which it proclaimed in operative paragraph (5) that "the sovereign right of every state to dispose of its natural wealth and its natural resources should be respected..."[136] On its face, there appears to be no indication in operative paragraph (5) that General Assembly Resolution 1515 (XV) either recognized resort to nationalization as a possible mode of exercising the right to dispose freely natural wealth and resources or, that it signified full U.N. backing to nationalization measures. Upon closer examination of the drafting history of the pertinent paragraph in resolution 1515 (XV) and the background deliverations of the second committee, however, it becomes clear that operative paragraph 5 not only envisaged resort to nationalization as a possible option in the exercise of the right to dispose natural wealth and resources, but also lent full

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[134] 7 U.N. General Assembly, Official Records, Plenary Meetings, 411th Meeting, at 488 (1952).

[135] For the pertinent text of General Assembly Resolution 1515 (XV) see, Appendix (A-3) of this paper

[136] Ibid.

support to acts of nationalization.

The initial draft text[137] of what later became General Assembly Resolution 1515 (XV) as originally submitted by the representatives of the United Kingdom, Canada, Columbia, the Federation of Malaya, Italy, Nigeria, Norway and Turkey, and which was entitled: "partnership for economic and social development" (later changed to "concerted action for economic development of economically less developed countries"), did not contain any paragraph that dealt with the right of states to freely dispose of their natural wealth and resources. It was only at a later stage in the deliberations of the second committee that the draft text of what subsequently became operative paragraph (5) of Resolution 1515 (XV) was introduced by the Romanian delegation. The text proposed by Romania came in the form of an amendment to the original 8-power draft resolution, and it provided that "... the right of [states] to dispose of [their] wealth and... natural resources should be respected...".[138] As the explanatory statement of the Romanian delegation clearly shows, in proposing the new paragraph, the Romanian representative made it plain that the exercise of the right to dispose freely natural wealth and resources within the terms of the Romanian amendment, included resort to nationalization as one of the possible modalities of exercising that right. According to the Romanian delegation, the principle which it was proposing then had already been proclaimed in General Assembly Resolution 626 (VII), in economic and social council Resolution 586-D (XX) and in the draft, covenant on economic rights",[139] and that, moreover, the

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[137] 15 U.N. General Assembly, Official Records, Annexes, Agenda Item 12, 29 and 74, at 11-12, U.N. Doc. A/C. 2/L.161/Add.1 (1960).

[138] Ibid. at 12, U.N. Doc. A/C.2/L.480.

[139] 15 U.N. General Assembly, Official Records, Second Committee, Summary Records of Meetings, at 197 (1960).

principle in question "included the right to nationalize undertakings, to grant or withhold from foreigners access to certain sectors of the economy, and to take any measure aimed at strengthening the sovereignty [of underdeveloped countries] over [their] natural resources".[140] That the Romanian amendment envisaged resort to nationalization as an aspect of the exercise of the right to dispose freely natural wealth and resources again becomes clear from the negative reaction and statements of a number of delegations, especially from the capital-exporting countries, who initially resisted the incorporation of the Romanian amendment into the 8-power draft resolution. In particular, the initial opposition, to the Romanian proposal, by one of the sponsors of the draft resolution, namely the representative of the United Kingdom,[141] was clearly predicated on the understanding that the Romanian amendment imported the element of U.N. backing to nationalization measures that might be carried out in the exercise of the right to dispose freely natural wealth and resources. Similarly, the support extended to the Romanian proposal in the second committee by the representatives of the U.S.S.R.[142] and the Bylorussian Soviet Socialist Republic[143] equally rested on that understanding.

At a later stage in the deliberations of the second committee, the U.S. representative submitted a sub-amendment[144] to the Romanian amendment, and that sub-amendment sought to

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[140] Ibid. at 202.

[141] Ibid. at 190 and 197.

[142] Ibid. at 199.

[143] Ibid. at 200.

[144] 15 U.N. General Assembly, Official Records, Annexes, Agenda Item 12, 29 and 74, at 15, U.N. Doc. A/C.2/L. 496 (1960).

qualify the exercise of the right to dispose freely natural wealth and resources again on the understanding that the Romanian amendment implied a U.N. license to unrestricted resort to nationalization. While the U.S. sub-amendment was no doubt intended, as we shall show elsewhere in this paper in connection with questions of "prior-restraint" to "taking" as well as matters of compensation, to impose attendant "obligations" on the "taking" state in the event of resort to nationalization, it still did not imply the complete exclusion of the option of resort to nationalization in the exercise of the right to dispose freely natural wealth and resources.

The sponsors of the draft resolution later agreed[145] to revise their original text in light of the Romanian amendment and the U.S. sub-amendment, and consequently, both Romania and the U.S. withdrew their respective proposals. In consenting to withdraw his amendment, the Romanian delegate again made it clear that it was his understanding that the incorporation in the revised draft text of the U.S. "qualification" to Romania's proposal did not have the effect of preventing resort to nationalization altogether.[146] The pertinent text of the 8-power draft resolution as a whole, as revised, was, then, put to a vote and was adopted unanimously in the second committee. Thus, it becomes clear from the drafting history of operative paragraph 5 of General Assembly Resolution 1515 (XV) that not only did the paragraph in question recognize resort to nationalization as one of the possible options in the exercise of the right to dispose freely

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[145] 15 U.N. General Assembly, Official Records, Second Committee, Summary Records of Meetings, at 201 (1960).

[146] Ibid. at 202.

natural wealth and resources, but it also signified U.N. support to acts of nationalization whenever they occurred.

As we tried to point out in connection with General Assembly Resolutions 523 (VI) and 626 (VII), the significance of resolution 1515 (XV) again lies in the fact that its support to nationalization measures attaches particularly to those carried out by underdeveloped countries. Upon superficial reading of operative paragraph 5 of Resolution 1515 (XV), (the "generality" of wording) where reference was made to the sovereign right of "every state", one may be led to think that the support of the U.N. to the exercise of the right to resort to nationalization extended to states other than underdeveloped countries as well. On closer examination, however, it becomes clear that U.N. support attached solely to those nationalization measures carried out particularly by underdeveloped countries. The "centrality" of the underdeveloped countries as the sole beneficiaries from the "promotive" norm implicit in Resolution 1515 (XV) is clearly borne by the very title of the Resolution, i.e., "concerted action for economic development of economically less developed countries". Moreover, the express statement of purpose in operative paragraph (1) of the resolution makes "the economic and social advancement of the less developed countries", the resolution's central object of concern. It should also be noted that General Assembly Resolution 1515 (XV) was a direct response to the Annual Report of the economic and social council which centred around the economic problems of the underdeveloped countries in particular, and consequently in the context of General Assembly Resolution 1515 (XV), respect for nationalization measures carried out by underdeveloped countries was regarded as an appropriate conduct consistent with the objectives of "concerted action for the economic development of economically less developed countries". Hence, in according special protection and support to nationalization measures carried out particularly by the under-

developed countries, General Assembly Resolution 1515 (XV), like Resolutions 523 (VI) and 626 (VII) was in fact according differential treatment to those countries.

General Assembly Resolution 1803 (XVII)[147] as a Basis for Nationalization

The General Assembly of the United Nations adopted, at its seventeenth session on December 14, 1962, Resolution 1803 (XVII) entitled: "permanent sovereignty over natural resources", and in that resolution, one again finds an implicit supportive (promotive) basis for acts of nationalization by underdeveloped countries. In that Resolution, the General Assembly re-affirmed "the inalienable right of...states freely to dispose of their natural wealth and resources in accordance with their national interests" (preambular paragraph 4), and declared "the right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the state concerned" (operative paragraph (1)).[148]

Although the broad and general principles enunciated in those two paragraphs of General Assembly did not as such refer to nationalization as an aspect of the exercise of "the right of peoples and nations to permanent sovereignty over their natural resources", operative paragraph 4 of the same resolution expressly pointed to nationalization measures by establishing the conditions under which they could be carried out. From a joint reading of preambular paragraph (4), operative paragraph (1) as well as operative paragraph (4) of

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[147] For the text of General Assembly Resolution 1803 (XVII), see Appendix (A-5) of this paper.

[148] Ibid.

General Assembly Resolution 1803 (XVII) it would, therefore, seem that the U.N. not only recognized resort to nationalization as a possible option in the exercise of the right to dispose freely natural wealth and resources, but that it also extended implicit support to the carrying out of nationalization measures as an aspect of the exercise of permanent sovereignty over natural resources. That the resolution's support for the exercise of "the right of peoples and nations to permanent sovereignty over natural wealth and resources", included implicit support for resort to nationalization as one of the possible modalities of implementing the exercise of that right, becomes all the more clear from a closer examination of the drafting history of Resolution 1803 (XVII),[149] particularly from the background documents that influenced the adoption, by the commission on permanent sovereignty over natural resources, of the original text of the 8-point declaration which later became the basis for Resolution 1803 (XVII), as well as from the deliberations of the commission on permanent sovereignty, the economic and social council, the second committee of the General Assembly, and the plenary meeting of the Assembly itself.

Right from the outset, and long before the final text of what became General Assembly Resolution was formulated by the second committee, the question of U.N. support for nationalization measures emerged as a key issue in the course of the work of the commission of permanent sovereignty over natural resources in connection with the latter's deliberations[150] on

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[149] For an account of the drafting history of General Assembly Resolution see, 17 U.N. General Assembly, Official Records, Annexes, Agenda Item 12, 34, 35, 36, 37, 39, and 84, (1962).

the preliminary[151] as well as the revised studies[152] on permanent sovereignty over natural resources prepared by the U.N. secretariat to facilitate the work of the commission. The pertinent feature of those studies which influenced the commission to adopt its 8-point declaration on permanent sovereignty over natural resources revolved around the data and information, in those studies, which clearly reflected the heavy concentration of foreign interests[153] in the ownership and exploitation of natural resources particularly in underdeveloped countries. As we tried to show in connection with the discussion in Chapter IV of this paper, the preliminary as well as the revised studies prepared by the U.N. secretariat included comprehensive data on the extent of foreign involvement in the exploitation of natural wealth and resources (land, subsoil and water resources) particularly in the underdeveloped countries. It was principally the secretariat's findings regarding the prevalence of foreign economic involvement in the exploitation of natural resources and their adverse economic implications for the resource-owning countries, as well as the overall and marked lack of effective exercise of sovereignty by the underdeveloped countries over their natural resources, that led the commission on permanent sovereignty to enunciate

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[150] For a full account of the first two sessions of the commission see, "progress report of the United Nations commission on permanent sovereignty over natural resources, covering the work of its first two sessions", 29 U.N. economic and social Council, official records, Annexes, Agenda Item 9, at 1-9, U.N. Doc. E/3334 (1960).

[151] 32 U.N. Economic and Social Council, Official Record, Annexes, Agenda Item 9, at 3, U.N. Doc. A/AC.97/5, Corr.1 and add. 1 (1961).

[152] U.N. Secretariat, The Status of Sovereignty Over Natural Resources, U.N. Doc. A/AC.97/5/Rev.2 (1962).

[153] For a discussion of the adverse economic implications of foreign dominance over the natural resources of underdeveloped countries see Chapter IV of this paper.

its 8-point declaration which, among other things, reaffirmed the necessity of extending U.N. support to, and guarantying respect for, the exercise of the right of underdeveloped countries to resort to nationalization.

The draft text of the 8-point declaration of the commission which was later adopted by 8 votes to 1 with no obstentions in the commission was initiated by a Chilean draft[154] proposal, and that proposal, interestingly enough, not only recognized resort to nationalization as an aspect of the exercise of the right to dispose freely natural wealth and resources, but its also supported, and even urged, the carrying out of nationalization measures by underdeveloped countries. As a matter of fact, the fourth operative paragraph of the draft 8-point declaration of the commission made express reference to recourse to nationalization as a component option in the exercise of permanent sovereignty over natural resources.

Again, after the commission's 8-point draft declaration was transmitted to the economic and social council, most of the discussion on permanent sovereignty in the council revolved around the question of U.N. support for resort to nationalization. The statement made before the economic and social council by one of the nine members of the commission on permanent sovereignty over natural resources, namely the Afghan representative, is particularly instructive as to the concern of the council with respect to the question of U.N. support for recourse to nationalization. In that interesting statement, the Afghan delegate recalled General Assembly Resolution 626 (VII) of 21 December 1952 in which the exercise of the right to dispose freely natural wealth and resources was affirmed by the U.N. and

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[154] U.N. Secretariat, The Status of Sovereignty Over Natural Resources, U.N. Doc. A/AC.97/5/Rev. 2 at 244 (1962).

pointed out that the latter resolution was invoked "by the civil court of Rome..., and by one of the judges of the international court of Justice" in the dispute involving the nationalization of the operations of the Anglo-Iranian Oil Company by the Iranian government.[155] Similarly, the Polish delegate pointed out in the course of the deliberations of the economic and social council, that the exercise of the right to dispose freely natural wealth and resources within the terms of the 8-point draft declaration could be implemented in several ways, and that "one of the methods... was nationalization".[156]

It was, however, mostly during the deliberations of the Second Committee that U.N. support for the exercise of the right to resort to nationalization was widely raised as an aspect of the effective (permanent) exercise of sovereignty over natural resources. As in the deliberations of the commission on permanent sovereignty over natural resources and the economic and social council, the 8-point draft declaration on permanent sovereignty became the basis for discussion in the Second Committee. The Second Committee had before it about 26 separate amendments and sub-amendments, among which the amendments introduced by the United States and the United Kingdom on the one hand, and that of the U.S.S.R. on the other, were the most controvercial. Throughout the deliberations of the Second Committee, the discussion revolved around two conflicting tendencies. The first tendency was an attempt to strengthen the exercise of permanent sovereignty over natural resources, by such means as nationalization and the opposite tendency militated in the direction of protecting foreign

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[155] 32 U.N. economic and social council, Official Records, Summary Record of Meetings: 1177th Meeting, Agenda Item 9, at 172 (1961).

[156] See 1178th meeting, Ibid. at 177.

private investors from risks associated with the exercise of sovereignty, and particularly from that of nationalization. At one end of the pole in the controversy stood the socialist countries and few underdeveloped countries, while such major capital-exporting countries as the United States and United Kingdom stood at the other end of the pole, with the majority of the underdeveloped country taking a "middle-of-the-road" position in the controversy.

Although the major issue which dominated the debate in the Second Committee related to the need for qualifying the exercise of the right to resort to nationalization, some delegations from the capital-exporting countries initially challenged the very option of resort to nationalization as an aspect of the exercise of the right to dispose freely natural wealth and resources. That, in the main, was, instance, the salient purpose of the original U.S. amendment[157] to the 8-point draft declaration submitted by the commission on permanent sovereignty over natural resources. Similarly, the separate amendment[158] submitted by the United Kingdom delegation proposing the addition of a new preambular paragraph to the commission's 8-point draft declaration was indirectly intended to exclude the option of resort to nationalization altogether. The U.S. and United Kingdom amendments were in fact aimed at countering the trend that supported the effective exercise of sovereignty over natural resources under the plea of guarantying a favourable and secure investment climate for foreign private investors. The arguments of the U.S. and U.K. delegations against U.N. support for resort to nationalization was that

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[157] 17 U.N. General Assembly, Official Records, Annexes, Agenda Item 39, at 42, U.N. Doc. A/C.2/L.668 (1960).

[158] Ibid., U.N. Doc. A/C.2/L.669 (1960).

nationalization tended to discourage (inhibit) foreign investors, and that its encouragement by the U.N. would scare away the major source of financing development in underdeveloped countries, and that, therefore, it would ultimately be prejudicial to the interest of the underdeveloped countries themselves. At one point, for instance, the U.S. delegate strongly argued against resort to nationalization by pointing out that "there was much governments could do, and many other things which they could avoid doing in order to encourage private investment, both domestic and foreign".[159]

The separate U.S. and United Kingdom amendments were, however, strongly opposed in the Second Committee not only by the socialist countries and some of the militant underdeveloped countries, but even by the "moderate" underdeveloped countries. In the face of those objections, the U.S. and United Kingdom delegations withdrew their original separate amendments and submitted a new joint draft amendment. Unlike the earlier amendments which tended to preclude the option of resort to nationalization altogether by trying to convert the 8-point draft declaration on permanent sovereignty over natural resources into what the Bulgarian delegate called a "charter for foreign investment", the new joint draft amendment reflected the reluctant acceptance, by the U.S. and U.K. delegations, of the inclusion of the option of recourse to nationalization as one of the modes of exercising permanent sovereignty over natural resources. As the statements of various delegations, particularly that of Afghanistan, Chile, Panama and India, show it was the understanding of the majority of the participants in the Second Committee that the withdrawal

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[159] 17 U.N. General Assembly, Official Records, Second Committee, Summary Record of Meetings, 835th Meeting, at 234 (1960).

of the original U.S. and U.K. amendments and the submission of the new joint amendment in fact signified acceptance by those capital-exporting countries of the possibility of resort to nationalization as one of the options in the effective exercise of sovereignty over natural resources.

The question of U.N. support for the exercise of the right to resort to nationalization was again raised in the Second Committee in connection with the discussion on three separate Soviet amendments to the 8-point draft declaration that later became General Assembly Resolution 1803 (XVII). One of the Soviet amendments proposed the addition of a new preambular paragraph at the beginning of the draft-declaration in which the Soviet delegation sought to insert a statement recalling earlier General Assembly Resolutions 523 (VI) and 626 (VII), "in order to emphasize that the new draft resolution under discussion did not detract, in essence, from earlier Resolutions, and that it was merely an elaboration of [those Resolutions]".[160] That amendment[161] was later adopted in the Second Committee by 57 votes to 15 with 15 abstentions, thereby, renewing the implicit support of the U.N. to acts of nationalizations as expressed in those earlier Resolutions.

The second Soviet amendment to the 8-point draft declaration proposed the insertion, at the beginning of paragraph 4 of the draft text, of a phrase calling the U.N. to confirm "... the inalienable right of peoples and nations to the unobstructed execution of nationalization... and other essential measures aimed at protecting and strengthening their

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[160] Ibid. at 229.

[161] 17 U.N. General Assembly, Official Records, Annexes, Agenda Items 12, 34, 35 36, 37, 39, and 84, at 42, U.N. Doc. A/C.2/L.670 (1960).

sovereignty over their natural wealth and resources".[162] Although that amendment was rejected for lack of a simple majority in support of it (the outcome of the votes being 30 in favour, 30 against with 33 abstentions), its rejection does not still imply the exclusion of resort to nationalization as one of the modalities of exercising sovereignty over natural resources. The rejection of that Soviet amendment by a slight margin only signifies that, owing to the "strong wording" of the Soviet proposal which called for the "unobstracted execution of nationalization", the "moderate" majority in the Second Committee did not wish to leave the impression either that resort to nationalization was the only or the main mode of exercising permanent sovereignty over natural resources, or that its exercise entailed no attendant obligation on the "taking" state. In other words, the "moderate" majority chose not to back the Soviet amendment not because they wanted to exclude altogether the option of resort to nationalization, but because they thought that the Soviet proposal, gave the impression, at least in the way it was worded, that resort to nationalization was the only or main avenue of exercising sovereignty over natural resources or that it could be carried out without any qualifying obligation. That the "moderate" majority reasoned along those lines can be shown by the different attitude it took towards still another Soviet amendment the essence of which was once again a call for U.N. support to nationalization measures.

The third Soviet amendment called upon the General Assembly to "unreservedly [support] measures taken by peoples and states to re-establish or strengthen their sovereignty over natural wealth and resources", including, implicitly, resort to nationalization.[163] The latter amendment, interestingly enough,

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[162] Ibid.

[163] Ibid.

was adopted by 43 votes to 32 with 16 abstentions in the second committee, and in supporting it, the majority implicitly endorsed resort to nationalization as a possible mode of exercising sovereignty over natural resources.

The question of U.N. support for nationalization was again raised in the course of the debate in the plenary meeting of the General Assembly in connection with two controvercial Soviet-intiated amendments. The first amendment, which was similar to the one submitted by the Soviet delegation in the second committee and which was later rejected, sought U.N. affirmation of the "unobstructed execution of nationalization".[164] The amendment was again rejected in the Assembly by 48 votes to 34 with 21 abstentions. The other controvercial text was operative paragraph 5 of the 8-point draft declaration which was adopted earlier by the second committee at the initiative of the Soviet delegation. The latter paragraph provided that the General Assembly "unreservedly supports measures taken by peoples and states to re-establish or strengthen their sovereignty over natural resources...",[165] and the paragraph in question, was put to a separate vote in the Assembly, at the insistence of the U.K. representative, and was rejected by 41 votes to 38 with 15 abstentions. The question, then, is whether the rejection of the two Soviet-initiated amendments in any way imply the exclusion of resort to nationalization as a possible mode of exercising sovereignty over natural resources. As we tried to argue in connection with the voting pattern in the second committee, the rejection of the Soviet-initiated amendments in the plenary meeting of the Assembly by no means

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[164] 17 U.N. General Assembly, Official Records, Annexes, Agenda Items 12, 34, 35, 36, 37, 39 and 84, at 57, U.N. Doc. A/L.414 (1962).

[165] Ibid. at 42, U.N. Doc. A/C. 2/L.670 (1962).

imply that the Assembly withdrew its support for nationalization measures as such. While the rejection of the Soviet-initiated amendments was no doubt the outcome of the combined vote of the capital-exporting countries and the "moderate" underdeveloped countries, the reasons for the rejection were by no means the same for each group. While it may well be that the capital-exporting countries voted against the Soviet-initiated amendments with the intension of excluding the option of resort to nationalization altogether, that was not necessarily the case as regards the "moderate" underdeveloped countries. In rejecting the Soviet-amendments, the "moderate" underdeveloped countries which depended heavily on foreign private investment, simply wished not to leave the impression either that recourse to nationalization was the only or main avenue of exercising permanent sovereignty over natural resources, or that the exercise of the right to resort to nationalization was not qualified by attendant obligations. In other words, the "moderates" simply wanted to attenuate, some of the "sweeping" implications of the "strongly-worded" Soviet-initiated amendments, without, at the same time, ruling out support for possible recourse to nationalization. By voting against the Soviet-initiated amendments, the "moderates" simply wished to reassure foreign investors that they (the "moderates") did not "share" the "Soviet view" regarding foreign investment. Other than the desire not to be closely "identified" with the "Soviet side" out of purely political considerations, the voting behavior of the "moderates" on the Soviet-initiated amendments was also influenced by a "well-timed" sensational article in The New York Times of 5 December 1962, which came just before the votes in the Assembly. The sensational Article which was entitled: "vote in U.N. unit criticized by U.S.: Soviet revision said to mar Resolution on resources: communist line seen", reported that the draft resolution which was just adopted in the second committee, and which was about to be tabled for a vote in the Assembly was simply a "development of the communist line

that the state is almighty".[166] The "scare tactic" employed by the article which branded the draft resolution as "communist-inspired", had no doubt an impact[167] in dissuading the "moderates" from supporting the Soviet-initiated amendments. In any event, by voting against the Soviet-initiated amendments in the Assembly, the "moderates" were simply opting for a compromise formula which, without excluding resort to nationalization altogether, at the same time reassured capital exporting countries that whenever recourse was had to nationalization, it would be accompanied by the payment of compensation. That the concession made by the "moderates" to allay the fears of the capital-exporting countries related solely to matters of compensation, and not to the exclusion altogether of resort to nationalization, is corroborated by the fact that the "moderates" were made to think by the sensational article in The New York Times that the Soviet-initiated amendment which called for "unreserved" U.N. support for "measures taken by peoples and states to re-establish or strengthen their sovereignty over natural resources", implied, "any measures, that is measures in violation of international law, in violation of treaties, in violation of contracts, in violation of the demands of economics, in violation of the

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[166] Alexander Burnham, "vote in the United Nations unit criticized by U.S. - Soviet revision said to mar Resolution on resources: Communist line seen", The New York Times, 5 December, 1962 at 12.

[167] The article in question came to the attention of the participants in the General Assembly some time before the votes, in connection with a scandalous and reproachful statement made by the Greek delegate, Mr. Costa P. Carnicas, who was quoted by The New York Times article as having said that the majority who voted for the Soviet initiated amendments in the second committee were "immature and irresponsible", for which statement the Greek delegate later submitted a formal apology before the Assembly.

international interest, in violation of true national interest".[168]

The 8-point draft resolution which was adopted by 87 votes to 2 with 12 abstentions in the Assembly, and which became Resolution 1803 (XVII), thus, not only recognized resort to nationalization as a possible option in the exercise of permanent sovereignty over natural resources, but it also extended implied support to nationalization measures.

The additional significance of Resolution 1803 (XVII) still lies in the fact that its support for nationalization attaches specifically to those carried out particularly by underdeveloped countries. On its face, the Resolution, both in its preambular and operative sections, appears to lend support for the effective exercise of sovereignty over natural resources by "all" states. Its "generality" of wording, for instance, manifests itself in preambular paragraph (3) where reference was made to the sovereign right of "every state" to dispose freely its natural wealth and resources. Preambular paragraph (4), similarly provided for support to the exercise of the right of "all states" to dispose freely their natural wealth and resources. Operative paragraph (1) also provided support for the exercise of the right of "peoples and nations" (in general) to permanent sovereignty over their natural wealth and resources. Operative paragraph (5), likewise, affirmed the free and beneficial exercise of sovereignty of "peoples and nations" over their natural resources. The apparent "generality" of application implied by the loose wording of the above paragraphs notwithstanding, the subjects of the right the effective exercise of which formed the central object of concern in General Assembly Resolution 1803 (XVII) were the underdeveloped countries. The "centrality" of the underdeveloped

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[168] Alexander Burnham, op. cit., at 12.

countries in General Assembly Resolution 1803 (XVII) is not only borne by the wording of preambular paragraphs 2, 7, 10, 11 and 12 where the exercise of permanent sovereignty over natural resources was directly linked to the needs of the economic development of underdeveloped countries, but it also becomes manifest from the drafting history of the Resolution itself. As we tried to show in the preceding discussion, General Assembly Resolution 1803 (XVII) was, in the main, a response to the state of natural resource exploitation, use and control in the underdeveloped countries as surveyed by the U.N. secretariat in its preliminary and revised studies on permanent sovereignty over natural resources. It was particularly the secretariat's finding of the prevalence of foreign economic domination in the exploitation of natural resources in the underdeveloped countries, and the harmful effects of that domination on the economic well-being of those countries, as well as the marked lack of effective of sovereignty, by those countries, over their natural resources, which warranted U.N. concern and led to the adoption of Resolution 1803 (XVII) so as to encourage the effective exercise, particularly by those countries, of their sovereignty over their natural resources. Again, throughout the deliberations of the commission on permanent sovereignty over natural resources, the economic and social council, the second committee as well as the General Assembly, U.N. support for the effective exercise of permanent sovereignty was invariably addressed particularly to underdeveloped countries. Moreover, in the context of Resolution 1803 (XVII), U.N. backing to the exercise, by the underdeveloped countries, of their right to resort to nationalization, was provided with the specific aim of enabling those countries to hasten their economic development and ensure their economic independence from foreign (alien) economic domination. Thus, by extending its implicit support particularly to those nationalization measures carried out by underdeveloped countries in their effective exercise of sovereignty over natural resources,

General Assembly Resolution 1803 (XV), like Resolutions 523 (VI), 626 (VII) and 1515 (XV), accorded differential treatment to underdeveloped countries by reason of their capacity of "underdevelopment".

General Assembly Resolution 2158 (XXI)[169] as a Basis for Nationalization:

U.N. support for resort to nationalization, by underdeveloped countries, as one of the possible modes of the effective exercise of permanent sovereignty over natural resources again becomes manifest from Resolution 2158 (XXI) which was adopted by the General Assembly at its twenty-first session back on November 25, 1966.[170]

Although General Assembly Resolution 2158 (XXI) no where expressly mentioned resort to nationalization as one of the possible options open to underdeveloped countries in the exercise of their sovereignty over their natural resources, a closer examination of the texts of the preambular and operative paragraphs of that Resolution as well as its drafting history shows that recourse to nationalization was implicitly included among the wide range of options available to underdeveloped countries in their effective exercise of permanent sovereignty over their natural resources.

The support of the U.N. for recourse to nationalization by underdeveloped countries manifested itself, indirectly, in General Assembly Resolution 2158 (XXI), through U.N. affirmation,

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[169] For the full text of Resolution 2158 (XXI) see Appendix (A-6) of this paper.

[170] For an account of the drafting history of Resolution 2158 (XXI) see, 21 U.N. General Assembly, Official Records, Annexes, Agenda item 45, at 1-6 (1966).

on the one hand, of the crucial role of natural resources as a basis for economic development, and in the categorical pronouncement, on the other, that the burden of undertaking the responsibility for alleviating the economic problems of underdeveloped countries rested primarily on the underdeveloped countries themselves, and that the role of foreign capital in the development process was secondary (supplementary).

Preambular paragraph (3) of Resolution 2158 (XXI), for instance, affirmed that "the natural resources of the developing countries constitute a basis for their economic development in general and of their industrial progress in particular".[171] Preambular paragraph (4) noted that the natural resources of underdeveloped countries were "limited and in many cases exhaustible and that their proper exploitation determines the conditions of the economic development of the developing countries both at present and in the future".[172] The General Assembly, therefore, reiterated in preambular paragraph (6) that the optimal use of those exhaustible natural resources for fulfilling the economic development objectives of those countries could only be guaranteed by letting the underdeveloped countries themselves "undertake... the exploitation and marketing of their natural resources so that they may exercise their freedom of choice in the various fields related to the utilization of natural resources under the most favourable conditions".[173] Implicitly, therefore, one of the ways in which underdeveloped countries may themselves "undertake... the exploitation and marketing of their natural resources" within the terms of the above preambular paragraphs of Resolution 2158 (XXI) is through nationalization.

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[171] See Appendix (A-6) of this paper. (Emphasis ours).

[172] Ibid.

[173] Ibid.

