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A NATIONALIZATION COMPENSATION FRAMEWORK IN THE
NEW INTERNATIONAL ECONOMIC ORDER

Emily Carasco

I. CERDS AND STATE RESPONSIBILITY
A. Background to Charter of Economic Rights and Duties of States

The proposition that a State has a responsibility when it takes over an alien's property to compensate the alien according to international standards has almost always been a controversial one. This is due largely to the fact that the two major groups, the capital exporting states (CES) and the capital importing states (CIS) have consistently maintained different positions as to what, if any, international law existed in this area.

Today, when the property taken over is related to natural resources, the taking is usually part of an attempt to reorganize and restructure a developing State's economy. If the party deprived of the property is a powerful foreign economic institution whose interests do not necessarily coincide with the best interests of the host State, the matter is no longer one simply concerned with property deprivation. It becomes inextricably tied to issues of economic development in the taking-over State. In 1974, in recognition of this problem, an overwhelming majority of United Nations member States adopted the Charter of Economic Rights and Duties of States (CERDS) as part of the Declaration on a New International Economic Order. Art. 2 of CERDS asserted, in part, a State's full permanent sovereignty over its natural resources and its right to regulate foreign investment within its territory and to ensure compliance with its social and economic policies.

In direct contradiction to traditional international law regarding state responsibility, Art. 2 of CERDS further declared that should a State exercise its sovereign right to nationalize the property of foreign owners, appropriate compensation should be paid by the nationalizing State and that settlement of any controversy arising from compensation of such property should be limited to the domestic law of the nationalizing State. Although the adoption of these CERDS provisions was considered dramatic and although the reaction to them was strong and vociferous, dissatisfaction with the traditional international rules of state responsibility was discernible soon after World War II.

The contents of Art. 2 of CERDS indicate that the issues pertaining to nationalization of natural resources industries are inextricably tied in with the economic development of the nationalizing State. The adoption of Art. 2 raises certain questions. Is Art. 2 to be given the same weight as a treaty provision; i.e., is it new law on the issues in question? What weight, if any, is to be given to the traditional rules of state responsibility? There is no general agreement on what exactly constitutes sources of international law, still less on how and when old
law "dies." The extreme CES position is that the traditional rules of state responsibility still stand and that CERDS has in no way changed the situation. The extreme CIS position is that CERDS has abolished the traditional rules of state responsibility and has provided new law on the subject.

B. Legal Significance of CERDS

CERDS is a General Assembly resolution and as such, is regarded by most scholars and the International Court of Justice as not legally binding upon member States, but not without legal significance. It should be noted too, that when dealing with vital issues that demanded immediate action, the General Assembly has been known to act beyond the capacities its creators anticipated. The role of the General Assembly has taken on increasing importance in the United Nations over the years.

The substance of the debates preceding the adoption of CERDS and the fact that CERDS was part of the Declaration of the New International Economic Order which was intended "to correct inequalities and redress existing injustices, make it possible to eliminate the widening gap between the developed and the developing countries and ensure steadily accelerating economic and social development and peace and justice ..." leads to the conclusion that to the CIS at least, CERDS was dealing with vital issues. The Declaration was adopted by the General Assembly without a vote. Paragraph 4 of the Declaration stated in part:

In order to safeguard these natural 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.

The Declaration thus adds weight to the legal significance of CERDS.

CERDS provisions on permanent sovereignty over natural resources and nationalization not only followed the Declaration adopted without a vote but was itself adopted by a large majority of General Assembly votes. This, in addition to the fact that CERDS followed a series of General Assembly resolutions on the same subject, makes it difficult and shortsighted to dismiss it as a mere General Assembly resolution with little or no significance.

Article 38 of the Statute of the International Court of Justice makes no mention of General Assembly resolutions as a source of international law. At the time of the drafting of Article 38, it could not have been anticipated that the General Assembly would some day be almost fully representative of the international community or that it
would be used as a forum for expressing views on highly significant legal issues. A prominent United States international lawyer and frequent representative at the United Nations has said of the General Assembly: "Only the General Assembly comes near to that ideal of a representative body of the entire globe. The General Assembly does have the capability for the true expression of that perfect consensus or nearly perfect consensus of all mankind."19

One of the arguments used to diminish the legal value of CERDS, is the fact that six "significant" States voted against the resolution and ten abstained.20 As the six States are wealthy capital exporting states who are likely to be most affected by a change in the traditional rules of state responsibility, this argument cannot be lightly dismissed. On the other hand, it is unlikely that the States that stood to gain the most from the traditional rules would willingly go along with a drastic change, and thus it would be unrealistic to expect the CIS to wait until such time as they could achieve complete consensus for change. As it was, a vote of 120 in favour of CERDS out of a total of 136 is a substantial and "significant" majority.21 A point to ponder is: at what point in time do a series of General Assembly resolutions adopted by a large majority reflect "consensus"? How much significance should be given to the consistently negative vote of a small minority especially when that minority stands to benefit from the status quo? The sponsors of CERDS, the group of 77, had originally intended that the Charter be a legally binding instrument. Representatives of several western countries expressed doubts both as to the feasibility and advisability of this.22 Eventually, in the interests of achieving consensus, the representative of Mexico, "in apparent recognition of the fact that the Charter was no longer intended necessarily to be a legally binding instrument," introduced revisions whereby the words "to codify and develop rules for" in the fourth preambular paragraph were replaced by the words "to promote."23 It would appear then, that there was both intention and awareness of the non-binding nature of the Charter. Perhaps the strongest argument against the view that CERDS is binding on its own and has therefore negated the traditional rules of state responsibility is that the subject is important enough that any desired change must be brought about in a very clear and explicit manner. For CERDS to be binding there should be a greater consensus than was achieved as to 1) the intention to be bound by the document bringing about the change and 2) the acceptance of the change by the "significant" States most likely to be affected by the change.

The discussion above leads to the conclusion that CERDS on its own is not binding on Member States of the United Nations nor has it abolished in one sweep the application of the traditional state responsibility rules for all States. CERDS must, however, be given considerable weight as a legal document expressing the views of a major part of the international community. The sections which were specifically voted against by certain States cannot be held binding upon them. For those States who strongly supported Art. 2, CERDS on its own provides, at the very least, evidence of an intention to treat issues of nationalization in the manner described in Art. 2. It is in fact quite
possible that some of these States may "express the position in their municipal courts and possibly elsewhere that the Charter actually reflects a new standard of international law."24

As between a State that voted against Art. 2 and one that voted in favour of it, the situation is more complex. In a nationalization dispute involving two such States, to merely state that Art. 2 is not applicable and only expresses a hope of legal norms for the future, is to dismiss too lightly the hard earned fruits of CERDS. A recent arbitral award did just that. Discussing the principles expressed in Art. 2 of CERDS, the sole arbitrator in the oil nationalization dispute, Texaco Overseas Petroleum Company/ California Asiatic Oil Company and the Government of the Libyan Arab Republic (hereinafter referred to as Texaco), said that the principles expressed in CERDS, have "nothing more than a de lege ferenda value only in the eyes of the States which have adopted them, [and] as far as the others are concerned, the rejection of these same principles implies that they consider them as being contra legem."25

If Art. 2 of CERDS can be said to have no more than de lege ferenda value, can it be said that as between a CIS that voted in favour of Art. 2 and a CES that voted against it, the traditional rules of state responsibility still apply? If provisions of Art. 2 cannot be said to be binding upon such a CES, can it be said to be binding upon the equally "significant" CIS that rejected these rules by voting in favour of Art. 2? The fact remains that CERDS was not just one solitary act of rebellion against the traditional rules. It was rather, the final act of rejection in a long drawn resistance to the application of the traditional rules and therefore it is questionable whether or not the latter can any longer be applied to the CIS who voted in favour of CERDS.26 There is adequate evidence of the fact that the traditional rules of state responsibility had never been acceptable to the CIS. Some important judicial decisions have taken note of the reluctance and sometimes refusal of CIS to hold themselves bound by the traditional rules of state responsibility.27

A further indication of the uncertain state of the law in the area (and an indirect acknowledgment of CES awareness of the non-universality of state responsibility rules) is the establishment of Friendship, Commerce and Navigation treaties between States. These bilateral treaties sought, among other things, to protect investments and generally provided for fair and equitable mutual treatment of nationals. Some treaties had specific provisions regarding nationalization and the payment of prompt, adequate and effective compensation in the event this should take place.28 This attempt to promote the use of the traditional rules of state responsibility through bilateral dealings with states has not proved very successful between CES and CIS. Very few CIS are party to such treaties.29

The United States Investment Guaranty Program, which is now under the Overseas Private Investment Corporation (OPIC), insures American investors going abroad against risks including expropriation. While the primary goal of the program was to spur American investment abroad, the
very existence of such an insurance coverage is also an indication that American investors (and the U.S. Government) are aware of the fact that belief in the prompt, adequate and effective compensation rules is not universal.

Not the least significant of the factors indicating the CIS attitude towards the rules of state responsibility is the undeniable failure to have these rules successfully codified. The seemingly endless debate about the applicability of the traditional rules of state responsibility which intensified after the Second World War, proves one thing if nothing else -- there is no agreement on the subject. Professor Baxter's observation is most apt: "The problem with the law of state responsibility is that its motion stopped several decades ago." Viewed against a background of numerous indications of non-acceptance by the CIS of the rules of state responsibility and of indications of the awareness of this on the part of the CES, CERDS appears as a final and concerted move to state clearly that the rules of state responsibility cannot be applied to nationalizations in the traditional manner. CERDS on its own does not make new law on the subject, but at least for the CIS, it "unmade" the archaic rules of state responsibility. From a CIS viewpoint, the fact that the traditional rules of state responsibility had been defended by most CES for over a hundred years does not necessarily give them any legal value, still less moral value.

