Case Western Reserve Journal of International Law

Volume 16 | Issue 2 Article 6

1984

An Examination of Compensation Terms in the United States-Egypt Bilateral Investment Treaty

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NOTE

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*by Saul Aronson**

I. INTRODUCTION

A. Background

One of the greatest concerns of U.S. investors abroad is the possible expropriation of property by a foreign government, particularly in less developed areas of the world.[1] Two reports demonstrate that these fears may be well founded. A late 1960's study of the Fortune 500 found that 187 companies had experienced an expropriation since the end of World War I.[2] The U.S. State Department reported in another study that between July of 1971 and July of 1973 there were at least 86 instances of expropriation of American investment interests.[3]

As a result of this problem, foreign investors are unlikely to invest in lesser developed nations unless basic conditions of investment protection are satisfied. Developing nations that are unable to meet these investment protection requirements endure harsh economic consequences. Although in need of foreign investment, such as technology and capital, these countries find it increasingly difficult to attract direct foreign investment unless they provide a favorable and secure investing environment to the overseas investor.[4]

In an attempt to protect U.S. foreign investment, the U.S. govern-

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[1] Pedersen, *Expropriation in International Law—Strategies of Avoidance and Redress*, 10 U. TOL. L. REV. 73 (1978).

[2] *Id.*

[3] *Id.*

[4] AMERICAN ARBITRATION ASSOCIATION, ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE, PROMOTION AND PROTECTION OF INVESTMENTS 8-10 (1982) (report prepared for conference on Nov. 3, 1982).

ment has negotiated, since the end of World War II, a total of 44 treaties.[5] These have included provisions for the protection and treatment of direct foreign investments.[6] These agreements, known as Treaties of Friendship, Commerce and Navigation, were extremely helpful to the U.S. overseas investor in the years immediately proceeding World War II (1946-56).[7]

These treaties, however, may now no longer be appropriate for the rapid commercial expansion of today's investing world.[8] A major problem with the Treaties of Friendship, Commerce and Navigation is that they are not limited exclusively to the protection of foreign investments, but rather, generally emphasize the protection of American citizens abroad.[9] Consequently, they are often complex and overbroad, thereby detracting from their effectiveness as an investment protection device.[10] The U.S. government responded to this problem in 1982 when it concluded its first Bilateral Investment Treaty with the government of Egypt.[11] The Bilateral Investment Treaty with Egypt is different from its predecessor, the Friendship, Commerce and Navigation Treaty, because of its focus on the protection of foreign investments.[12]

The purpose of this note is to examine the efficacy of the compensation terms of the U.S.-Egypt Bilateral Investment Treaty and to determine whether the Treaty provides improved legal protection to the U.S. foreign investor in the event of expropriation of U.S. interests in Egypt.

B. Problems of Compensation Under International Law

The major problem of compensation under international law is the question of which rule of compensation should be used when foreign assets have been expropriated by a host country. The three competing

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[5] Asken, *The Case For Bilateral Investment Treaties*, in PRIVATE INVESTORS ABROAD—PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS 357, 358-59 (M. Landwehr ed. 1981).

[6] *See, e.g.*, Treaty of Amity and Economic Relations, May 29, 1966, United States-Thailand, art. III(2), 19 U.S.T. 5843, 5847, T.I.A.S. No. 6540; Convention of Establishment, Nov. 25, 1959, United States-France, art. IV(3), 11 U.S.T. 2398, 2403, T.I.A.S. No. 4625; Treaty of Friendship and Commerce, Nov. 12, 1959, United States-Pakistan, art. VI, 12 U.S.T. 110, 113, T.I.A.S. No. 4683; Treaty of Friendship, Commerce and Navigation, Mar. 27, 1956, United States-Netherlands, art. VI(4), 8 U.S.T. 2043, 2051, T.I.A.S. No. 3942.

[7] Asken, *supra* note 5, at 367.

[8] *Id.*

[9] *Id.* at 368.

[10] *Id.* at 371.

[11] Treaty Concerning the Reciprocal Encouragement and Protection of Investments, Sept. 29, 1982, United States-Egypt, *reprinted in* 21 I.L.M. 927 (1982) [hereinafter cited as U.S.-Egypt Bilateral Investment Treaty].