In light of preambular paragraphs 3, 4 and 6 of Résolution 2158 (XXI), the affirmation, in operative paragraph (1), that "the inalienable right of all countries to exercise permanent sovereignty over their natural resources in the interest of their national development"; the recommendation, in operative paragraph 2 that the "United Nations should undertake a maximum concerted effort to channel its activities so as to enable all countries to exercise that right fully"; the call, in operative paragraph (3), to strength the ability of those countries "to undertake this development themselves, so that they might effectively exercise their choice in deciding the manner in which the exploitation and marketing of their natural resources should be carried out"; and lastly, the affirmation, in operative paragraph (4), that "the exploitation of natural resources in each country shall always be conducted in accordance with its national laws and regulations", thus, implied, among others, indirect U.N. support for nationalization as an aspect of the exercise of sovereignty over natural resources. Moreover, by recognizing, in operative paragraph (5), "the right of all countries, and in particular of the developing countries, to... 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...", Resolution 2158 (XXI), provided for a dynamic mechanism of making readjustments in the ownership and control of natural resources exploitation, leading ultimately to complete state ownership and control by way of nationalization. In other words, as one delegate aptly put it, operative paragraph (5) of Resolution 2158 (XXI) established a dynamic mechanism for "the progressive expropriation (read nationalization) of private foreign investment".[174]

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[174] 21 U.N. General Assembly, Official Records, Second Committee, Summary Record of Meetings, at 175 (1966).

The Resolution's implied support for nationalization as one of the possible modes of exercising sovereignty over natural resources becomes all the more clear in light of the drafting history of the resolution and the background deliberations of the economic and social council, the second committee, and the General Assembly.

Long before the original draft text that became Resolution 2158 (XXI) was formulated in the second committee, there was already a strong tendency in the deliberations of the economic and social council urging U.N. support for the exercise of the right to resort to nationalization. That tendency first surfaced in the economic and social council in connection with the discussion on, and partly as a reaction to, a study[175] on permanent sovereignty over natural resources prepared by the U.N. secretariat pursuant to General Assembly Resolution 1803 (XVII). In the course of the council's deliberations of July 1964, several delegations, and particularly those from Czechoslovakia, India, the U.S.S.R., Yugoslavia, Iraq and Algeria, strongly critized the secretariat's study for failing to include a Report on nationalization measures already carried out by such underdeveloped countries as Algeria, the U. A.R., Iraq and Ceylon, and urged future studies to reflect the increasing trend towards recourse to nationalization as an aspect of the effective exercise of sovereignty, by underdeveloped countries, over their natural resources.

Again, during the first round deliberations by the second committee[176] back in December 1965, there was a similar tendency

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[175] 37 U.N. Economic and Social Council, Official Records, Annexes, Agenda item 15, at 4-40, U.N. Doc. E/3840 (1964).

[176] 20 U.N. General Assembly, Official Records, Second Committee, Summary Records of Meetings, at 369 (1965).

to strengthen the permanent sovereignty, of underdeveloped countries, over their natural resources, by openly supporting nationalization measures carried out by those countries. At that time, the second committee's discussion focused mainly on two draft resolutions which represented two conflicting tendencies in the second committee regarding U.N. attitude towards the question of permanent sovereignty over natural resources. The first draft resolution submitted jointly by Ceylon and Ecuador had, as its principal aim, the formulation, by the U.N., of standards and procedures for the protection of foreign investors so as to guarantee a favourable climate for foreign private investment and ensure a smooth flow of foreign capital into the underdeveloped countries. On the other hand, the second draft resolution proposed by Algeria, Poland, the United Arab Republic, and Tanzania emphasized the need for strengthening permanent sovereignty of underdeveloped countries over their natural resources by supporting, among others, resort to nationalization as one of the possible modes of exercising that sovereignty. Unlike the latter draft resolution which was based on the premise that the "best way of ensuring the permanent sovereignty of the developing countries over their natural resources was to enable them to exploit and market those resources by themselves",[177] the joint Ceylonese and Ecuadorian draft resolution rested on the assumption that foreign capital was crucial for financing development in the underdeveloped countries, and that the decline, then, of foreign investment in the underdeveloped countries was primarily due to the prevailing insecurity felt by foreign investors as a result of the increasing support of the U.N. to nationalization measures that were being carried out by the underdeveloped countries.

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[177] Ibid at 312.

The draft resolution submitted by Ceylon and Ecuador was met with serious objections and disapproval from the majority of the delegates in the second committee, especially those from Poland, Sudan, the United Arab Republic, Ghana, the Ukranian Soviet Socialist Republic, Romania, Ivory Coast, Uganda, Algeria, Congo Brazaville, Czechoslovakia, the Byelorussian Soviet Socialist Republic, Mexico, Mauritania and Mali. On the other hand, it was supported mainly by the representatives of the capital-exporting countries, especially those from the United States, the Netherlands, Israel, Belgium and the United Kingdom. The delegations from Liberia, Chile, Iran, Kenya, Nigeria and Costa Rica, representing the "moderate", middle-of-the-road position, opted for a compromise formula that tried to reconcile the need for strengthening permanent sovereignty on the one hand, and the mitigation of the insecurity felt by foreign investors, on the other.

As the discussion on the two draft resolution shows, the majority of the participants were favourably disposed towards the draft resolution adopted by Poland, Algeria, the U.A.R. and Tanzania. Unlike previous deliberations of the second committee where the prevailing view since 1952 had been that of the "moderate" one, the 1965 deliberations of the second committee began to exhibit a shift towards subordinating the need for foreign capital to that of domestic resources as a source of financing development, and consequently, the strengthening of permanent sovereignty over natural resources by such means as the support of nationalization measures began to assume a dominant place in the deliberations of the second committee. The majority of those who participated in the second committee's 1965 deliberations on permanent sovereignty over natural resources were, thus, in complete agreement that "the poverty of most developing countries was due not to their lack of resources, but rather to the prolonged unilateral exploitation of their resources by foreign companies",[178] that

[178] Ibid. at 352.

one of the best ways of overcoming that situation was through nationalization.

Again, a strong tendency calling for strengthening permanent sovereignty over natural resources, and consequently, urging U.N. support for nationalization measures, manifested itself in the deliberations of the second committee during its 1966 follow-up discussions. There, the committee's deliberation centred around an 11-power draft[179] resolution (later adopted, with some changes, as Resolution 2158 (XXI)) submitted by the representatives of the U.A.R., Algeria, Burma, Iran, Iraq, Panama, Poland, Syria, the Ukranian Soviet Socialist Republic, the United Republic of Tanzania and Yugoslavia (later joined by Libya, Morocco and Mauritania), as well as on a number of amendments and sub-amendments to that draft resolution. In their explanatory statements[180] regarding the 11-power draft resolution, most of the sponsors saw recourse to nationalization as one of the effective means of exercising sovereignty over natural resources, and urged U.N. support for it. One of the supporters of the 11-power draft resolution, the Ghanian delegate, for instance, summed-up the prevailing attitude regarding the need to strengthen permanent sovereignty over natural resources, by making the following interesting remark:

> "If the developing countries were poor, it was not because they lacked natural resources but because they had been unilaterally exploited during the colonial period by foreign interests.
> ...
> It was an indisputable fact that the developing countries

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[179] 21 U.N. General Assembly, Official Records, Annexes, Agenda Item 45, at 1, U.N. Doc. A/C.2/L.870 and corr. 1 (1966).

[180] 21 U.N. General Assembly, Official Records, Second Committee, Summary Records of Meetings, at 173 (1966).

> possessed abundant natural resources. For instance, Africa had iron reserves twice as [large] as those of the United States; coal reserves sufficient to last 300 years; a hydro-electric power potential equivalent to 42 per cent of the world total; 63 per cent of the world's gold production; large quantities of uranium, copper, titanium, oil and other raw materials indispensable for the economic might of many industrialized countries. It also had a vast agricultural potential, and the congo basin alone could produce enough food crops to satisfy the need of almost half of the world's population. Despite all that, its per capita income ranging from $80 to $250 was among the lowest in the world, as against the per capita income of $1,320 for western Europe and $3,272 for the United States of America. It was true that large proportion of the natural resources of Africa were still untapped, but the resources that had been tapped had been mainly for the profit of foreigners. For example, between 1945 and 1955 foreign firms and exported from the Congo alone raw materials valued at $2,773,000,000,000; and between 1945 and 1951 foreign mining companies in South Africa had drawn a profit of $814,000 million from gold mining".181

It was, thus, in response to the above state of affairs that U.N. support for recourse to nationalization was urged.

The question of <u>including</u> resort to nationalization as a possible option in the exercise of sovereignty over natural resources and that of U.N. support for nationalization measures again arose in connection with the discussion in the second committee on a number of controversial amendments and sub-amendments to the 11-power draft resolution which later became General Assembly Resolution 2158 (XXI).

The proposition, in the preambular section of the 11-power draft resolution, that underdeveloped countries should be able to undertake the exploitation and marketing of their natural resources "themselves" proved one of the most controvercial points in the eleven-power draft resolution, and it was principally in connection with that controversy that the question of U.N. support for nationalization measures was

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[181] <u>Ibid.</u> at 180.

raised.

The first controvercial discussion involved two sets of conflicting amendments to the draft texts that later became preambular paragraphs (b) and operative paragraph (3) of Resolution 2158 (XXI). The first set of amendment submitted separately by the U.S.[182] and United Kingdom[183] delegations, were opposed to the idea contained in the draft texts of what later became preambular paragraph (6) and operative paragraph (3) of Resolution 2158 (XXI), that the underdeveloped countries should undertake the exploitation and marketing of their natural resources "themselves". Instead, the U.S. and U. Kingdom amendments proposed that foreign capital should play a significant role in the exploitation of natural resources. As the explanatory statements of the U.S. and U.K. delegations later confirmed, those amendments were implicitly intended to oppose recourse to nationalization as a possible option in the exercise of sovereignty over natural resources. On the other hand, the second series of amendments[184] to the same texts submitted jointly by Iran, Afghanistan, Ceylon, Ecuador and Lebanon tended, on the contrary, to reinforce the proposition in the two draft texts that underdeveloped countries should undertake the exploitation and marketing of their natural resources "themselves". Thus, the latter amendments, unlike the U.S. and U. Kingdom amendments, broadened the options in the exercise of sovereignty over natural resources, and, therefore, implicitly included the possibility of resort to nationalization as a means by which

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[182] 21 U.N. General Assembly, Official Records, Annexes, Agenda Item 45, at 2, U.N. Doc. A/C.2/L.873 (1966).

[183] Ibid. at 3, U.N. Doc. A/C.2/L.880.

[184] Ibid at 4, U.N. Doc. A/C.2/L.870/Rev.2 and corr.1 (1966).

underdeveloped countries could undertake the exploitation and marketing of resources by themselves. In the course of the deliberations of the second committee, the U.S. and U. Kingdom amendments were met with strong opposition from the majority of the participants, and as a result, they were withdrawn by the sponsors themselves. On the other hand, the amendments jointly submitted by Iran, Afghanistan, Ceylon, Ecuador and Lebanon mustered majority support in the second committee, and were subsequently incorporated into the final versions of what later became preambular paragraph (6) and operative paragraph (3) of General Assembly Resolution 2158 (XXI). There, again, the rejection of the U.S. and U. Kingdom amendments and the adoption,[185] instead, of the amendment jointly submitted by Iran, Afghanistan, Ceylon, Ecuador and Lebanon, tended to reflect implicit majority support for recourse to nationalization as a possible mode of exercising sovereignty over natural resources.

Again, the question of support for nationalization measures was raised in connection with the discussion on the draft text of what later became operative paragraph (5) of Resolution 2158 (XXI). The latter text which issued from operative paragraph (4) of the original draft resolution provided for the right of underdeveloped countries "to 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". While the draft provision was principally intended to enable underdeveloped countries to increase their share of ownership and control in joint-venture schemes, it was indirectly supporting partial

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[185] The 5-power amendment relating to the draft text that later became operative paragraph (3) of Resolution 2158 (XXI) was adopted by 98 votes to none with 7 abstentions. See Ibid. at 5.

as well as total ultimate nationalization of foreign-operated enterprises. That was precisely why most of the representatives of the capital-exporting countries strongly opposed the draft text, which they saw as a basis for "the progressive expropriation of private foreign investment".[186] On the other hand the majority of the participants in the second committee, supported that draft text on the understanding that it provided a dynamic mechanism of "increasing" the share of underdeveloped countries in the control and ownership of enterprises connected with natural resource exploitation, up to and including, total nationalization.

Thus, the rejection of the U.S. and U. Kingdom amendments and the adoption instead, of those amendments that tended to strength permanent sovereignty over natural resources, indirectly confirm that Resolution 2158 (XXI) not only recognized resort to nationalization as a possible option in the exercise of sovereignty over natural resources, but also that it extended implicit support for nationalization measures.

As we tried to point out in connection with Resolution 523 (VI), 626 (VII), 1515 (XV) and 1803 (XVII), the significance of Resolution 2158 (XXI), like the other Resolutions on permanent sovereignty over natural resources lies in the fact that its support for nationalization measures attached specifically to those carried out particularly by underdeveloped countries.

In the face of the "generality" of wording of some of the paragraphs of Resolution 2158 (XXI), one may be tempted to conclude that the subjects of the right the effective

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[186] 21 U.N. General Assembly, Official Records, Second Committee, Summary Records of Meetings, at 175 (1966).

exercise of which formed the object of concern for the U.N. in Resolution 2158 (XXI) were in fact "all" states. Operative paragraph (1), for instance, referred to the inalienable right of "all countries" to exercise permanent sovereignty over natural resources. Operative paragraph (2) recommended that the United Nations should undertake "maximum concerted effort to channel its activities so as to enable "all countries" to exercise their right fully. Similarly operative paragraph (5) affirmed the right of "all countries" to increase their share in the administration and profits of enterprises which were fully or partly operated by foreign capital in the past. On the other hand, other provisions of Resolution 2158 (XXI) seemed to recognize the "centrality" of underdeveloped countries by linking U.N. support for the effective exercise of sovereignty over natural resources specifically to underdeveloped countries. Preambular paragraph (3) of the resolution, for instance, referred solely to underdeveloped countries, when it affirmed that the natural resources of "the developing countries" constitute the basis for "their economic development in general and their industrial progress in particular". Similarly, preambular paragraph (4) confined its concerns to the problem of underdeveloped countries when it noted that natural resources were limited and in many ways exhaustible and that their proper exploitation determined the conditions of "the economic development of the developing countries both at present and in the future". Preambular paragraphs (5) and (6), likewise, addressed themselves to the specific problem of "the developing countries" in particular in recommending that those countries should themselves undertake the exploitation and marketing of their natural resources. Similarly, operative paragraphs 6, 7, 8 and 9 of Resolution 2158 (XXI) dealt with the various aspects of permanent sovereignty over natural resources as they related specifically to "developing countries".

On a purely textual interpretation of the various

paragraphs of Resolution 2158 (XXI) one is not in fact certain whether the Resolution's support for the effective exercise of permanent sovereignty over natural resources extended to "all" states, or whether it was confined to underdeveloped countries alone. Seen contextually, however, there can hardly be any doubt that it was the particular economic situation of the underdeveloped countries that warranted U.N. concern with the question of permanent sovereignty over natural resources in the first place, and it was in support to the effective exercise of sovereignty particularly by the underdeveloped countries that Resolution 2158 (XXI) was adopted.

The question as to whether the Resolution's concern extended to "all" states or whether it was solely confined to underdeveloped countries, was in fact clarified in the course of an exchange between the Netherlands representative and the Polish delegate during the 1965 deliberations of the second committee. Addressing himself to an earlier statement made by the Polish delegate, the Netherlands representative remarked that "by emphasizing that the draft resolution dealt only with the permanent sovereignty of less developed countries, the Polish representative had tried to convince the committee that all states members of the United Nations were sovereign, but that some of them were less sovereign than others".[187] Pursuing the point still further, the Netherlands representative asserted that the Polish statement "brought the fundamental weakness of the draft resolution into the limelight, namely, the assumption that there were two kinds of sovereignty. The sovereignty of western and eastern countries on the one hand, and the sovereignty of less developed countries, on the

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[187] 20 U.N. General Assembly, Official Records, Second Committee, Summary Record of Meetings, at 349 (1965).

other".[188] In answer to the Netherlands representative, the Polish delegate admitted that it was "perfectly true" that the draft resolution was "biased in favour of the developing countries", and argued that the economic "advancement of those countries could not be achieved without such a bias, which had been the very essence of the organization's work for some fifteen years".[189] The author of this paper not only agrees with the Polish reply in the above exchange with the Netherlands representative, but also uses arguments such as those put forward by the Polish delegation as key points of departure for developing the thesis that U.N. support for the effective exercise of permanent sovereignty related particularly to underdeveloped countries, and that this support, in fact, amounted to differential treatment in favour of underdeveloped countries by reason of their special capacity of "underdevelopment".

General Assembly Resolution 2386 (XXIII)[190] as a Basis for Nationalization:

Recourse to nationalization by underdeveloped countries as an aspect of the effective exercise of permanent sovereignty over their natural resources again finds implicit support in General Assembly Resolution 2386 (XXIII) of 19 December 1968.

Being mainly a follow-up Resolution, General Assembly Resolution 2386 (XXIII) did not, of course, introduce a new element by way of a substantial elaboration of the concept of permanent sovereignty over natural resources. However, its importance, for our purposes here, is that by reaffirming the principles enunciated in earlier Resolutions on permanent

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[188] Ibid.

[189] Ibid. at 374.

sovereignty over natural resources, it tended to lend further support for the effective exercise sovereignty over natural resources by underdeveloped countries.

Although Resolution 2386 (XXIII) made no express reference to resort to nationalization as an aspect of the effective exercise of sovereignty over natural resources, its implied support for the option of recourse to nationalization can be deduced both from the text as well as the drafting history of the Resolution.

The Resolution's indirect support for nationalization measures is, for instance, implicit in preambular paragraph (2) and (3) as well as in operative paragraph (1). In preambular paragraph (2), Resolution 2386 (XXIII) reaffirmed "the principles and recommendations contained" in General Assembly Resolution 2158 (XXI), and in light of the preceding discussion regarding the latter resolution, we have tried to show that those "principles and recommendations" included support for recourse to nationalization. Therefore, by reaffirming those "principles and recommendations", Resolution 2386 (XXIII) was indirectly re-affirming U.N. support for resort to nationalization. Again, by affirming, in preambular paragraph (4), that "the full exercise of permanent sovereignty over natural resources will play an important role in the achievement of the goals of the second United Nations Development decade", Resolution 2358 (XXIII) implicitly envisaged, as we shall show in a moment, recourse to nationalization as an aspect of the "full exercise" of permanent sovereignty over natural resources. In requesting the Secretary General, under operative paragraph (1), "to include in his further report, a comprehensive account of the implementation of the principles and recommendations set forth in General Assembly

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[190] For the full text of Resolution 2386 (XXIII) see Appendix (A-7) of this paper.

Resolution 2158 (XXI), in particular Section I, paragraphs 5, 6 and 7", Resolution 2386 (XXIII), again envisaged acts of nationalization among those measures of "implementation of the principles and recommendations set forth in General Assembly Resolution 2158 (XXI)".

The implicit support of Resolution 2386 (XXIII) for acts of nationalization by underdeveloped countries becomes still manifest from the background deliberations in the second committee leading to the formulation of that Resolution. One of the pertinent areas of discussion in the second committee which tended to reflect the Resolution's implicit support for nationalization measures was the attitude of the majority towards the content of the progress Report[191] on permanent sovereignty over natural resources submitted by the U.N. Secretariat. The Report, which served as a basis for Resolution 2386 (XXIII), dealt with permanent sovereignty over natural resources from three angles. The first aspect was concerned with the emergence of what the report called a "new trend", in which the direct role of governments in underdeveloped countries in the exploitation of natural resources was on the increase. The second aspect was concerned with the increasing role of the U.N. in assisting the underdeveloped countries by providing various kinds of administrative and technical services to state-operated enterprises, thereby, acting as a vacuum-filler and a substitute in place of foreign private capital. The third aspect dealt with the role of foreign private investment, and the Report assigned an important role to foreign capital and strongly commended that it could continue to operate on a new basis of "controlled association" in the form of joint-venture schemes with governments of underdeveloped countries.

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[191] 23 U.N. General Assembly, Official Records, Annexes, Agenda Item 39, at 1, U.N. Doc. A/7268 (1968).

While the majority of the participants in the second committee and the General Assembly fully endorsed the first and second aspects of the secretariat's report, they were very critical of the third aspect of the report which they considered an "apology" for foreign capital on the part of the U.N. Secretariat. In other words, while they recognized and commended the propriety of the increasing direct role of governments, of underdeveloped countries in the exploitation of natural resources, and the supplementary role of the U.N. as a vacuum-filler in place of foreign capital, they down-played the importance of foreign capital in the exploitation and development of natural resources in underdeveloped countries. The implication of this selective attitude towards the various aspects of the secretariat's report in influencing the orientation of Resolution 2386 (XXIII), hardly needs amplification. Since the direct involvement of governments of underdeveloped countries in the exploitation and development of natural resources is mostly implemented by way of nationalization, the recommendation and commendation of such direct government involvement indirectly amounted to an implied support for nationalization measures. Moreover, the majority's satisfaction with the increasing role of the U.N. as a vacuum-filler in place of foreign capital assisting state-operated enterprises in the exploitation of their natural resources, as well as the assigning, by the majority, of a diminished role to foreign capital, clearly implies U.N. indifference (accommodation) to the possible discouraging effect of recourse to nationalization on the inflow of foreign capital.

That this selective attitude towards the content of the secretariat's Report implied indirect support for nationalization measures becomes even more manifest from the statements[192]

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[192] 23 U.N. General Assembly, Official Records, Second Committee, Summary Records of Meetings, Agenda Item 39, 1195th Meeting, at 1; 1196th Meeting at 1-5; 1197th Meeting at 1-3 (1968).

of the representatives of the Byelorussian Soviet Socialist Republic, Romania, Libya, the U.S.S.R., Poland, Nigeria, the Ukranian Soviet Socialist Republic, Bulgaria, Zambia, Guinea, Panama, Algeria and Yemen. The statements made by the delegations from Zambia[193] and Guinea,[194] in particular, expressly suggested that recourse to nationalization should not only be recognized as one of the possible ways of effectively exercising sovereignty over natural resources but should also be strongly supported by the U.N.

The implicit support of Resolution 2386 (XXIII) for recourse to nationalization again becomes manifest from the controvercial discussion in the second committee regarding the singling out, in the draft resolution submitted jointly by Poland, Ghana, Libya and the Ukranian Soviet Socialist Republic, of Resolution 2158 (XXI) from among other earlier Resolutions, and the re-affirmation, with particular emphasis, of certain distinct principles enunciated in Resolution 2158 (XXI). The controversy arose from an objection, by the Netherlands[195] delegation that it was improper to single out, and make particular reference, in operative paragraph (1) of the draft resolution, to Section I, operative paragraphs 5, 6 and 7 of Resolution 2158 (XXI). As it becomes clear from an earlier position taken by the Netherlands Government with respect to operative paragraph (5) of Resolution 2158 (XXI), the renewal of its objection against reference to that paragraph in the draft resolution, stemmed from its opposition to the idea, implicit in the controversial paragraph, of U.N. support for the "progressive" nationalization of foreign-operated enterprises through gradual "increase" of the share of governments of underdeveloped countries in the administration and profits of those enterprises.

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[193] Ibid. at 4, 1197th Meeting.

[194] Ibid. at 2, 1198th Meeting.

The proposal by the Netherlands representative for the deletion of the specific reference, in the draft resolution, to the provision in Resolution 2158 (XXI) which implied support for recource to partial as well as total nationalization, triggered a controversy in the second committee, and the ensuing debate clearly reflected that the underlying difference in the second committee was between those who stood for U.N. support to nationalization measures and those who were opposed to it. While the delegations from Panama, Algeria, the U.S.S.R. and Yemen strongly opposed the objections of the Netherlands, the representatives from such capital-exporting countries as Belgium, the United Kingdom, Japan and the United States supported the reservations of the Netherlands. In the face of the rejection of its objections both by the sponsors of the draft resolution and the majority of the participants in the second committee, the Netherlands delegation was finally forced to withdraw its proposals. The draft resolution incorporating the reference to the controvercial paragraph of Resolution 2158 (XXI) was subsequently adopted by 85 votes to none, with 12 abstentions in the second committee. The draft resolution which, thus, lent indirect support for partial as well as total nationalization measures was transmitted to the General Assembly and was adopted by 94 votes to none with 9 abstentions. The explanatory statements[196] made particularly by those delegates from the capital-exporting countries who abstained during the adoption of Resolution 2386 (XXIII) again illustrate indirectly that the reference, in operative paragraph (1) of Resolution 2386 (XXIII), to the "implementation of the principles and recommendations set forth in General Assembly Resolution 2158 (XXI), in particular Section I, paragraph 5, 6 and 7", signified, among others, implicit U.N. support for resort to nationalization.

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[196] Ibid. at 3, 1209th Meeting.

Like the earlier Resolutions on permanent sovereignty over natural resources, the significance of Resolution 2386 (XXIII) still lies in the fact that its implicit support for nationalization measures related specifically to those carried out particularly by underdeveloped countries. The "centrality" of the underdeveloped countries in Resolution 2386 (XXIII) derived essentially from the fact that the Resolution was a response to the Secretary General's progress Report mentioned earlier, which dealt with the problem of permanent sovereignty over natural resources strictly in connection with underdeveloped countries. The particular stress, made in that report of the problem of the effective exercise of sovereignty over natural resources as it related specifically to the underdeveloped countries not only determined the focus, on the underdeveloped countries, of the discussion in the second committee, but it also shaped the specific orientation of the solution of the problem towards the particular needs of the developing countries. Not only did the majority of the participants in the second committee attribute the glaring lack of the effective exercise of sovereignty over natural resources in the underdeveloped countries to the still prevalent reign of economic "neo-colonialism" over the peoples of those countries, but they also saw the solution in terms of "freeing of [those] countries from foreign domination".[197]

The "centrality" of the underdeveloped countries in Resolution 2386 (XXIII) was, for instance, clearly echoed in the second committee by one of the supporters of the Resolution, namely the Zambian delegate who pointed out that the problem of permanent sovereignty over natural resources was in essence a problem stemming from the "foreign ownership" of the resources of the underdeveloped countries, which according to him, "made a mockery of [the] political independence" of those countries.[198]

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[197] Ibid. at 1, 1195th Meeting.

[198] Ibid. at 4, 1197th Meeting.

The indirect support for nationalization measures implicit in preambular paragraphs 2 and 4 as well as in operative paragraph (1) of Resolution 2386 (XXIII), thus, not only relates particularly to those carried out by underdeveloped countries, but it also implies, by reason of its specific application, differential treatment in favour of the underdeveloped countries.

General Assembly Resolution 2626 (XXV)[199] as a Basis for Nationalization

Recourse to nationalization as an aspect of the effective exercise of sovereignty over natural resources by underdeveloped countries again finds implicit support in General Assembly Resolution 2626 (XXV)[200] of 24 October 1970. That Resolution, which inaugurated the "International Development strategy for the second United Nations Development Decade" effective from January 1, 1971, and which was regarded by many as "the best possible reflection of the present stage of the collective conscience of mankind in one of the crucial areas of organizing humanity",[201] and a "milestone in the annuals of international economic and social development",[202] laid down important

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[199] For the full text of Resolution 2626 (XXV) see Appendix (A- 8) of this paper.

[200] For an account of the drafting history of Resolution 2626 (XXV) see, 25 U.N. General Assembly, Official Records, Annexes, Agenda Item 42, at 4-30, U.N. Doc. A/8124 and Add.1 (1970).

[201] Ibid. at 15. That appraisal was made by the group of 89 states in their joint formal statement upon sponsoring the draft resolution that later became the "International Development Strategy for the second United Nations Development Decade".

[202] 25 U.N. General Assembly, Official Records, Plenary Meetings, Summary Record of Meetings, 1871st Meeting, Agenda Item 42, at 1 (1970). That appraisal was made by the Rapporteur of the second committee.

principles among which was U.N. affirmation of support for the effective exercise of permanent sovereignty over natural resources by underdeveloped countries.

A joint reading of preambular paragraphs (10) and (11), as well as operative paragraphs (41) and (74) of that Resolution tends to show indirect U.N. support for recourse to nationalization as one of the possible modalities of exercising sovereignty over natural resources. The General Assembly, for instance, proclaimed in preambular paragraph (10) that "every country has the right and duty to develop its human and natural resources", and in preambular paragraph (11), it reiterated the guiding principle that "the primary responsibility for the development of the developing countries rests upon (the underdeveloped countries) themselves".[203] Again, in operative paragraph (41), the General Assembly proclaimed that:-

> "Developing countries must and do bear the main responsibility for financing their development. They will, therefore, continue to adopt vigorous measures for a fuller mobilization of the whole range of their domestic financial resources and for ensuring the most effective use of available resources, both internal and external... Efforts will be made to improve the efficiency of public enterprises so that they make an increasing contribution to investment resources".204

Finally, operative paragraph (74) provided explicitly that:

> "The full exercise, by developing countries, of permanent sovereignty over natural resources will play an important role in the achievement of the goals and objectives of the Decade. Developing countries will take steps to develop the full potential of their natural resources".205

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[203] See Appendix(A-8), of this paper. (emphasis ours).

[204] Ibid. (Emphasis ours).

[205] Ibid. (Emphasis ours).

The implications of the foregoing provisions of Resolution 2626 (XXV) in so far as the exercise of the right to resort to nationalization is concerned, is quite clear in light of the overall context of the International Development Strategy of the Second United Nations Development Decade.

The strategy adopted for the second U.N. Development Decade was largely a response to the failures and shortcomings of the development effort pursued during the First U.N. Development Decade of the 1960's. One of the major shortcomings of the strategy adopted for the First Development Decade, with respect to the economic development of underdeveloped countries, and whose rectification was sought by the new strategy of the Second Development Decade, was heavy reliance on foreign capital as a source of financing development. The policy imperatives dictated by the earlier strategy expected governments in underdeveloped countries to allow foreign capital to operate under "lax" and "generous" investment climates. In particular, the exercise of sovereignty over natural resources by the underdeveloped countries had to be so fashioned as to permit foreign capital a wide latitude of freedom and a secure operational climate that resort to nationalization by host underdeveloped countries were hardly consistent with the strategy of the First Development Decade.