C. Analysis of Recent Nationalizations Involving Natural Resources Industries

An analysis of recent nationalizations involving natural resource industries revealed some interesting features. The reasons for the nationalizations varied and were sometimes difficult to extricate from the political rhetoric that accompanied the announcement of the nationalization. Whether the alleged reason was retaliation for U.S. Mid-East policies, a desire to control a vital source of foreign exchange and GNP, or a need to redeem national pride and dignity, it was clear that each reason fell within the realm of economic development. The nations involved clearly deemed the decision to nationalize to be an exercise of national sovereignty. In all instances, the dispute, if any, centered on the issue of compensation. The right of the State to nationalize was not questioned.

In all the nationalizations studied, except for the Peruvian nationalization of IPC, the nationalizing Government paid some compensation to the nationalized corporations. In none of these instances could it be said that the compensation paid was clearly made in conformity with an international obligation to pay compensation. Practice has confirmed the right to nationalize, but it confirms neither the CES position requiring full compensation nor the CIS position that compensation is an internal matter.

In spite of strongly expressed opposition by the CIS to the
acceptance of an international obligation to pay compensation, it is submitted that, understandable as such opposition was given the history of the issue, it is now time to abandon this opposition. Continued opposition is, in the long run, contrary to the interests of the CIS. Resources and energies directed towards rejecting an international norm regarding compensation would be more fruitfully employed in the formulation of international standards acceptable to both the CIS and the CES.

II. IN SUPPORT OF INTERNATIONAL STANDARDS OF COMPENSATION

A. Equity Arguments to Support International Standards

Arguments to support the need for international standards for compensation may be divided into two categories -- those based on equity and those based on a pragmatism which would include recognition of the fact that the issue has become internationalized. Of primary concern in the first category are the manifold dangers of arbitrariness in decisions regarding compensation if no international standards exists. A situation in which one party to a dispute unilaterally decides the outcome of the dispute with no possibility of that decision being objectively reviewed is naturally abhorrent to advocates of the rule of law.\(^4\) In such a situation, the hypothesis presented by the Cuban representative to the General Assembly in which a State may decide to pay no compensation at all for nationalized property is not an unlikely possibility.\(^2\) Except in extreme and rare circumstances such a nationalization would be nothing more than a confiscation.

The trend towards subjectively-based and selective deductions from compensation as exemplified by Chile\(^3\) has its own dangers. Unlimited and undefined deductions could lead to a situation of no compensation even if the letter of the municipal law which provides for compensation is strictly adhered to. Furthermore, shareholders of a nationalized corporation could be placed in a position where they bear losses arising from matters far removed from the economic or legal activities of the nationalized corporation.\(^4\)

B. Pragmatic Arguments to Support International Standards

The pragmatic reasons from a CIS viewpoint for international standards for compensation are many. Foreign investment is still desirable and necessary to most CIS and is actively encouraged. In the CERD's debates, the Jordan representative realistically stated that a reasonable balance should be maintained between the overriding consideration of sovereignty, national independence and welfare of states, particularly developing states, on one side, and the pragmatic consideration of encouragement of foreign investment on the other.\(^5\)

The existence of international standards would also help ensure that
politics, both internal and international, do not interfere with the negotiation process or other aspects of compensation disputes. It may well be that internal pressures from various factions of the Chilean society prevented the late President Allende from arriving at a negotiated settlement with the nationalized copper companies, and thus changed the course of Chilean history.\textsuperscript{46}

International political pressures on a nationalizing State come in many forms. Apart from open threats to suspend aid, more indirect means of exerting pressure have been exercised.\textsuperscript{47} As suspension of aid and other economic pressures may disrupt the national economy and destroy any possible progress in economic development gained by the nationalization, it would be to the advantage of a nationalizing CIS to have the issue of compensation freed from such pressures. The chaos and uncertainties surrounding the issue of compensation has led uncompensated nationalized enterprises to use whatever means are available to them to gain possession of products they regard as their own and which third parties have obtained from the nationalizing State.\textsuperscript{48}

Speedy settlement of compensation disputes or even just the knowledge that settlement was in the process within an international framework, would eliminate the waste of resources spent on law suits disputing ownership of hot products, enable the nationalizing State to carry on the business of the nationalized enterprise and presumably reap the benefits anticipated by the nationalization. Reluctance by foreign companies, wary of law suits, to purchase ore from Marcona cost Peru a loss of $8 million a month in foreign exchange.\textsuperscript{49} Both Libya and Iraq received strong support from OPEC for their respective oil nationalizations.\textsuperscript{50} However, not all the commodity-producing developing countries are in a position to call upon OPEC-like power, and a united effort to have their views be part of an international framework for compensation would be more beneficial to them than isolated or solitary attempts to ward off international pressures.

Perhaps the most persuasive argument of self-interest to support the need for international agreement on compensation issues is the fact that a number of the so-called developing countries are joining the ranks of the capital exporting states. The oil producing states are the most obvious of the new exporters of capital. The unexpected and unprecedented new wealth of the oil producing nations has led to long range planning on the part of these nations in order to obtain the maximum benefit from their new found wealth. Investments abroad are part of this planning, and concern about possible nationalization of these foreign investments inevitably follows.\textsuperscript{51}

C. Internationalization of the Compensation Issue

Internationalization of the issue of compensation for nationalized property is the term used to describe the fact that despite assertions to the contrary, the issue of compensation for nationalized property is no
longer (if, indeed it ever was) the sole concern of the nationalized corporation and its host State. The internationalization is brought about by the concern, interest and involvement of States other than that of the host States, the actions of host States, and those of transnational corporations and international institutions.

The United States, a capital exporting state whose 1976 assets of direct foreign investment was $132.7 billion, has indicated its concern, interest and involvement in the compensation controversy in a number of ways.52 The much-flaunted but not-much-used Hickenlooper Amendment to the Foreign Assistance Act53 is one example of the concern and possible involvement of the U.S. Government in compensation disputes which affect U.S. nationals. U.S. relations with the nationalizing State could also be affected if the U.S. Trade Act provisions regarding compensation for nationalized property are involved.54 A third piece of restrictive legislation that can be invoked by the U.S. against a nationalizing State in the event of non-payment of adequate compensation is the Gonzalez amendment of the Inter-American Development Bank Act.55

The U.S. has a direct interest in the financial settlement over nationalized property because of the treatment of expropriated property under U.S. tax laws. It may also be argued that the U.S. Government has an interest in compensation for nationalized property in that compensation proceeds, as much as repatriated foreign earnings, are part of the patrimony of the United States.56 Vattel's well-known thesis, "Whoever ill-treats a citizen indirectly injures the State, which must protect that citizen"57 may well be applied not to the "injury" to the property but to the injury in not paying compensation to the foreign investor. Finally, there is the argument that United States foreign investors who pay taxes to the United States Government are entitled as citizens to have their interests protected at home as well as abroad.

The United Nations is one international organization that has had a history of dealing with nationalization/compensation issues which is almost as old as the institution itself. The International Law Commission, the General Assembly, and UNCTAD have all discussed, debated and proposed solutions to the compensation issue.58 U.N. adoption of CERDS, which in Article 2 provides that each State has the right to regulate and supervise the activities of TNCS (transnational corporation), undoubtedly contributed to the CTNC's (Center for Transnational Corporations) concerted effort to formulate a Code of Conduct for TNCs.59 Ironically, CERDS may have thus paved the way to returning the issues of nationalization/compensation to an international level. The tentative formulation for the Code includes a clause on nationalization/compensation and if the Code is made binding both on TNCS and States (as desired by the CES), breach of the Code's provisions for compensation could give States the right (CERDS notwithstanding) to international claims.60

One other international institution that has played a role in the internationalization of the nationalization/compensation issue is the International Centre for the Settlement of Investment Disputes
(ICSID). As of June 30, 1978, almost seventy-five international agreements between CES and CIS dealing with encouragement and protection of investment had provisions relating to the utilization of ICSID for dispute settlement. During the CERDS debates, the Singapore representative stated expressly that even though Singapore voted in favour of the Charter, it would adhere faithfully to bilateral and multilateral treaties and to the Convention on the Settlement of Disputes between States and Nationals of Other States in its regulation of foreign investment.

The transnational corporations have played a role in the internationalization of the compensation issue. One clear illustration of this is the deliberate strategy employed by Kennecott Corporation in Chile to ensure that in the event of nationalization, it would have lined up as many as possible "international supporters who would automatically share the Kennecott parent's outrage." There is evidence that the practice of spreading risk and insuring international response as well as the practice of obtaining guarantees for the amount of the investment to enable a nationalized corporation to bring suits against third parties involved with disputed nationalized property is increasing.

Some host States' actions have been another factor pointing towards the proposition that settlement of compensation disputes concerns more than just the host country and the foreign investor. The highly successful negotiations over compensation arising from Peru's nationalization of the Marcona Company and the (less successful) negotiations regarding Venezuela's nationalization of its oil industry are examples of this. Despite the provisions of Art. 2(1) of CERDS, which provides for internal settlement of compensation disputes, and notwithstanding a Calvo clause in the constitutions of both states, these two major post-CERDS compensation settlements were brought about with the direct assistance of the national State (United States) of the nationalized corporations. These settlements may be regarded as a positive indication in Latin America of "a tip-toeing away from Calvo and its strict insistence that nationalization is the exclusive concern of the host countries" and thus adding to evidence of the internationalization of the issue.