[12] *Id.* at 930-34 (art. II).

views are: (1) the traditional view; (2) the emerging view, as set forth by Professor Ignatz Seidl-Hohenveldern; and, (3) the Third World view.

The traditional view of compensation, supported primarily by the western industrialized nations, is that the expropriating state must pay "prompt, adequate and effective" compensation to the deprived property owner.[13] This rule has been upheld and interpreted by international courts and tribunals to require that compensation be equal to the fair market value of the property concerned[14] and loss of anticipated profits.[15] In *Sapphire International Petroleums Ltd. v. National Iranian Oil Company*,[16] the arbitrator concluded:

> According to the generally held view, the object of damages is to place the party to whom they are awarded in the same pecuniary position that they would have been in if the contract had been performed in the manner provided for by the parties at the time of its conclusion. . . . This compensation includes the loss suffered (*damnum emergens*), for example the expenses incurred in performing the contract, and the profit lost (*lucrum cessans*), for example the net profit which the contract would have produced.[17]

Furthermore, in *Norwegian Shipowners' Claims*,[18] the Permanent Court of Arbitration Tribunal stated: "Just compensation implies a complete restitution of the *status quo ante*, based not upon future gains of the United States or other powers, but upon the loss of profits of the Norwegian owners as compared with other owners of similar property."[19]

In addition to the traditional view, a new rule of compensation is emerging under customary international law: "[W]here a State takes the property of foreigners, such persons are entitled to compensation, even if nationals of the State concerned obtain no compensation at all, or only inadequate compensation; yet, the compensation due to the foreign owners does not necessarily amount to full compensation."[20] The proponents of this standard believe that it is replacing the traditional rule of prompt, adequate and effective compensation. In support of this contention they

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[13] Seidl-Hohenveldern, *Austrian Practice on Lump Sum Compensation by Treaty*, 70 AM. J. INT'L L. 763, 766 (1976).

[14] Norwegian Shipowners' Claims (Nor. v. U.S.), 1 R. Int'l Arb. Awards 309, 334, 340 (Perm. Ct. Arb. 1922).

[15] Sapphire International Petroleums Ltd. v. National Iranian Oil Co., 35 I.L.R. 136, 185-186 (1963).

[16] *Id.*

[17] *Id.*

[18] Norwegian Shipowners' Claims, 1 R. Int'l Arb. Awards at 390.

[19] *Id.* at 338.

[20] Seidl-Hohenveldern, *The Social Function of Property and Property Protection in Present Day International Law*, in ESSAYS ON THE DEVELOPMENT OF INTERNATIONAL LEGAL ORDER 77, 95-96 (F. Kalshoven, P. Kuyper & J. Lammers eds. 1980).

refer to the Austrian government lump-sum settlement treaties signed after World War II.[21]

A third standard of compensation, which is followed primarily by developing nations, is articulated in the United Nations Charter of Economic Rights and Duties of States: "[A]ppropriate compensation should be paid by the state adopting such measures [i.e., expropriation, nationalization], taking into account its relevant laws and regulations and all circumstances that the State considers pertinent."[22] One Third World author even suggests that compensation should be limited solely to the scrap value of the installations concerned, arguing that industrialized nations have a responsibility to pay back damages inflicted by them on lesser developed countries during the colonial period.[23] The conflicting views of compensation held by industrial and developing nations are a source of continuing controversy.

C. *The U.S. Position Regarding Compensation*

The U.S. government position is that compensation for property expropriated by a foreign government must be prompt, adequate and effective. The Second Restatement of Foreign Relations Law defines adequate as meaning "the full value of property taken, together with interest to the date of payment."[24] Furthermore, the U.S. State Department has stated that the "acceptance by U.S. nationals of less than fair market value does not constitute acceptance of any other standard by the U.S. government."[25] Payment with reasonable promptness is defined by the Second Restatement of Foreign Relations Law as meaning "payment as soon as is reasonable under the circumstances."[26] The Official Comments clarify this definition by stating that:

> [P]rovision for determining compensation must exist at the time of the

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[21] Seidl-Hohenveldern, *supra* note 13, at 766.

[22] G.A. Res. 3281 (XXIX), 29 U.N. GAOR Supp. (No. 31), at 50, U.N. Doc. A/9946 (art. 2(2)(c)). The U.N. Resolution has a nonbinding effect. Furthermore, it was not supported by the western industrialized nations. Seidl-Hohenveldern, *supra* note 20, at 91-92.