The disappointment resulting from the outcome of the First Development Decade, thus, forced the U.N. to change its strategy of support for reliance on foreign capital as a source of financing development. According to the new strategy, then, the responsibility for development of underdeveloped countries had to rest "primarily" upon the underdeveloped countries "themselves", and all external sources of financing development, including foreign capital had to play a supplementary or secondary role. Again, along with the recognition of "self-reliance" as a basic approach towards development, the new

development strategy considered "domestic resources" as the primary source of financing development. Consequently, the new strategy brought about a corresponding change in policy imperatives with respect to the choice of appropriate modalities in the exercise of sovereignty over natural resources. With the relegation of the importance of foreign capital to a secondary position, resort to nationalization was seen as one of the effective vehicles by means of which underdeveloped countries could concretely assume their "primary responsibility" for their development and by way of which they could effect a "fuller mobilization" of their domestic resources and develop "the full potential of their natural resources".

That U.N. affirmation, particularly under paragraph (74) of Resolution 2626 (XXV), of "the full exercise" by under-developed countries, of permanent sovereignty over their natural resources actually signified indirect support for recourse to nationalization as an aspect of the exercise of that sovereignty, becomes all the more clear from the various collective formal statements made by several delegation in the course of the deliberations of the second committee on the draft text which later became Resolution 2626 (XXV). In a joint formal statement made by the group of 89 states which sponsored the draft resolution, the factors that impel underdeveloped countries to resort to nationalization were, for instance, alluded to when it was pointed out that "the objectives and measures set out...in the first sentence of paragraph 74 have important bearing on the problem of development" and that "the fulfilment of the conditions mentioned in [those] paragraphs is essential for the economic independence of [the underdeveloped countries] and for their very existence as sovereign states".[206]

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[206] 25 U.N.General Assembly, Official Records, Annexes, Agenda Item 42, at 15-16, U.N. Doc. A/8124 and Add 1 and 2 (1970).

Again, in the joint formal statement submitted by 8 socialist countries, similar allusions were made regarding the factors that force underdeveloped countries to resort to nationalization. According to the latter statement, the state of natural resource use and control during the First Development Decade was such that "the exploitation of the developing countries by the developed countries not only failed to cease but on the contrary, intensified".[207] As a solution to the problem, the statement alluded to the necessity of recourse to nationalization by proposing the following:

> "...the implementation of radical social and economic reforms designed to...guarantee the consolidation of national sovereignty and the protection of natural resources in the interests of national development;
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> ...
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> the creation and consolidation of the state and co-operative sectors of the economy, the introduction of a planned basis for economic management, the exercise of effective pressure on the private sector and the subordination of that sector to the national interests..." [208]

Although, for obvious reasons, not all the proposals contained in the joint statement of the 8 socialist countries were included in Resolution 2626 (XXI), there is ample evidence to show that the above proposal relative to nationalization was implicitly incorporated within the general wording of paragraph (74) of Resolution 2626 (XXV). In fact, the Belgian delegation's express reservation[209] on paragraph (74) of the draft resolution indirectly confirms that U.N. support for the "full exercise" of sovereignty over natural resources within the terms of paragraph (74) envisaged implicit support for recourse to nationalization, as well.

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[207] Ibid. at 1.

[208] Ibid.

[209] Ibid. at 18.

While paragraph (74) of Resolution 2626 (XXV), thus, implied indirect U.N. support for nationalization measures, paragraph (50) of the same Resolution appears, at least on its face, to contradict the taking of such drastic measures as nationalization against foreign capital. Operative paragraph (50) provides that "developing countries will adopt appropriate measures for inviting, stimulating and making the effective use of foreign private capital taking into account the areas in which such capital should be sought and bearing in mind the importance for its attraction of conditions conducive to sustained investment".[210] Seen in isolation, and independent of other provisions of Resolution 2626 (XXV), paragraph (50) seems to forbid nationalization since nationalization generally tended to "discourage" rather than "stimulate" and "attract" foreign private capital. However, seen in light of the fundamental objectives of the second United Nations Development Decade and the secondary role assigned to foreign capital as a source of financing development, paragraph (50) cannot be given a meaning that can supercede and override paragraph (74) of Resolution 2626 (XXV). To construe paragraph (50) as one forbidding underdeveloped countries not to nationalize foreign-operated enterprises on the ground that nationalization would discourage the inflow of foreign capital, would not only amount to subordinating the permanent sovereignty of underdeveloped countries over their natural resources to the needs of foreign capital, but it would also mean depriving underdeveloped countries the indispensable vehicle for carrying out the effective mobilization of their domestic resources for development financing. Such a construction of paragraph (50) would contradict the whole change of approach, in the international Development strategy, towards the role of foreign capital since the demise

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[210] See Appendix (A-8 of this paper.

of the strategy of the First Development Decade. Thus, the only way to reconcile paragraphs (74) and (50) is to construe paragraph (50) in such a way that it affords some degree of protection to foreign capital without, at the same time, implying total prohibition of nationalization. Interpreted in that light, paragraph (50) can, then, be construed as signifying, at the most, attendant obligations on the "taking" state subsequent to nationalization. That such qualification to the exercise of sovereignty over natural resources as implied by paragraph (50) constituted some of the "controvercial" points in Resolution 2626 (XXI) were conceded by the majority merely to secure international unanimity of support for Resolution 2626 (XXV) is confirmed by the reservation of the 89 states which noted that the final document on the International Development strategy for the Second United Nations Development Decade "does not constitute an adequate expression of the aspirations of the developing countries".[211]

It can, thus, be concluded that the special role assigned to domestic sources, as opposed to foreign capital, as a major source of financing development within the terms of the International Development strategy of the seventies, coupled with the affirmation, in paragraph (74) of Resolution 2626 (XXV), of the "full exercise" of sovereignty over natural resources, indirectly legitimizes resort to nationalization as one of the effective means of realizing the objectives and goals of the second United Nations Development Decade.

Apart from lending support for resort to nationalization, the significance of Resolution 2626 (XXV) still lies in the fact that it did so specifically in relation to those carried out particularly by the underdeveloped countries. The "centrality" of the underdeveloped countries in the concern of the U.N. with respect to permanent sovereignty over natural

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[211] U.N. Doc. A/8124 and Add 1 and 2, op. cit. at 15.

resources is not only borne by the very wording of paragraph (74) of Resolution 2626 (XXV) wherein only "developing countries" were expressely mentioned as subjects of the right in question, but it also stems from the special orientational-bias of the International Development strategy itself towards the solution of the economic problems peculiar to under-developed countries. Moreover, throughout the deliberation of the second committee, the question of U.N. support for the effective exercise of sovereignty was examined solely in connection with the underdeveloped countries. Furthermore, the drafting history of Resolution 2626 (XXV) amply illustrates that the indirect support which paragraph (74) of the Resolution afforded particularly to underdeveloped countries to resort to nationalization in the exercise of their sovereignty over their natural resources was intended to help those countries achieve speedy economic development and secure their full independence from foreign (alien) domination. Thus, by reason of its specificity of application, the Resolution's indirect support for those nationalization measures carried out particularly by underdeveloped countries, signified differential treatment in favour of underdeveloped countries.

General Assembly Resolution 2692 (XXV)[212] as a Basis for Nationalization

Recourse to nationalization by underdeveloped countries again received implied support from General Assembly Resolution 2692 (XXV) of 15, December 1970, as one of the possible modes of exercising permanent sovereignty over natural resources.

Although Resolution 2692 (XXV) does not make express reference to nationalization as such, there is ample indirect evidence to show that it envisaged resort to nationalization

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[212] For the full text of Resolution 2692 (XXV) see Appendix (A-9) of this paper.

as one of the possible options in the exercise of sovereignty over natural resources.

The Resolution's implicit support for nationalization finds expression, particularly in preambular paragraph (1) where it makes retrospective affirmative reference to earlier Resolutions on permanent sovereignty over natural resources; in its recognition, under preambular paragraph (6), of "the positive experience gained by the developing countries in the exercise of their sovereignty over natural resources for the purpose of increased mobilization of domestic resources for development"; in its reaffirmation, under operative paragraph (1), of "the right of peoples and nations to permanent sovereignty over their natural wealth and resources" and its recommendation that the right in question "must be exercised in the interest of their national development and of the well-being of the people of the state concerned"; in its appraisal, under operative paragraph (3), that the "exercise of permanent sovereignty over their natural resources by developing countries is indispensable in order that they may... accelerate their industrial development..."; in its call, under operative paragraph (5), for "the complete implementation of the principles and recommendations contained" in earlier General Assembly Resolutions; in its request, under operative paragraph (5), of the economic and social council to instruct the committee on natural resources to include in its periodic report, "the advantages derived from the exercise by developing countries of permanent sovereignty over their natural resources"; and finally in its invitation, under operative paragraph (6), of member states to inform the committee on natural resources on the progress achieved "to safeguard the exercise of permanent sovereignty over their natural resources".

Upon closer examination of the drafting history of Resolution 2692 (XXV), it becomes clear that the Resolution did

not, as such, introduce new[213] principles by way of elucidating the concept of permanent sovereignty over natural resources beyond the mere re-affirmation of those already enunciated in earlier Resolutions. In other words, seen in the overall context of dynamic evolution of the concept of permanent sovereignty over natural resources, Resolution 2692 (XXV) is a norm-implementing and not a norm-generating (creating) Resolution.

As its drafting history amply illustrates, its significance as a norm-implementing resolution, thus, consists in the fact that it tended, among other things, to legitimize acts of nationalization carried out by underdeveloped countries in the exercise of permanent sovereignty over their natural resources.

The Resolution's legitimizing-function as regards acts of nationalization is, first of all, reflected by the background discussion in the second committee that led to the formulation of Resolution 2692 (XXV). There, the initial debate revolved around the Progress Report of the Secretary General on "permanent sovereignty over natural resources".[214] The Report, of which Resolution 2692 (XXV) was a response, consisted of 3 parts. The first part, dealt with issues involving foreign participation in the exploitation of natural resources of underdeveloped countries. The second part, was concerned with a review, on a country-by-country basis of the status of

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[213] The only new elements introduced by the Resolution, and into which we need not go here, relate, on the one hand, to the extension of the territorial limit of sovereignty over "marine resources", and the idea, on the other hand, of exercising sovereignty for the "protection of the environment".

[214] 25 U.N. General Assembly, Agenda Item 45, U.N. Doc. A/8058 (mimeograph, 1970).

contractual arrangements between developing countries and foreign investors for the exploitation and marketing of natural resources and their products. The last part dealt with the state of multi-lateral assistance provided to developing countries for the exploitation of natural resources. Among other things, the report concluded that because of the inadequacy of domestic savings, on the one hand, and the need for high investment called for by the growth requirements of underdeveloped countries, on the other, "an increasing flow of foreign capital from the developing countries will remain necessary for the implementation of the programmes of the developing countries for the exploitation of their natural resources".[215] The implication of the latter conclusion, then, being that permanent sovereignty over natural resources should be exercised in such a way that it would not discourage the flow of foreign capital. Consequently, the most controversial aspect of the Report, in reaction to which the overwhelming majority in the second committee sought the further legitimization of the increasing trend towards nationalization, involved the section entitled "the case for using foreign capital and technology in the exploitation of natural resources". The prevailing criticism against the orientation[216] of the controvercial section of the report was that it failed to examine the problem from the standpoint of strengthening permanent sovereignty over natural resources in light of

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[215] Ibid. at 14.

[216] The orientation of the report was largely apologetic for foreign capital mainly because it relied heavily on studies made by such bodies as the International Bank for Reconstruction and Development (IBRD), The African Development Bank, the Asian Development Bank, the Inter-American Development Bank, and the East-African Development Bank, which are directly or indirectly controlled by, and actually serve, strong interests of the major capital-exporting countries.

the new experiences gained (i.e. the experiences being nationalization measures), and the obstacles faced by the developing countries, and that the report, instead, became an "apology" for foreign private investment. In the course of criticising that aspect of the Secretary General's report, most of the delegations in the second committee, particularly those from Chile, the Ukranian Soviet Socialist Republic, the U.S.S.R., Poland and Bolivia, argued[217] not only that the permanent sovereignty of underdeveloped countries over their natural resources should be strengthened even further, but they also alluded repeatedly that resort to nationalization was one of the effective means for doing so. The Ukranian delegate, for instance, noted that Secretary General's Report "completely ignored the experience of developing countries, particularly the experience of Chile which was nationalizing its mineral resources in order to satisfy the needs of its own people".[218]

The implication of the criticisms against the orientational-bias of the Secretary General's Report as regards the question of U.N. legitimization of acts of nationalization by underdeveloped countries is obvious. In criticising the report on the ground that it overlooked the experiences gained, and the obstacles faced, by developing countries in the exercise of their sovereignty over their natural resources, the pertinent experiences which the majority of the delegations in the second committee had in mind included nationalization experience, and the obstacles regarding which they expected thorough study by the U.N. Secretariat included those which underdeveloped countries faced upon carrying out nationalization measures. Again, in criticizing the report, for its undue emphasis on the

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[217] 25 U.N. General Assembly, Official Records, Second Committee, Summary Records of Meetings, Agenda Item 45, at 355, 359, 368 and 371 (1970).

[218] Ibid. at 359.

importance of foreign capital as a source of financing development, most delegations were indirectly showing their preference for direct government role in the exploitation of natural resources by way of nationalization. In other words, the reaction of most of the delegations against both the ommissions and commissions of the Secretariat's report tended to reflect a strong urge to legitimize resort to nationalization by underdeveloped countries as an aspect of strengthening permanent sovereignty over natural resources. It was, therefore, principally the above reaction[219] to the report of the Secretary General that influenced the thrust of General Assembly Resolution 2692 (XXV), and particularly, preambular paragraphs 4, 6 and 7, and operative paragraphs 2, 3, 5 and 6, in favour of legitimizing the increasing trend towards resort to nationalization by underdeveloped countries.

Again, the call for the legitimization of acts of nationalization was indirectly raised during the deliberations of the second committee in the course of the discussion on the draft resolution[220] which was jointly submitted by Afghanistan, Algeria, Chad, Chile, Morocco, the Peoples Republic of the Congo, Poland, the Sudan, Syria, Tunisia, Uganda, the Ukranian Soviet Socialist Republic and the United Republic of Tanzania

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[219] Incidentally, the establishment of the committee on Natural Resources and the subsequent role assigned to it under operative paragraphs 5 and 6 of Resolution 2692 (XX) was, partly a direct consequence of the lack of confidence, by the majority, in the "objectivity" of the U.N. Secretariat in studying the problem of permanent sovereignty over natural resources. The committee on Natural Resources was established by the Economic and Social Council pursuant to its Resolution 1535 (XLIX) of 27 July, 1970. The committee was composed of Government representatives, and initially, it had a membership of 27, but by a later amendment, the committee's membership was enlarged to 38. See 50 U.N. Economic and Social Council, Official Records, supp. 6, (1971).

[220] 25 U.N. General Assembly, Official Records, Annexes, Agenda Item 45, at 1-2, U.N. Doc. A/C.2/L. 1136 (1970).

(later joined by Guinea, Mauritania, Sierra Leone, Bolivia, Guyana and Mali) as well as on the separate amendments submitted by the Philippines,[221] and jointly by Peru, Ecuador and Yugoslavia.[222]

Upon introducing the 13-power draft resolution which later became, after some modifications, Resolution 2692 (XXV), one of the co-sponsors, the representative of Chile, for instance, spoke of the numerous occasions in which "foreign investors...devised accounting administrative or trade methods" to frustrate the legislations adopted by underdeveloped countries to "protect...their sovereignty" over natural resources, and argued that the final alternative left for underdeveloped countries was to resort to nationalization, as some already did.[223] The statements made by the delegations from Guyana, Algeria, the Ukranian Soviet Socialist Republic, Iraq, Romania, Peru, Czechoslovakia, the Sudan, Dahomey, Poland, Mongolia, Bolivia, India, Libya, the U.S.S.R., Brazil and Ecuador again reflected the prevailing tendency in the second committee to legitimize acts of nationalization by under-developed countries. The Sudanese representative, for instance, argued that "since foreign investors were not always helpful to the host countries in exercising permanent sovereignty over their natural resources, nationalization was sometimes

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[221] Ibid. at 2, U.N. Doc. A/C. 2/L. 1138.

[222] Ibid. at 2, U.N. Doc. A/C. 2/L. 1137.

[223] 25 U.N. General Assembly, Official Records, Second Committee, Summary Records of Meetings, 1354th Meeting, Agenda Item 45, at 355 (1970). The accounting, administrative and trade methods about which the Chilean delegation spoke were those examined in Chapter 4 of this paper in connection with the mechanics of conflict between the multi-national corporation and host underdeveloped countries.

necessary", and brought to the attention of the second committee that "the Sudan had been obliged, for example, to nationalize foreign banks".[224]

Similarly, the spokesmen of the capital-exporting countries had nationalization in mind when they strongly resisted the majority's attempt, in the second committee, to strengthen permanent sovereignty over natural resources. Alluding to nationalization and warning against the possible dire consequences resulting from it, the U. Kingdom representative for instance, at one point spoke of its "unfortunate effect on the developing countries".[225]

In the face of the objections by the capital-exporting countries to the draft resolution, the Philippines delegation introduced an amendment to "tone down" the wording of the original draft text and to achieve some degree of unanimity on the draft resolution. While the Philippines amendment was intended to prevent the total exclusion of the role of foreign capital in the exploitation of natural resources in all cases, and to allow some room for its selective admission into under-developed countries, it introduced virtually no modification to that part of the draft resolution which tended to legitimize resort to nationalization as one of the options in the exercise of sovereignty over natural resources. While the sponsors of the draft resolution agreed to tone down[226] the language of the original draft text in line with some of the Philippines proposals, there is little evidence to suggest that the revised draft endorsed, wholesale, some of the controvercial implications of the Philippines amendment. In other words, even if one were to construe the Philippines amendment as

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[224] Ibid. at 367.

[225] Ibid. at 368.

implying the exclusion of the nationalization option, there is no evidence to support that the sponsors incorporated that aspect of the Philippines amendment into the revised draft text.

On the other hand, the series of amendments[227] introduced jointly by Peru, Yugoslavia and Ecuador at a later stage in the deliberations of the second committee tended to counter the effect of the Philippines amendment. The 3-power proposal sought the insertion of 3 new operative paragraphs between operative paragraph 2 and 3 of the original draft resolution, and the object of the new amendments was to strengthen even more U.N. support for the effective exercise of sovereignty over natural resources as a necessary vehicle for realizing the economic development in general, and the industrial development in particular, of underdeveloped countries. The controversial aspect of the 3 - power amendments (which were later consolidated into one new paragraph and incorporated into the revised draft resolution, thus, constituting what became operative paragraph 3 of the final text of Resolution 2692 (XXV)) was that by making no reference to foreign capital, they gave the impression to the delegates from the capital-exporting countries, especially to those from France and the Netherlands, that the amendments were intended to totally exclude the role of foreign capital in the exploitation of natural resources in underdeveloped countries. The pertinent section of the 3-power proposal that provoked controversy involved an amendment to preambular paragraph (5) of the original draft text, and the effect of the amendment appeared to be the implicit denial of even the

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[226] It is, interesting to note that the French delegation had the opposite impression regarding the language of the revised text. According to that delegation, while ordinarily "consultations preceding the preparation of a revised draft resolution generally had the effect of toning down the text", in this particular case, "the contrary appeared to have occurred". See 25 U.N.General Assembly, Official Records, Second Committee, Summary Records of Meetings, 1360th Meeting, at 399 (1970).

supplementary role of foreign capital in financing development.

The representatives from the capital-exporting countries, especially those from France and the Netherlands, objected not only to the three power amendment for its implicit tendency to exclude the role of foreign capital altogether in the exploitation of natural resources, but even went so far as disapproving the proposition that the financing of development in underdeveloped countries must rest on their share of the profits derived from the exploitation of natural resources. The Netherlands delegate, for instance, argued that according to paragraph (50) of the International Development Strategy, the developing countries, far from excluding foreign capital were, in fact, required to "adopt appropriate measures for inviting, stimulating and making effective use of foreign private capital" and that, therefore, the wording of the fifth preambular paragraph, even as it stood and without the re-inforcement of the 3-power amendment, was "most unfortunate".[228] Similarly, the French delegate warned that if the 3-power proposal that tended to re-inforce and strengthen preambular paragraph (5) of the draft text was approved, his delegation would "abstain during the vote on the draft resolution as a whole".[229] Finally, the sponsors of the draft resolution agreed to "tone down" the proposition implicit in the 3-power amendment to preambular paragraph (5) of the original draft resolution and formulated a revised draft text that tried to "balance" the conflicting thrusts of the Philippines amendment on the one hand, and that of the joint

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[227] 25 U.N. General Assembly, Official Records, Official Records, Annexes, Agenda Item 45, at 2, U.N. Doc. A/C.2/L.1137 (1970).

[228] 25 U.N. General Assembly, Official Records, Second Committee, Summary Records of Meetings, 1361st Meeting, at 404 (1970).

amendment of Peru, Yugoslavia and Ecuador, on the other. In any event, the compromise formula finally adopted in no way diminished U.N. support for recourse to nationalization as an option in the exercise of sovereignty over natural resources.

The significance of the debate in the second committee on the Philippines amendment as well as the joint proposal of Peru, Yugoslavia and Ecuador lies, however, in that it brought the international controversy of whether to strengthen permanent sovereignty over natural resources or to allow free reign for foreign capital participation in condition of security, to a new level hitherto unknown in the formative process of the concept of permanent sovereignty over natural resources. The controversy raised by the two sets of amendments revolved, interestingly enough, around the question of whether to totally exclude foreign capital participation in the exploitation of natural resources, and that controversy signified a shift away from earlier assumptions that foreign capital was a vital source of financing development, and towards the realization of its "dispensability" after all. In other words, the underlying thrust of the controversy marked a new phase in the dynamic evolution of the concept of permanent sovereignty over natural resources. As far as U.N. support for recourse to nationalization was concerned, the latter shift of trend in the international consensus, reflected a corresponding shift from the legitimization of the sparing use of nationalization measures (as envisaged by earlier resolutions), to that of making resort to nationalization the principal mode of the effective exercise of sovereignty over natural resources.

The need for U.N. support for nationalization was again indirectly urged by the Delegations from Dahomey, Bolivia and Libya in the course of the discussion of the revised draft as part of the call for strengthening permanent sovereignty

over natural resources. According to the delegate from Dahomey, for instance, the question of strengthening the permanent sovereignty of the underdeveloped countries over their natural resources was one that was "closely bound up with that of decolonization"; that the underdeveloped countries were being "daily more aware of the need to rely essentially on themselves for their economic development", and to that end, were seeking to "make effective use of their domestic resources..."[230] In other words, the representative of Dahomey was again voicing the commonly-held view of the overwhelming majority in the second committee that U.N. support for nationalization was a direct extension of U.N. support for political as well as economic decolonization. Similarly, the delegate from Bolivia argued for the necessity of U.N. support to nationalization measures by underdeveloped countries by pointing to Bolivia's own experience. According to the Bolivian delegate, the exercise, by underdeveloped countries, of their "right to determine the use of their natural resources had been expressed, in conformity with the spirit and principles of the charter, in several General Assembly Resolutions", and accordingly, Bolivia had "taken steps to secure its sovereignty and had, inter alia, nationalized its petroleum resources".[231] Other than corroborating the revised draft resolution's implicit recognition of resort to nationalization as a mode of exercising sovereignty over natural resources, the interesting significance of the above remark by the Bolivian representative is that nationalizing states such as Bolivia consciously derived legitimation, for their nationalization practice, from the "norm-generating" pronouncements of the U.N. forums.

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[229] Ibid. at 405.

[230] Ibid. at 368, 1356th Meeting.

[231] Ibid. at 371.

The revised draft resolution which indirectly legitimized recourse to nationalization was adopted by 80 votes to 5 with 4 abstentions in the second committee, and it was finally endorsed, without much discussion in the plenary meeting of the General Assembly, by 100 votes to 6 with only 3 abstentions.

The significance of Resolution 2692 (XXV), like the earlier Resolutions on permanent sovereignty over natural resources, again lies in the fact that its support for nationalization measures related specifically to those carried out particularly by the underdeveloped countries. As the title of Resolution 2692 (XXV) bears out clearly, U.N. support for the effective exercise of sovereignty over natural resources was conceived exclusively in relation to the underdeveloped countries. Even a cursory glance at the text of the Resolution reveals that the problem of permanent sovereignty over natural resources was tackled specifically in connection with the problem of the economic underdevelopment of the developing countries. Preambular paragraph (4) of the Resolution, for instance, considered the question of permanent sovereignty over natural resources in relation to the efforts of the "developing countries in mobilizing and effectively utilizing their domestic sources" for their economic development. Preambular paragraph (5) dealt with the effective exercise of sovereignty over natural resources as it related to the financing of the development plans of "developing countries". Preambular paragraph (6) dealt with the positive experience against specifically by "developing countries in the exercise of their sovereignty over their natural resources". Operative paragraph legitimized the exercise of permanent sovereignty over natural resources by "developing countries". Again, in operative paragraphs (5) and (6), the General Assembly showed particular interest in the advantages derived from the effective exercise of sovereignty over natural resources by "developing

countries". The only text in Resolution 2692 (XXV) that appears to imply "generality" of application, is the seventh preambular paragraph where reference was made to the exercise of sovereignty by "all countries". The exceptionality of the latter paragraph is, however, more apparent than real since the paragraph's "generality" addressed itself to the territorial scope of sovereign jurisdiction than to the strict problem of permanent sovereignty over natural resources per se.

The "centrality" of the underdeveloped countries in Resolution 2692 (XXV) becomes all the more manifest from the drafting history of the Resolution. As we tried to point out earlier, Resolution 2692 (XXV) was initiated in response to the U.N. Secretariat's Report on permanent sovereignty over natural resources and that Report was concerned almost exclusively with problem of the exercise of sovereignty over natural resources by underdeveloped countries.

It was the "centrality" of the underdeveloped countries in that Report which largely accounts for the fact that Resolution 2692 (XXV) addressed itself specifically to the problem of permanent sovereignty over natural resources as it related particularly to the underdeveloped countries. Again, in the deliberations of the second committee, almost all delegations approached the question of the effective exercise of sovereignty over natural resources solely in connection with the economic problems of the underdeveloped countries. In other words, the significance of the U.N. "norm-generating" pronouncements in Resolution 2692 (XXV) lies in the fact that they single out the underdeveloped countries as the sole subjects of the right the effective exercise of which formed the object of U.N. concern in that those pronouncements legitimized only those acts of nationalization measures carried out specifically and particularly by the underdeveloped countries in the exercise of their sovereignty over their

natural resources.

Again, like the earlier Resolutions on permanent sovereignty over natural resources, U.N. support for those nationalization measures carried out specifically by the underdeveloped countries was extended by Resolution 2692 (XXV) with a view to help those countries accelerate their economic development and secure economic independence from alien (foreign) domination.

Thus, Resolution 2692 (XXV) not only recognized resort to nationalization as one of the possible modalities of exercising sovereignty over natural resources, but by legitimizing and lending full support for those nationalization measures carried out particularly by the underdeveloped to help them achieve economic development and ensure thier independence from alien economic domination, it also tended to accord differential treatment particularly to those countries by reason of their special status as "underdeveloped" countries.

General Assembly Resolution 3016 (XXVII)[232] as a Basis for Nationalization

The exercise of the right to resort to nationalization by underdeveloped countries as one of the modalities of implementing their permanent sovereignty over their natural resources again finds implicit support in General Assembly Resolution 3016 (XXVII) of 18 December, 1972.

That Resolution reaffirmed U.N. support for the exercise of "the right of states to permanent sovereignty over all their natural resources, on land within their international boundaries as well as those found in the sea-bed and sub-soil

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[232] For the full text of Resolution 3016 (XXVII) see Appendix (A-10) of this paper.

thereof within their national jurisdiction and in the super-adjacent waters".[233] The same Resolution stressed "the great importance for the economic progress of...the developing countries, of their fully exercising their rights so as to secure the maximum yield from their natural resources, both on land and in their coastal waters" and called upon governments "to continue their efforts aimed at the implementation of the principles and recommendations" contained in Resolutions 626 (VII) of 21 December 1952; 1803 (XVII) of 14 December 1962; 2158 (XXI) of 21 November 1966; 2386 (XXIII) of 19 November 1968; as well as 2692 (XXV) of 11 December 1970. Moreover, the Resolution endorsed principles II and (XI) of Resolution 46 (III) of the United Nations Conference on Trade and Development (UNCTAD) adopted on 18 May 1972 at the latter's third session in Santiago De Chile. Principle II of UNCTAD Resolution 46(III) which General Assembly Resolution 3016 (XXVII) endorsed specifically provided that "every country has the sovereign right freely to dispose of its natural resources in the interest of the economic development and well-being of its own people"[234] and principle (XI) of UNCTAD Resolution 46 (III) provided that "coastal states have the right to dispose of marine resources within the limits of their national jurisdiction which must take duly into account the development and welfare needs of their peoples".[235]

Although textually the provisions of Resolution 3016 (XXVII) made no express reference to nationalization measures as such, it is clear from the drafting history as well as the

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[233] Ibid.

[234] 3 Proceedings of the United Nations Conference on Trade and Development, Report and Annexes vol. 1, at 59-60 (1973).

[235] Ibid. at 60.

background U.N. deliberations leading to the formulation of the resolution that resort to nationalization was envisaged as an aspect of the effective exercise of sovereignty, by underdeveloped countries, over their natural resources both on land, in and under their coastal waters.