One further acknowledgement of recognition by some CIS that the issue of compensation is of international significance is the fact that a number of these states are party to international investment protection agreements in which a formula for the computation of compensation for nationalized property is stipulated. Some of these agreements have been entered into in the post-CERDS era.

Finally and importantly, at the time of the vote on CERDS, a number of the CIS stated that they acknowledged an international obligation to pay compensation for nationalized property and/or an obligation to use means other than national ones to settle compensation disputes. While these statements may have been made primarily to reassure foreign investors, at the very least they are indications of a flexible attitude towards settlement of compensation issues.
III. COMPENSATION FRAMEWORK

The attempt in this paper to create an international framework for compensation assumes that although the CIS have rejected the traditional international law standard of adequate compensation, there is agreement in the international community that it would be both equitable and pragmatic to establish guidelines for calculation and payment of compensation and that, except in instances governed by an international treaty providing otherwise, controversial compensation issues will be determined in the first instance at the national level. 71

A. Basis of Obligation to Compensate

The standard for compensation and the method of valuation used to a large extent are dictated by the theory that underlies the obligation to compensate. In traditional international law, the valid exercise of the right to nationalize 72 required that compensation be "adequate" or, as expressed in the Chorzow case, to be the "just price of what was expropriated." This has been interpreted as requiring compensation which would be the equivalent of what the nationalized enterprise might have fetched in a sale in ideal market conditions prior to the nationalization and which would return the owner to his pre-nationalization financial position. 73 The net effect of a nationalization was to reduce the transaction to a forced sale of the enterprise by the private owner to the nationalizing State with only the interests of the "seller" taken into consideration. 74 In a post World War II nationalization involving natural resources, usually of vital significance to the economy of the nationalizing State, this outlook is outdated, unrealistic and unequitable.

If the term "adequate" is no longer acceptable; 75 the term 'appropriate' compensation which is used in the widely supported 1962 General Assembly resolution on natural resources 76 and also in CERDS, albeit in a different form, 77 is too imprecise to be of assistance in the actual computation of compensation. This lack of precision follows from the lack of a clearly defined basis for the obligation to compensate.

What takes place in fact when an enterprise involved in natural resources is nationalized, is not a sale, hypothetical or otherwise. It may be described as the unilateral and premature termination of a contractual relationship between the host State and the nationalized enterprise which involves, in part, the transfer of property from the enterprise to the host State. On the basis of its agreement with the host State, a TNC involved in a natural resources industry usually proceeds on two levels. While it is growing along what may be called the horizontal level (e.g., acquiring property, equipment, technology, etc.), it simultaneously develops what may be called on-going vertical ties with the government of the host state (e.g., interaction with regulatory agencies, with customs and tax institutions, etc.), thus creating a complex and intricate relationship between the two parties. A
nationalization of the TNC terminates this relationship, and prevents the TNC from fulfilling its legitimate expectations based on this relationship.

Although the relationship thus terminated is almost always a contractual one, it is submitted that termination by nationalization cannot be treated as a regular fundamental breach of contract. Because one party to the contract is a State, it has the legal right and power to abrogate the contract in the national interests. Nationalization, which terminates a contractual relationship for the exploitation of natural resources, thus creates a paradoxical situation where the "breach" of contract is legal but has detrimental effects requiring a "remedy."

Compensation should not be regarded as an indication of rights requiring a fixed and rigid standard but as an equitable settlement of claims following the termination of the host State/nationalized TNC relationship which takes into account the legitimate expectations and goals of both parties. Such an outlook allows for settlement of legal claims in the total context in which they arise. That actual transfer of property causes losses to the nationalized enterprise thus giving risk to probable claims is perhaps self-evident. However, the termination of the contractual relationship between the host State and the nationalized enterprise could also give to other claims by the nationalized enterprise and the host State based upon the terminated relationship.

A comprehensive outlook towards nationalization and compensation is indicated in CERDS Art. 2.2(2), which provides that compensation should take into account the State's relevant laws and regulations "and all circumstances that the State considers pertinent." The United Nations Intergovernmental Working Group on a Code of Conduct for Transnational Corporations has taken a similar outlook towards compensation. Although the Group's discussions thus far have not been formulated in binding terms, agreement has been reached that in the event of nationalization, "just compensation should be paid." In explaining this tentative agreement, the Chairman of the Working Group stated: "The adjective 'just' refers to the final outcome of the compensation process rather than to the particular methods and criteria employed. A just result is to be sought taking into account all relevant circumstances in each case."

An elaboration of the policy considerations involved in an equitable resolution of the nationalization/compensation issue is necessary in order to arrive at appropriate computation guidelines. For the nationalizing State an equitable method of compensation computation would be one that does not defeat the very purpose of a nationalization and does not prevent the nationalizing state from enjoying the fruits of a nationalization. However, the nationalizing CIS has an interest in maintaining a favourable investment climate in order to continue to attract desirable foreign investment to promote its development process. This interest as well as the interest in deterring coercive measures by CES to obtain compensation for the nationalized property of their nationals must be balanced with nationalization goals.
From a CES viewpoint, in depriving a nationalized TNC of its property and terminating its contract for the exploitation of natural resources, a nationalizing State interferes with the TNC's legitimate goal of profit making through foreign investment. Equitable compensation for such interference with the TNC's goals (which has an effect on the TNC's national State's economy) and some uniformity regarding computation of compensation are essential for protection of foreign investment and, from a CES viewpoint, must be taken into consideration in any compensation framework. The maintenance of a favourable foreign investment climate is also important to the CES because of its need for sources of raw materials. It is suggested, then, that the computation of compensation should utilize guidelines that allow for the legitimate expectations of both groups to be fulfilled to the extent that one does not contradict the other. A minimum level of compensation extracted from the common policy interests of both groups could form the base of a flexible compensation framework which could accommodate particular features of each nationalization.

The mutual need for the promotion and continuance of a favourable foreign investment climate would suggest that, at a minimum, a nationalized enterprise be compensated for all actual losses suffered as a result of nationalization. Flexibility is added to the definition of actual losses by viewing the contractual relationship terminated by nationalization in the light of the actions of both parties to the relationships.

The compensation framework being proposed here has two parts, the first dealing with possible claims by a nationalized TNC and the second dealing with possible claims by a nationalizing State.

**B. Compensation Framework: Part One**

(i) **TNC claims arising out of losses incurred by transfer of (nationalized) property.**

There is general agreement that the raison d'être of compensation for private property taken over by a State is the notion that a State should not take advantage of its right to expropriate at the expense of private persons. The legitimate expectation on the part of the TNC that the host State should pay for what it receives as a result of the transfer is not generally questioned. The nationalized TNC's first claim then, would be for losses arising as a result of the transfer of ownership to the host State. The question that arises, then, is how the transferred property should be valued.

Although the book valuation method of nationalized property has not received universal support as an acceptable measure of the worth of property, it may be said to represent what is regarded by some CES as the minimum value of the property and by some CIS as a satisfactory measure of the value of the property. In the case of a natural resources
enterprise that is nationalized, book value would represent the company's total expenditure for exploration, development and other capital investments minus that part of the original investment already recouped by depreciation, amortization and other tax write-offs.

In order to overcome the major CES objection to the use of book value compensation, and to comply with the demands of equity, book value must be "updated", i.e., the effects of inflation must be taken into account. The use of book value for computation of the value of nationalized property is not unknown to U.S. corporations.

If updated book value is established as the measure of payment for the part of the compensation settlement that deals with the property actually transferred from the nationalized TNC to the host State, the accounting principles and general practices of TNCs regarding bookkeeping will have to undergo some changes. The subjective facets of readjustment must be minimized and agreement as to the methods of doing so will prevent the problem of books being falsified to represent a higher value in anticipation of a nationalization.

(ii) TNC claims for losses based on 'gains lost' by reliance on economic development agreements.

Another possible TNC post nationalization claim may be that termination of its economic development agreement by nationalization not only caused losses as a result of the transfer of the nationalized property but also resulted in "gains lost," that is, actual losses involved in foregoing the opportunity to enter into another contract. Compensation for these losses may be claimed on the basis that it was in reliance upon the contract that the TNC entered into the investment and passed up opportunities for other possible investments. It could be pointed out that in a credit-conscious economic system, as soon as an investment is made, its anticipated worth based on the amount invested is already owned by the investor, and when a nationalization deprives the investor of this ownership, the investor incurs an actual loss. If reliance losses are protected only to the extent that compensation is paid for that property actually transferred to the host State, the existence of the economic development contract and its terms upon which the investment was made is, in fact, being ignored. No importance is attached to commitments made by the host State, and no value is placed on the terms of the contract. To a TNC considering foreign investment in a natural resources industry in a CIS, these commitments are of great value as they are the foundation upon which the investment is based. Given the present CIS attitude towards natural resources, TNCs would probably not invest in natural resources in developing countries without protective host State commitments.