[23] Girvon, *Expropriating the Expropriators: Compensation Criteria From a Third World Viewpoint*, in 3 THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW 168 (R. Lillich ed. 1975).

[24] RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 188 (1965). Full value is defined as "fair market value if ascertainable" and it "must be determined as of the time of taking, unaffected by the taking or other related takings, or by conduct attributable to the taking state and having the effect of depressing the value of the property in anticipation of the taking." *Id.*

[25] *U.S. Policy on Foreign Investment and Nationalization Reiterated*, 74 DEP'T ST. BULL. 138 (1976).

[26] RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 189 (1965).

> taking. It must include provision for determination within a reasonable time and for payment promptly after determination.
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> . . . .
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> Payment in state bonds . . . does not satisfy the requirement of promptness unless the maturity date of the bonds is within a reasonable time under the circumstances.[27]

Effective compensation is also defined by the Second Restatement of Foreign Relations Law, which states that compensation must be in an "effectively realizable form [requiring payment] in the form of cash or property readily convertible into cash."[28]

II. Compensation Problems Under Current U.S. Investment Protection Treaties

A. Difficulties with the Standard of Compensation of U.S. Investment Treaties

Typically, the compensation provision of a U.S. investment treaty requires that "property shall not be taken . . . without the prompt payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken."[29] Reliance on such a general standard, however, has done little to clarify such difficult questions as how much compensation is "adequate," how prompt is "prompt," and what form is "effective." As one author has written: "[G]eneral principles will not help much . . . . [R]esort to generalities such as 'prompt, adequate, and effective' . . . are far more likely to obscure thought, comfort the parties with notions of ideological certainty and moral perfection, and inspire them to dig their trenches deeper."[30]

Two major difficulties exist with the current U.S. treaty standard of prompt, adequate and effective compensation. First, the standard does

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[27] *Id.* § 189 comments a and b.

[28] *Id.* § 190.

> If not in the currency of the state of which the alien was a national at the time of taking, the cash paid must be convertible into such currency and withdrawable, either before or after conversion, to the territory of the state of the alien's nationality, except . . . [s]uch conversion . . . may be delayed to the minimum extent necessary to assure the availability of foreign exchange for goods and services essential to the health and welfare of the people of the taking state.

Id.

[29] Treaty of Amity, Economic Relations, and Consular Rights, Aug. 15, 1955, United States-Iran, art. IV(2), 8 U.S.T. 899, 903, T.I.A.S. No. 3853 [hereinafter cited as U.S.-Iran Treaty].

[30] Rogers, *Foreward*, to 1 The Valuation of Nationalized Property in International Law at viii (R. Lillich ed. 1972).

not effectively articulate the minimum level of compensation expected by the U.S. government. Second, the standard does not offer a solution to the extremely complex problem of valuation, thereby leaving the U.S. foreign investor vulnerable to the possibility of improper or unfair methods of valuation by the depriving state.

B. Application of the Prompt, Adequate and Effective Standard of Compensation

The terms of the traditional compensation standard are not defined by a rigid formula, but rather by the peculiarities of each case. For example, the word "prompt," "anticipates immediate recovery, whether the deprivation be limited or extensive."[31] International tribunals have held it to mean payment made " 'as rapidly as possible,' 'without undue delay,' or within a 'reasonable time.' "[32] Actual practice, however, is inconsistent with the theory of immediate payment, "emphasizing instead the deferred character of compensation."[33] Often the expropriating state will resort to delaying tactics in order to forestall paying its obligation or to encourage settlement at a lower figure.[34]

The term "effective" has traditionally meant the payment of compensation "in a medium of exchange of maximum value to the deprived alien, preferably his own legal currency."[35] But in actuality, depriving states have engaged in practices not conforming to the conventional definition of "effective." Such practices include not paying obligations due to

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[31] Dawson & Weston, *"Prompt, Adequate and Effective": A Universal Standard of Compensation?*, 30 FORDHAM L. REV. 727, 736-40 (1962). "[S]ome of its adherents [have] even insist[ed] on prior payment." *Id.* at 736.