That Resolution 3016 (XXVII) signified U.N. support for, and the legitimization of, resort to nationalization by underdeveloped countries, is, for instance, evident from a closer examination of two major U.N. documents, namely, the 1972 Report[236] of the economic and social council and the progress report[237] of the Secretary General on permanent sovereignty over natural resources, in response to which the General Assembly adopted the Resolution in question.

It should be noted that it was in the course of examining those Reports in the second committee of the General Assembly, and largely in response to the recommendations of the Committee on Natural Resources, the economic committee of the economic and social council, the council itself and that of the Secretary General that the draft resolution which later became Resolution 3016 (XXVII) was submitted by representatives of 17 countries.

The pertinent section of the Report of economic and social council which formed the basis for the deliberations of the second committee of the General Assembly, namely, Chapter (IX) on natural resources, included the works of the Committee on Natural Resources as well as that of the Economic Committee of the council with respect to the question of

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[236] 27 U.N. General Assembly, Official Records, Supp.3, U.N. Doc. A/8703 (1972).

[237] 53 U.N. Economic and Social Council, Official Records, Annexes, Agenda Item 5, (1972).

permanent sovereignty over natural resources. A closer examination of the work of the Committee on Natural Resources as well as the deliberations of the economic committee of the council, clearly show that the prevailing tendency in both forums not only envisaged resort to nationalization as an aspect of the effective exercise of sovereignty over natural resources, but it was also one that lent full support for those nationalization measures that might be carried out by the underdeveloped countries.

The question of U.N. support for nationalization measures was, for instance, raised in the course of the deliberation of the second session of the Committee on Natural Resources held in Nairobi (Kenya) between January 31st and February 11, 1972, in connection with discussion on the Progress Report on permanent sovereignty over natural resources submitted by the Secretary General pursuant to General Assembly Resolution 2692 (XXV).

In the course of examining the Progress Report of the Secretary General by the Committee on Natural Resources, several delegations stressed the importance of the "full application of the principle of permanent sovereignty" and drew the attention of the committee "to the increasing tendency in developing countries in favour of nationalization of important sectors of the state economy", which they welcomed and strongly supported.[238] Several delegations in fact argued that resort to nationalization was legitimate since the universally accepted principle of the right of peoples to self-determination included "the right to dispose freely of natural resources as

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[238] Committee on Natural Resources: Report on the Second Session, 52 U.N. Economic and Social Council, Official Records, supp. 5, at 14, U.N. Doc. E/5097 (1972).

they deemed fit".[239] The statements made by the delegations from Chile, the Ukranian Soviet Socialist Republic, Zaire, the U.S.S.R. and Uganda during the deliberations of the Committee on Natural resources are particularly reflective of the prevailing tendency in the committee that urged U.N. support for nationalization measures. Speaking before the committee on natural resources on February 2, 1972, the Chilean delegation, for instance, gave an extensive account of Chile's nationalization experience so that it could "furnish valuable lessons to other developing countries which might find themselves in similar situations".[240]

According to the Chilean delegate:-

> "Sovereignty over natural resources was particularly important to Chile, for it was a country which depended for its livelihood on a single product, copper, which accounted for 85 per cent of its exports. The production of minerals had not began until the middle of the 19th century, but after that date had expanded rapidly. In the earlier years of the twentieth century Kennecott Copper and Anaconda Copper, two large mining companies with world wide interests had established themselves in Chile. They had been enormously successful but the Chilean government had never received a fair share of their ever-increasing profits. Between 1955 and 1965, for example, the companies total profit had been 3,100 million dollars, production costs had been 937 million dollars and Chile's profit had been only 914 million dollars. Up to 1964, the Chilean government had had no control over the marketing and distribution of the copper. The prices were subject to external manipulation, because the mining companies were linked with manufacturing companies using Chilean copper. It was for that reason, and because the association formed in 1965 between the companies and the state had proved unsatisfactory that the people's government elected to power in 1970 had decided to nationalize copper. President Allende, in explaining the reasons for that move, had

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[239] Ibid.

[240] Committee on Natural Resources, Second Session, Summary Records of the forty-third to fifty second Meetings, vol.2, at 81, U.N. Doc. E/C.7/SR. 47 (1972).

> observed that it was impossible to talk of freedom and dignity in relations among peoples when the resources essential to their livelihood had been appropriated and were being ruthlessly exploited by a small group of large companies".241

The Chilean delegate not only stressed that nationalization was one of the effective ways of exercising sovereignty over natural resources, but also placed it among the attributes of fundamental human rights, especially the right of peoples to self-determination.[242] According to the Chilean representative:

> "The international covenants on human rights...each contained an article on the right of peoples to self-determination in which there was a clause which had been proposed by Chile, to the effect that all peoples might freely dispose of their natural wealth and resources and that in no case might a people be deprived of its own means of subsistance. Further statements to similar effect were to be found in General Assembly Resolution 1803 (XVII) and in the third of the General principles approved by the First United Nations Conference on Trade and Development in 1964 which also referred to the right of each country...to use its natural resources to promote economic development... At the regional level, the historic consensus of vina del mar, adopted in 1968, had stated that one of the principles on which economic relations between the countries of Latin America should be based was respect for the sovereign right of each country to dispose of its own natural resources".243

Speaking on the incident that prompted the declaration of vinadel mar, the Chilean delegate maintained that "the developing countries had always shown solidarity in the face of pressures intended to prevent the exercise of their right to dispose of their natural resources", and in that regard, pointed out that "in 1968...when Peru had expropriated the

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241 Ibid. at 81-82.

242 Ibid. at 80.

243 Ibid. at 80-81.

International Petroleum Company, the Latin American countries had expressed unanimous support for it in the consensus of Vina del Mar, which condemned the use of coercise measures of an economic or political character for the purpose of forcing concessions from another state".[244]

At the same meeting of the committee on Natural Resources, the delegate from the Ukranian Soviet Socialist Republic likewise related Ukraine's nationalization experience in the following terms:

> "Before the advent of Soviet power, Ukraine's natural resources had been plundered by foreign capital, but after the October revolution of 1917 all natural wealth in the Ukraine had been declared socialist property and its exploitation by the state had led to the swift development of productive forces and the promotion of economic and social progress".245

In light of Ukraine's experience, the delegate urged the committee on natural resources to "recognize the principle that nationalization was a legitimate measure in the exercise, by the developing countries, of their permanent sovereignty over natural resources".[246] Again alluding to nationalization, the delegate from Zaire pointed out that "the political emancipation of the former colonies would be complete only" if it was coupled with economic decolonization, so that "all decisions" affecting natural resource use and exploitation would be taken "exclusively by the national decision making centres".[247] The delegate from the U.S.S.R. also urged U.N. support for nationalization measures in connection with his critical remarks on the orientational-bias of the secretariat's report towards foreign capital, and proposed, in particular, that in his

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[244] Ibid. at 84.

[245] Ibid. at 85.

[246] Ibid.

[247] Ibid. at 93.

future periodic reports, the Secretary General should examine "the legitimate tendency in the developing countries to nationalize their natural resources, to extend the public sector and to organize their own industries so as to secure that their natural resources were used in the country itself".[248] Similarly, the Ugandan delegation pointed out that the exercise of permanent sovereignty over natural resources should, in the case of the developing countries, include, among others, "the right to...nationalize certain resources in the public interest".[249]

On the other hand, a number of delegations from the capital exporting countries, particularly those from Canada,[250] the Netherlands[251] and Australia[252] strongly argued against measures that tended to strengthen permanent sovereignty over natural resources in underdeveloped countries, and instead advocated for a policy that is conducive to the inflow of foreign capital into the underdeveloped countries. By arguing in favour of a natural resource policy which would guarantee a secure investment climate for foreign capital, the delegations from Canada, the Netherlands and Australia were indirectly resisting the majority's strong support for nationalization measures.

At a later stage in the deliberations of the committee on natural resources, the Algerian and Venezuelan delegations jointly submitted a draft recommendation the salient feature of which was one that called for U.N. technical assistance to

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[248] Ibid. at 97-98.

[249] Ibid. at 100.

[250] Ibid. at 90.

[251] Ibid. at 91-92.

[252] Ibid. at 94-95.

para-satal bodies in underdeveloped countries that directly assume control over natural resource exploitation subsequent to acts of nationalization.[253] The delegations from the capital-exporting countries, especially those from the Netherlands, France, Australia, the United Kingdom and Japan strongly opposed the joint Algerian and Venezuelan draft proposal on the understanding that the proposal tended to legitimize nationalization measures indirectly. Despite the resistance of those delegations, however, the overwhelming majority supported the draft recommendation, which, upon adoption in the committee, was later transmitted to the economic and social council for consideration. Thus, the prevailing tendency in the deliberations of the committee on Natural Resources as well as the committee's final draft recommendation clearly manifested strong U.N. backing for nationalization measures.

After the recommendation of the committee on natural resources was transmitted to the economic and social council, that recommendation became the principal basis for the work of the economic committee of the council in its deliberations on permanent sovereignty over natural resources. In the course of the deliberations of the economic committee of the economic and social council, the overwhelming majority of the participants, particularly those delegations from Kenya, Pakistan, the U.S.S.R., Indonesia, the Philippines, Poland, India, Egypt Trinidad and Tobago, China, the Ukranian Soviet Socialist Republic, Romania, Ghana, Argentina, Bulgaria, and Chile expressed their full support for the recommendations of the committee on Natural Resources which legitimized nationalization

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[253] Committee on Natural Resources: Report on the Second Session, 52 U.N. Economic and Social Council Official Records, supp. 5, Annex III, at 31-32, (1972).

measures that might be carried out by the underdeveloped countries in the exercise of sovereignty over natural resources.[254] On the other hand, the delegations from the capital-exporting countries, particularly those from the United Kingdom, France, the U.S., Spain and Japan, argued indirectly against U.N. support for nationalization measures, and instead advocated for a policy favouring a safe climate of investment for foreign capital.

At a later stage in the deliberations[255] of the economic comittee, the delegations from Kenya, the Philippines, Trinidad and Tobago (later joined by Niger, Rwanda and Madagascar) submitted a draft resolution, section (D) of which wholly endorsed the earlier recommendations of the committee on Natural Resources. The draft resolution recommended, in particular, the preparation of a thorough study on the various aspects of the principle of permanent sovereignty over natural resources with the implicit aim, on the one hand, of legitimizing measures such as nationalization undertaken by the underdeveloped countries in the exercise of their sovereignty over natural resources, and in order to identify and prevent the obstacles to those measures, on the other hand. With the exception of the representatives of the capital-exporting countries, especially those from Canada, Japan, the United Kingdom, the United States and France, the overwhelming majority in the economic committee supported section (D) of the draft resolution, and as a result, it was adopted by 40 votes to 3 with 3 abstentions.[256] Subsequently, the draft resolution as adopted by the economic committee was transmitted

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[254] See economic committee of the Economic and Social Council, Summary Records of the 540th — 543rd, U.N. Doc. E/AC.6/SR.540-43 (1972).

[255] Ibid. at 140, U.N. Doc. E/AC.6/SR.546 (1972).

[256] Ibid. at 408, U.N. Doc. E/AC.6/SR.561 (1972).

to the economic and social council for the latter's consideration. The council examined the draft resolution and later adopted it by 22 votes to 4 with 1 abstention. Finally, the pertinent section of the draft resolution formed Resolution 1673 D (LII) of the economic and social council and constituted one of the influencial bases for the formulation of General Assembly Resolution 3016 (XXVII).

The second committee of the General Assembly then examined the problem of permanent sovereignty over natural resources on the basis of the recommendations of the committee on Natural Resources, the economic committee of the economic and social council as well as council Resolution 1673 D (LII), and it was in the course of the discussion, by the Second Committee, of those recommendations that the representatives of 17 countries, namely, Iceland, Algeria, Chile, Ecuador, Ghana, Guyana, Kenya, the Libyan Arab Republic, Mauritania, Mexico, Panama, Peru, Romania, Trinidad and Tobago, Venezuela, Yugoslavia and Zaire (later joined by Mali and Morocco) introduced the draft Resolution that later became, with some minor changes, General Assembly Resolution 3016 (XXVII).

The draft resolution submitted before the second committee again reflected the prevailing tendency in the earlier deliberations of the committee on Natural Resources, the economic committee of the economic and social council and the council itself in the sense that it clearly recognized the necessity of legitimizing nationalization measures undertaken by underdeveloped countries in the effective exercise of their sovereignty over their natural resources. In the second committee, very few amendments to the draft resolution were submitted, and even those proposed, tended to strengthen, rather than weaken, the draft resolution's implicit support for nationalization.

The amendment submitted jointly by the representatives of Algeria, Chile, Ecuador, Egypt, Ghana, Guyana,

Iceland, Kenya, the Libyan Arab Republic, Mali, Mauritania, Mexico, Morocco, Nicaragua, Panama, Peru, Romania, the Syrian Arab Republic, Trinidad and Tobago, Venezuela, Yugoslavia and Zaire, for instance, proposed to give more "precise guidelines" to the Secretary General in preparing its future study on permanent sovereignty over natural resources, instead of the loose and general frame of reference provided in operative paragraph (5) of the original draft text. The sponsors of the amendment, in particular, proposed that the Secretary General's future study should focus "on recent developments, taking into account the right of states to exercise permanent sovereignty over natural resources as well as the factors impeding states from exercising this right".[257]

It should be noted that, although the above amendment seemed merely technical in appearance, it in fact involved a serious substantive issue. In as much as the formulation of broad principles and norms concerning permanent sovereignty over natural resources by the various U.N. forums was largely based on factual studies made by the U.N. secretariat on the matter, the particular approach or orientational bias underlying those studies had its influence in shaping U.N. Resolutions on permanent sovereignty over natural resources. In other words, whether the Secretary General prepared its study from the standpoint of "stimulating" the flow of foreign capital into underdeveloped countries and "guarantying" the "protection" of foreign capital, or whether the study approached the question from the standpoint of "strengthening" the permanent sovereignty of underdeveloped countries over their natural resources, not only determined the selection, collection and

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[257] 27 U.N. General Assembly, Official Records, Annexes, Agenda Item 12, at 10, U.N. Doc. A/8963 (1972). [Emphasis ours].

organization of pertinent facts in the study, but also the orientation of the recommendations issuing out of the study itself. Consequently, the particular approach in the Secretary General's study was bound to influence the orientation of the policies and recommendations of the U.N. forums in the formulation of resolutions on the subject. It was, therefore, the substantive aspect of the question that led the sponsors of the amendment, on the one hand, to propose "precise guidelines", and which prompted several delegations from the capital-exporting countries, on the other hand, to oppose not only the necessity of "precise guidelines", but also the whole idea of requiring the U.N. Secretariat to submit a detailed report on permanent sovereignty over natural resources.[258]

In spelling out the precise framework for the Secretary General's future study, the sponsors of the amendment, as well as the majority of the delegations in the second committee which supported the amendment, indirectly showed the kind of report they expected to see and the type of measures they sought to legitimize. Thus, by requesting the Secretary General to focus on "recent developments, taking into account the right of states to exercise permanent sovereignty over natural resources, as well as factors impeding states from exercising this right" both the sponsors of the amendment and

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[258] One such argument was, for instance, made by the Canadian delegation on 19 May 1962 during the deliberations of the economic committee of the economic and social council, in which the delegate opposed the necessity of a detailed study on permanent sovereignty over natural resources on the rather cynical ground that "the scope of such a study would be so wide that the end product would be a veritable encyclopedia ", see, Summary Records of the 546th Meeting of the Economic Committee, op. cit. at 143, U.N. Doc. E/AC.6/SR. 546 (1972).

those who supported it, indirectly manifested their support for those "recent developments" in the exercise of sovereignty by underdeveloped countries over their natural resources which included, not only partial nationalizations that increased the share of host governments in joint-venture schemes with foreign capital, but also, total nationalization measures. In other words, the overwhelming majority of the delegations in the second committee sought information, among others, on nationalization measures with the aim of legitimizing those measures and preventing the obstacles faced by underdeveloped countries in the process of carrying out those measures.

The draft resolution as amended was adopted by 82 votes to none with 24 abstentions in the second committee. Later still, the General Assembly adopted it without further discussion. Thus, being a direct extension, particularly, of General Assembly Resolutions 2158 (XXI), 2386 (XXIII) and 2692 (XXV), Resolution 3016 (XXVII) once again tended to legitimize resort to nationalization by underdeveloped countries as one of the possible modalities of the effective exercise of sovereignty over natural resources.

Like the earlier Resolutions on permanent sovereignty over natural resources, the significance of Resolution 3016 (XXVII) still lies in the fact that its support for nationalization measures specifically related to those carried out particularly by the underdeveloped countries. Although, on its face, the text of Resolution 3016 (XXVII) appears to extend the application of permanent sovereignty over natural resources to "all" states, the title of the resolution as well as the background deliberations in the committee on natural resources, the economic committee of the economic and social council, and the second committee of the General Assembly leading to the final formulation of the Resolution, amply show that U.N. support for nationalization measures attached almost exclusively

to those undertaken particularly by the underdeveloped countries. Moreover, as the preambular section of the resolution, especially paragraphs 3, 4 and 5 fully indicate, U.N. support for the effective exercise of sovereignty, by underdeveloped countries, over their natural resources was extended to those countries for the specific purpose of helping those countries achieve economic development and ensure their independence from foreign (alien) economic domination. Thus, by singling out underdeveloped countries and supporting (even promoting) those nationalization measures carried out particularly by them in the exercise of their sovereignty over their natural resources, Resolution 3016 (XXVII) once again accorded differential treatment to those countries by virtue by their special status as "underdeveloped" countries.

General Assembly Resolution 3171 (XXVIII)[259] As a Basis for Nationalization

U.N. support for the exercise, by the underdeveloped countries, of their right to resort to nationalization as an aspect of their permanent sovereignty over their natural resources, again finds full expression in General Assembly Resolution 3171 (XXVIII) of 17 December, 1973.

In that Resolution,[260] the General Assembly reiterated the inalienable right of underdeveloped countries "to the full exercise of national sovereignty" over their natural resources

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[259] For the full text of Resolution 3171 (XXVIII), see Appendix (A-12) of this paper.

[260] For the drafting history of the Resolution see, 28 U.N. General Assembly, Official Records, Annexes, Agenda Item 12, U.N. Doc. A/9400 (1973).

in line with the general consensus which evolved within the U.N. machinery by way of numerous earlier resolutions on the same subject.

Under preambular paragraph 2, for instance, the General Assembly emphasized that "an intrinsic condition of the exercise of the sovereignty of every state is that it be exercised fully and effectively over all the natural resources of the state, whether found on land or in the sea".[261] In preambular paragraph 6, the General Assembly took cognizance that "the full exercise by each state of sovereignty over its natural resources is an essential condition for achieving the objectives and targets of the second United Nations Development Decade and that this exercise requires action by states aimed at achieving a better utilization and use of those resources covering all stages from exploration to marketing".[262] Again, in operative paragraph (1), the General Assembly strongly reaffirmed the inalienable right of underdeveloped countries to "permanent sovereignty over all their natural resources on land within their international boundaries as well as those in the see-bed and sub-soil thereof within their national jurisdiction and in the superadjacent waters", and expressed its resolute support to "the efforts of the developing countries and of the peoples of the territories under colonial and racial domination and foreign occupation in their struggle to regain effective control over their natural resources".[263] Of particular importance to the question of U.N. support for resort to nationalization, were especially those pronouncements in preambular paragraphs (3) and operative paragraph (3) of Resolution 3171 (XXVIII).

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[261] See Appendix (A-12) of this paper at [Emphasis ours].

[262] Ibid. [Emphasis ours].

[263] Ibid. [Emphasis ours].

In preambular paragraph (3), the General Assembly enunciated, for the first time in connection with the concept of permanent sovereignty over natural resources, the interesting principle that "every country has the right to adopt the economic and social system it deems most favourable to its development".[264] In as much as nationalization measures are generally associated with an overall policy of economic and social transformation in a country, the recognition of the freedom of each country to adopt the economic and social system of its own choice tended to legitimize resort to nationalization as part of that country's economic and social policy. More important still, operative paragraph (3) of Resolution 3171 (XXVIII) expressly affirmed that "the application of the principle of nationalization carried out by states", constituted "an expression of their sovereignty in order to safeguard their natural resources".[265]

As far as the exercise of the right to resort to nationalization is concerned, therefore, Resolution 3171 (XXVIII) furnishes a relatively more elaborate and direct consensual basis than that provided by earlier U.N. resolutions on permanent sovereignty over natural resources. In other words, unlike earlier Resolutions on permanent sovereignty over natural resources whose support for nationalization measures were expressed only indirectly and implicitly, Resolution 3171, especially operative paragraph (3), spelled out clearly and expressly that recourse to nationalization constituted one of the possible modalities of the effective exercise of sovereignty over natural resources.

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[264] Ibid.

[265] Ibid.

The background deliberations in the committee on natural resources, the economic committee of the economic and social council as well as the second committee of the General Assembly regarding the question of permanent sovereignty over natural resources, show even more clearly that the overwhelming majority of the delegates who participated actively in those U.N. forums supported the strong U.N. drive to legitimize nationalization measures which culminated in Resolution 3171 (XXVIII).

The question of U.N. support for nationalization measures, for instance, dominated the whole debate of the third session of the committee on natural resources during the latter's 63rd, 64th and 65th meetings held in New Delhi between the 13th and 14th of February 1973. Upon introducing the Report of the Secretary General on permanent sovereignty[266] before the committee on natural resources, the Director of the Division of Public Finances and Financial institution of the U.N. Secretariat, for example, noted that the report not only envisaged recourse to nationalization as an aspect of the effective exercise of sovereignty over natural resources, but that it also emphasized "the need for careful planning and preparation" by the underdeveloped countries prior to carrying out nationalization measures.[267] In the course of the ensuring discussion in the committee on Natural Resources, several delegations, and particularly those from Iceland, Chile, Poland Romania, Algeria, Kenya, the Ukranian Soviet Socialist Republic, Iraq, Peru, the U.S.S.R. and Yugoslavia, strongly argued in

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[266] U.N. Secretariat, permanent sovereignty over natural resources, U.N. Doc. E/5170 (1972).

[267] Committee on Natural Resources, third Session, Summary Records of the 63rd Meeting, at 28, U.N. Doc. E/C.7/SR.63 (1973).

favour of U.N. support for the effective exercise of sovereignty by underdeveloped countries over their natural resources including recourse to nationalization. The Chilean delegate, for instance, argued that the U.N. secretariat's future study on permanent sovereignty over natural resources should focus, among others, on the exercise of the right of underdeveloped countries "to [nationalize], in accordance with their legislation, multi-national companies which endangered the political or economic security of their peoples".[268] Similarly, the Polish delegate argued in favour of U.N. support for partial as well as total nationalizations by pointing out that recognition should be given to "the right of developing countries to participate to a great extent in decision-making and to receive a large share of the profits of foreign companies engaged in the exploitation of their natural resources", which "might include, if necessary, the possibility of modifying the rights of ownership".[269] The Romanian delegate was even more explicit when he pointed out that "when a state nationalized a company in order to regain control of its natural resources, it was merely exercising its sovereign right", and that, therefore, his delegation unreservedly supported those developing countries which had enacted "laws containing provisions for takeovers with a view to eliminating foreign interference in their economic policy".[270] The representative of Kenya argued along similar lines by pointing out that "it was an inherent right of any state to...nationalize the property of aliens", and that "the old concept of regarding nationalization as illegal per se was no longer valid".[271] The Iraqi delegation

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[268] Ibid. at 35-36.

[269] Ibid. at 37 [Emphasis ours].

[270] Ibid. at 42, U.N. Doc. E/C.7/SR.64 (1973).

[271] Ibid. at 47.

likewise, urged U.N. support for nationalization by underdeveloped countries, and in that respect, related Iraq's own experience on the matter by drawing the committee's attention to the numerous obstacles faced by the Iraqi government in its attempt to exercise its sovereignty over its oil resources, and explained how Iraq was at last forced to "nationalize its oil industry by the passage, in 1972, of Act No.69" in order "to free itself from dependency on foreign capital".[272]

On the other hand, the delegations from the capital-exporting countries, particularly those from the United Kingdom[273] and Japan[274] strongly resisted the prevailing trend towards legitimizing resort to nationalization by arguing instead for the creation, on the part of the underdeveloped countries, of a favourable investment climate for foreign capital.

At a later stage in the deliberations of the committee on Natural Resources, a draft recommendation,[275] whose salient feature included the re-affirmation of U.N. support for nationalization measures by underdeveloped countries, was jointly submitted by the delegations from Algeria, Brazil, Chile, Egypt, Ghana, Iceland, India, Iraq, the Libyan Arab Republic, Kenya, Peru, the Philippines, Venezuela, Yugoslavia and Zaire. The draft recommendation was adopted by the committee on natural resources, and was later transmitted to the economic and social

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[272] Ibid. at 55, U.N. Doc. E/C.7/SR.65 (1973).

[273] Ibid. at 49-50, U.N. Doc. E/C.7/SR.64 (1973).

[274] Ibid. at 54, U.N. Doc. E/C.7/SR.65 (1973).

[275] Committee on Natural Resources. Report on the third session, 54 U.N. Economic and social council, Official Records, supp.4, at 20-21, U.N. Doc. E/5247 (1973).

council for the latter's consideration.

The question of U.N. support for nationalization measures was again discussed at great length in the economic committee of the economic and social council in connection with the debate on the recommendations of the committee on Natural resources as well as the progress report of the Secretary General on permanent sovereignty over natural resources. It was in the course of those deliberations of the economic committee held between 18 and 28 April 1973, that the draft text which later became council Resolution 1737 (LIV) was formulated.

During the discussion in the economic committee[276] of the council, the overwhelming majority of the participants, especially those delegations from Hungary, Iceland, Egypt, Poland, Zaire, the U.S.S.R., the Peoples Republic of China, Romania, Brazil, Yugoslavia, Iraq, Tunisia, Pakistan, the Ukranian Soviet Socialist Republic, Trinidad and Tobago, Algeria, Sudan, Peru, Argentina, Venezuela, Chile, and Ghana supported, directly or indirectly, the U.N. effort to legitimize nationalization measures carried out by underdeveloped countries in the effective exercise of sovereignty over their natural resources. Numerous delegations strongly argued in favour of U.N. support for recourse to nationalization by underdeveloped countries in the course of their critical comments on the progress report of the Secretary General on permanent sovereignty over natural resources. The representative of the U.S.S.R.,[277] for instance, strongly argued in support of

[276] 54 U.N. Economic and Social Council, Official Records, Economic Committee, Summary Records of the 599th, 602nd, 604th - 609th Meetings, U.N. Doc. E/AC.6/SR.599, 602, 604-609 (1973).

[277] Ibid. at 141, U.N. Doc. E/AC.6/SR.605 (1973).

[278] Ibid. at 142.

nationalization measures in the course of approving that part of the Secretary General's report which dealt with "the extremely interesting experience of several countries such as Cuba, China, Chile, Algeria, Sri Lanka and Tanzania which had undertaken complete or partial nationalization of property held by foreign interests". Addressing himself to the section of the secretariat's report dealing with the subject of nationalization, the U.S.S.R. delegate further noted that, nationalization, being "the most important" mode of safeguarding sovereignty over natural resources "should constitute the primary objective of developing countries".[278] Similarly, the Romanian representative argued, in connection with his comment on the section of the Secretary General's report dealing with nationalization, that each underdeveloped country "had the right to...nationalize enterprises owned by foreigners" and that any U.N. recommendation on the matter "to the developing countries must proceed from that consideration".[279] The Romanian delegate, then, proposed that the U.N. should "specify" the various components of permanent sovereignty over natural resources and should legitimize the possibility that underdeveloped countries "could nationalize...property owned by foreigners."[280] Speaking in support of nationalization measures, the Brazilian delegate criticized the Secretary General's report for appearing to restrain, rather than encouraging underdeveloped countries to resort to nationalization.[281] Urging the need for U.S. support to nationalization measures by the underdeveloped countries, the Iraqi delegate cited his country 's experience as a concrete example to show the kind of obstacles that underdeveloped countries faced in the process of carrying out nationalization measures. According to the Iraqi representative:

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[279] Ibid. at 150, U.N. Doc. E/AC.6/SR.606 (1973).

[280] Ibid. at 150-151.

[281] Ibid. at 156.

> "Iraq which had chosen to exercise its right of sovereignty over its natural resources by nationalizing the activities of the Iraqi petroleum company in Northern Iraq in July 1972, had to face covert pressure directed against it by one of the giant multinational corporations established in its territory. Despite the economic and financial hardships involved, the people of Iraq stood fast against those pressures and tactics and had shown that they would never give up or compromise their permanent sovereignty over their natural resources. The oil corporation had thus had to give in and recognize the sovereign right of the Iraqi people to exercise complete sovereignty over their natural resources".282

Speaking in support of the need for U.N. backing to nationalization measures by underdeveloped countries, the Pakistani delegate pointed out that as far as his country was concerned, the option to resort to nationalization was always open to it, and that "the Pakistan government and state could, if circumstances so warranted, and in the interest of the Pakistani people, [nationalize] all movable and immovable property belonging to foreign interests".[283] Commenting on the Report of the Secretary General, the representative of the Ukranian Soviet Socialist Republic, noted that "while the report dealt with the question of nationalization, it treated that measure as far less important than it actually was for the countries of the third world in putting an end to the activities of foreign monopolies" and that, since "nationalization was becoming increasingly important" in Asia, Africa and Latin America, it should have deserved the Secretary General's serious attention.[284] According to the Ukranian delegate,

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[282] Ibid. at 159.

[283] Ibid. at 161.

[284] Ibid. at 164.