It is in the interests of the CIS not to discourage investment. Therefore, a compensation framework disregarding losses claimed as a result of reliance upon the terms of an economic development agreement the host State freely entered into, is undesirable. The CIS determinedly
excluded the obligation to comply with economic development contract commitments in Art. 2.2(d) of CERDS, but this exclusion does not eliminate consideration of the role of these commitments in the computation of compensation for nationalized property. The exclusion of economic development contract obligations from CERDS was, in any case, only because the CIS did not want to raise these contracts to the level of a treaty. An equitable treatment of a foreign investor would demand consideration of the role of the contract terminated by nationalization. Although it is uncertain how much CIS consensus is involved in this clause, the most recent report of the Working Group on the Code of Conduct for TNCs, on the subject of compensation states:

Fair and equitable treatment of transnational corporations by the countries in which they operate includes payment of just compensation in the event of nationalization ... with full regard to international obligations and contractual undertakings to which the States have freely subscribed.89

The measure of losses involved in foregoing the opportunity to enter into another contract presents some difficulty. In a hypothetical society in which all values were available on the market and where all markets were 'perfect' in the economic sense, there would be no difference between a claimant's loss based on reliance upon a contract and his loss based on expectations of performance of the contract. In other words, the claimant's loss in foregoing the opportunity to enter another contract would be identical with the expectation value of the contract he did make. With an economic development contract, however, the factors which dictate the terms of a contract and the circumstances of the investment (by which expectancy may be measured) are usually peculiar to the investment itself. A comparable market situation in which exist identical terms which might have been agreed on is unlikely to exist. The losses of the nationalized TNC as a result of having foregone an opportunity to enter into another contract may thus have very little relation to that which the TNC might have received had the contract it did enter into been performed. The losses could be either more or less than losses valued by expectancy. Added to this is the fact that even if a comparable market situation existed, the losses based on reliance could only be said to be identical to losses based upon expectation of performance of contract if the latter was an unchanging factor, and thus it could be said that the prospective profits were within the reasonable expectations of the TNC. The peculiar characteristics of investment in natural resources industries in developing countries rules out reliance that the terms of the economic development agreement will remain unchanged for the full term of the contract.91

What exists then, is a situation where compensation is believed desirable for losses incurred by a nationalized TNC's reliance upon the host State's contractual commitments but there is no accurate method of measuring those losses. Those losses could be claimed even if it cannot be proved that a TNC would have entered into a contract just as
favourable or more favourable. Such a claim is brought on the basis that without the host State's commitments, the TNC would not have entered into the investment and incurred losses upon nationalization. It is anticipation of certain minimum profits over invested capital that causes a TNC to rely on the host State's commitments in a contract and enter into the investment. The value placed on that reliance may then be said to be the equivalent of the minimum anticipated annual profits (MAAP). One implication of this assumption is that the corporation would not have entered into the investment if in its estimation the return over the investment would fall below the MAAP. Another implication is that even in renegotiation of the contract over the course of the investment, the TNC would not allow its share of the profits in the investment to go below the MAAP. In other words, the TNC would have reason, based on the host State's commitment, to count on receiving each year, at the very least, the MAAP.

On this basis, a possible formula for calculation of the loss incurred by a nationalized TNC because of reliance placed upon a host State's contractual commitments could be the minimum anticipated annual profits over invested capital multiplied by the remainder of years left on the terminated contract. The use of this formula is not limited to situations where a comparable investment possibility existed at the time the terminated contract was entered into. MAAP may be calculated solely on factors relating to a particular investment in its environment. If, for example, the MAAP of a nationalized investment that had 10 years left on its contract, had been A%, the compensation for losses based on reliance would be A% x 10. The total amount arrived at would represent "gains lost" by the nationalization to which the TNC had legitimate expectation.

Corporations are not unfamiliar with the concept of estimates of MAAP or return on investments (ROI). Methods for calculating possible returns on investments range from examination of one or two characteristics of an investment to sophisticated risk analysis projections. One method of deciding upon the possibility of recovering the MAAP is to have some type of rating scale for determining a country's investment climate. A more sophisticated method of risk analysis in order to estimate ROI is one that takes into account possible changes in the factors that will affect the project's profitability. Methods like these can be used by TNCs to arrive at an estimate of a cutting-off point in profits below which the investment would not be worthwhile.

The selection of a rate of MAAP that is satisfactory to both the host State and the TNC for future contracts should be negotiated prior to the investment and the formula provided for in the contract as part of total compensation in the event of nationalization. Obviously, if future investment is not to be discouraged, the MAAP must be high enough to provide investors with the incentive to enter into an investment in the first place. Erring on the side of conservation is recommended, although how far this is possible at a time when the bargaining power of the TNC is at its strongest (prior to the investment) is questionable. Reasoned calculations of MAAP in particular investments and the ensuing
custom among parties concerned would, it is hoped, gradually create norms for categories of industries. Provisions for review of the estimated MAAP will afford the host State some protection against abuse of the TNC's strong bargaining position when the MAAP was provided for in the contract and will allow for the actual profit level of the investment to provide an equitable MAAP.

The question then arises as to the use of the formula for already existing contracts repudiated by nationalization. Years after an investment has been entered into (and presumably successfully or else it would not have been nationalized) an estimate of MAAP will be somewhat arbitrary. The profit level of the enterprise, comparable investments, records of the corporation, a hindsight risk analysis of the factors involved, etc. will assist in the estimation. The profit level on its own is not a reliable basis, for a decision as the fact that the TNC had continued investing in particular enterprises whose recorded profit level was not very high may have been due to factors relating to other branches of the TNC. A possible solution to the difficulties involved in estimating a hindsight MAAP is to select a minimum percentage for the various categories of industries in each country and leave it to the parties concerned to negotiate the final figure.

Would provisions for compensation in the event of nationalization encourage nationalizations? It is not likely that they will, as the nationalizing State will still have to evaluate the usual political and economic considerations involved in making the decision to nationalize. It is even possible that provisions for compensation with specific formulas will discourage nationalization as the nationalizing State will be fully aware of the financial burdens it will incur upon nationalization.

Should the formula be applied to all economic development contracts? The question should be answered in the affirmative and the rare occasions in which the formula would be inapplicable should be dealt with on a case by case basis. An extreme example of such an occasion would be a case where the economic development agreement had run most of its course and the TNC involved had reaped profits very much higher than the MAAP. In the case of very long-term agreements in which only part of the complete term had expired, a scaling down of MAAP may be provided for after a certain period.96

One further concession towards the protection of the host State is necessary. Natural resources industries deal with depletable commodities which often get to be increasingly costly to exploit. In order to afford some protection to the nationalizing State at a time when continued exploitation of the resources may be unprofitable, provisions should be made for a minimum point of profits level which, if arrived at, will absolve the nationalizing State of its obligation for reliance losses compensation. Such a provision is justifiable because if the TNC had still been operating the enterprise, it would have divested its interests when exploitation became costly and profits were negligible.
Except in the instances described, where a compensation formula for MAAP is provided for in a contract, the provision should be strictly adhered to unless there is clear evidence that the agreement was concluded in circumstances marked by duress or clear inequality between the parties, or where the conditions upon which such a contract was based have fundamentally changed, causing unforeseen major distortions in the relations between the parties and thus rendering the contract unfair or oppressive to either of the parties. TNCs presently involved in natural resources industries in developing countries would do well to provide for compensation along the lines suggested. Even with the existing uncertainty as to the status of economic development agreements, a clear agreement by a host State as to compensation will not be lightly set aside by any judicial tribunal.

A distinction must be made here between awarding _lucrum cessans_ (which would take the compensation to fair market value level) and awarding the TNC the losses of minimum anticipated profits. The latter are awarded on the basis that without anticipation of this minimum level of profits for the full term of the contract (anticipation created by the facts surrounding the investment and the conduct of the host State) the TNC would not have entered into the investment. The award would be dependent on the profit level of the enterprise after the nationalization. _Lucrum cessans_, on the other hand, is what the TNC would have earned during the full term of the contract if it had not been changed and not been repudiated -- circumstances that are made impossible by nationalization. Its amount would depend on the future profitability level of the investment.

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**C. Compensation Framework: Part Two**

(i) **Host State Claims Against Nationalized Enterprise (Deductions).**

Although host States in recent nationalizations have made various deductions from net compensation awarded nationalized enterprise on the basis of retroactive claims, there has been little public explanation or justification of the legal basis for such deductions. If it is acknowledged that a nationalization results in the termination of a complex economic and legal relationship between a TNC and the host State, it is to be expected that upon termination of the relationship the latter may have claims against the TNC based upon the relationship prior to its termination. When a TNC enters into a contractual relationship with a host State for the exploitation of its natural resources, the host State can be said to have reasonable expectations that the TNC will conform with its laws and regulations and will refrain from unjust enrichment at the expense of the State's national objectives. It is alleged non-conformity with these expectations that gave rise to the claims that formed the "deductions" in recent compensation settlements.

TNCs have been put on general notice about CIS' expectations regarding their activities. Art. 2.2(b) of CERDS states that each State...
has the right to regulate and supervise the activities of transnational corporations within its national jurisdiction "and to take measures to ensure that such activities comply with its laws, rules and regulations and conform with its economic and social policies." In stating the general obligations of TNCs in the most recent report on work on the Code of Conduct for TNCs, the burden of adherence to economic goals and development objectives, policies and priorities is shifted more directly to the TNC:

Consistent with the need to maintain the viability of their operations, transnational corporations should take effective measures to ensure that their activities are compatible with and make a positive contribution towards the achievement of the economic goals and established development objectives of the countries in which they operate.