[32] Pedersen, *supra* note 1, at 94. *See also* Norwegian Shipowners' Claims, 1 R. Int'l Arb. Awards at 337 (payment to be made without undue delay).

[33] Dawson & Weston, *supra* note 31, at 766. The prompt payment standard can be realistically applied in limited deprivations since the amount involved would presumably be insignificant enough to permit swift payment. However, in extensive deprivations, prompt payment becomes almost impossible because the depriving state usually lacks the resources necessary for compliance. *Id.* at 737.

[34] Pedersen, *supra* note 1, at 94. Three examples are given. First, "[t]he Chilean Act which nationalized American copper companies in 1971 provided for payment over an extended period not to exceed thirty years." *Id.* at 94 n.98. Second, "[f]ollowing an expropriation in Guatemala, an offer of payment was made in bonds to mature in twenty-five years, interest on which was to accrue at three percent per annum." *Id.* Third, "[t]he Cuban offer of compensation following expropriations in the early 1960's provided for payment in thirty year bonds, both the interest and principle of which were to be paid out of revenues received from the sales of sugar to the United States." *Id.*

[35] Dawson & Weston, *supra* note 31, at 738. *See* Case of S.S. "Wimbledon," 1923 P.C.I.J., ser. A, No. 1, at 32 (Judgment of Aug. 17, 1923). Bonds may be acceptable if they appear sound and have prompt maturation dates. Pederson, *supra* note 1, at 96.

an inability or unwillingness to pay[36] and manipulating the medium of payment particularly when the currency involved is subject to a high degree of exchange fluctuation.[37]

The term most subject to dispute, "adequate," traditionally obligates the taking state to provide recompense to the former owners of the seized property in an amount equal to the fair market value of the property at the time of taking.[38] This rule is supported by international tribunals.[39] However, such standards as fair, just or appropriate compensation do not specify how compensation is to be calculated, other than to say that it should be less than full and more than nothing.[40] Even when compensation formulas have been acknowledged, they have not always been properly applied.[41] The fair market value standard has been criticized on account of: (1) vagueness;[42] (2) an absence of a market for the usual type of

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[36] Dawson & Weston, *supra* note 31, at 738-39. While limited takings should be made in "hard" or the most available currency, extensive takings introduce difficulties of larger proportion due to the vastness of the taking. In such instances claimant states have been forced to accept payment in government bonds, redeemable in soft currencies, which may be of little value at maturation date due to inflation, devaluation, inconvertability or general monetary instability. *Id.* at 739.

[37] Pedersen, *supra* note 1, at 95.

[38] *Id.* at 86.

[39] Case Concerning the Factory at Chorzów (Ger. v. Pol.), 1928 P.C.I.J., ser. A, No. 17, at 47 (Judgment of Sept. 13, 1928).

[40] Baxter, *Foreward*, to 2 THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW at viii (R. Lillich ed. 1972). The absence of generally accepted guidelines to property valuation is due to a general reluctance at the international level to express a methodology used in calculating a compensation amount. For example, The Foreign Claims Settlement Commission of the United States, a national claims program whose task is primarily to calculate value within the international context, has rarely acknowledged the method of valuation employed in determining awards. This lack of an articulated standard has also been characteristic of British and French national claims commissions set up to distribute lump sum settlements to qualified claimants. Smith, *Real Property Valuation for Foreign Wealth-Deprivations*, in 1 THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW 133 n.3 (R. Lillich ed. 1972).

[41] Smith, *supra* note 40, at 133-34 n.3.

> The American-Turkish Claims Commission under the agreement of December 24, 1923, presents the classic example of such improper application in *Christo Pirocaco v. Republic of Turkey*. The claimant has asserted a value for certain property in excess of $50,000. The Commission first multiplied the purchase price for the property, as stated in the deed, by a coefficient adopted from the practice of the Turkish-Greek Commission and arrived at a sum of $3,520. The Commission then adopted the study of the American Consul General, which had capitalized rental value, and arrived at a sum of $10,971.42. The Commission then averaged these two figures and obtained a figure of $7,245.71. The Commission, in a final step, estimated damage by deducting the value of the property, as stated in a tax assessment, from the above figure and awarded the claimant $6,030.01.

Id.