> "...nationalization applied to the experience of the developing countries as well as that of the socialist countries, which implemented that principle in the most systematic way in order to ensure optimum utilization of their natural resources. The authors of the reports carefully omitted any mention of that unparallelled method of strengthening of national sovereignty over a country's resources; that omission was all the more serious since it inevitably limited the body of general knowledge in that field."285

Similarly, the representative of Trinidad and Tobago backed the U.N. attempt to legitimize recourse to nationalization by underdeveloped countries, and in that light, criticized the U.N. secretariat for not including in its report, the nationalization experience of the "socialist countries, Peru, Indonesia and Guyana".[286] Commenting in connection with the report of the Secretary General, the Algerian delegate, likewise, maintained that "the right of countries to recover their natural resources" by means of nationalization directly flowed from the principle of permanent sovereignty over natural resources.[287] The Argentinian delegate, similarly argued in favour of U.N. support for nationalization measures by pointing out that nationalization "should not be considered a bad word but rather a logical and proper means for countries to reassume control over their natural resources when they deemed it necessary in accordance with their national interests".[288]

On the other hand, some delegations from the capital-exporting countries strongly resisted the U.N. attempt to lend strong support for nationalization measures by the underdeveloped countries. Unlike the overwhelming majority of the delegates

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[285] Ibid. at 164-165.

[286] Ibid. at 172.

[287] Ibid. at 172-173.

[288] Ibid. at 179.

in the economic committee of the council who strongly critized the Secretary General's report for its orientational-bias towards foreign capital, the representative of the U. Kingdom, for instance, spoke of "the balanced" nature of the report, in that it recognized "the important role of foreign private and public investment in developing countries".[289] According to the same delegate, it was necessary for host underdeveloped countries "to create a favourable climate for investment" in order to attract foreign capital.[290] In other words, the U. Kingdom representative was strongly disinclined to support U.N. backing for recourse to nationalization by underdeveloped countries as a possible mode of exercising sovereignty over their natural resources. Similarly, the delegate from the Netherlands expressed his strong reservation to the necessity of U.N. support for that aspect of the effective exercise of sovereignty over natural resources, such as nationalization, which tended to exclude foreign-capital participation.[291] The Japanese delegate, likewise, resisted the majority's support for nationalization measures, and complained against that section of the Secretary General's report which recommended that recourse to nationalization should be regarded as a possible option open to underdeveloped countries in the effective exercise of sovereignty over natural resources, by arguing that "it was neither appropriate nor necessary to include" such a recommendation since there were already "rules of international law governing expropriation".[292] It is interesting to note that some delegations from certain

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[289] Ibid. at 49, U.N. Doc. E/C.7/SR.64.

[290] Ibid. at 50.

[291] U.N. Doc. E/AC.6/SR.605, op. cit. at 145.

[292] U.N. Doc. E/AC. 6/SR.607, op. cit. at 168.

capital-exporting countries, particularly those from France and Sweden, somehow took the unprecedented stand of open support for nationalization measures for the first time since the emergence of the concept of permanent sovereignty over natural resources back in 1952, thus, further broadening the international consensual basis of support for recourse to nationalization by the underdeveloped countries. The French delegate, for instance, made the unprecedented admission that:

> "A state could not be called sovereign unless it exercised its sovereignty over the natural resources of the areas under its national jurisdiction, and France fully recognized the sovereign right of states to dispose freely of their natural resources", and

that moreover, France fully recognized that the effective exercise of sovereignty over natural resources included the right of states "to nationalize...enterprises exploiting its natural resources".[293] Similarly, the Swedish delegate admitted the need for supporting the effective exercise of sovereignty by underdeveloped countries over natural resources when he made the following interesting remark:

> "...over the last few years, there had been a trend among developing countries towards a search for greater self-reliance in determining and carrying out their development policies. Many of them had won political independence only to find that economic independence did not automatically follow political independence and sovereignty comprised the right of each state to develop freely its own natural resources and to organize the economic structure of its society. It [must, therefore, be] against that background that the Committee must view measures undertaken by developing countries aiming at increased influence over the use of domestic resources and a widened control over the foreign owned sector of their economies". 294

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[293] U.N. Doc. E/AC.6/SR.604, op. cit. at 122-123.

[294] U.N. Doc. E/AC.6/SR. 605, op. cit. at 133-34.

Thus, the overwhelming majority in the economic committee comprising the delegates from the socialist countries, the underdeveloped countries as well as some capital-exporting countries fully supported the exercise of the right of underdeveloped countries to resort to nationalization as an aspect of their sovereignty over natural resources. The draft resolution[295] which was submitted jointly by the delegates from Algeria, Chile, Columbia, Egypt, Ghana, Guinea, Iceland, Peru, Romania, Venezuela and Zaire at a later stage in the deliberations of the economic committee, and which was later adopted[296] by 37 votes to 2 with 6 abstentions, not only legitimized acts of nationalization measures carried out by underdeveloped countries, but it also signified a concentrated expression (as the Chilean delegate called it) of the General international consensus, which evolved within the U.N. machinery since 1952, regarding permanent sovereignty over natural resources. The draft resolution in question was then transmitted to the economic and social council, and the council adopted it by 20 votes to 2 with 4 abstentions, and the text, thus, adopted became council Resolution 1737 (LIV).[297]

The prevailing tendency both in the Committee on Natural Resources and the Economic Committee which culminated in Council Resolution 1737 (LIV) subsequently became the basis for the deliberation of the Second Committee in its consideration of the item on permanent sovereignty over natural resources. The work of the Second Committee was shaped not only by Council Resolution 1737 (LIV) but also, in some respects, by the report

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[295] 54 U.N. Economic and Social Council, Official Records, Annexes, Agenda Item 2, at 4, U.N. Doc. E/5305 (1973).

[296] U.N. Doc. E/AC.6/SR 609, op. cit. at 214.

[297] For the text of Council Resolution 1737 (LIV) see, Appendix (A-11) of this paper.

of the Secretary General on permanent sovereignty over natural resources.[298] The pertinent section of the report consisted of a section dealing with nationalization - in which the U.N. Secretariat presented a short account of recent (i.e. 1973) cases of actual nationalization measures and a general description of the circumstances under which those nationalizations occurred in underdeveloped countries. In particular, the report emphasized that "it is inherent in the right of each state to dispose fully of its natural resources and to determine how best to utilize those resources through the organization of such economic structures as it sees fit" and that "a state may undertake nationalization measures if and when these are considered to be necessary and in the best national interest".[299] In the opinion of the U.N. Secretariat:

> "The exercise of the right of permanent sovereignty over natural resources in the developing countries could best be achieved through the retention by these countries of full control over the utilization of these resources. Such control could best be secured through ownerships of the natural resources themselves and of the means of production to develop and exploit them by nationals subject to the countries' laws and regulations or by the state itself".300

According to the Secretariat's report, "in many developing countries, governments have in recent years established public enterprises charged... with the exploration, exploitation and processing of mineral resources" and that, a number of governments such as those of Algeria, Chile, Cuba, Egypt, Ghana, Guinea, Guyana, Indonesia, Iraq, The Libyan Arab Republic

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[298] U.N. Secretariat, Permanent Sovereignty over Natural Resources: Report of the Secretary General, U.N. Doc. E/5425 (1973).

[299] Ibid. at 13.

[300] Ibid.

Mauritania, Peru, Venezuela and Zambia, "have nationalized certain foreign assets or negotiated to secure control of existing enterprises".[301] Explaining some of the circumstances that led underdeveloped countries to resort to nationalization, the U.N. Secretariat noted in its report as follows:

> "The circumstances in which governments may be led to proceed to nationalization vary. In some cases, governments which had welcomed private foreign investment in the exploitation of natural resources may have failed to appreciate the implication and ramifications of their policy which did not become evident until some time after an enterprise had been established. In other cases, difficulties may arise because concessions granted to foreign enterprises by the government of a country prove unacceptable to a later government which does not share the former's economic philosophy and aspirations regarding national development. Finally, in many cases, developing countries which had previously been under colonial administration inherited, upon attaining independence, a situation in which effective control and ownership of the means for exploiting natural resources has long been vested in a few foreign companies which had been granted rights and concessions by Colonial administrations. These circumstances are highly conducive to conflict as the newly sovereign states attempt to deal with entrenched interests. In addition, there are cases where the behaviour of foreign enterprises in the developing countries actually constitutes an infringement on the right of states to exercise permanent sovereignty over their natural resources by violating and circumventing national laws and regulations. This notably can occur in the case of subsidiaries of multinational corporations which may tend to give greater weight to the regulations and policies of their home country than to those of the host country, for purely economic or political reasons.... In view of the importance of natural resources to national development, governments faced with conflicts with foreign enterprises [tend] ... to opt for nationalization".302

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[301] Ibid. at 14.

[302] Ibid. 15. [Emphasis ours]. For a discussion of the nature of the conflict between host countries and multinationals to which the Secretary General's report referred, see Chapter IV of this paper.

Thus, the report of the Secretary General over natural resources, despite its shortcomings in other sections as noted by several delegations in the Second Committee, was not only positively disposed towards the legitimization, by the U.N., of nationalization measures but also furnished the justifications for those measures. The fact that the Secretary General acknowledged, in his report to the General Assembly, the necessity of resort to nationalization as the best modality of the effective exercise of sovereignty by underdeveloped countries over their natural resources and his positive appraisal of recent state practice in underdeveloped countries further reinforced the prevailing tendency, within the various organs and sub-organs of the U.N., of giving an international consensual backing, encouragement and legitimation to resort to nationalization. Moreover, the fact that the Secretary General's report underlined that in most cases, resort to nationalization were directed against rights acquired and entrenched under the patronage of Colonial administrations, as well as in circumstances where multi-national corporations pursued exploitative "super-profit-reaping" activities, gave a further leverage of justification for most of the delegations in the Second Committee to argue, against respect for Colonially acquired rights and in favour of putting restraint on the activities of multi-national corporations on the one hand, and to strongly support, encourage and legitimize resort to nationalization, on the other.

It was, thus, in the course of examining the recommendations of the Committee on Natural Resources, the Economic Committee of the Economic and Social Council including Council Resolution 1737 (LIV), and the above study of the Secretary General on permanent sovereignty over natural resources, that the representatives of Argentina, Egypt, Iceland, Kenya, the Libyan Arab Republic, Peru, the United Republic of Tanzania and Venezuela submitted before the Second Committee, a draft

resolution[303] that later became, with some minor modifications, General Assembly Resolution 3171 (XXVIII). The text of the draft resolution was, with the exception of some minor changes, a full restatement, almost word for word, of the pronouncements of Council Resolution 1737 (LIV). The draft text tended, in general, to be more elaborate and forceful than Council Resolution 1737 (LIV). The only conspicuous difference between Council Resolution 1737 (LIV) and the draft text pertaining to the question of the right to resort to nationalization consisted in the inclusion of two additional paragraphs in the draft text which reflected some new elements not expressly spelled out in Council Resolution 1737 (LIV). The first one was the third preambular paragraph of the draft resolution (also the third preambular paragraph of the final text of General Assembly Resolution 3171 (XXVIII)) where a reaffirmation was made "to the inviolable principle that every country has the right to adopt the economic and social system which it deems most favourable to its development" thus furnishing a much broader basis for the right to resort to nationalization as one of the modalities of the effective exercise of sovereignty over natural resources.[304] The other one was operative paragraph 2 of the draft text as revised, (also forming the second operative paragraph of the final text of General Assembly Resolution 3171 (XXVIII)) where strong support was expressed to "the efforts of the developing countries and of the peoples of the territories under colonial and racial domination and foreign occupation in their struggle to regain effective control over their natural resources".[305] Thus, the draft text strongly

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[303] 28 U.N. General Assembly, Official Records, Annexes, Agenda Item 12, at 6-8, U.N. Doc. A/9400 (1973).

[304] Ibid. at 6.

[305] Ibid.

reflected the prevailing tendency within the various U.N. forums in favour of extending full support, encouragement and legitimization to the exercise, by underdeveloped countries, of their right to nationalize enterprises engaged in the exploitation of their natural resources.

In the course of the deliberations of the Second Committee, various amendments and sub-amendments were introduced to the draft resolution of which the one submitted jointly by the representatives of Iraq, Algeria and the Syrian Arab Republic was significant as far as the question of nationalization was concerned. The amendment proposed the addition of a new operative paragraph between operative paragraphs 2 and 3 of the draft text, which affirmed that "the application of the principle of nationalization carried out by states" constituted a definitive "expression of their sovereignty ... to safeguard their natural resources".[306] The three-power amendment was accepted by the sponsors of the draft resolution, and was later adopted, on a separate vote, by 81 votes to 11 with 23 abstentions.[307] The revised draft resolution as a whole, as amended was adopted in the Second Committee by 99 votes to 1 with 15 abstentions.[308] The revised draft resolution as adopted was transmitted to the General Assembly, and in the plenary meeting of the Assembly, the new operative

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[306] Ibid. at 7, U.N. Doc. A/C.2/L. 1334 (1973).

[307] Ibid. at 8. It is interesting to note that the 11 countries which voted against the amendment were Belgium, France the Federal Republic of Germany, Greece, Israel, Italy, Japan, the Netherlands, Spain, the United Kingdom and the United States.

[308] Ibid. at 8. Here, again, while the United Kingdom voted against the revised draft resolution as a whole, Belgium, Denmark, France, the Federal Republic of Germany, Greece, Israel, Italy, Japan, the Netherlands, Norway, Portugal, South Africa, Spain, Sweden and the United States of America abstained.

paragraph which expressly referred to nationalization was again put to a separate vote, and was adopted by 86 votes to 11 with 28 abstentions.[309] The draft resolution as a whole was finally adopted by 108 votes to 1 with 16 abstentions.[310]

Thus, General Assembly Resolution 3171 (XXVIII) further established a firm international consensual basis of support for underdeveloped countries to resort to the nationalization of foreign operated enterprises engaged in the exploitation of natural resources.

The significance of Resolution 3171 (XXVIII) still lies in the fact that, like the earlier resolutions examined in the preceding discussion, its support for nationalization measures attached specifically to those carried out particularly by the underdeveloped countries.

On its face, General Assembly Resolution 3171 (XXVIII) appears to extend U.N. support for the effective exercise of sovereignty over natural resources to "all" states. The loose references to "each state", "every state", "every country" or simply "states" in preambular paragraphs (1), (2) and (3), and in operative paragraph (1) of Resolution 3171 (XXVIII) seem, by reason of the "generality" of wording of the paragraphs in question, to give the impression that the subjects of the right the exercise of which became the object of U.N. concern in that Resolution were "all" states without distinction. Upon closer examination of the text of the Resolution as a whole, as well as the background deliberations that led to the resolution's formulation, however, the "centrality" of underdeveloped countries in the resolution becomes readily manifest. Even a textual interpretation of the Resolution shows that, by linking the question of the effective exercise of sovereignty over natural resources to the

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[309] Ibid. at 20.

[310] Ibid.

problem of economic development, nearly every paragraph of Resolution 3171 (XXVIII) attached, directly or indirectly, U.N. support for the effective exercise of sovereignty over natural resources particularly to the underdeveloped countries.

Both in the committee on natural resources and the economic committee of the economic and social council, the question of U.N. support for nationalization was linked distinctly to the underdeveloped countries. Not only did the Secretary General's report, which became the basis for discussion in the two committees, deal with permanent sovereignty over natural resources solely in connection with underdeveloped countries, but nearly all delegations which participated in those committees also approached the question of the effective exercise of sovereignty over natural resources from the "centrality" of the development problems of underdeveloped countries. Again, in the second committee of the General Assembly, U.N. support for the effective exercise of sovereignty over natural resources in general, and for nationalization in particular, was attached distinctly to the underdeveloped countries.

Moreover, both the text of Resolution 3171 (XXVIII) as well as its drafting history show that the support of the U.N. for nationalization measures carried out by underdeveloped countries was extended with the view that those measures would help the underdeveloped countries achieve speedy economic development and ensure their Independence from foreign (alien) economic domination. Like the other Resolutions examined earlier, the significance of Resolution 3171 (XXVIII), thus, lies in the fact that by singling out underdeveloped countries as its principal object of concern, and by extending its support to those nationalization measures carried out particularly by the underdeveloped countries, that Resolution was in effect according differential treatment to those countries, by

reason of their special capacity as "underdeveloped" countries.

Permanent Sovereignty over Natural Resources as a Basis for Nationalization: A Summary

In the preceding discussion, then we tried to examine, from a somewhat static perspective, each of the major General Assembly Resolutions on permanent sovereignty over natural resources separately, to show that the U.N. supported and legitimized recourse to nationalization by underdeveloped countries as one of the legitimate modalities of exercising permanent sovereignty over natural resources. A complete understanding of the concept of permanent sovereignty over natural resources in general, and the exercise of the right to resort to nationalization as an attribute of that broad concept in particular, is, however, hardly possible by merely examining each resolution independent of, and in isolation from, other similar resolutions on the basis of a static time setting. The concept of permanent sovereignty over natural resources and the exercise of the right to nationalize property of aliens as one of its attributes evolved within the U.N. forums over a period of two decades since the enunciation of the concept back in January 1952. Seen from a dynamic perspective, the concept of permanent sovereignty over natural resources as it related to the exercise of the right to nationalize foreign operated enterprises exibits distinct evolutionary changes.

As far as U.N. support for the exercise of the right to resort to nationalization is concerned, the evolution of the concept of permanent sovereignty over natural resources between 1952 and 1972 can be divided into three distinct phases of development. The first phase covers the period between 1952 and 1966 within which the General Assembly adopted Resolutions 523 (VI) of January 12, 1952; 626 (VII) of December 21, 1952;

1515 (XV) of December 15, 1960; and 1803 (XVI) of December 14, 1962. The second phase covers the period between 1966 and 1970 within which the General Assembly adopted Resolutions 2158 (XXI) of November 25, 1966; and 2386 of December 19, 1968. The third phase covers the period since 1970 in which the General Assembly adopted Resolutions 2626 (XXV) of 24 October, 1970; 2692 (XXV) of 11 December 1970; 3016 (XXVII) of 18 December, 1972 and 3171 (XXVIII) of 17 December 1973. Each of those three phases in the evolution of the concept of permanent sovereignty over natural resources are separated by distinct resolutions marking the culminating points of the different tendencies prevalent in each phase. Thus, General Assembly Resolution 1803 (XVII) of 1962 represented a culminating point for the dominant tendency in the first phase, while General Assembly Resolution 2158 of 1966 marked that of the second phase, and General Assembly Resolution 2692 (XXV) of 1970, that of the last phase. What, then, were the varying tendencies which were reflected by those resolutions at each stage in the evolution of the concept of permanent sovereignty over natural resources?

While all the resolutions adopted during the three phases in the evolution of the concept of permanent sovereignty over natural resources, recognized the exercise of the right to resort to nationalization as one of the several alternative modalities of the effective exercise of sovereignty over natural resources, each phase attributed varying degrees of importance to the nationalization mode as against other alternative modalities of implementing permanent sovereignty over natural resources. In other words, each phase differred from the other in the hierarchy of importance it attached to nationalization as a mode, vis-a-vis other alternative modes, of effective exercise of sovereignty over natural resources. This hierarchy was itself determined by the relative importance assigned in each phase, to the role of foreign capital participation in the

development process of underdeveloped countries in general and the exploitation of their natural resources, in particular.

During the first phase of the evolution of the concept of permanent sovereignty over natural resources the resolutions adopted by the General Assembly reflected a tendency in which the effective exercise of sovereignty over natural resources was envisaged primarily in terms of the mere regulation, by the host state, of the entry and operation of foreign-owned enterprises. The option for the mere regulation of the entry and subsequent operation of foreign-owned enterprises as the prevalent modality of effective exercise of sovereignty over natural resources was predicated on the dominant belief, held by the majority of states during the early period, in the indispensability of foreign capital as a source of financing development in the underdeveloped countries. Although recognition was given to the possible exercise of the right to resort to nationalization as an alternative mode of exercising sovereignty over natural resources even during the first phase, that particular mode was relegated to a secondary position at this time owing to its presumed "discouraging impact" on the flow of foreign capital which was then regarded crucial for development. The relegation of nationalization as a mode of exercising sovereignty over natural resources to a secondary position, is fully borne by the circumscribed conditions under which it was allowed and the elaborate limitations to its exercise improvised by General Assembly Resolution 1803 (XVII) of 14 December 1962.

During the second phase of the evolution of the concept of permanent sovereignty over natural resources, the resolutions adopted by the General Assembly, especially Resolution 2158 (XXI) of 25 November 1966, envisaged the establishment of joint venture partnerships between foreign capital on the one hand, and local and host government participation on the other, as the principal modality of the effective exercise of sovereignty

over natural resources. Although the resolutions adopted during the second phase recognized both host government regulation of the entry and subsequent operations of foreign-owned enterprises as well as resort to nationalization as possible alternative modalities of the effective exercise of sovereignty, the primary option which they strongly recommended was the joint venture formula. Here again, the resolutions marked a change of attitude, albeit a slight one, since the first phase, on the part of the majority of the states participating in the U.N. forums, regarding the relative benefit to underdeveloped countries accruing from foreign capital on the one hand, and the desirable degree of control which host countries should exercise over foreign capital on the other. By strongly recommending host government participation in the management and ownership of foreign-operated enterprises those resolutions for instance, tended to reflect serious misgivings towards the desirability of an "open-door" policy in favour of foreign capital. Thus, in the same measure as the importance of foreign capital diminished in the second phase, the importance of nationalization as an alternative modality of the effective exercise of sovereignty began to be increasingly reaffirmed.

During the third phase, the resolutions of the General Assembly further militated against the desirability of foreign capital participation, thus reversing the hierarchy of modalities in the exercise of sovereignty over natural resources. Although the resolutions adopted during the last phase recognized the regulation of the entry and manner of operation of foreign-owned enterprises by host governments as well as the formation of joint ventures as possible alternative modalities of the exercise of sovereignty over natural resources, increasing primacy was given to a predominantly "state-managed" economy which presupposed extensive resort to nationalization.

It is interesting to note, at this juncture, the factors that accounted for this overall shift, over the last two decades, in the relative primacy of the various modalities of the effective exercise of sovereignty over natural resources. As we have pointed out earlier, the hierarchy in the modalities of effective exercise of sovereignty over natural resources in each phase was largely determined by the relative importance attached to foreign capital as a source of financing economic development in general, and the exploitation of natural resources, in particular. Thus, the recognition, by the U.N., of the relative primacy of nationalization as a modality of effective exercise of sovereignty over natural resources, over and above other modalities, during the last phase is largely the result of the diminished role assigned to foreign capital in the development process. There are of course several factors, both internal (i.e. internal to most of the underdeveloped countries which participated in the deliberations of the U.N. forums) and international, that explain the changes in attitude, over the last two decades, towards the role of foreign capital in the development process. Internally, the underdeveloped countries became increasingly disappointed with the contribution of foreign capital as a source of financing their economic development, owing partly to the overall paucity of the natural flow of foreign capital to those countries, and partly due to the growing social, economic and political costs associated with foreign capital participation in the economic life of those countries. Moreover, the economic and social conditions in those countries continued, despite temporary bonanzas associated with peak prices of primary products in the world market, to deteriorate partly because of, and partly in spite of, foreign capital participation in the "underdevelopment" process, in which case the situation gradually led to the sharpening of internal contradictions within those countries, thus, calling for major social, political and economic reforms that required the increasing role of the state

in the economic management of those countries. Internationally, the attitude towards foreign capital participation as a motive force for development in underdeveloped countries was increasingly questioned as a result of the dismal failure of the international development effort of the 1960's. In the economic sphere, the unwarranted dependence of many underdeveloped countries on foreign capital in line with the premises of the First United Nations Development Decade led to bitter frustration as a result of two related global developments. On the one hand, the specific features of the international division of labour in the post-recovery period following the Second World War brought about a relative global shift in the locus and direction of direct foreign capital flow which tended to move away from underdeveloped countries, and to concentrate instead within the developed market-economy countries themselves, thus partly accounting for the overall paucity of foreign capital flow to underdeveloped countries, regardless of the inducements provided by those countries, to prospective investors through favourable investment policies.[311] On the other hand, the fierce competition between multi-national corporations and their global cartelization continued to bear heavily on the economic relations between those multi-nationals and their host environment such as to render their continued operations increasingly detrimental to the interest of the most countries. Those objective international developments therefore, forced the underdeveloped countries to expect less from foreign capital and to rely more on their own domestic resources for their economic development. Politically, dependence on foreign capital tended to compromise the sovereignty and independence of those countries, and gradually exposed the neo-colonial and satellite status of the governments

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[311] This phenomenon is, for instance, observed by economists like Tamas Szentes, see his, The political economy of underdevelopment at 154-155 (Budapest, 1973).

of those countries before the eyes of their own peoples thereby, making those governments vulnerable to attack from within. The political problems associated with dependence on foreign capital were further accentuated (aggravated) in most underdeveloped countries by the fact that foreign capital acted as the economic umbilical cord linking the newly independent countries with their respective ex-colonial masters, thus, perpetuating the former relations under a new kind of subordination which took the form of neo-colonialism. While the above economic and political reasons were, therefore the main factors that influenced the change in attitude regarding foreign capital, there was still another important factor which accounts for the shift in international consensus regarding the role of foreign capital, and that factor is the ideological and political influence of the socialist countries within the U.N. machinery itself. Ever since the socialist countries emerged in the international arena as a distinct political force, their influence in the formulation of norms with respect to permanent sovereignty over natural resources within the U.N. machinery has been quite considerable. Although that influence was very minimal during the earlier period partly due to the effect of the cold war particularly on the "moderate" majority within the U.N. forums, the repeated initiatives of those countries in this field has no doubt left its impact in influencing a considerable number of the under-developed countries to modify their attitudes towards foreign capital.

Hence, the change in attitude regarding foreign capital that was brought about as a result of the above factors, consequently led to a corresponding shift, over time, in the hierarchy of the modalities of the effective exercise of sovereignty over natural resources, and as a result, the U.N. forums, began to accord primacy to nationalization as the main mode of exercising sovereignty over natural resources. The

international consensual shift, within the U.N., in favour of the primacy of nationalization as a mode of the effective exercise of sovereignty over natural resources is itself an indirect expression of the change of approach towards development inaugurated by the International strategy of the Second United Nations Development Decade of the 70's in response to the dismal failure of preceding First Development Decade.

In light of the dynamic evolution of the concept of permanent sovereignty over natural resources within the U.N. machinery over the last two decades, therefore, one can draw a number of conclusions regarding the current state of international consensus on the subject of permanent sovereignty over natural resources. The first conclusion is, that, being the concentrated expression of the international concensus, the above resolutions on permanent sovereignty over natural resources, furnish, together and cummulatively, a supportive (promotive) and legitimizing basis for underdeveloped countries to carry out nationalization measures in the exercise of their sovereignty over natural resources. Secondly, by according primacy to nationalization as a mode of exercising sovereignty over natural resources as opposed to other modes, those U.N. Resolutions on permanent sovereignty over natural resources adopted particularly since 1970, give expression to the latest governing norm in this area by modifying and updating the normative principles implicit in the earlier Resolutions on permanent sovereignty over natural resources.

Thirdly, and most importantly, the significance of the above U.N. resolutions on permanent sovereignty over natural resources lies, as we tried to argue earlier, in the fact that, by singling out the problems of natural resource use and control peculiar to underdeveloped countries as the central object of concern for the U.N., and consequently, by giving special support for those nationalization measures carried out

particularly by the underdeveloped countries, those resolutions in effect accorded differential treatment in favour of the underdeveloped countries by reason of their special status as "underdeveloped" countries. When one examines the evolutionary trend in the content of the resolutions on permanent sovereignty over natural resources with respect to the latter question, one is struck by the marked ambiguity of the earlier resolutions regarding the question as to the exercise of whose right became the central object of U.N. concern. One notes, for instance, that at the time when the earlier resolutions on permanent sovereignty over natural resources were adopted between 1952 and 1966, there was a marked lack of awareness among several participants in the U.N. forum as to whom U.N. support specifically applied or as to why that support should attach particularly to the underdeveloped countries. It was, in fact, precisely this lack of awareness that led some delegations to either challenge the jurisdictional competence of the U.N. to deal with the matter or to assert that U.N. affirmation of the right was superfluous since that right was already implicit in the sovereignty of every state. In other words, those resolutions on permanent sovereignty over natural resources adopted between 1952 and 1966 bore the ambivalent mark of "generality of application" by giving the false impression that U.N. support for the effective exercise of sovereignty over natural resources attached to "all states" without distinction. It was only later, especially after 1966, that the U.N. resolutions on permanent sovereignty over natural resources began to show clearly that U.N. support for the effective exercise of sovereignty over natural resources attached specifically and particularly to underdeveloped countries. By closely linking resort to nationalization with the objectives of the economic development of the underdeveloped countries, and the safeguarding of the economic independence of those countries from alien (foreign) domination, the latter resolutions, not only clarified the underlying justification

for the particular concern of the U.N. with the subject matter of permanent sovereignty over natural resources, but they also brought to light the precise rationale as to why the U.N. chose to accord differential treatment particularly to the underdeveloped countries. As far as we can discern from the background deliberations of the U.N. forums, the underlying rationale for according differential treatment particularly to underdeveloped countries appears to be the internationally acknowledged need of redressing for the injustices of the past suffered particularly by the underdeveloped countries. In other words, it is by reason of the rationale of the doctrine of redress that the U.N. resolutions on permanent sovereignty over natural resources provide a supportive international consensual basis for underdeveloped countries to resort to nationalization, and as we shall argue in the last section of this chapter, it is precisely this consensual support that ultimately creates an independent juridical basis for the "taking" of property of aliens by the underdeveloped countries.

(ii) Support for Nationalization in the Context of Contemporary Principles Governing International Economic Relations Among States and in the New International Economic Order

Side by side with, and in addition to, the enunciation of the doctrine of permanent sovereignty over natural resources, the U.N. machinery has also been,within the last two-and-half decade, formulating principles and norms governing international economic relations (and principally trade relations) among states, and laying down a policy framework for establishing a new international economic order, and in the process, a "promotive" norm that enables underdeveloped countries to resort to nationalization has gradually evolved.

The "promotive" norm enabling underdeveloped countries

to carry out nationalization measures in order to enhance their economic development began to evolve during the first session of the United Nations conference on Trade and Development back in 1964, and has since been repeatedly reaffirmed in the subsequent sessions of UNCTAD, and particularly in the second session in 1968, and in the third session in 1972. While the UNCTAD Resolutions of the first three sessions affirmed the right of the underdeveloped countries to resort to nationalization only in an indirect way in connection with the enunciation of basic principles governing trade relations between states conducive to development, they ultimately led to the formulation of the New International Economic Order and the Charter of Economic Rights and Duties of States in which the exercise of the right to resort to nationalization was assigned a significant role in the development process of underdeveloped countries.