In the compensation framework being recommended, it is anticipated that the expectations of the host State of a TNC's conformity with its national goals would be expressed in relevant agreements and contracts between the host State and the TNC. Equally importantly, specific examples of what may be considered contrary to a host State's expectations, should, as far as possible, be made known to TNCs operating in a host State. Publication of the specific practices and activities of TNCs which are contrary to the expressed expectations of the host States and which may give rise to claims during or upon termination of its relationship with a TNC, will avoid the charge of retroactivity that has been levelled at claims of this type in recent practices of States. When the Code of Conduct for TNCs which has isolated undesirable TNC business practices comes into effect, a clause in every economic development contract specifying a TNC's obligation to conform with its provisions would solve this problem. However, the code may be a while in being adopted, and, furthermore, its legal nature is at this point unforeseeable.

Meanwhile, some States are less able than others to anticipate undesirable TNC business practices and may not have provided laws for them prior to nationalization, giving rise to retroactive claims. Retroactive charges against a TNC may also be brought about with regard to circumstances that were unforeseeable at the time the contract was entered into. As the bargaining, economic and commercial skills as well as the technological knowhow of the developing countries increase, instances of retroactive claims should naturally decrease. The dangers involved in retroactive claims would be greatly diminished if they were permitted only if 1) the TNC may reasonably have been aware that its undesirable activities had detrimental effect on the host State's objectives and 2) the undesirable activities unjustly enriched the TNC. It should be noted that for civil purposes, retroactive legislation is not uncommon and there is "neither hard principle of international law nor developed consensus of municipal law prohibiting the use of retroactively applied civil rules."
Some examples of possible claims in this third category of claims within the compensation framework will be discussed here. The subject of the claims in this category as well as the substance of each claim will vary greatly according to the history and circumstances of the investment involved. This discussion therefore is undertaken with a view to suggesting possible guidelines and attitudes towards settlement of such claims rather than with the intention of offering clear-cut rules regarding them.

(a) **Profits.**

The issue of 'excess profits' as a deduction against compensation has given rise to much controversy. Profit maximization being the primary motivation for investment, it is essential that guidelines for possible deduction of 'excess-profits' be set up in order to afford some protection to TNCs. At what point do high profits become "excess-profits"? The word "excess" has been defined as: "State or fact of going beyond limits, especially beyond sufficiency, necessity, or duty; also that which exceeds what is usual, proper, just or specified." There is an implication in the definition of 'excess' of a known standard, making its applicability to the matter of profits inappropriate in most instances.

The contractual relationship entered into by a TNC and a host State for the exploitation of its natural resources presupposes that the TNC is entitled to profits for its risky venture within the terms of the economic development. Profits that a TNC obtains by unconscionable actions, i.e. profits that may be said rightly to belong to the host State, are not part of the legitimate expectations of both parties to the relationship. These profits may be reclaimed by the host State prior to or at the time of the termination of its relationship with the TNC by nationalization. The term "unconscionable profits" with its connotations of unfairness is preferred over the term "excess-profits" with its connotations of impropriety. Basing claims upon the unconscionable methods used to obtain certain profits rather than upon an undefined standard of appropriate profits has certain advantages. It leaves each host State free to seek an equitable resolution of an 'unconscionable profits' dispute in the light of the TNC's own particular history and the circumstances surrounding its investment.

Specific claims for 'unconscionable profits' may arise in situations involving a) unfair contracts, b) transfer pricing practices and/or c) windfall profits. The strength of these claims will depend to a large extent on the evidence produced by the host State to indicate reasonably that the profits rightly belong to the host State. A standard of reasonableness is admittedly capable of distortion but is not one unknown to lawyers, judges and arbitrators and its use may be safeguarded by judicial review. The difficulties of arriving at objective standards of reasonableness may in this instance lie more in obtaining information regarding relevant commercial practices than in deciding upon the standards to be applied.
(b) **Host State's Claim for Environment Damage.**

A deduction for environmental damage from a compensation award in a recent nationalization,\(^{109}\) as well as the inclusion of provisions for environmental protection in the tentative agreement on the anticipated Code of Conduct for TNCs suggests yet another category of possible deductions from compensation. There are no international standards regarding environmental protection at present and in the absence of such standards it is likely that TNCs will shop around for low constraint countries. In order to avoid a situation where the desperation of needy developing countries turns them into dumping grounds for unscrupulous TNCs, international environmental rules are essential.

Until then, however, the question is -- to what extent should environmental damage caused by a TNC be a deduction against compensation if no standards or extremely low standards for environmental protection existed in the nationalizing host State? One possible approach is to hold a TNC responsible for environmental damage that might reasonably have been anticipated as a consequence of the investment. The decision as to the level of damage and its reasonable anticipation by the TNC can be made on the basis of a) any knowledge and information regarding the possibility of the damage that could be presumed to have been available to the TNC and b) comparable experiences in other countries.

When (and if) the Code of Conduct for TNCs becomes effective, decisions as to what damage may reasonably have been anticipated may be made easier. The present tentative agreement on provision for environmental protection requires that in addition to complying with existing laws and in the performance of their activities, protecting and improving the environment, the TNCs are required to supply all relevant information concerning:

- features of their products or processes which may harm the environment and the measures and costs required to avoid harmful effects;

- prohibitions, restrictions, warnings and other regulatory measures imposed in other countries, on grounds of protection of the environment, on products and processes which they have introduced or intend to introduce in the countries concerned.\(^ {110}\)

(c) **Other Possible Host State Claims.**

The anticipated Code of Conduct for TNCs deals with various issues that cause tension between TNCs and host States. Often, though not necessarily, these are the issues that lead to nationalization. Even if the Code does not become legally binding on TNCs as an international obligation, the subject matter of the Code may be incorporated into the national legislation of host States and may give rise to claims on violations thereof. These could be claims based on violations of human rights, balance of payments laws, etc.\(^ {111}\) As part of a State's
national legislation, these claims could be brought prior to a nationalization as well.

D. Compensation Framework: Part Three

(i) Method and Form of Compensation Payment.

The method and form of payments in a post-CERDS compensation framework, unlike the traditional requirements of "prompt" and "effective" payment, must take into account the fact that the reasons underlying a nationalization in a developing country are often not unrelated to the country's desire to improve its foreign exchange and balance of payments situation. To do otherwise would be to ignore the central significance of Art. 2 as a provision within CERDS -- the fact that for the CIS, nationalization is one means of advancing their economic development and redressing some of the imbalance in the present international economic system.

As CIS generally do not have the means to pay compensation at the time it is awarded, the source of payment will often be (and rightly so), the subsequent profits from the nationalized enterprise itself. The ideal solution would be payment as soon as possible and in the form most meaningful to the nationalized TNC. Even if this were possible, it would probably only be at the expense of denying the host State any of the financial benefits of the nationalization. It would probably mean that all profits from the enterprise would be directed towards payment of compensation, thus defeating the purpose of the nationalization. The method and form of payment of compensation should be ones that will ensure that the nationalizing State enjoys an adequate flow of the profits of the nationalized enterprise but will not leave the nationalized TNC in a position where the amount of the compensation may be equitable but meaningless due to the form and method of payment. These goals may be realized more easily in nationalizations of natural resources industries than perhaps in nationalization of manufacturing industries because in the former, profits form a high share of the value of output and because these industries are sometimes in a position to control world supply and therefore prices.

Presented below are some suggestions for guidelines in the method and form of payment for compensation for nationalized enterprises involved in natural resources industries.

(a) If payment is possible in convertible currency, it should be made in such form.

(b) Where money paid for compensation can be repatriated by the TNC without causing balance of payments problems to the host State, the TNC should be entitled to transfer such money to any country of its choice.
(c) If a host State's balance of payments does not permit a) or b), the host State may pay part of the total compensation (perhaps one third) immediately and the rest of the compensation in the form of Government bonds bearing a reasonable rate of interest and redeemable over a reasonable period.

(d) The annual payment of the principal and interest must be low enough to permit the anticipated net profits of the enterprise to cover it and leave a reasonable flow of profits accruing to the State for the advancement of its economy. The portion of the net profits devoted to payment of the principal and interest in Government bonds should not exceed a third of the total annual net profits of the nationalized enterprise.

(e) If the bonds and interest thereon used for the payment of compensation are redeemable beyond an eight year period, provisions should be made for periodic revaluation of the compensation award or for revaluation at the request of either party to take into account the effects of inflation and other factors affecting payment of compensation.

(f) The parties should feel free to arrange for payment of compensation in the form of the commodity being exploited.

There can no longer be rigid rules for the method and form of compensation payment and in the final analysis, each nationalization and its surrounding circumstances determine both factors.

E. Summary of Suggested Compensation Framework

The comprehensive framework proposed was created with the basic aim of satisfying what is assumed to be a common goal of the CIS and the CES -- the promotion of foreign investment compatible with the national goals of host States in a favourable investment climate. At the same time, the compensation framework was not intended to penalize the nationalizing State or even discourage nationalization of natural resources industries in developing countries. Nationalization as a right (and, to the CIS, an important development strategy) is regarded as an inevitable occurrence in the new international economic order. The framework sought to ensure that the level of compensation and its method and form of payment did not defeat the purpose of a nationalization. Recognition is also given to the fact that even if a nationalization is carried out for the primary purpose of national economic development and the secondary purpose of altering existing economic power patterns, a nationalized TNC which is an
economic institution with its own commercial goals (usually in the host State at its invitation), should not be penalized for existing inequities in the international economic system and should be held responsible only for its own detrimental actions in the host State.