[42] Pedersen, *supra* note 1, at 87.

enterprise investment;[43] (3) more acute difficulties for the depriving state when takings are extensive;[44] (4) reduced fair market value of an asset resulting from government actions, such as prior notice of expropriating, thereby reducing the amount of compensation;[45] and, (5) the fact that although the fair market value standard may be appropriate for measuring a small, locally established firm, multinational firms require a more sophisticated form of evaluation.[46]

1. The U.S. Government Approach to Calculating Fair Market Value and Relevant Criticisms

The U.S. government has three methods to determine fair market value: (1) the going-concern approach; (2) the replacement cost of property approach; and, (3) the book value approach.

The going-concern approach is a method which attempts to measure earning power and therefore encompasses elements such as loss of future profits, which may be based on projections of past earnings or estimates of future earnings.[47] This method has several problems in application. First, it can be difficult or unfair to apply "where the expropriated enterprise lacks an earnings history which is sufficiently long for accurate prediction."[48] Second, the earning power of an enterprise is vulnerable to actions of the host state which affect profit in a negative way,[49] such as tax increases, threat of contract cancellation or withdrawal of privileges.[50] And third, compensation can vary considerably depending on how capitalization is applied.[51] In these situations the U.S. government recognizes that this method may be impracticable.[52]

In addition to the going-concern approach, the U.S. government also

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[43] *Id.* at 87-88. "While in other contexts, sales of similar products or things could be used for determination of their value in the relevant market, there will seldom be sales of similar enterprises to be used for comparison. Thus, 'market value' is not a directly ascertainable amount. Accordingly, it must be approximated." *Id.* at 88.

[44] Dawson & Weston, *supra* note 31, at 738. "Extensive deprivations may be of such . . . magnitude as to render 'full' compensation truely impossible . . . . Moreover, recent opinion and practice suggest that 'partial' compensation in this context has become more the norm than the exception." *Id.*

[45] Wesley, *Establishing Minimum Compensation Criteria for Use in Expropriation Disputes*, 25 VAND. L. REV. 939, 959 (1972).

[46] *Id.* at 960. Market conditions do not accurately measure value in this instance because of the imperfect competitive market conditions of the multinational corporation. *Id.*

[47] Smith, *The U.S. Government Perspective on Expropriation and Investment in Developing Countries*, 9 VAND. J. TRANSNAT'L L. 517, 519 (1976).

[48] Pedersen, *supra* note 1, at 88.

[49] *Id.* at 89.

[50] Smith, *supra* note 47, at 519.

[51] Pedersen, *supra* note 1, at 89.

[52] Smith, *supra* note 47, at 519.

accepts the use of the replacement cost of property approach when appropriate.[53] Under this method, compensation equals the replacement cost of property at the time of the expropriation less actual depreciation.[54] The advantage of this approach is that it is simpler to apply than the going-concern approach, and it yields results which are relatively equitable, consistent and predictable.[55] The major defects are that it does not take into account earning capacity, is of little use in valuing intangibles,[56] and does not reflect the market conditions and technology that can change between the time when an asset is put into operation and the time of valuation.[57] In addition, it does not measure the real loss to the investor, which is in terms of lost opportunities since an investor cannot replace opportunities by replacing lost assets.[58]

The final method employed by the U.S. government is the book-value approach, which values assets at acquisition cost less depreciation.[59] The major objection to this method is that it bears little relation to the actual value of the investment as the time increases between the establishment of the enterprise and the expropriation although it is possible that the value of the investment may increase.[60]

The reader will better understand the complex problems of applying the prompt, adequate and effective standard of compensation upon examination of two recent case examples.

2. The French Nationalization Cases

At the center of President Francois Mitterand's political and economic changes is the controversial $7.4 billion nationalization of major industries and banking institutions.[61] Although foreign firms are specifi-

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[53] *Id.* This method is less acceptable to the United States than the going-concern approach. *Id.*

[54] *Id.*

[55] Pedersen, *supra* note 1, at 89.

[56] Smith, *supra* note 47, at 519.

[57] Weigel & Weston, *Valuation Upon the Deprivation of Foreign Enterprise: A Policy-Oriented Approach to the Problem of Compensation Under International Law*, in 1 THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW 3, 16 (R. Lillich ed. 1972).