In the following section, we will be discussing the principal resolutions of the first three sessions of UNCTAD as well as the General Assembly resolutions endorsing the principles enunciated in the UNCTAD resolutions pertaining to the subject of nationalization. The discussion will, in the main, focus on General principle Three of the Final Act of the first session of UNCTAD (1964) and General Assembly Resolution 2085 (XX); Resolution 22 (II) and 28 (II) of the Second Session of UNCTAD (1968) and General Assembly Resolution 2402 (XXIII); Resolution 45 (III) and Principles II and XI of Resolution 46 (III) of the

third session of UNCTAD (1972) as well as General Assembly Resolutions 3201 (S-VI), 3202 (S-VI) and the Charter of Economic Rights and Duties of States of January 1975. In the following discussion, as in the case of the preceding one concerning permanent sovereignty over natural resources, we shall try to show (i) that the resolutions set in motion a "promotive" norm which encourages underdeveloped countries to resort to nationalization; (ii) that the subjects of the right which can avail themselves of the support of the "promotive" norm are exclusively underdeveloped countries and that such exclusive benefit is accorded to those countries by reason of their special situation of underdevelopment; and (iii) that U.N. support for resort to nationalization by underdeveloped countries was given to enable those countries to enhance their economic development and achieve economic independence through self-reliance.

General Principle Three of the Final Act of UNCTAD (1964):[312]

The first session of United Nations Conference on Trade and Development which was convened in Geneva from March 23 to June 16, 1964, adopted, among others, General Principle Three

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[312] For the full text of General Principle Three of the Final Act of UNCTAD (1964), see Appendix (A-13) of this paper. The United Nations Conference on Trade and Development was first convened in the spring of 1964 in Geneva pursuant to Economic and Social Council Resolution 917 (XXXIV) of August 1962 and General Assembly Resolution 1785 (XVII) of December 18, 1962. Thereafter, by virtue of General Assembly Resolution 1995 (XIX) of December 30, 1964, the conference acquired an institutional character of its own and became a permanent sub-organ of the General Assembly. For historical account see, proceedings of the United Nations conference on Trade and Development, Third Session, Santiago De Chile, Report and Annexes, vol. 1 at 1 (1973).

in which it reiterated that "every country has the sovereign right ... freely to dispose of its natural resources in the interest of the economic development and well-being of its own people".[313]

Although General principle Three did not expressly refer to nationalization, it becomes clear from the background deliberations of the Fifth Committee of UNCTAD which drafted the principle that the broad options in the free disposal of natural resources envisaged by the principle included, among others, the option to resort to nationalization. According to the report[314] of the working group established by the fifth committee of UNCTAD, the draft text that later became General principle 3 provoked some controversy among the participants, and the root of the controversy was that the draft principle implied U.N. support for nationalization measures. The amendment[315] proposed by the U.S. delegation to qualify the exercise of the right envisaged by the draft principle, as well as the express reservations made by the delegations from Australia, Canada the United Kingdom, Belgium, the Federal Republic of Germany and France that they were willing to support the draft principle provided that the qualifying phrase: "in accordance with international law" was inserted,[316] reveal indirectly that those delegations understood the draft principle as implying U.N. support for nationalization. In rejecting the U.S. amendment by 63 votes to 16 with 2 abstentions, and in adopting

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[313] See Appendix (A-13) of this paper.

[314] Proceedings of the United Nations Conference on Trade and Development, third session, Santiago De Chile, Report and Annexes, vol. 1 at 309; 321-322.

[315] Ibid. at 309.

[316] Ibid. at 322.

the draft text as it was, by 68 votes to 3 with 18 abstentions the overwhelming majority[317] in the fifth committee again confirmed that General principle Three envisaged the possible option of resort to nationalization. Moreover, the prevailing understanding in the Conference itself when the draft principle was adopted by 94 votes to 4 with 18 abstentions, was that the principle in question included the exercise of the right to resort to nationalization.

Like the other U.N. Resolutions on permanent sovereignty over natural resources, General Principle Three of the Final Act gives rise to a "promotive" norm that is attached particularly to underdeveloped countries. Although the language of General Principle Three implies, on its face, "generality" of application in the sense that "every country" appears to be made the subject of the right envisaged by the principle, the drafting history of the Final Act amply shows that the promotive norm enabling states to resort to nationalization applied specifically and particularly to underdeveloped countries by reason of their special status as "underdeveloped" countries.

The centrality of the underdeveloped countries in the formulation of the General Principles of the Final Act of which General Principle Three forms a part stems from the fact that the convening of the United Nations Conference on Trade and Development was itself prompted by the desire to seek solutions to "the urgent trade and development problems of the developing countries".[318] The economic problems peculiar to underdeveloped countries in respect to which UNCTAD was called upon to respond were highlighted as early as 1962 in the famous Cairo Declaration of Developing Countries where over 35 developing countries

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[317] Ibid. at 309.

[318] Ibid. at 4.

urged "the holding of an international Economic Conference within the framework of the United Nations" to consider, inter alia, questions raised at the Cairo Conference.[319] Among other things, the Cairo Declaration of Developing Countries affirmed that "the developing countries must have the maximum opportunities and facilities to take the fullest advantage of their resources".[320] The Declaration also noted that "the developing countries have made progress in their economic development, in spite of unfavourable factors mainly inherited from a colonial past, relying primarily on their own resources".[321] The Declaration further reaffirmed "the importance of maximum mobilization of internal resources of the developing countries, including the establishment of suitable institutions for this purpose".[322] In connection with safeguarding the right of peoples under colonial rule, the Cairo Conference recalled "the United Nations Declaration on the granting of independence to colonial countries and peoples" and urged "complete decolonization as being necessary for the economic development of the dependent peoples and the exercise of their sovereign right over their natural resources".[323] From the general spirit of the whole Declaration, it becomes obvious that the last pronouncement was not confined to dependent peoples only but also extended to independent countries as well. Thus, from the Cairo Declaration of Developing Countries there emerged not only the origin of the centrality

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[319] For the text of the Cairo Declaration see, 17 U.N. General Assembly, Official Records, Annexes, Agenda Items 12, 34, 35, 36, 37, 39 and 84, at 2-6, U.N. Doc. A/5162 (1962). It is interesting to note that the Cairo Declaration was later endorsed by the General Assembly in its Resolution 1820 (XVII) of 18 December 1962.

[320] See UNCTAD's third session proceedings, supra at 3.

[321] Ibid.

[322] Ibid.

[323] Ibid.

of the underdeveloped countries in what was later to form the principal work of UNCTAD but also the proposition that the primary responsibility for the economic development of underdeveloped countries should rest on those countries themselves and that in order to effectively undertake that responsibility the nationalization of domestic resource exploitation was crucial. It was, therefore, in the context of the latter proposition that the broad freedom of choice for determining natural resources use, control and disposal ultimately found expression in General Principle Three of the Final Act of UNCTAD.

The economic problems peculiar to underdeveloped countries and the various ways of solving them were again spelled out in a joint Declaration of 75 developing countries at the eighteenth session of the General Assembly in 1963 in which the latter urged the establishment of "more stable and healthy international relations" where the developing countries "could increasingly find from their own resources the means required for self-sustaining economic growth".[324] The Joint Declaration not only sought the strengthening of "the economic independence of developing countries" but also urged the establishment of an economic order that would take into account the peculiar economic condition of the underdeveloped countries so that they might be given special treatment of a non-reciprocal character.[325] Here again, the proposal that the underdeveloped countries be given the opportunity to rely on their own resources for their economic development and that international co-operation in their favour need not be reciprocated bear strongly on the

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[324] 18 U.N. General Assembly, Official Records, Resolutions, Annex to Resolution 1897 (XVIII), at 24-25 (1963).

[325] Ibid.

freedom of the underdeveloped countries to dispose their natural resources by such modalities, among others, as nationalization.

A similar preoccupation with the centrality of the underdeveloped countries ultimately shaping General Principle Three of the Final Act is to be found in the Charter of Alta Gracia where 19 Latin American countries resolved, at a meeting of the Organization of American States held in Alta Gracia, Argentina between February and March 1964, to urge the convening of UNCTAD in order to formulate principles that could serve as "effective instrument for the economic growth of the developing countries" and grant "special privileges" to underdeveloped countries "on a non-reciprocal basis" owing to their peculiar economic situation.[326]

Likewise, the Niamey Resolution of the Economic and Social Commission of the Organization of African Unity which met in Niger between 9 and 13 December 1963 reiterated that "the main objective of the United Nations Conference on Trade and Development should be to define the elements of a better policy in the field of international economic co-operation so as to secure for the developing countries an optimum rate of economic growth".[327] Among other things, the Niamey Resolution reaffirmed "the unanimous determination of African countries to extricate themselves from economic dependence which still [continued] to characterize their relationship with the former colonial countries".[328] Similarly, the Economic Commission for Asia and the Far East at its March 12, 1964 meeting urged, in its Teheran Resolution on the United Nations Conference on

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[326] Proceedings of the United Nations Conference on Trade and Development, first session, Geneva, Trade Expansion and Regional Groupings, vol. 6 Part I at 58 (Geneva, 1964).

[327] Ibid. at 55.

[328] Ibid.

Trade and Development, the creation of a dynamic international trade policy based on the need for providing special assistance and protection for the less-developed parts of the world."

In addition to the foregoing Declarations and Resolutions of the Regional Economic Commissions and other regional conferences which inspired and shaped the first session of UNCTAD in so far as the centrality of the underdeveloped countries was concerned, the General Principles formulated by the Conference were also influenced to a large degree, by a report of the Secretary General of UNCTAD entitled "Towards a New Trade Policy for Development". [329] The underlying theme of that Report was a set of proposals to build a new economic order "with a view to solving the serious problems of trade and development that beset the world, especially the problems that affect the developing countries." [330] The report not only spelled out the centrality of the underdeveloped countries in UNCTAD's work of formulating a new trade policy for development, but also proceeded from the belief that the peculiar economic status of the underdeveloped countries (i.e. their capacity of underdevelopment) necessitated special treatment of a non-reciprocal character.

Thus, from the foregoing background Resolutions, Declarations and Documents that influenced the formulation of General

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[329] See proceedings of the third session of UNCTAD, supra, at 5.

principle three, it appears that UNCTAD's support for nationalization measures as an aspect of the exercise of the right to freely dispose natural resources, attached specifically to those carried out particularly by the underdeveloped countries. While UNCTAD's special concern with the peculiar economic condition of the underdeveloped countries in general, and the effective exercise, by those countries, of their sovereignty over their natural resources, in particular, generally derived from the very aims and purposes of the U.N. which set for itself the task of "employing international machinery for the promotion of [the] economic and social advancement of all peoples" and for promoting "the social progress and better standards of life in larger freedom" (preamble to the U.N. charter), the majority of the participants in the conference, especially those from the underdeveloped countries, seemed to justify the U.N. drive to accord special treatment of a non-reciprocal character particularly to the underdeveloped countries on grounds of historical "redress for the injustices of the past" inflicted on those countries. In a joint Declaration of the 77 developing countries made at the conclusion of the first session of UNCTAD, those countries, for instance, asserted that:

> "The injustice and neglect of centuries need to be redressed. The developing countries are united in their resolve to continue the quest for such redress and look to the entire international community for understanding and support in this endeavour".331

Although the doctrine of redress was not expressly recognized as the underlying rationale for according special

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330 Proceedings of the United Nations Conference on Trade and Development, first session, Geneva, Policy Statements vol. 2 at 5 (1964).

331 See proceedings of the third session of UNCTAD, supra, at 68.

treatment of a non-reciprocal character particularly to underdeveloped countries during the first session of UNCTAD, the fact that this novel doctrine was invoked for the first time by the majority of the participants influenced subsequent UNCTAD sessions to make the doctrine the justifying basis for extending support specifically to those nationalization measures carried out particularly by the underdeveloped countries.

By endorsing General Principle Three of the Final Act of UNCTAD, the General Assembly, in its Resolution 2085 (XX), again indirectly extended its support to nationalization measures carried out by underdeveloped countries.[332]

Thus, from the drafting history of General principle and the background documents and deliberations leading to its formulation, it can be concluded that: (a) UNCTAD indirectly supported and legitimized the exercise, by underdeveloped countries, of their right freely to dispose their natural resources by such means as nationalization; (b) UNCTAD's support for nationalization measures was attached particularly to the underdeveloped countries by reason of their special status as "underdeveloped" countries, and with specific object of helping them achieve economic development and safeguard their independence from alien (foreign) economic domination; (c) by extending its support particularly to the underdeveloped countries in their effective exercise of their right freely to dispose their natural resources, UNCTAD was in effect advocating for the according of special treatment of a non-reciprocal character to the underdeveloped countries, and the underlying justification for according differential treatment particularly to the underdeveloped countries seems to rest on the doctrine of redress.

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[332] 20 U.N. General Assembly, Official Records, supp. 14, at 25-26, U.N. Doc. A/6014 (1965).

UNCTAD Resolution 22 (II) of 26 March 1968: "Steps to Achieve a Greater Measure of Agreement on principles Governing International Trade Relations and Trade Policies Conducive to Development":

The United Nations Conference on Trade and Development adopted Resolution 22 (II) at its second session in New Delhi on March 26, 1968.[333] The resolution had its origin in a draft resolution presented before the Trade and Development Board by a group of thirty-one developing countries. The draft text which provided for steps "to be taken to achieve agreement on principles" governing trade relations conducive to development was transmitted to the second session of UNCTAD pursuant to Recommendation A.I.1 of the Final Act of the first session of the United Nations Conference on Trade and Development. It was in the course of the deliberations of the fifth Committee of UNCTAD on the draft text as well as on the pertinent sections of the Charter of Algiers and the Report of the Secretary General of UNCTAD dealing with principles governing trade relations conducive to development that a group of representatives from 64 countries (mostly underdeveloped countries) submitted a draft resolution that later became Resolution 22 (II) of UNCTAD.[334]

Although Resolution 22 (II) did not specifically deal with the question of the sovereign right freely to dispose natural resources, it nevertheless has indirect bearing on that problem. The significance of the resolution lies not so much in that it enunciated new principles pertaining to the

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[333] For an account regarding the background of UNCTAD Resolution 22 (II) see, Proceedings of the United Nations Conference on Trade and Development, second session, New Delhi, Report and Annexes, vol.1 at 335 (1968).

[334] Ibid.

question of nationalization as in the fact that it was an implementing resolution of the principles already formulated at the First session of UNCTAD back in 1964. Moreover, the resolution, being a follow-up document, served as a bridge between the work of UNCTAD at its first session and its third session in 1972 and as such, it laid the basis for the formulation of those major economic policy statements of UNCTAD and the General Assembly which culminated in the establishment of the New International Economic Order of which the Charter of Economic Rights and Duties of States was a definite expression.

Resolution 22 (II) endorsed the "principles governing international trade relations and trade policies conducive to development" adopted by UNCTAD at its first session in 1964, and urged "all member states to support and to implement" those principles.[335] By implication, therefore, the resolution reaffirmed General Principle Three of the Final Act of UNCTAD which empowered underdeveloped countries to exercise their sovereign right freely to dispose their natural resources by such means as nationalization. Underlying the resolution's reaffirmation of the principles already adopted by UNCTAD at its first session were the findings of the progress report of the Secretary General of UNCTAD and the recommendations of the Charter of Algiers both of which largely shaped the resolution. In its "Review of international trade and development, 1967", the Secretary General's progress report pointed out that although "many of the principles recommended by the first session of the Conference had received growing recognition and had begun to be reflected in specific actions at both national and international levels", the practical measures adopted so far still fell "far short of the comprehensive action called for by that Conference", and that in fact some of the important

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[335] Ibid. at 34.

policy guidelines "appear to have been ... vitiated by measures taken in some countries".[336] Similar misgivings were expressed in the Charter of Algiers where it was noted that "the promise held out by the Final Act has not been realized".[337] Aside from laying down a practical Programme of Action, the Charter of Algiers underlined that while "the second session of the Conference may ... elaborate new principles", those "already adopted would not be re-examined in any case even from the point of view of form or substance".[338] The proposition that the principles adopted at the first session of UNCTAD should not be questioned was later endorsed in operative paragraph 3 of Resolution 22 (II) where the United Nations Conference on Trade and Development requested "the Trade and Development Board ... to examine the desirability of elaborating... additional principles consistent with the set of principles already adopted and to report thereon" to it at its third session.[339] Thus, the findings of the Secretary General of UNCTAD regarding the state of implementation of the Principles adopted at the earlier session of UNCTAD as well as the misgivings and recommendations expressed in the Charter of Algiers necessitated the reaffirmation, in Resolution 22 (II), of those same principles and the urging of their unfettered implementation. Although, as we have noted earlier, there was no direct reference to the question of sovereignty over natural resources either in the background documents or in Resolution 22 (II) itself, we are of the view that the reaffirmation, in general, of those principles adopted in the first session of UNCTAD necessarily implies a reaffirmation of General Principle Three which recognized the sovereign right of underdeveloped countries freely to dispose

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[336] Ibid. at 335.

[337] Ibid. at 432. For the full text of the charter, see Ibid. at 431-441.

[338] Ibid. at 451.

[339] Ibid. at 34.

their natural resources. It is not, therefore, accidental that it was the same group of countries which did not support General Principle Three at the first session of UNCTAD, which again opposed or abstained in the vote on Resolution 22 (II) which was adopted by 68 votes to 17 and 6 abstentions.[340]

As in General Principle Three of the first session of UNCTAD, the centrality of the interest of the underdeveloped countries was implicit in Resolution 22 (II). Although the latter resolution does not expressly spell that out, the background documents leading to its formulation, especially the Charter of Algiers, make it amply clear that UNCTAD's endeavour "to achieve a greater measure of agreement on principles governing international trade relations and trade policies conducive to development" proceeded from the central challenge of seeking solutions to "the urgent trade and development problems of the developing countries". The Charter of Algiers which was the principal background document that influenced the work of UNCTAD in its second session was adopted at the Ministerial meeting of the Group of 77 on October 24, 1967 in which the representatives of several developing countries "United by common aspirations and the identity of their economic interests and determined to pursue their joint efforts towards economic and social development, peace and prosperity", reviewed "the work of the international community for economic progress since the adoption of the joint Declaration of the seventy-seven developing countries made at the conclusion of the first session of the United Nations Conference on Trade and Development in 1964" and decided to "chart a

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[340] Ibid. The countries which voted against the Resolution were Australia, Austria, Belgium, Canada, Denmark, Federal Republic of Germany, Finland, France, Iceland, Italy, Japan, Norway, South Africa, Sweden, Switzerland, the United Kingdom and the United States.

common course of action" for recommendation to UNCTAD.[341] The Charter of Algiers was itself inspired by the African declaration of Algiers, the Bangkok Declaration of Asian countries and the Charter of Tequendama of Latin American countries each of which specifically tackled the urgent trade and development problems of the underdeveloped countries of Africa, Asia and Latin America respectively. The Charter of Algiers not only put the work of the first session of UNCTAD in the perspective of the centrality of the economic interest of the underdeveloped countries by underlining the fact that the concern over the increasingly aggravating economic and social condition of those countries and the joint efforts made by them to correct those problems "have progressively led the international community to embark on a series of initiatives culminating in the Final Act adopted in 1964", but it also affirmed that "the international community has an obligation to rectify those unfavourable trends and to create conditions under which all nations can enjoy economic and social well-being, and have the means to develop their respective resources to enable their peoples to lead a life free from want and fear".[342] Expressing the hope of its framers, the

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[341] Ibid. at 431.

[342] Ibid. at 432. It appears that the "obligation" to which the Charter of Algiers referred, rested on the doctrine of redress in so far as the political and economic culpability of those responsible for the condition of the underdeveloped countries was implicitly recognized in that charter.

Charter provided that the "developing countries expect that the second session of the Conference will concentrate on a common endeavour for accelerated economic and social development".[343] The centrality of the economic interest of the underdeveloped countries which was manifest from the Charter of Algiers was, therefore, implicitly recognized in Resolution 22 (II) especially since part II, section E (1) of the Charter dealing with "principles governing trade relations and trade policies conducive to development" was incorporated in that resolution.

By endorsing General Principle Three of the Final Act, the second session of UNCTAD did not only recognize the sovereign right of underdeveloped countries to resort to nationalization but it also indirectly supported the exercise of that right so that the nationalization measures might enable them to achieve accelerated economic development and independence from alien domination. The promotive norm implicit in Resolution 22 (II) was later approved by the General Assembly in its Resolution 2402 (XXIII) of December 13, 1968.

UNCTAD Resolution 28 (II) of March 28, 1968: "Improving the mobilization of Internal Resources":

In addition to Resolution 22 (II), the United Nations Conference on Trade and Development adopted Resolution 28 (II)

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[343] Ibid.

at its second session in New Delhi. In that resolution the Conference recognized, among other things, that "the primary responsibility for their development rests with the developing countries themselves" and appreciated "the efforts already made by the developing countries to mobilize and make effective use of their internal resources".[344] It further noted that "in the interests of rapid development, developing countries need both to mobilize internal resources as fully as possible and to ensure effective use of available resources".[345] The Conference particularly pointed out that the mobilization of internal resources could be effectively implemented by way of "a broad range of economic and social policies conducive to development".[346]

Although Resolution 28 (II) does not expressly address itself to the problem of nationalization, it becomes apparent from the drafting history of the resolution as well as the thrust of the final text that UNCTAD contemplated the possible use of nationalization as one of the means of guaranteeing the effective mobilization of internal resources for accelerating economic development in the developing countries. That the realization of the effective mobilization of internal resources within the terms of Resolution 28 (II) implied resort to nationalization was alluded to by several delegations

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[344] Ibid. at 39.

[345] Ibid.

[346] Ibid.

during the deliberations of the Third Committee of UNCTAD. The representatives of the Socialist countries of Eastern Europe, for instance, saw "the pursuit of independent economic policies and ... the preservation of sovereignty" as related objectives to the mobilization of internal resources for development.[347] According to those countries, the "necessary conditions" for the effective "mobilization of domestic resources" as "the main source of financing development" were that "certain social and economic reforms should be carried out with a view to strengthening the economic position of the state".[348] From their statement it is clear that nationalization was contemplated as one of the economic reforms aimed at "strengthening the economic position of the state".

UNCTAD's recognition that "the primary responsibility for their development rests with the developing countries themselves" as provided in the first paragraph of Resolution 28 (II) still bears strongly on the question of nationalization. The foregoing normative policy statement was directly borrowed from the Charter of Algiers[349] and in the context of the latter document, the policy of self-reliance was considered an alternative option as against reliance on foreign capital as a source of financing development. In subordinating the importance of foreign capital to that of domestic resources of financing development and in opting for the latter, the framers of the

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[347] Ibid. at 284.

[348] Ibid. at 285.

[349] Ibid. at 432.

Charter of Algiers indirectly legitimized acts such as nationalization which, while prejudicial to the interest of foreign capital, are nonetheless necessary for realizing the mobilization of domestic resources for development.

As we tried to show in connection with the evolution of the concept of permanent sovereignty over natural resources, the international recognition of the legitimacy of resort to nationalization has invariably been a reflection of a restrained attitude, on the part of the international community, regarding the relative importance of foreign capital as a source of financing development. In the same way as nationalization assumed primacy, as a mode of exercising sovereignty over natural resources as against other modalities at a time, in the evolution of the concept of permanent sovereignty, when the relative importance of foreign capital as a source of financing development diminished, so also did nationalization assume implicit importance at a time when self-reliance on the basis of domestic sources of financing was adopted as a policy guideline for economic development in the framework of the work of UNCTAD. It is the preference, implicit in the Charter of Algiers, for domestic resources as a source of financing development that underlies the bias in favour of nationalization, and it is precisely that bias which finds indirect expression in UNCTAD Resolution 28 (II).

As in UNCTAD Resolution 22 (II), so also in Resolution 28 (II), the indirect legitimation of the exercise of the right to resort to nationalization applied specifically to underdeveloped countries. In other words, the object of concern of UNCTAD in the context of Resolution 28 (II) regarding the "mobilization of internal resources" was the peculiar economic condition of the underdeveloped countries and consequently, the subjects of the right to resort to nationalization recognized within the terms of the resolution were exclusively underdeveloped countries. The central preoccupation of UNCTAD with the economic condition of the underdeveloped countries becomes manifest in every paragraph of Resolution 28 (II). In paragraph 1, for instance, the Conference recognized that "the primary responsibility for development rests with the developing countries themselves".[350] In the same paragraph, the Conference appreciated "the efforts already made by the developing countries to mobilize and make effective use of their internal resources" and indicated that "further efforts in this regard are essential for accelerating economic development in the developing countries".[351] In paragraph 2, the Conference maintained that "in the interests of rapid development, developing countries need both to mobilize internal resources as fully as possible and to ensure effective use of available resources both internal and external".[352] In the same paragraph, the Conference

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[350] Ibid. at 39.

[351] Ibid.

[352] Ibid.

noted that those objectives could be realized by means of "a broad range of economic and social policies conducive to development" and "the creation of the necessary institutions ... in developing countries".[353] In paragraphs 3, 4, 5 and 6 the same theme is reaffirmed. Thus, throughout Resolution 28 (II), UNCTAD made it clear that its central object of concern was the economic condition of the underdeveloped countries and consequently, it confined its implied support for the exercise of the right to nationalize property of aliens to those definite category of countries by reason their special capacity of economic underdevelopment.

The fact that UNCTAD envisaged the underdeveloped countries as the sole subjects of the right entitled to avail themselves of the promotive norm implicit in Resolution 28 (II) derives, in general, from the very raison d'être of the Conference as well as the immediate influence of the Charter of Algiers. In as much as the convening of UNCTAD constituted "a new Chapter in the history of United Nations endeavours to accelerate the economic development of developing countries",[354] it is only natural that Resolution 28 (II) attached the promotive norm allowing resort to nationalization

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[353] Ibid.

[354] See proceedings of the third session of UNCTAD, op. cit. at iii. The remark quoted was made by the then Secretary General of the U.N. U. Thant on the occasion of the convening of the first session of UNCTAD back in 1964.

solely to underdeveloped countries. Moreover, the bias in favour of underdeveloped countries implicit in Resolution 28 (II) derives directly from the fact that the Charter of Algiers served as its principal source of inspiration. Being a document charting "a common course of action as conceived in the African Declaration of Algiers, the Bangkok Declaration of Asian countries and the Charter of Tequedama of Latin American countries", [355] the Charter of Algiers represented a vivid articulation of the economic interest of underdeveloped countries.

Aside from underlining the centrality of the economic interest of underdeveloped countries, the Charter of Algiers introduced the idea that the international community had "an obligation to rectify" the unfavourable economic trends harming underdeveloped countries and "to create conditions" favourable for their development by granting those countries special treatment in the field of international trade and development. In the area of mobilization of resources, one such special treatment proposed by the Charter of Algiers implicitly constituted the legitimation of nationalization measures undertaken by underdeveloped countries. It was, therefore, the recognition of the centrality of the economic interest of the underdeveloped countries in the work of UNCTAD and the need to grant special treatment to underdeveloped countries as expressed in the Charter of Algiers that underlay Resolution 28 (II).

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[355] See proceedings of the second session of UNCTAD, vol. 2 op. cit. at 431.

Thus, UNCTAD Resolution 28 (II) not only legitimized resort to nationalization as an effective means of mobilizing domestic resources for economic development but also confined that special support to underdeveloped countries. The promotive norm enabling underdeveloped countries to resort to nationalization of property of aliens in order to promote their economic development was later implicitly endorsed by the General Assembly in its Resolution 2402 (XXIII) of December 13, 1968. [356]

UNCTAD Resolution 46 (III) of May 18, 1972: "Steps to achieve a greater measure of agreement on principles governing trade relations and trade policies conducive to development".

The United Nations Conference on Trade and Development at its third session held in Santiago De Chile between April 13 and May 21, 1972, adopted Resolution 46 (III) in which it enunciated certain "principles to govern international trade relations and trade policies conducive to development". [357] Among those principles which the Conference adopted, principles II and XI directly bear on the question of nationalization. Principle II of Resolution 46 (III) provided that:

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[356] 23 U.N. General Assembly, Official Records, supp. 18, at 25-26, U.N. Doc. A/7218 (1968).

[357] Proceedings of the United Nations Conference on Trade and Development, third session, Santiago De Chile, Report and Annexes, vol. 1 at 59-60 (1973).

> "Every country has the sovereign right freely to dispose of its natural resources in the interests of the economic development and well-being of its own people."[358]

Principle XI of the same resolution, in part, provided that:

> "Coastal states have the right to dispose of marine resources within the limits of their national jurisdiction which must take duly into account the development and welfare needs of their peoples."[359]

Although both principles II and XI of Resolution 46 (III) dealt with the free disposal of natural resources in the context of the sovereign right to trade freely, the broader scope of the sovereign right freely to dispose natural resources (both land and marine resources) within the terms of resolution implied support for the exercise of sovereignty over natural resources by such means as nationalization. That nationalization was envisaged as one of the modalities of the exercise of sovereign disposal of natural resources within the terms of Resolution 46 (III), especially Principle II, becomes clear both from the background documents that influenced the resolution and the controversy over the draft resolution initially proposed, on behalf of the Group of 77 developing countries, by the Ethiopian delegation and later revised and submitted by the Indonesian delegation.[360]

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[358] Ibid.

[359] Ibid.

[360] Ibid. at 37.