Part One of the Compensation Framework deals with "actual losses" incurred by a TNC as a result of nationalization by termination of its contract with the host State. Even though it is built at a level that may be regarded as the minimum compensation for which a host State may be held responsible, the guidelines suggested allow for enough flexibility that the final sum arrived at after settlement of the TNC's claims will be an equitable one in the circumstances of the investment.

Part Two of the Compensation Framework enables a State to reclaim from a nationalized TNC what may be said rightly to belong to it, that is, the State. Here too the claims are restricted to actual losses in that only those losses incurred which the TNC should have been aware of or from which it unjustly enriched are permitted to be used as a basis for a deduction claim.

The major flaw of a flexible compensation framework of the kind recommended is that it leaves much to subjective decision-making. For example, if MAAP have not been provided for and a TNC is dissatisfied with the host State's post nationalization estimate, who then decides the dispute and on what grounds is the decision made? Deductions cause equally difficult decision-making problems. What is an "unfair contract"? Where does the decision-maker get the information to make the necessary decision? An international dispute-settlement body that is acceptable to both the CES and the CIS is essential. It is nevertheless suggested that the first stage of compensation settlement should be on a municipal level.

In order to have uniform utilization of a compensation framework of the kind suggested, it should be in the form of an international agreement with provisions for incorporation into municipal law. Uniformity is necessary in order to prevent a situation where some countries or some regions provide a more "favourable" investment climate for TNCs because of low constraints on the TNCs or because of a vacuum in their compensation laws leaving them open to pressures from the more powerful States.
APPENDIX I

CALENDAR OF IMPORTANT EVENTS LEADING TO ADOPTION OF CERD

1930  Hague Conference for Codification of International Law -- The doctrine of an international standard for compensation was upheld by a narrow margin, 23-17.

1947-48  U.N. Conference on Trade and Employment held at Havana. Proposals for an International Trade Organization. The conference drew up a Charter and many of its provisions foreshadow the agenda of the 1974 New International Economic Order. The proposal for an ITO, which was designed to join the IMF and IBRD in forming the foundation of the post-war economic order was never ratified by the United States.

1952  A United National General Assembly resolution (G.A. Res. 626) contained the proposition that "the right of peoples freely to use and exploit their natural wealth and resources is inherent in their sovereignty... ."

1955  Largely by the votes of the economically less developed nations and over the opposition of many western European States, the General Assembly's Third Committee adopted, for inclusion as part of Art. 1 in both draft Covenants on Human Rights, the following language: "All peoples have the right to self-determination... [and] may freely dispose of their natural wealth and resources... without prejudice... upon the principle of mutual benefit."

1955  A group of 29 African and Asian countries met in Bandung at Indonesia's initiative. This Conference, which the People's Republic of China attended, was addressed to efforts for hastening the independence of countries still under colonial rule; the conference was aimed at shifting away from alliances with the great powers.

1960  The Asian, African Legal Consultative Committee, with Japan as the one dissenter, rejected the principle of an "international standard" for nationalization and drafted a convention that provides for payment for expropriated property "in accordance with local laws, regulations and orders."


1962  Second Conference of Non-Aligned Nations held in Cairo. Recommendation was made to hold an international conference on trade and development -- precursor to UNCTAD.

1962  G.A. Res. 1803 on Permanent Sovereignty Over Natural Resources adopted with 87-2-12 vote. The resolution affirmed the principle of permanent sovereignty over natural resources and
recognized the right of nationalization in accordance with international law and the need for good faith observance of foreign investment agreements.

1964 First UNCTAD conference held in Geneva. Intellectual "think tank" for development issues. Also provided a forum for the emergence of collective action among developing nations.

1966 G.A. Res. 2158 on Permanent Sovereignty Over Natural Resources confirmed that the exploitation of natural resources in each country shall always be conducted in accordance with its national laws and regulations.

1970 Third Conference of Non-Aligned Nations held in Lusaka. The economic dependence of developing countries was discussed and for the first time the concept of self-reliance was formulated. The Conference called for a decrease in dependence on aid from developed countries and the establishment of an effective strategy for economic, financial and technological development.

1971 G.A. Res. 2692 on Permanent Sovereignty Over Natural Resources of Developing Countries and Expansion of Domestic Sources of Accumulation for Economic Development reaffirmed the right of the peoples and nations to permanent sovereignty over their natural wealth and resources, which must be exercised in the interest of their national development and the well-being of the people of the State concerned.

1971 Group of 77 formed to defend a common position at UNCTAD conference at Lima.

1972 A meeting of Ministers of Foreign Affairs of the Non-Aligned countries at Georgetown further defined the concept of self-reliance, and an action programme of economic co-operation among developing countries was established.

1972 Ninety-second Plenary Meeting of UNCTAD held in Chile. President of Mexico, The Honourable Luis Echeverria Alvarez suggested that the international economy should be placed on a "firm legal footing" through formulation of a Charter of Economic Rights and Duties of States.

1972 UNCTAD resolved to establish a Working Group to draft the Charter "to protect duly the rights of all countries and in particular the developing States...."

1972 The Trade and Development Board of UNCTAD adopted Res. 88 which after affirming the principles of permanent sovereignty over natural resources stated that such measures as States may adopt in order to recover their natural resources are the expression of a sovereign power in virtue of which it is for each State to fix the amount of compensation and that any dispute arising therefrom falls within its national jurisdiction.

1973 (Sept.) Fourth Conference of Non-Aligned Nations held in Algiers. The Economic Declaration of the Algiers Conference of Non-Aligned Countries included the statement that a State that carries out a nationalization is entitled to determine the amount of compensation and any dispute settlement thereof would be in accordance with the national legislation of the State.

1973 (December) G.A. Resolution 3171 reaffirmed recognition by the international community of national sovereignty over natural resources and supported resolutely the efforts of developing countries to regain effective control over their natural resources. The resolution provided in part that the principle of nationalization carried out by States as an expression of their sovereignty in order to safeguard their natural resources, "implies that each State is entitled to determine the amount of possible compensation, and the mode of payment, and that any disputes which might arise should be settled in accordance with the national legislation of each State carrying out such measure."

1974 (January) Permanent Representative of Algeria to the U.N. requested the Secretary-General to convene a Special Session of the General Assembly to consider the "Study of the Problems of Raw Materials and Development."

1975 (May) The General Assembly adopted without a vote Res. 3201, entitled "Declaration on the New International Economic Order." The Declaration stated in paragraph 4 that under the new international economic order, every State enjoyed full permanent sovereignty over its natural resources and the right to nationalize these resources in order to safeguard them was an expression of this full, permanent sovereignty.

1974 (December) The General Assembly by a 120-6-10 vote adopted the Charter of Economic Rights and Duties of States.

1975 (February) The Declaration of Dakar at the Conference of Developing Countries on Raw Materials stated that the recovery and control of natural resources held the key to their economic freedom.
APPENDIX II

CHARTER OF ECONOMIC RIGHTS AND DUTIES OF STATES

CHAPTER II

ECONOMIC RIGHTS AND DUTIES OF STATES

Article 1

......

Article 2

1. Every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities.

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

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

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

1. See generally, F. BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD (1915); C. EAGLETON, THE RESPONSIBILITY OF STATES IN INTERNATIONAL LAW (1928); F. DUNN, THE PROTECTION OF NATIONALS (1932); S. FRIEDMAN, EXPROPRIATION IN INTERNATIONAL LAW (1953); GARCIA-AMADOR, SOHN, BAXTER, RECENT CODIFICATION OF THE LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS (1974); SOHN & BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 1-21 (1975).

2. In U. N. jargon the countries of the world are broken up into four categories according to whether they are highly industrialized democracies (First World), Communist States (Second World), developing countries (Third World), and countries extremely underdeveloped economically (Fourth World). Generally speaking for the purpose of this paper, CES refers to the First World States and CIS to the other three categories. The terms CES and CIS, in addition to labelling states that either import or export capital, refer to the two camps that sometimes surface in U.N. debates. It should be noted that the line may perhaps be more clearly drawn for economic matters than political matters. Japan and Israel are examples of two states that often change camps, depending on the subject matter being debated.


5. Art. 2 of CERDS is reproduced in full in Appendix II following this article.

6. Id.

7. Id.

8. See note 3, supra.

9. See note 5, supra.

11. This was the position taken by Libya in its nationalization dispute with Texaco. See Texaco, supra note 10.


13. In adopting the "Uniting for Peace" Resolution in 1950 and in the 1965 Res. 2145 terminating South Africa's mandate over South West Africa, it may be said that the General Assembly was acting beyond its powers as anticipated in 1945 and set out in the U.N. Charter.

14. Having been denied permanent positions of power in the Security Council, the Afro-Asian States that comprise the CIS, have used the General Assembly as a forum to express their needs and desires.


16. Id.


20. Negative votes were cast by Belgium, Denmark, the Federal Republic of Germany, Luxembourg, the United Kingdom and the United States. Brower and Tepe, The Charter of Economic Rights and Duties of States: A Reflection or Rejection of International Law? 9 Int. Law. 295, 305 (1975)

21. Japan was the only "significant" CES that abstained. Discussing the issue of consensus, a CIS representative said: "While the third world countries were always prepared to exercise every effort to achieve consensus, consensus was not an end in itself: the objective was to secure agreement on the substance of the Charter provisions." GAOR 29 Sess. Comm. Mtg. 1647 at 433 (A/C 2/SR 1647).

22. Brower & Tepe, supra note 20, at 300-1.

23. Id. A statement made by the Mexican representative who was
Chairman of the Working Group that prepared the Charter, makes it clear that he did not envision the Charter as a fixed set of rules, binding on all States: "The Charter of Economic Rights and Duties of States was conceived as a general basic document embodying the major principles of economic relations between states. Some issues dealt with in the Charter would subsequently become the subject of further codification. Thus the Charter was intended to be a kind of basic code and not a complete and exhaustive set of rules. A/C 2/SR 1638 at 8.

24. Brower & Tepe, supra note 20, at 302.
26. See note 17 supra.
33. The nationalizations studied by the author were: Libya's Oil Nationalizations in 1973 and 1974; Iraq's Oil Nationalization in 1972; Venezuela's Oil Nationalization in 1974; Chile's Copper Nationalizations in 1971; Peru's Oil Nationalization in 1968, its copper nationalization in 1974 and its iron ore nationalization in 1975.
34. Libya nationalized the Bunker Hill Oil Company in June 1973, asserting then that the time was ripe for Arabs to strike at U.S. interests in retaliation for support of Israel. N.Y. Times, June 4, 1973, at 3, col. 5; Wesley, Compensation Framework for Expropriated Property in III THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW 11 (R. Lillich ed. 1975).
35. Oil, the backbone of the Venezuelan economy, accounts for over 90%

36. The 1968 Peruvian nationalization of International Petroleum Company has been described as a "symbolic act of national affirmation". G. INGRAM, EXPROPRIATION OF U.S. PROPERTY IN SOUTH AMERICA 89-90 (1974).

37. Having achieved political self-determination, most CIS are presently concentrating on economic self-determination. The first step towards this goal is economic development. This usually means more than mere economic growth. It is a struggle to make political independence a real, positive and visible change for the better, internally as well as in relation to the rest of the world. See generally, M. HAQ, THE POVERTY CURTAIN: CHOICES FOR THE THIRD WORLD (1976).

38. The right to nationalize was in fact expressly recognized in a number of these nationalizations. See, e.g., N.Y. Times, June 13, 1975, at 67, col. 2, for U.S. recognition of Libya's right to nationalize.

39. Although the Peruvian Government specifically excluded IPC from the lump sum settlement for other properties, the Department of State included IPC in the list of corporations to receive $76 million. The Peruvian Government strongly protested this action. See Gantz, The Marcona Settlement: New Forms of Negotiation and Compensation for Nationalized Property, 71 Am. J. Int'l L. 397, 474 (1977).

40. This is in accord with general practice in this area. See, e.g., Dawson & Weston, Prompt, Adequate and Effective: A Universal Standard of Compensation? 30 Fordham L. Rev. 627 (1962).

41. This objection is supported by the principle that no one should be judge of his own case (nemo debet esse index in propria causa).

42. In a debate preceding the adoption of CERDS, the Cuban representative at the U.N. stated that he wanted it clearly understood that the Cuban delegation vote in favour of Art. 2(c) could not be taken as implying acceptance of the right to compensation in every case. On the contrary, he stated that the question of compensation implied the reverse possibility, that is, the nationalized concerns should compensate the nationalizing state. U.N. Doc A/C 2/SR. 1649 at 20.

43. In July, 1971, the Chilean law approving nationalization of Kennecott Company's share of the El Teniente mines provided for deductions (from compensation) based on (among other things) "excess profits". The determination of excess profits, which was left in the sole discretion of the President and was not reviewable.
44. E.g., deductions made as retaliation for political differences or for losses incurred by the nationalizing State because of actions of the national state of the investor. Cuba's counter-claims for the U.S. trade "embargo," for damage inflicted during the Bay of Pigs incident, and for covert sabotage and assassination attempts are examples of deductions that would be unjustified because of lack of relationship to the investor's own conduct. See SPECIAL STUDY MISSION TO CUBA REPORT: TOWARD IMPROVED U.S. - CUBA RELATIONS, 95th Cong., 1st Session, 11 (1977).


47. Standard Oil of New Jersey was said to have been able to work "quietly and effectively behind the scenes" to block aid to Peru. Moran, Transnational Strategies of Protection and Defence by Multinational Corporations: Spreading the Risk and Raising the Cost for Nationalization in Natural Resources, 27 Int. Org. 227, 279 n. 8 (1973). An admitted-to U.S. Treasury attempt to delay IBRD educational aid to Iraq is another illustration of the use of indirect tactics to apply pressure on a nationalizing government. N.Y. Times, June 27, 1972, at 55, col. 3.

48. In 1973, gratified by the U.S. contention that Libya's seizure of Bunker Hunt Oil Company was not entitled to recognition by other states, the company announced that it would assert its rights to any oil from the company fields which was exported to other nations. N.Y. Times, July 5, 1975, at 40, col. 5. The fact that Bunker Hunt Oil Company oil and oil from other nationalized oil companies was blacklisted, caused disruptions in Libya's oil policy and was the cause of a number of law suits. N.Y. Times, May 16, 1974, at 50, col. 3.

49. See Gantz, supra note 39, at 480.

50. Following the announcement of Libya's nationalization of all the oil companies in Libya, the OPEC nations resolved to take "appropriate measures" which it deemed necessary if the oil companies took individual or collective action to hinder the nationalizations OPEC Resolution on Support of Libyan Government Action, reprinted in 3 Int'l Legal Mat. 221, at 222 (1974).


52. Scholl & Russell, The International Investment Position of the


54. Sec. 502(b)(4) of the Trade Act 1974.

55. Gonzalez Amendment, Sec. 12 of the International Development Association Act/Sec. 21 of the Inter-American Development Bank.

56. Under Sec. 1212(a) of the Internal Revenue Code of 1954, a corporation has a ten year period in which to carry forward a foreign expropriation capital loss as a charge against tax liability.

57. E. VAITEIL, CLASSICS OF INTERNATIONAL LAW, Bk. II, Ch. VI at 136 (III ed. 1758).

58. The International Law Commission at its first session in 1949 included the topic of "State Responsibility" in its provisional list of topics of international law for Codification. It has produced two draft conventions on the topic. See GARCIA-AMADOR, SOHN, BAXTER, supra note 30; The General Assembly has adopted a number of resolutions on the topic. See, Events Leading to the Adoption of CEROS, Appendix II, infra, for the more important resolutions; for significant UNCTAD resolutions dealing with State Responsibility, see Appendix II.

59. In March 1976, the United Nations Commission on Transnational Corporations established as its highest priority the task of formulating a code of conduct for TNCs. The U.N. Commission on Transnational Corporations (CTNC) has its origins in ECOSOC Res. 1721, 53 U.N. ESCOR, Supp. (no. 1), U.N. Doc. E/5209 (1972), which requested the U.N. Secretary-General to establish a Group of Eminent Persons to study the effects of transnational corporations on world development and international relations. The Group of Eminent Persons recommended the creation of a commission on transnational corporations attached to the ECOSOC that would work, inter alia, to develop both specific and more general arrangements dealing with transnationals.

60. Art. 52 of the December 1978 Formulations by the Chairman of the Intergovernmental Working Group on a Code of Conduct which deals with nationalization and compensation states:

In the exercise of their sovereignty, States have the right, acting in the public interest, to nationalize property in their territory. Fair and equitable treatment of transnational corporations by the countries in which they operate includes payment of just compensation in the event of nationalization or other taking of their property, such government action
being undertaken under due process of law, in accordance with national law, regulations and administrative practices without discrimination between enterprises in comparable situations and with full regard to international obligations and contractual undertakings to which States have freely subscribed. (emphasis added)


61. For the background and goals of ICSID, see Broches, The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, II "Recueil des Cours" 1972.


63. Id., at 285.

64. For an excellent account of the Marcona nationalization and settlement, see Gantz, supra note 39; for an account of the Peruvian nationalization, see Rogers, Of Missionaries, Fanatics, and Lawyers: Some Thoughts on Investment Disputes in the Americas, 72 Am. J. Int'l L. 1, 10 (1978).

65. Art. 21, paragraph 1, of the Venezuelan Constitution (1947):

Aliens in Venezuela have, without prejudice to what is provided in international conventions, the duties and rights that this Constitution and the laws grant to them; but neither the one nor the other may be greater than those of Venezuelans.

Art. 17 of the Peruvian Constitution (1933):

Commercial companies, national or foreign, are subject, without restrictions, to the laws of the Republic. In every State contract with foreigners, or in the concession which grant them in the latter's favour, it must be expressly stated that they will submit to the law and courts of the Republic and renounce all diplomatic claims.

66. In the Marcona negotiations, the Peruvian Government in fact insisted on dealing directly with the United States Government and the final settlement was between the two governments. See Gantz, supra note 39. In the compensation negotiations arising from the Venezuelan nationalization, the United States Government played a less direct but definite role in bringing the parties together, offering suggestions and clarifying official views with regard to public policy aspects of the transfer of payment. See Rogers, supra note 64.
67. Rogers, supra note 64. The Cuban Government has also insisted that negotiations relating to the 1959, 1960 Cuban nationalizations of American properties in Cuba take place between the Governments of the United States and Cuba.

68. ICSID, Twelfth Annual Report, 1977/78. at 22-29. Many of these agreements contain compensation standards.

69. See, e.g., Egypt, United Kingdom: Agreement for the Promotion and Protection of Investments, June 11, 1975, reprinted in 14 Int'l Legal Mat. 1470 (1975). The compensation for nationalized property provided for in this agreement "shall amount to the market value of the investment expropriated immediately before the expropriation itself or before there was an official Government announcement that expropriation would be effected in the future, whichever is earlier ..." Id. at 1471-72.