Resolution 46 (III) was largely influenced by The Declaration and Principles of the Action Programme of Lima which was adopted by representatives of 96 developing countries at the second Ministerial Meeting of the Group of 77 on November 7, 1971 with the aim of "harmonizing [their] positions with a view to the third session of the United Nations Conference on Trade and Development".[361] In The Declaration and principles of The Action Programme of Lima, the representatives of 96 developing countries maintained that their deliberation was intended, inter alia, "for seeking new areas of development strategy and evolve concepts, principles and additional measures for furthering international co-operation for development".[362] In its Declaration the Group stressed that:

> "The primary responsibility for the economic development of the developing countries rests upon themselves and to that end they are determined to make all efforts to resolve their problems, to carry out the necessary reforms in their economic and social structures, to mobilize fully their resources and ensure participation of their peoples in the process and the benefits of development." 363

The Declaration urged the international community "to recognize the principle" that "every country has the sovereign right freely to dispose of its natural resources in the interests of the economic development and well-being of its own people".[364]

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[361] Ibid. at 373.

[362] Ibid.

[363] Ibid. at 376.

[364] Ibid.

That The Lima Declaration envisaged resort to nationalization as one of "the necessary reforms" in the economic structures of developing countries to realize their "primary responsibility" for their economic development, and as one of the possible modalities of exercising their "sovereign right freely to dispose" of their natural resources,becomes clear from the interpretation of the spirit of The Declaration, by President Salvador Allende Gosset of Chile in his inaugural address delivered at the opening meeting of the Third session of UNCTAD. In his statement of interpretation of self-reliance and self-determination pertaining to natural resource use, control and ownership, the President stated as follows:

> "The governments of the countries of the Third World have now formulated a philosophy much more consciously in keeping with the realities of today. For example, The Declaration of Lima, besides endorsing the emphatic assertion of the Charter of Algiers that the primary responsibility for our development rests on us, pledged its signatories to carry the reforms in the economic and social structures required to ensure the full mobilization of their basic resources and to guarantee their peoples participation in the process of development and its benefits".[365]

Moreover, the Chilean President brought to the attention of the Conference the experience of the Chilean nationalization measures as a concrete implementation of that philosophy. In that connection, President Allende pointed out that:

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[365] Ibid. 351.

> "One of the primary objectives of the people's government is the recovery of the country's basic resources for its own use. We have nationalized iron, steel, coal and nitrate which now belong to the Chilean people. We are nationalizing copper through a constitutional reform that has been unanimously approved by a parliament in which the government does not have the majority... The recovery of our basic resources will now enable us to use for our own benefit, the surpluses formerly sent abroad by the foreign companies."[366]

The Chilean President's interpretation of the spirit of the Lima Declaration pertaining to the mobilization of natural resources, therefore, illustrates that Principle II of Resolution 46 (III) envisaged nationalization as one of the modalities of the exercise of the sovereign right freely to dispose natural wealth and resources.

Again, in the deliberation of the plenary session of the Conference the discussion relating to the draft text that later became Resolution 46 (III) tends to reflect that one of the controversial points must have been the implicit recognition of nationalization as one of the modalities of exercising the sovereign right freely to dispose natural resources. At the 109th plenary meeting of the Conference, for instance, the Peruvian delegation pointed out that the draft resolution repeated those principles enunciated in The Declaration of Lima and noted, in particular, that it proclaimed "the sovereign right of all countries to dispose freely of their natural

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[366] Ibid.

resources without any outside political or economic measure" and reaffirmed "the right of all countries to dispose of the resources of the seas adjacent to their coasts in order to promote their economic development and raise the standard of living of their peoples".[367] The thrust of the statement of the Peruvian delegation strongly suggests that the delegation had Peru's nationalization experience in mind in addressing itself to the problem of political and economic interference against the legitimate exercise of the sovereign right freely to dispose natural resources in respect to which the Special Committee on Latin American co-ordination adopted the 1969 Latin American Consensus of Vina del Mar condemning all forms of outside coercion in retaliation for nationalization.

Although no direct reference was made to the question of nationalization, the objection of most of the capital-exporting countries to the adoption of the Principles contained in Resolution 46 (III) appears to be partly directed against Principle II which envisaged the option of nationalization. In particular, the French and Netherlands' amendments to the draft resolution were intended to prevent the adoption of Principle II. According to the French and Netherlands' delegations, the principles, instead of being adopted by the

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[367] Proceedings of the United Nations Conference on Trade and Development, third session, Santiago De Chile, Summary Record of Plenary Meetings, vol. 1(a). Part 2 at 135. (1973).

Conference and implemented forthwith, should be transmitted to either the Trade and Development Board or a special working group for further consideration and study.[368] The delay tactic employed by the capital-exporting countries over the adoption of Principle II seems to confirm their stubborn disapproval of the option of nationalization - a stand consistent throughout the adoption of the concept of permanent sovereignty over natural resources as well. Later in the deliberations of the plenary session of the Conference, several delegations objected to the French and Netherlands Amendments and the amendments were rejected by an overwhelming majority.[369] The final adoption of the draft resolution by 72 votes to 15 with 18 abstentions clearly indicates that the overwhelming majority supported Principle II on the understanding that it envisaged possible resort to nationalization. As the explanatory statements regarding the votes reflect, even out of those delegations which abstained on the adoption of the draft resolution the majority did so because of their reservations regarding those principles in Resolution 46 (III) other than principle II.[370]

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[368] Ibid. at 226-227.

[369] Ibid. The French amendment was rejected by 63 votes to 25 with 9 abstentions. The Netherlands amendment was likewise rejected by 65 votes to 7 with 25 abstentions.

[370] Ibid at 229. The delegations from the East European socialist countries, for instance, abstained solely because of their reservation on principles (X) and (XI) dealing with questions of disarmament and the territorial limit of state jurisdiction over marine resources. Again, some of the land-locked underdeveloped countries also abstained because of their objection to the territorial limit of state jurisdictions over marine resources.

Thus, it becomes manifest both from the background documents that inspired Resolution 46 (III) and the deliberations of the plenary session of the Third session of UNCTAD that "the sovereign right freely to dispose of ... natural resources" within the terms of Principle II of Resolution 46 (III) included the exercise of the right to nationalize property of aliens.

As in the earlier UNCTAD resolutions pertaining to the question of the sovereign right freely to dispose natural resources so also in Resolution 46 (III), the exercise of the right to resort to nationalization is recognized and legitimized solely for the benefit of the underdeveloped countries. On its face, the wording of Principle II of Resolution 46 (III), which refers to "every country" as the subject of the right, seems to "universalize" what was otherwise a specific response to the peculiar needs of the underdeveloped countries. The generality of application borne by the language of Principle II notwithstanding, the subjects of the right the exercise of which was supported by the resolution are the underdeveloped countries.

The centrality of the economic interest of the underdeveloped countries and consequently, the exclusive application of the promotive norm emerging from principle II of Resolution 46 (III), stems, in the main, from the fact that The Declaration of Lima largely inspired and shaped Resolution 46 (III). The Declaration of Lima, being the embodiment of the common expression of will of 96 developing countries, exclusively centered around the economic problems peculiar to underdeveloped countries and "invited the attention of the international community" to appreciate the need "to establish a new structure of international economic relations based on a more just and dynamic international division

of labour between developing and developed countries"[371] favourable to the underdeveloped countries. The Declaration of Lima itself constituted a synthesis of the general consensus reached at the Bangkok Declaration of the Ministerial Meeting of the Asian Group, the Addis Ababa Declaration of the Ministerial Meeting of the African Group and the Lima Consensus of the Ministerial Meeting of the Latin American Group.[372] It was in light of the centrality of the Trade and Development interests of the underdeveloped countries that the representatives of 96 developing countries expressed their conviction that the Third session of the United Nations Conference on Trade and Development should "provide a fresh opportunity for the developing as well as the developed countries of the world to make a collective and determined endeavour to correct effectively the adverse situation confronting the developing countries".[373] Among other things, the developing countries invited, in the Lima Declaration, the international community "to take urgent action commensurate with the development requirements of the developing countries to assist them in accelerating the pace of their economic development significantly improving the standard of living of their peoples".[374] It was largely in response to the call of the Lima Declaration that the third session of UNCTAD adopted Resolution 46 (III) in which it implicitly legitimized and supported resort to nationalization specifically by underdeveloped countries. Underlying UNCTAD Resolution 46 (III)'s exclusive concern with the economic problems of the underdeveloped countries, was the novel idea that, owing to the peculiar economic situation of those category of countries, the international community should extend "preferential treatment" of a non-reciprocal

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[371] Proceedings of the third session of UNCTAD, vol.1 op. cit. at 374.

[372] Ibid. at 373.

[373] Ibid. at 374.

[374] Ibid. at 375.

character to developing countries in all matters relating to trade and development.[375] The formulation of certain positive norms for the exclusive benefit of underdeveloped countries and the according of special treatment of a non-reciprocal character to those same countries, as we shall argue later, has significant juridical implications in that it tends to modify those traditional international law rules governing the "taking" of property of aliens in several ways.

Lastly, the other significant feature of Resolution 46 (III) consists in the fact that it legitimized resort to nationalization by underdeveloped countries with the object of helping them ensure their economic development and independence from alien domination. Principle II of Resolution 46 (III), in particular, expressly envisages the exercise of the sovereign right freely to dispose of natural resources for the exclusive purpose of meeting "the interest of the economic development and well-being" of the underdeveloped countries.[376] The same objective is spelled out in Principle V of the resolution where the international community recognized its responsibility to eliminate any impediments "to the growth and development of the developing countries".[377] Underlying the Resolution's implicit support for nationalization measures, was also the objective of safeguarding the economic independence of the underdeveloped countries. That objective was in particular spelled out in the Declaration of Lima where the representatives of the 96 developing countries outlined a concrete programme of action to help them "attain true economic independence".[378] In their Declaration those

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[375] Ibid. at 376.

[376] Ibid. at 59.

[377] Ibid. at 60.

[378] Ibid. at 374.

same representatives sought to strengthen their unity and solidarity to effectively articulate their common position in order to secure "the full economic independence" of the underdeveloped countries.[379] Here too, UNCTAD's recommendation that the exercise of the sovereign right freely to dispose natural resources by such means as nationalization should be intrumental in promoting the economic development and independence of underdeveloped countries, has important bearing, as we shall show later, in modifying particularly those traditional international law rules which govern "prior-retraints" to "taking".

For the moment, however, it will suffice to note that Resolution 46 (III) recognized the legitimacy of resort to nationalization by underdeveloped countries in order to ensure their economic development and independence from alien domination.

The Establishment of a New International Economic Order and the Right to Resort to Nationalization:

The exercise of the right to resort to nationalization by underdeveloped countries again finds full support and legitimation in the context of the establishment of the New International Economic Order. The Sixth special session of the General Assembly of the United Nations adopted, at its 2229th plenary meeting, on May 1, 1974, Resolutions 3201 (S-VI) and 3202 (S-VI) in which it laid down certain basic principles underlying what it called the New International Economic Order.[380]

In its "Declaration on the establishment of a New International Economic Order" (i.e. Resolution 3201 (S-VI), the

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[379] Ibid. at 375.

General Assembly assigned a significant role to the exercise of permanent sovereignty over natural resources as one of the basic principles upon which the New International Economic Order was to be founded. Pertaining to the specific question of nationalization, Resolution 3201 (S-VI) particularly noted in operative paragraph 1, that under the existing International Economic Order there still prevailed "vestiges of alien domination ... and neo-colonialism in all its forms" thus posing as "the greatest obstacles to the full emancipation and progress of the developing countries".[381] In order to "correct inequalities and redress existing injustices", resulting from those vestiges, the General Assembly adopted, in operative paragraph 4 of the resolution, important principles directly related to nationalization. Section (d) of paragraph 4, for instance, provided that the New International Economic Order should be founded, among other principles, on full respect for "the right of every country to adopt the economic and social system that it deems most appropriate for its own development....".[382] In so far as the choice of an economic and social system by a given country could include the carrying out of nationalization measures, section (d) paragraph (4) indirectly legitimized resort to nationalization. Section (e) paragraph 4 also recognized "full sovereignty of every state over its natural resources and all economic activities" as one of the underlying principles of the New

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[380] For a short account of the drafting history of Resolutions 3201 (S-VI) and 3202 (S-VI), see "Report of the Ad Hoc committee of the sixth special session", U.N. General Assembly, sixth special session, Annexes, Agenda Item 7, at 13-37, U.N. Doc. A/9556 (1974).

[381] U.N. General Assembly, Official Records sixth special session, supp. 1 at 4, U.N. Doc. A/9559 (1974).

[382] Ibid.

International Economic Order. It further provided that "in order to safeguard these resources, each state is entitled to exercise effective control over them and their exploitation with means suitable to its own situation, including the right to nationalization or transfer of ownership to its nationals, this right being an expression of the full permanent sovereignty of the state".[383] Again section (h) of the same paragraph provided, as another principle underlying the New International Economic Order, for "the right of the developing countries and the peoples of territories under colonial and racial domination and foreign occupation to achieve their liberation and to regain effective control over their natural resources and economic activities".[384]

At the same session, the General Assembly adopted, in its Resolution 3202 (S-VI), a "Programme of Action on the Establishment of a New International Economic Order"[385] in which it extended its support for nationalization by developing countries. In particular, the legitimacy of the effective exercise of the right of states to full permanent sovereignty over their natural resources was affirmed in sections (a) and (b) of part I; section 1(b) of part VII; and sections (a) and (b) of part VIII of the Programme of Action. In section (a) part I of the Programme of Action, the General Assembly called for measures "to put an end to all forms of foreign occupation ... Colonial and neo-colonial and alien domination and exploitation through the exercise of permanent sovereignty over natural resources".[386] In section (b) of the same part dealing with raw materials, the Assembly urged that all efforts should be

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[383] Ibid.

[384] Ibid.

[385] Ibid. at 5-12.

[386] Ibid. at 5.

made to take measures for"the recovery, explitation, development, marketing and distribution of natural resources, particularly of developing countries, to serve their national interests, to promote collective self-reliance among them and to strengthen mutually beneficial international economic co-operation with a view to bringing about the accelerated development of developing countries".[387] Again in part VII of section (b), the Assembly urged developing countries "to protect their inalienable right to permanent sovereignty over their natural resources" as part of a collective effort of self-reliance and co-operation among themselves.[388] In part VIII dealing with international assistance in the exercise of permanent sovereignty of states over natural resources, the General Assembly further urged that all efforts should be made:

> "(a) to defeat attempts to prevent the free and effective exercise of the right of every country to full permanent sovereignty over its natural resources;
>
> (b) to ensure that competent agencies of the United Nations system meet requests for assistance from developing countries in connection with the operation of nationalized means of production".389

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[387] Ibid.

[388] Ibid. at 9.

[389] Ibid. The original text of section (a) submitted jointly by 94 delegations was more explicit in its reference to nationalization, in that the phrase used was: "to defeat attempts to counteract the positive effects of the nationalization of foreign property on the economy of the developing countries", see U.N. General Assembly, Official Records, sixth special session, Annexes, Agenda Item 7, at 17, U.N. Doc. A/9556 (1974).

It, therefore, becomes clear both from the Declaration and the Programme of Action that the General Assembly supported and legitimized resort to nationalization as a fundamental policy option underlying the New International Economic Order. It is important to note once again that the permissive norm regarding resort to nationalization applied specifically to underdeveloped countries. This stemmed from the fact that Resolutions 3201 (S-VI) and 3202 (S-VI) were conceived within the framework a general problem of raw materials and development as they related to underdeveloped countries. In considering the "study of the problems of raw materials and development" pursuant to the request of the General Assembly at the latter's 2210st plenary meeting on 11 April 1974, the Ad Hoc Committee of the Sixth Special Session of the Assembly dealt with problems of raw materials as they particularly affected underdeveloped countries. The basic documents examined in the course of its study included reports by the Secretary General dealing with the evolution of basic commodity prices since 1950, the significance and problems of basic commodities in world trade in 1970 and an analysis on the hypothetical impact of commodity price movements on world trade.[390] The thrust of all those documents revolved around the economic problems peculiar to underdeveloped countries as they manifested themselves in the terms of trade between primary products of underdeveloped countries and manufactured goods originating from developed countries. It was in the course of the deliberation of the Ad Hoc Committee on those documents that representatives of a group of ninety-four countries (mostly underdeveloped countries) submitted the draft proposals that later formed the Declaration and Programme of Action on the establishment of the New International Economic Order. Although both the draft texts and the final versions of Resolutions 3201 (S-VI) and 3202 (S-VI) imply the universal application of the promotive norm

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[390] Ibid.

by appearing to support resort to nationalization by "every country", the background documents and the overall thrust of the resolutions clearly show that the promotive norm was specifically attached to underdeveloped countries. In other words, although the "generality" of wording in sections (d) and (e) of paragraph (4) of the Declaration, tended to imply that "every country" could avail itself of the backing of the promotive norm implicit in Resolution 3201 (S-VI), the Declaration's support for resort to nationalization within the terms of both resolutions specifically applied to underdeveloped countries.

That the promotive norm applied particularly to underdeveloped countries can be seen from a closer observation of both the Declaration and the Programme of Action. In its preamble, for instance, the Declaration proclaimed the establishment of a New International Economic Order to "correct" the "inequalities" and "redress" the injustices suffered by the underdeveloped countries in the past. Moreover, the Declaration envisaged that the establishment of a New International Economic Order will "make it possible to eliminate the widening gap between the developed and the developing countries and ensure steadily accelerating economic and social development" particularly for the benefit of the peoples of the underdeveloped countries. The apparent "universalization" of U.N. support for "all" nationalization measures implied by sections (d) and (e) of paragraph (4) of the Declaration notwithstanding, the special concern shown by the U.N. for the underdeveloped members of the organization, and the peculiar character of the problems of natural resource use, control and ownership in underdeveloped countries were the principal justifications for confining the permissive norm to a defined category of states, and as such, the phrase "every country" in sections (d) and (e) of paragraph 4 of the Declaration should be understood in the sense of "every underdeveloped country". Again,

sections (g) and (h) of paragraph 4 further reinforced the centrality of the underdeveloped countries in the application of the promotive norm by recommending that the New International Economic Order should be founded on respect for the "right of the developing countries ... to struggle for their liberation and for the purpose of regaining effective control over their natural resources and economic activities" and upon respect for the principle of "extending ... assistance to developing countries, peoples and territories ... subjected to coercion, economic aggression or political pressure and neo-colonialism in all its forms and which have established or are endeavouring to establish effective control over their natural resources and economic activities that have been or are still under foreign control". Section (m) of paragraph 4 of the Declaration further underlined the need for the differential treatment of those countries by urging the provision of "preferential and non-reciprocal treatment for developing countries in all fields of international economic co-operation". Section (g) paragraph 4 drew special attention to "the need for developing countries to concentrate all their resources for the cause of development". Again, the centrality of the underdeveloped countries in the application of the promotive norm legitimizing resort to nationalization becomes manifest from the final text of the Programme of Action. That the New International Economic Order was in fact conceived as a direct response to the peculiar economic problems of the underdeveloped countries is fully borne by the following opening statement of the Programme of Action in its paragraph 1.

> "In view of the continuing severe economic imbalance in the relations between developed and developing countries, and in the context of the constant and continuing aggravation of the imbalance of the economies of the developing countries and the consequent need for the mitigation of their current economic difficulties

> urgent and effective measures need be taken by the international community to assist the developing countries...."391

In part I of the Programme of Action dealing with fundamental problems of raw materials and primary commodities in relation to trade and development, the General Assembly urged that all efforts should be made "to put an end to all forms of foreign occupation... colonial, neo-colonial and alien domination and exploitation through the exercise of permanent sovereignty over natural resources" and called upon underdeveloped countries "to take measures for the recovery, exploitation, development, marketing and distribution of natural resources [in order to safeguard and]serve their national interests, to promote collective self-reliance among them and to strengthen mutually beneficial international economic co-operation with a view to bringing about the accelerated development of developing countries". In part VII of the Programme of Action dealing with the promotion of co-operation among developing countries, the General Assembly, urged, "with a view to expanding co-operation at the regional, sub-regional and inter-regional levels", developing countries to take steps "to protect their inalienable right to permanent sovereignty over their natural resources". Lastly, in part VIII, dealing with international assistance in the exercise of permanent sovereignty over natural resources, the General Assembly called upon all members "to defeat attempts to prevent the free and effective exercise" by underdeveloped countries, of their right "to full and permanent sovereignty over [their] natural resources" and urged that all efforts should be made "to ensure that competent agencies of the United Nations system meet requests for assistance from developing countries in connection with the operation of nationalized means of production".

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391 Ibid. at 11-12.

The significance of the Declaration as well as the Programme of Action of the New International Economic Order still lies in the fact that their support for those nationalization measures carried out particularly by the underdeveloped countries were extended with the specific understanding that those acts of nationalization would serve as effective means for enhancing the economic development of the underdeveloped countries and for safeguarding their economic independence from alien (foreign) domination. In the preamble to the Declaration on the establishment of the New International Economic Order, for instance, the General Assembly proclaimed that the establishment of a New International Economic Order should, among other things, "ensure steadily accelerating economic and social development" in underdeveloped countries. In section (d) paragraph 4 of the Declaration, the right of the underdeveloped countries to introduce basic reforms in their economic structures including the strengthening of public ownership of the means of production through nationalization, was fully recognized for the purpose of ensuring their "own development". Again, the Programme of Action provided, in part I section 1 (b), that the taking of measures, by underdeveloped countries, aimed at "the recovery, exploitation, development, marketing and distribution of natural resources" (i.e. including nationalization measures) were supported "with a view to bringing about the accelerated development of developing countries".

As regards the objective of the economic independence of underdeveloped countries from alien domination both resolutions are equally clear. The Declaration on the establishment of the New International Economic Order, for instance, provided in paragraph 1 that although "the greatest and most significant achievement since the foundation of the United Nations has been the independence from colonial and alien domination of a large number of peoples and nations", the "remaining vestiges of alien

domination ... and neo-colonialism in all its forms continue to be the greatest obstacles to the full emancipation and progress of the developing countries". In section (h) paragraph 4 of the Declaration, the General Assembly asserted that the New International Economic Order should be founded on the full respect for the principle of "the right of the developing countries ... to achieve their liberation and to regain effective control over their natural resources and economic activities". Again in section (h) of the same paragraph the Assembly appreciated the need to extend "assistance to developing countries, peoples and territories which are under ... alien domination ... or are subjected to economic, political, or any other type of coercive measures to obtain from them the subordination of the exercise of their sovereign rights and to secure from them advantages of any kind, and to neo-colonialism in all its forms, and which have established or are endeavouring to establish effective control over their natural resources and economic activities that have been or are still under foreign control". The safeguarding of the economic independence of underdeveloped countries through nationalization was also affirmed in the Programme of Action. In section 1 (a) of part I, for instance, the effective exercise of permanent sovereignty over natural resources by such means as nationalization was envisaged as a sure way of ending "all forms of ... neo-colonial and alien domination and exploitation".

Thus, by giving support and legitimation specifically to those nationalization measures carried out particularly by the underdeveloped countries, both the Declaration and Programme of Action of the New International Economic Order were in effect according "preferencial and non-reciprocal" treatment to the underdeveloped countries by reason of their special status of "underdevelopment", and the underlying rationale for such differential treatment appears to be UNCTAD's recognition of

the propriety of applying the doctrine of redress for the purpose of rectifying the injustices of the past.

Charter of Economic Rights and Duties of States: General Assembly Resolution 3281 (XXIX) of 12 December 1974:

The exercise of the sovereign right to resort to nationalization again finds recognition in the Charter of the Economic Rights and Duties of States adopted by the General Assembly in its Resolution 3281 (XXIX) of 12 December 1974.[392] The pertinent section of the Charter that sheds light on the general problem of nationalization consists mainly of Chapter II, especially articles 1, 2, 7, 16, 17 and 32. Of particular importance to the question of the juridical basis for the act of "taking" (nationalizing), however, are Articles 1, 2(1), 2 (2c), 7 and 16. While some of those articles expressly referred to nationalization, others alluded to it indirectly either as a mode of the free "exercise of full permanent sovereignty"; or as an aspect of "the sovereign and inalienable right" of a state "to choose its economic system ... in accordance with the will of its people"; or as a manifestation of the "right and the responsibility" of a state "to choose its means and goals of development, fully to mobilize and use its resources, to implement progressive economic and social reforms"; or further still, as a means of ridding itself of "neo-colonialism and all forms of foreign... domination and the economic and social consequences thereof":

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[392] For the text of the Charter of Economic Rights and Duties of States see Appendix (A-15) of this paper. For an account on the drafting history of the Charter see, 29 U.N. General Assembly, Official Records, Annexes, Agenda item 48, U.N. Doc. A/9946 (1974); see also, Burns A. Weston, "The Charter of Economic Rights and Duties of States and deprivation of foreign-owned wealth", 75 A.J.I.L. 437 (1981).

Article 2, paragraph 2(c), for instance, expressly provides that each state has the right "to nationalize, expropriate or transfer ownership of foreign property".[393] Article 2, paragraph 1 provides that "every state has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities". From the drafting history of paragraphs 1 and 2 of Article 2 it becomes clear that the free exercise of "full sovereignty" within the terms of paragraph 1 includes, among other options open to a sovereign state, the right to resort to nationalization of foreign-operated enterprises engaged in the exploitation of natural resources.

The legitimacy of the exercise of the right to resort to nationalization is again implicitly recognized in Article 1 of Chapter II where it is provided that "every country has the sovereign and inalienable right to choose its economic system ... in accordance with the will of its people". The choice of "economic system" implies the possible restructuring of the relations between the private and the public sectors of the economy of a given country which may in turn call for the undertaking of nationalization measures in order to strengthen one sector as against the other. By empowering the exercise of free choice in adopting an economic system, Article 1, Chapter II of the Charter implicitly supported states to resort to nationalization of foreign-operated enterprises.

Similarly, Article 7 of Chapter II of the Charter provides that:

> "Every state has the primary responsibility to promote the economic, social and cultural

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[393] See Appendix (A-14) of this paper.

> development of its people. To this end, each state has the right and the responsibility to choose its means and goals of development, fully to mobilize and use its resources and to implement progressive economic and social reforms..."

In so far as nationalization is one of the effective means for carrying out the mobilization of domestic resources, and to the extent that domestic resources were regarded by the Charter as the principal sources for financing development, the implication is that nationalization was encouraged by the Charter regardless of whether it tended to discourage the inflow of foreign capital. The affirmation that "every state has the primary responsibility to promote the economic ... development of its peoples" in Article 7, therefore, amounted to an affirmation of the legitimacy of the right to resort to nationalization. That this interpretation is sound can be supported by reference to the text of Article 7 itself. According to Article 7, in an effort to fulfil its "primary responsibility" for development, each state has the right and the responsibility to choose "its means"; it has the right and responsibility "fully to mobilize and use its resources"; and it has the right and responsibility "to implement progressive economic and social reforms". The right to choose the appropriate "means" in order to fulfil a state's primary responsibility, undoubtedly includes resort to nationalization. The right and responsibility to mobilize and use resources "fully" may equally call for the adoption of nationalization measures. Again, the right and responsibility "to implement progressive economic ... reforms" could include the restructuring of the economy by means of nationalization of certain private sectors. In every respect, therefore, Article 7 of Chapter II of the Charter indirectly endorsed the legitimacy of resort to nationalization as a practical means of achieving economic development through self-reliance.

Similarly, Article 16 of Chapter II of the charter provided that "it is the right and duty of all states, individually and collectively, to eliminate ... neo-colonialism and all forms of foreign ... domination and the economic and social consequences thereof, as a prerequisite for development". Here, again, the implication of Article 16, Chapter II of the charter, is one of indirect support for nationalization in so far as resort to nationalization forms part a drive by the underdeveloped countries towards the elimination of "neo-colonialism and all forms of foreign ... domination and the economic and social consequences thereof".

That the Charter of Economic Rights and Duties of States assigned special importance to nationalization can also be seen from the drafting history of the Charter and the deliberations of the various U.N. bodies involved in the process of the Charter's conception and its final formulation.

As far back as May 1972, when the idea of drawing-up a Charter, as proposed by the Ethiopian delegation on behalf of the Group of 77, was considered and discussed in the plenary meeting of the third session of the United Nations Conference on Trade and Development, various delegations put forward the proposal that the Charter of Economic Rights and Duties of States, should among other things, recognize the sovereign right of states to dispose freely of their natural resources.

In particular, the Chilean and Egyptian delegations urged the inclusion of the right of every state to adopt the economic and social system it deemed appropriate as well as the right to dispose freely of its natural resources.[394] Of particular importance in this respect also, was the influential speech made by the President of Mexico - Mr. Luis Echeverria Alvarez, at the 92nd plenary meeting of the third session of UNCTAD - a speech which directly inspired UNCTAD Resolution 45 (III) of 18 May 1972 and the Charter of Economic Rights and Duties of States. In that speech, President Alvarez, after making a thorough survey of the international economic situation since the end of the Second World War, suggested that:

> "The international economy should be placed on a firm legal footing through [the] formulation of a Charter of Economic Rights and Duties of States. Such an instrument [may] contain some of the following principles: freedom to dispose of natural resources; the right of every nation to adopt the economic structure it considered most suitable and to treat private property as the public interest required..." [395]

From the President's speech, it was obvious that his call for "all countries" to "recognize and respect the right of other nations to dispose freely of their natural resources without any kind of external coercision" [396] clearly envisaged resort to nationalization as one of the possible ways of

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[394] Proceedings of the United Nations Conference on Trade and Development, third session, Santiago De Chile, Summary Records of Meetings, vol.1(a), part 2 at 124, 137 (1973).

[395] Ibid. at 186.

[396] Ibid. at 187.

determining the disposal of natural wealth and resources.

Again the question of including recognition of the sovereign right of state to dispose freely of their natural resources, and therefore by implication also of the right to resort to nationalization, in the Charter of Economic Rights and Duties of States was raised in the deliberations of the Working Group assigned to draft the Charter. At the first session of the Working Group held in Geneva between 12 and 23 February 1973, during which time the Working Group was considering the possible topics that should be covered by the Charter, several delegations, (for instance) proposed that the draft instrument should "explicitly affirm the right of the state to exercise sovereignty over its natural resources and wealth and its right freely to dispose thereof."[397] At the conclusion of the deliberations of the first session of the Working Group, a broad outline of what was later to be Chapter II of the Charter was formulated. In that outline, the Working Group included, among other things: the right of a state to choose the political, economic and social system it deemed appropriate;[398] the right of a state freely and fully to dispose of natural resources in the interest of the economic

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[397] Report of the Working Group on the Charter of Economic Rights and Duties of States on its first session, at 10, U.N. Doc. TD/B/AC.12/1 (1973).