71. This would comply at least in part with the spirit of Art. 2(2)(c) of CERDS and reaffirm the principle of exhaustion of local remedies as required by traditional international law of state responsibility.


73. This position is evident in the Department of State statement that "in the case of an operating enterprise, adequate compensation is usually considered to be an amount representing the market value or 'going concern' value of the enterprise, calculated as if the expropriation or other governmental act decreasing the value of the business had not occurred and was not threatened." 8 WHITEMAN, DIGEST OF INTERNATIONAL LAW 1143 (1967).

74. The intent of Congress for the Foreign Claims Settlement Commission at least with regard to compensation claims against the Cuban Government, was the application of flexible standards "most appropriate to the property and equitable to the claimant." Hearings on Claims of U.S. Nationals against the Government of Cuba before the Subcomm. on Inter-American Affairs of the House Comm. on Foreign Affairs, 88 Cong., 2d Sess. 53 (1964). See also Ch. I explaining rejection by CIS of traditional international law of state responsibility among other reasons, for its one-sided view of nationalization.

75. Supra, note 3.

76. G.A. Res. 1803, 17 U.N. GAOR, Supp. 17, U.N. Doc. A/5217 (1962). The resolution refers to the obligation to pay "appropriate compensation in accordance with rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law."
77. CERDS, supra note 5. Art. 2(2)(c) refers only to "appropriate compensation which should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent."

78. CERDS, supra note 5.


80. Id. at Annex, p. 2.

81. Not many publicists have acknowledged the importance of 'coming to grips, however tentatively,' with policy considerations in the nationalization issue before a compensation framework can be established. Weigel & Weston, Valuation Upon the Deprivation of Foreign Enterprise: A Policy-Oriented Approach to the problem of Compensation Under International Law in THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW I (R. Lillich ed. 1972).

82. Compensation based on net book value is generally understood as the value of the actual historical costs of the assets of an enterprise less amounts historically deducted and written off against income tax for depreciation. Updated book value compensation, which takes into account the effects of inflation upon the value of assets, yields a higher compensation than net book value, but less than fair market value.

83. For instance, in a number of claims before the Foreign Claims Settlement Commission, words to the following effect may be found: "In the absence of other evidence, the Commission concludes that the book value is the most appropriate basis of valuation." Lillich, The Valuation of Nationalized Property by the Foreign Claims Settlement Commission, 95 in THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW 106-112 (R. Lillich ed. 1972). See also, note 34, supra. Net book value was the method of valuation for nationalized property compensation favoured by Libya, Peru, Venezuela, Iraq and Chile in their respective nationalizations. Other CIS that have used the net book value method in compensation agreements: Chilean 51% take-over of Anaconda's subsidiary in 1969; Zambia for its participation in the copper companies in 1969; Guyana for its participation in the Alcan subsidiary (bauxite) in 1970-71.

84. From a CES point of view, the net book value is unsatisfactory for a number of reasons, perhaps the most important of which, is that in periods of sustained inflation the historical cost of assets is not an accurate indication of their value.
85. According to Lillich, in spite of expressed Congressional intent that when dealing with the Cuban claims, the FCSC "take into account the basis of valuation most appropriate to the property and equitable to the claimant, including but not limited to (i) fair market value, (ii) book value, (iii) going concern value or (iv) cost of replacement", the Commission has looked first, and often only, to book value. 78 Stat. III (1964), 22 U.S.C. Sec. 16443b(2) (Supp. V, 1965-1969).

86. In the Chilean nationalization of Kennecott, the Chilean Comptroller General deducted from the book value at the time of the nationalization, revaluation of Kennecott's assets which had been based on an updated appraisal at the time of Kennecott's transfer of assets to the State Agency prior to the nationalization. STEINER & VAGTS, supra note 29, at 450.

87. The so-called stabilization clause which is added to these contracts to provide the investors with some stability and security. See Domke, Foreign Nationalizations, 55 Am. J. Int'l L. 593, 607 (1961).


91. At least initially, the technologies of exploration, extraction and processing in natural resources industries are tightly held by the TNCs and are unavailable to the host State. At this point when the TNC's bargaining power is strongest because of the resources it possesses and because it is the party bearing the risk of the venture, it usually seeks and obtains highly favourable operating conditions and profit returns if successful. Once the investment is made, the mines or wells are successfully working and the host state improves its economic, financial and accounting skills, a new interaction between the host state and the natural resources investor takes place. The original terms of the contract seem over-generous to the host state and it calls for renegotiation for new contract terms. Kaymon Raymond Vernon has called this phenomenon "the obsolescing bargain." R. VERNON, SOVEREIGNTY AT BAY: THE MULTINATIONAL SPREAD OF U.S. ENTERPRISES 46-59 (1971). See also, BERGSTEN, HORST, MORAN, AMERICAN MULTINATIONALS AND AMERICAN INTERESTS 386 (1978).

92. For example, some companies use a 10% after tax ROI as a minimum on investment in highly developed countries and a 15% return on emerging countries, the difference being based on their basic assumption of less risk involved in the former. Stobaugh, How to Analyse Foreign Investment Climates, 47 Harv. Bus. Rev. 101 (1969).
93. Examples of the factors rated are: capital repatriation, foreign ownership allowed, discrimination and controls, currency stability, political stability, availability of local capital, inflation rates etc.

94. As explained by Stobaugh:

"[T]he company manager makes his best estimate of what the value will be for the various factors that will affect the project's profitability. To do this, he identifies the crucial variables, estimates as best he can what these variables will be at different times in the future and obtains a resultant estimate of cash flow (and other target variables, such as reported net profit). He then varies his estimates of these crucial factors in order to determine the sensitivity of the cash flow to changes in each factor. He then selects those factors having the greatest effect on project profitability and varies his estimates of them and different combinations of them within a reasonable range; this enables him to estimate a likely range within which the resulting cash flow will be."

Stobaugh, supra note 92 at 103.

95. The MAAP can be adjusted upwards during renegotiation or by a judicial tribunal upon nationalization/compensation disputes.

96 If, for example, 40 years were left on a contract and the MAAP was estimated at 10% over investment, the formula in view of the term involved, may be altered to:

\[
10\% \times 20 \text{ (years)} \\
6\% \times 15 \text{ (years)} \\
4\% \times 5 \text{ (years)} \\
40 \text{ years}
\]

97. These are the conditions stated in the tenatative agreement on the Code of Conduct provisions that may give rise to a request by either party for a renegotiation of a contract. See note 79, supra.

98. For a discussion regarding lucrums cessans, see Z. KRONFUL, PROTECTION OF FOREIGN INVESTMENTS 26 (1972).

99. See e.g., Chilean nationalization of copper industry, discussed by STEINER & VAGTS, supra note 29, at 450.

100. CERDS, supra note 5.

102. The legal nature and scope as well as matter pertaining to implementation of the Code has not yet been discussed by the Working Group. Given the wide subject matter coverage of the anticipated Code, consensus as to the degree of binding legality will not be easily forthcoming.

103. Wesley, supra note 34, at 30, 31.

104. See supra note 99.

105. Webster's New Collegiate Dictionary, at 287.

106. It is not unusual to find contracts entered into in colonial or quasi-colonial circumstances in a developing country which favours the TNC to a degree which clearly illustrates unequal bargaining powers between the parties and which may result in exorbitant profits to the TNC. Right after the First World War, Kennecott paid taxes to the Chilean Government of only 0.8 per cent in sales. Mimalakis and Reynolds, Essays on the Chilean Economy 226 (1965). As late as 1958, the transfer price received by Venezuela for its iron ore “was determined solely by the companies [U.S. Steel & Bethlehem] on the basis of criteria each deemed relevant.” Gomez, “Venezuela’s Iron Ore Industry” 327 in MIKESELL & OTHERS, FOREIGN INVESTMENT IN THE PETROLEUM AND MINING INDUSTRIES (1971).

107. The term "transfer price" which in its neutral use applies to all prices for the transfer of goods within one and the same group has come to be used in a perjorative sense to denote an artificially manipulated intracorporate price. The conflict between a host State and a TNC with regard to transfer pricing is based on the fact that the dictates of global maximization may cause underpricing of exports by TNCs and overpricing of imports, depriving the host State of possible income. Analysts studying the phenomenon of transfer pricing in underdeveloped countries document underpricing of exports averaging 40 to 60 per cent and overpricing of imports ranging anywhere from 20 per cent to 8,000 per cent. See, THE NATION-STATE AND TRANSNATIONAL CORPORATIONS IN CONFLICT 92 (G. Mann ed. 1975).

108. A post-nationalization claim for windfall profits is not an unlikely possibility because of the extreme rises in prices that are possible due to a sudden increase of demand for natural resources. When the increase in prices is brought about by circumstances unforeseeable by the TNC and the host State, the latter should be entitled to some share of the windfall.

109. When Peru nationalized the U.S.-based Cerro de Pasco Corporation in 1974, the nationalizing law (Decree No. 20492) named among the company’s misdeeds, adverse environmental impact from its operations. Reprinted in 13 Int'l Legal Mat. 421 (1974).


112. See generally supra note 1.


114. The Center for Transnational Corporations at the U.N. is a possibility. An ICSID-type procedure could be utilized.