[398] Ibid. at 17.

development and well-being of its people;[399] the affirmation that the primary responsibility for economic development rested with the country concerned and to that end, it should mobilize its internal resources to the full extent possible;[400] the recognition of the right of developing countries to eliminate the economic consequences of colonialism, neo-colonialism and all forms of foreign domination;[401] and finally, the affirmation of the right and duty of developing countries to take measures towards inplementing progressive social and economic reforms in the interest of their development and aiming at the effective mobilization of their internal resources.[402] While no explicit reference was made to nationalization in the draft outline, it was nevertheless implicit from each of the foregoing proposals that nationalization constituted one of the possible options for state action. With the exception of a French alternative proposal[403] to paragraph 4, Chapter II of the original draft outline which implied the restriction of nationalization in order to allow for the participation of foreign capital in the exploitation of natural resources, none of the proposals, counter-proposals and alternatives submitted in connection with the draft outline negated the possibility

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[399] Ibid. at 18.
[400] Ibid. at 19.
[401] Ibid. at 22
[402] Ibid.
[403] Ibid. at 19.

of resort to nationalization. The draft outline formulated during the first session of the Working Group was communicated to governments with a view to soliciting comments and suggestions so that the Working Group might acquire a broad basis for its deliberations on the draft Charter in its second session. As the records of the deliberations of the Working Group in its second session clearly reveal, neither the various alternative proposals and counter-proposals to the revised draft Charter nor the comments submitted by 31 member states of UNCTAD to the second session of the Working Group substantially derogated from the draft text earlier submitted.[404] Consequently, the basic propositions contained in the draft outline adopted during the first session of the Working Group were again retained in the conclusions of the second session of the Working Group in so far as those propositions indirectly supported the legitimacy of resort to nationalization as an exercise of sovereignty in the disposal of natural resources.

Again, in the third session of the Working Group no substantial modification was introduced to those propositions endorsed in the first and second sessions of the Working Group. Among the eight different alternative drafts to paragraph 2 of

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[404] Report of the Working Group on the Charter of Economic Rights and Duties of States on its second session, at 1-22, U.N. Doc. TD/B/AC.12/2 (1973).

Chapter II that were considered in the third session of the Working Group, only one of the proposals, implied the curtailment of resort to nationalization on the grounds that the exercise of the sovereign right to dispose of natural resources should be subject to "the requirements and interdependence of the economics of all states"[405] - a clause that was intended to immunize foreign capital from the insecurity of "takeover" by nationalization.

It was mainly during the fourth session of the Working Group that the draft Charter constituting several alternative texts was finalized for considerations by the Trade and Development Board and the General Assembly. In the final draft text considered by the Working Group one of the controversial provisions was paragraph 2 of Chapter II of the draft dealing with permanent sovereignty over natural resources. Among the four alternative proposals submitted only one of them indirectly implied the curtailment of the right to resort to nationalization on the ground that it would be prejudicial to "the requirements and interdependence of the economies of ALL states"[406] - an "interdependence" that presumably required the free play of foreign investment in the exploitation of natural resources.

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[405] Report of the Working Group on the Charter of Economic Rights and Duties of States on its third session, at 16, U.N. Doc. TD/B/AC.12/3 (1974).

[406] Report of the Working Group on the Charter of economic Rights and Duties of States on its fourth session, at 7-10, U.N. Doc. TD/B/AC. 12/4 (1974).

The latter proposition did not, however, muster any support in the Working Group. As the statements of the Mexican delegation, speaking on behalf of the Group of 77, and that of the Peruvian delegation, before the fourth session of the Working Group show, the developing countries were totally opposed to the idea of subordinating the right of permanent sovereignty over natural resources to the so-called "requirements and interdependence of the economies of ALL states".[407] The Mexican delegate's insistence that particular reference should be made, in the report of the Working Group, to indicate that the countries' members of the Group of 77 had sponsored, among others, that particular proposal (1st alternative to paragraph 2 of Chapter II) supporting the unrestricted right to exercise permanent sovereignty, was precisely intended to show that the group of 77 dissociated from the other alternative proposal which implied the curtailment of the right to resort to nationalization.[408] Again, the Peruvian delegation's objection to alternative 4 of paragraph 2 of Chapter II which injected "the requirements and <u>interdependence</u> of the economies of <u>all</u> states" (as a factor to be taken into account in the exercise of sovereignty) on the ground that it "did not represent a significant step forward in relation to the view points of the developing countries ... as expressed in various organs of

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[407] <u>Ibid.</u> at 21-23.

[408] <u>Ibid.</u> at 21-22.

the United Nations system and other organizations", reflected the strong support which resort to nationalization received from the majority of the underdeveloped countries represented in the fourth session of the Working Group.[409] Although no explicit reference was made to nationalization as such in the deliberations of the thirteenth and fourteenth session of the Trade and Development Board, the latter's acceptance of most of the provisions of the Charter (at least those in regard to which no conflicting proposals were submitted), as well as the statements of full endorsement of the Charter expressed before the fourteenth session of the Trade and Development Board by the representatives of such U.N. specialized bodies as the International Labour Organization and the Executive Board of UNESCO, establish a strong consensus in favour of the international recognition of the right to resort to nationalization.[410] Decision 110 (XIV) of the Trade and Development Board must, therefore, be seen as the culminating point of that consensus.[411]

On the basis of the reports of the Working Group and the Trade and Development Board, the Second Committee of the General Assembly tackled the final formulation of the Charter. In the course of its deliberation the representative of Mexico

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[409] Ibid. at 23.

[410] Report of the Trade and Development Board on the first part of the fourteenth session, at 50, U.N. Doc. TD/B/528 (1974).

[411] Ibid. at 21.

submitted a draft text on behalf of ninety-two delegations. Article 1, Chapter II of the draft text which affirmed that "every state has the sovereign and inalienable right to choose its economic system as well as its political, social and cultural systems in accordance with the will of its peoples" raised virtually no controversy in the Second Committee. No amendment or revision was proposed in respect to it and it was finally adopted by a unanimous vote of 131.[412] One of the most controversial provisions of the draft text, on the other hand, was Article 2 of Chapter II of the Charter. The first paragraph of Article 2 of the draft text provided that "every state has and shall freely exercise full permanent sovereignty, including possession, use and disposal over all its wealth, natural resources and economic activities."[413] In the course of the deliberations of the Second Committee, the delegations from Australia, Belgium, Canada, Denmark, France, Germany (Federal Republic of), Greece, Ireland, Italy, Japan, Luxembourg, the Netherlands, the United Kingdom of Great Britain and Northern Ireland and the United States of America proposed the deletion of the first paragraph of Article 2, Chapter II and its substitution by the following paragraph.[414]

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[412] 29 U.N. General Assembly, Official Records, Annexes, Agenda Item 48, at 24, U.N. Doc. A/9946 (1974).

[413] Ibid. at 6.

[414] Ibid. at 15.

> "Every state has permanent sovereignty over its natural wealth and resources and has the inalienable right fully and freely to dispose of them".415

It is important to note that, while the original draft text went beyond the more recognition that every state "has permanent sovereignty" over its natural wealth and resources and encouraged states to go ahead and freely exercise their sovereignty, the fourteen-power amendment simply confined itself to the mere recognition that every state "has permanent sovereignty" over "its natural wealth and resources" and "the inalienable right" fully and freely to dispose of them. As far as U.N. support for resort to nationalization is concerned, the distinction between the two texts was indeed significant. As we tried to argue in connection with the evolution of the concept of permanent sovereignty over natural resources, the significance of the U.N. pronouncements on the question of sovereignty over natural resources lies not so much in that they enunciate or reiterate that sovereign states have this or that right in the abstract, as in the fact that they urge and support the exercise of those rights already implicit in sovereignty. If the U.N. pronouncements were limited to the mere restatement of those already recognized attributes of sovereignty, they would not only be uncalled for but would also be superfluous. The significance of those pronouncements, therefore, consists in the fact that they deal not with

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415 Ibid. at 16.

the restatement of the right as such, but rather with its exercise. The distinction between the two texts must, therefore, be seen in that light. In proposing the deletion of the phrase authorizing the exercise of sovereignty and in merely restating the right in the abstract, the proponents of the amendment to the original text totally watered down the essence of the original draft text. In fact, the amendment would have added nothing new which any underdeveloped country could not enjoy by virtue of its sheer sovereignty alone. In any case, the fourteen-power amendment was later rejected[416] by 87 votes to 19 with 11 abstentions and the full text of the original draft was retained in the final version of the Charter without any alterations. The adoption of the original text of the draft by the overwhelming majority of the delegations in the Second Committee, therefore, signifies that the free "exercise of full sovereignty" within the terms of Article 2, paragraph 1 of the Charter included the exercise of the right to resort to nationalization.

More explicit as regards the exercise of the right to nationalization, however, is Article 2, paragraph 2(c) of the draft text. According to that provision, each state was authorized, if it so wished, "to nationalize ... or transfer ownership of foreign property". In the course of the deliberations of the Second Committee, the delegations from

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[416] Ibid. at 22.

the fourteen countries mentioned earlier, submitted an amendment to the text of Article 2, paragraph 2(c).[417] Although the amendment introduced various new elements to the original text in the sense that it qualified the exercise of the right to resort to nationalization (a subject to which we shall come back later), it did not basically alter the original text's support for nationalization measures by underdeveloped countries. In the meantime, the Mexican representative submitted a revised text to the original draft taking into account the fourteen-power amendment.[418] As far as U.N. support for resort to nationalization is concerned, the revised text introduced virtually no change on the original text. Finally, with the rejection[419] of the fourteen-power amendment by 87 votes to 19 with 11 abstentions and the adoption[420] of the revised text by 104 to 16 with 6 abstentions, the international legitimation of resort to nationalization was clearly affirmed in Chapter II, Article 2, paragraph 2(c) of the Charter.

The other provision in the draft text that had indirect bearing on the question of nationalization is Article 7, Chapter II of the Charter. Article 7 provided that:

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[417] Ibid. at 16.

[418] Ibid. at 19.

[419] Ibid. at 22.

[420] Ibid. at 24.

> "Every state has the primary responsibility to promote the economic, social and cultural development of its people. To this end, each state has the right and the responsibility to choose its means and goals of development, fully to mobilize and use its resources, [and] to implement progressive economic and social reforms..." 421

As we tried to argue earlier, Article 7 indirectly supported nationalization since the latter is almost always instrumental, as a political and administrative act, for the realization of self-reliance in the promotion of economic development and as such, represents an effective "means" by way of which "progressive economic and social reforms" are implemented for the purpose of the full mobilization and use of a country's resources. In the deliberation of the Second Committee, virtually no objection was raised against Article 7 of Chapter II and it was finally adopted unanimously by 129 votes.[422]

One other provision in the draft text that has direct bearing on the exercise of the right to resort to nationalization is Article 16 of Chapter II. The draft text provided that:

> "It is the right and duty of all states, individually and collectively, to eliminate ... neo-colonialism and all forms of foreign ... domination, and the economic and social consequences thereof, as a prerequisite for development." 423

In the course of the deliberations of the Second Committee, the delegations from Belgium, Canada, Denmark, France, Germany

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421 Ibid. at 7-8.

422 Ibid. at 25.

423 Ibid. at 10.

(Federal Republic of), Italy, Ireland, Japan, Luxembourg, the Netherlands, the United Kingdom and the United States proposed the deletion of Article 16 of the draft text.[424] The Second Committee, however, rejected the proposal by an overwhelming majority of 98 votes to 17 with 8 abstentions[425] and the draft text was retained with no alterations and became the final version of Article 16, Chapter II of the Charter. As far as U.N. support for resort to nationalization is concerned, the implication of Article 16, Chapter II of the Charter is crystal clear. The elimination of neo-colonialism which is the economic variant of colonialism and "all forms of foreign domination" as well as "the economic and social consequences thereof" could be achieved by, among others, the carrying out of nationalization of foreign-operated enterprises. The extensive carrying out of nationalization measures in fact forms an integral part of the drive to eliminate neo-colonialism since the victims of neo-colonialism are almost exclusively Third World countries, and it is precisely by those countries that the need to resort to nationalization of foreign-operated enterprises is strongly felt. In supporting the drive to eliminate neo-colonialism, the international community is, therefore, implicitly supporting resort to nationalization by underdeveloped countries.

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[424] Ibid. at 18.

[425] Ibid. at 23.

At this juncture, then, it is important to underline that Articles 1, 2 paragraph (1) and (2c), 7 and 16 of Chapter II of the Charter support and legitimize resort to nationalization particularly in respect to underdeveloped countries. In other words, the subjects of the right the exercise of which form the object of concern for the international community, and which can avail themselves of the benefits of the consensual promotive norm emanating from the Charter are, specifically, underdeveloped countries. On the face of the provisions of Article 1, 2 paragraphs 1 and 2(c), 7 and 16 it may appear that the Charter extended "universal" support to nationalization measures carried out by "all" states without distinction. Nearly all the provisions used the phrase "every state" suggesting that the Charter supported all nationalization measures irrespective of the state involved. As we tried to argue elsewhere in this paper, the generality of the wording of the Charter is a reflection of a typical drafting style of U.N. resolutions dealing with similar subject matters wherein the "universality" of the Organization is usually and unconsciously transfigured, through a loose linguistic medium, in the apparent "universalization" of the norms which are otherwise intended to benefit only a certain category of states. Notwithstanding the apparent generality of application implied by the loose reference to "every state" or "all states" in Article 1, 2 paragraph 1 and 2(c), 7 and 16, of Chapter II of the Charter, however, the drafting

history of the Charter and the general context under which it emerged fully reveal that the promotive norm legitimizing resort to nationalization applied specifically and distinctly to underdeveloped countries.

In order to fully grasp the centrality of the interest of underdeveloped countries in the Charter and consequently, to ascertain the precise scope of application of the promotive norm emanating from it, it may be necessary to go into the historical conditions that led to the formulation of the Charter itself. As we tried to point out in another connection, the idea of drawing-up a Charter of the Economic Rights and Duties of States was raised, for the first time, by President Luis Echeverria Alvarez of Mexico in his address to the third session of UNCTAD on 19 April 1972. In that statement, which immediately led the Group of 77 to propose the draft that later became UNCTAD Resolution 45 (III) (initiating the mandate to prepare the Charter) the President succintly put forward the factors that necessitated the drawing up of a charter. Approaching the economic problems peculiar to underdeveloped countries from a broader perspective and contrasting "the high hopes with which UNCTAD had been set up" as against the results achieved by it, the President had the following to say:

> "on the occasion of the third session of the United Nations Conference on Trade and Development, it had to be admitted that most of the initial aspirations had not been truly satisfied. The principle of joint responsibility had not

> been respected, the adoption of agreements had been deferred and the period had ended with the introduction of protectionist measures. Furthermore, the terms of trade had deteriorated, surpluses had been launched on world markets, the transfer of financial resources had been reduced, and the foreign-debt burden of the developing countries had become almost unbearable. Colonial attitudes persisted in international relations; the centres of world influence imposed conditions for trade on other countries and opposed essential structural transformations or interfered in their political affairs. For a great number of countries the decade had been one of increasing marginality. A further factor that had to be taken into account was that the human race would double in numbers in the course of a single generation. A reduction in the rate of population growth was therefore desirable, but the primary task facing the Third World was to give a vigorous impulse to development." 426

The President further noted that "without international co-operation it would be most difficult for the developing countries to achieve sufficiently rapid economic growth to cover increased social demands."[427] The President asserted that so far, "the expansion in world trade had chiefly favoured the more prosperous nations and brought only minimum benefits to the developing countries" and in his opinion, "recent protectionist trends and the monetary crisis confirmed that."[428] According to the Mexican President, the trend so far had been the continuous

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[426] Proceedings of the United Nations Conference and Trade and Development, third session, Santiago De Chile, Summaries of Statements by heads of delegations, vol. 1A. part 1 at 184 (1973).

[427] Ibid.

[428] Ibid.

concentration of "wealth where it already existed in abundance."[429] In response to the existing state of affairs, the Mexican President urged that "a new era of international economic co-operation must come into being"[430] and it was precisely to give that new order "a firm legal footing" that he proposed the formulation of a Charter of Economic Rights and Duties of States.[431] According to the Mexican President:

> "Such an instrument might contain some of the following principles: freedom to dispose of natural resources; the right of every nation to adopt the economic structure it considered most suitable and to treat private property as the public interest required; renunciation of the use of economic pressures; subjection of foreign capital to domestic laws; prohibition of inteference by supra-national corporations in the internal affairs of states; abolition of trade practices that discriminated against the exports of non-industrial nations; economic advantages proportionate to levels of development, treaties guaranteeing stable and fair prices for basic products; transfer of technology; and greater economic resources for long-term untied aid." 432

Thus, central to the Mexican president's proposal for a Charter of Economic Rights and Duties of States was not only the need to respond to the economic problems peculiar to underdeveloped countries but also to make the solution secure by way of a legal document. All the principles

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[429] Ibid.

[430] Ibid.

[431] Ibid. at 186.

[432] Ibid.

proposed for inclusion in the Charter touched, in one way or the other, on major problems peculiar to underdeveloped countries, and they were specifically advanced to resolve those problems. The Mexican President deemed it necessary, for instance, to urge the international community to recognize the freedom of states to dispose freely their natural resources and to adopt the economic structure in the way they deemed fit, because the exercise of that freedom particularly by underdeveloped countries had in the past been met with outside interference and diverse forms of coercion. It is, therefore, the centrality of the interest of the underdeveloped countries as conceived by the President of Mexico that later found direct reflection in the Charter's formulation throughout the deliberations of the Working Group on the Charter, the Trade and Development Board, the Second Committee of the General Assembly and the Assembly's plenary meetings.

Aside from the immediate influence of the statement of the Mexican President in the conception of the Charter at the third session of UNCTAD, the centrality of the interest of underdeveloped countries in the Charter that led to the adoption of a promotive norm encouraging underdeveloped countries to resort to nationalization, stemmed from the fact that the Charter had its roots in those earlier works of UNCTAD which were concerned with the problem of natural resource use and control in underdeveloped countries. As we

tried to point out earlier in connection with the work of UNCTAD in its first session, the very idea of convening a United Nations Conference on Trade and Development was conceived with the object of seeking appropriate solution to the urgent Trade and Development problems peculiar to under-developed countries.[433] Both General Principle Three and the recommendation on principles governing international trade relations and trade policies conducive to development adopted by the first session of UNCTAD came as a direct response to resolve some of the urgent Trade and Development problems peculiar to under-developed countries. Similarly, Resolution 22 (II) on "steps to achieve a greater measure of agreement on principles governing international trade relations and trade policies conducive for development" and Resolution 28 (II) on "improving the mobilization of internal resources" adopted by UNCTAD at its second session in March 1968 had, as their object of concern, the Trade and Development problems peculiar to underdeveloped countries. Aside from laying the basis for the formulation of what was later to be the Charter of Economic Rights and Duties of States, Resolutions 22 (II) and 28 (II) implicitly endorsed the Charter of Algiers adopted at the Ministerial meeting of the Group of 77 on October 24 1967, and in so doing, they served as a significant bridge for the subsequent incorporation of

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[433] Proceedings of the United Nations Conference on Trade and Development, first session, Geneva, Final Act and Report, vol. 1 at 4 (1964).

some of the major principles contained in that document into what was later to be the Charter of Economic Rights and Duties of States. One such principle which originated from the Charter of Algiers and which was subsequently incorporated into the preambular section as well as Article 7, Chapter II of the Charter of Economic Rights and Duties of States was the doctrine of the "self-reliance" of underdeveloped countries. The centrality of the economic interest of underdeveloped countries in the Charter of Algiers itself derived from the fact that the Charter represented a synthesis of the general consensus reached by the underdeveloped countries of Africa, Asia and Latin America in the Declaration of the Seventy-seven developing countries adopted at the conclusion of the first session of UNCTAD back in 1964, in the African Declaration of Algiers, the Bangkok Declaration of Asian Countries and the Charter of Tequendama of Latin American countries. The fact that the economic interest of underdeveloped countries constituted the central theme of the Charter of Algiers, thus, partly accounts for the adoption, in the Charter of Economic Rights and Duties of States, of norms beneficial particularly to the underdeveloped countries, such as the "promotive" norm legitimizing nationalization measures carried out by them.

Again, the centrality of the economic interest of underdeveloped countries in the Charter of Economic Rights and Duties of States stemmed from the influence of principles

II and XI of Resolution 46 (III) of UNCTAD which dealt with the problems of resource use, control and ownership peculiar to the underdeveloped countries and the solutions to those problems. The centrality of the economic interest of underdeveloped countries in Resolution 46 (III) stemmed from the fact that the resolution was largely influenced by the Declaration of Principles and the Action Programme of Lima adopted in November 1971 at the Second Ministerial meeting of the Group of 77 where representatives of ninety-six developing countries deliberated on a common programme aimed at "harmonizing their positions with a view to the third session of the United Nations Conference on Trade and Development".[434] The Declaration of Principles and the Action Programme of Lima, which were themselves a synthesis of the general consensus reached at the Bangkok Declaration of the Ministerial Meeting of the Asian Group, the Addis Ababa Declaration of the Ministerial Meeting of the African Group and the Lima consensus of the Ministerial Meeting of the Latin American Group,[435] reaffirmed some of the principles enunciated by the Charter of Algiers. Among those principles which were advanced in response to the development problems peculiar to

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[434] Proceedings of the United Nations Conference on Trade and Development, third session, Santiago De Chile, Report and Annexes, vol. 1 at 373 (1973).

[435] Ibid.

underdeveloped countries was the reaffirmation in those documents that "the primary responsibility for the economic development of the developing countries rests upon themselves and to that end they are determined to make all efforts to resolve their problems, to carry out the necessary reforms in their economic and social structures, to mobilize fully their basic resources and ensure participation of their peoples in the process and the benefits of development".[436] It is, therefore, important to bear in mind that the principle enunciated in Article 7, Chapter II of the Charter of Economic Rights and Duties of States, being a direct reproduction of the "self-reliance" clause in the Declaration of Lima, is equally stamped with the Declaration's central concern with the economic problems of underdeveloped countries.

The centrality of the economic problem of the underdeveloped countries in the Charter of the Economic Rights and Duties of States again stemmed from the fact that the very idea of drawing up the Charter issued out of UNCTAD Resolution 45 (III) as the culminating point in UNCTAD's effort to achieve a "greater measure of agreement on principles governing international trade relations and trade policies" conducive to the economic development of underdeveloped countries. The deliberations of the third session of the United Nations Conference on Trade and Development further bear witness to the fact that the drawing up of the Charter

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[436] Ibid. at 376.

was closely linked to the resolving of the economic problems peculiar to the underdeveloped countries. Upon submitting a draft resolution proposing the drawing up of a Charter of Economic Rights and Duties of States, the representatives of the developing countries sponsoring the draft pointed out that "the proposal had been inspired by the address of the President of Mexico at the 92nd plenary meeting of the Conference".[437] According to them:

> "The principles adopted at the first session of the Conference governing international trade relations and trade policies conducive to development were no longer sufficient to protect weaker countries against foreign economic power. The principles had to be converted into internationally legal instruments in order to make it possible for the governments of the countries concerned to invoke their rights".438

The statements made by the delegations from Chile, Mexico, Egypt, the U.S.S.R., and Ecuador during the third session of UNCTAD again confirm that the drawing up of the Charter was conceived primarily in response to the specific needs of the underdeveloped countries.[439] Again, in the deliberations of the working group entrusted with the task of drafting the Charter, the centrality of the development

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[437] Ibid. at 35.

[438] Ibid.

[439] Proceedings of the United Nations Conference on Trade and Development, third session, Santiago De Chile, Summary Records of Plenary Meetings, vol. 1A part 2 at 123-125; 137-138, 179.

problems of underdeveloped countries was fully recognized. In his opening speech to the Working Group, the Chairman from Mexico, for instance, underlined that the Charter would have to take into account the unequal distribution of economic power in the modern world and should accordingly respond to the need to "protect the economically weak and most vulnerable states".[440] With that in mind, most of the provisions of the draft text formulated during the first session of the Working Group made express reference to developing countries as the subjects of the rights the free exercise of which was to be guaranteed by the Charter. Of particular importance in that respect is especially the wording of those paragraphs in the first draft text which later became Articles 7 and 16 of Chapter II of the final version of the Charter. While the final text of Article 7, for instance, loosely referred to "every state", the equivalent paragraph in the first draft which was proposed by Chile and Hungary referred expressly to "the right ... of developing countries".[441] Again while Article 16, Chapter II of the final version of the Charter referred to "the right... of all states", the equivalent paragraph in the first draft proposed by Chile, Iraq, Poland and Syria specifically referred to "the right of developing countries".[442] It was only later, and apparently out of merely formal considerations, that the initial specific reference to

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[440] U.N. Doc. TD/B/AC.12/1, Supra at 4.

[441] Ibid. at 22.

[442] Ibid.

the underdeveloped countries as the sole subjects of the right contemplated by the Charter was "universalized" by the use of the phrases: "every state" or "all states". Those formal changes in wording notwithstanding, the centrality of the economic interest of the underdeveloped countries in the draft Charter was again stressed in the comments and statements submitted by 31 member states during the deliberation of second session of the working group entrusted with the drafting of the Charter.

Thus, to the extent that the economic problems peculiar to the underdeveloped countries formed the central object of concern of the Charter of Economic Rights and Duties of States, the support and encouragement given, under Articles 1, 2, 7 and 16 of the Charter, particularly to the underdeveloped countries to resort to nationalization in order to enhance their economic development and safeguard their independence from alien economic domination amounts, in effect, to the according of differential treatment by the charter to the underdeveloped countries by reason of their special status as "underdeveloped" countries.

The underlying rationale for the according of differential treatment to the underdeveloped countries in particular stems from the Charter's express recognition of the doctrine of redress as a basis for rectifying the injustices of the past suffered by the underdeveloped countries. By expressly providing, in paragraph (i), Chapter I, that the "remedying of injustices which have been brought about by force and which deprive a nation of the natural means necessary for its normal development", the Charter of Economic Rights and Duties in fact elevated the doctrine of redress from a hitherto vague rationale for according differential treatment in favour of underdeveloped countries to a fundamental principle governing "economic as well as political relations ... among states" in the context of the new international economic order (intro-

ductory paragraph to Chapter I of the Charter). As we shall try to show in subsequent Chapters, the according of differential treatment to underdeveloped countries by supporting and legitimizing nationalization measures carried out particularly by them, on the basis of the justification of the doctrine of redress, has a number of implications in modifying not only the traditional concept of "sovereign equality" on which the rights and obligations of states in the area of the law of "taking" of property of aliens rested under traditional international law, but also those traditional rules governing matters of "prior-restraint" to "taking" as well as compensation for "taking".

In so far as the act of "taking" alone is concerned, however, the significance of the international consensus that culminated in the adoption of the Declaration and the Action programme on the New International Economic Order as well as the Charter on Economic Rights and Duties lies in the fact that it serves as a supportive (promotive) basis for underdeveloped countries to resort to nationalization.

2. U.N. Norms of Human Rights as a Basis for Nationalization

The exercise of the right to resort to nationalization by underdeveloped countries again received full support and legitimation from those U.N. norms that evolved in connection with the advancement of human rights.

The works of the U.N. in the field of the advancement of human rights and the norms issuing out of them are based on the mandate of the Charter itself. In its preamble, the U.N. Charter, for instance, re-affirmed the international community's "faith in fundamental human rights, in the dignity and worth of the human person, and in the equal rights of ... nations, large and small".[443] The organization set out "to

promote social progress and better standards of life in larger freedom", and resolved to employ international machinery for the promotion of the economic and social advancement of all peoples". Again, under Article 1, paragraph (3) of the Charter, the organiza- sought "to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion" and pledged to act as "a centre for harmonizing the actions of nations in the attainment of these common aims". Pursuant to Article 13, paragraph 1(b), the General Assembly was empowered by the Charter to initiate studies and make recommendations for the purpose of "promoting international co-operation in the ... social ... field and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion". Again, under Chapter IX, Article 55, the organization set itself the task of promoting "conditions of economic and social progress and development"; "solutions of international economic, social, health and related problems"; and "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion", for the fulfilment of which all members pledged themselves to take joint and separate action in co-operation with the organization pursuant to Article 56. Under Chapter X, Article 62 of the Charter, the Economic and Social council was entrusted with the task of initiating "studies and reports with respect to international economic, social, ... and related matters"; of making "recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for

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[443] The reference to the Charter provisions in this section is from, L.B. Sohn, Basic Documents of the United Nations (1968).

all"; and preparing "draft conventions for submission to the General Assembly, with respect to matters falling within its competence". Again, Article 98 of the Charter entrusted to the Secretary General, the responsibility of carrying out support functions to the General Assembly and the Economic and Social Council to facilitate the fulfilment of the tasks assigned to them under Articles 13 and 62 respectively. It was, therefore, in line with the foregoing Charter provisions that the United Nations Organization formulated several human right norms over the last three decades, the most important of which being those contained in the two international covenants adopted by the General Assembly in December 1966, namely, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.

In the following discussion, we shall be concerned, in the main, with two distinct collective human rights of "peoples" of underdeveloped countries, namely (i) the right of self-determination as recognized in the Charter of the U.N. (particularly in Articles 1(2) and 55) as well as in Article 1 of both the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, and (ii) the Right of Peoples to enjoy and utilize fully and freely their natural wealth and resources as recognized by Article 25 of the international covenant on economic, social and cultural rights and Article 47 of the International covenant on civil and political rights. In the discussion which follows, we will try to show that the enunciation, by the U.N., of those two distinct collective human rights furnishes a further supportive basis for "peoples" of underdeveloped countries to resort to the nationalization of property of aliens as an aspect of the exercise of their human right.