[58] *Id.*

[59] Smith, *supra* note 47, at 519. This is the least acceptable method of valuation to the U.S. government. *Id.*

[60] Pedersen, *supra* note 1, at 90.

[61] Borde & Eggleston, *The French Nationalizations*, 68 A.B.A. J. 422 (1982).

> [S]hareholders of each of the publicly traded nationalized concerns [were entitled] to receive, for each share nationalized, the highest average monthly opening stock market quotation during the six-month period ending March 31, 1981, as increased by 14 per cent to compensate for France's inflation rate in 1981. In addition, the shareholders will receive, in lieu of 1981 dividends, a bonus equivalent to the per share dividends made by the nationalized concern in 1980, again as in-

cally excluded from the nationalization program, foreign minority shareholders in French banks and industries were not excluded.[62] This section examines the implications of the indemnification scheme for American minority shareholders.

The Convention of Establishment[63] states in article IV that:

> Property of nationals and companies of either . . . Party shall not be expropriated . . . except for a public purpose and with payment of a just compensation. Such compensation shall represent the equivalent of the property taken; it shall be accorded in an effectively realizable form and without needless delay. Adequate provision for the determination and payment of . . . compensation must have been made no later than the time of taking.[64]

In addition to article IV, section 5 of the Protocol provides that "the term 'expropriated . . . for a public purpose' extends *inter alia* to nationalizations."[65] And section 6 of the Protocol states that provisions providing for payment of compensation "shall extend to interests held directly or indirectly by nationals and companies of either . . . Party in property expropriated within the territory of the other . . . Party."[66]

France claims that the indemnification paid to American shareholders will meet the fair market value criteria provided for in the Convention of Establishment.[67] The first plan of indemnification provided by the French government was declared unconstitutional by France's highest judicial body, the Constitutional Council.[68] The second indemnification scheme, however, was quickly approved by the Constitutional Council and called for compensation based exclusively on stock market exchange prices.[69]

Indemnification was to be paid in the form of state bonds issued

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creased by a 14 per cent inflation adjustment.

As for the 21 banks not publicly traded, the definitive Nationalization Law creates an Administrative Commission that must determine, no later than June 30, 1982, the amount of indemnification to be paid by analyzing the value of the shares nationalized as of December 31, 1981, and correcting that for inflation and other economic events during the first semester of 1982.

Id. at 426.

[62] *Id.* at 425.

[63] Convention of Establishment, Nov. 25, 1959, United States-France, 11 U.S.T. 2398, T.I.A.S. No. 4625.

[64] *Id.* at 2403.

[65] *Id.* at 2421.

[66] *Id.*

[67] Borde & Eggleston, *supra* note 61, at 427.

[68] N.Y. Times, Jan. 18, 1982, at 10, col. 3. The Council's principle objection to the plan was the fact that dividends for 1981 had been suspended and were not included in the indemnification scheme. *Id.*

[69] Borde & Eggleston, *supra* note 61, at 426.

within three months from the effective date of the Nationalization law.[70] Shareholders were given, in exchange for their shares, negotiable bonds issued by the National Industrial Fund and guaranteed by the government of France.[71] Interest on the bonds is to be paid semi-annually and is set equal to the rate in effect for the long term government debt obligations.[72] The National Industrial Fund is to redeem the bonds pursuant to a lottery draw conducted once per year for fifteen years.[73]

The French indemnification scheme exemplifies the difficulties of applying the prompt, adequate and effective compensation standard. The plan most likely fails to meet the requirements of adequate payment for several reasons. First, "although higher than before, the compensation to be received by shareholders remains below . . . the compensation which might have been awarded had the shares been evaluated in accordance with widely recognized international accounting practices."[74] Second, article 18, paragraph 2 of the plan, which provides for a National Administrative Commission to fix the exchange values of shares of non-quoted banks, has several problems which adversely affect the valuation process: (1) it does not indicate how net profits and assets should be computed; (2) it does not specify whether goodwill value should be included in net assets; (3) it does not make any provision for determining whether consolidated accounts should be taken into consideration; (4) it makes no statement as to whether assets of banks should be revaluated and their worth redetermined as of the date the Commission is to decide value; and, (5) it does not mention what part of net assets should be considered or how net profits are to be determined.[75]

Additionally, the plan fails to meet the prompt and effective requirements. The government of France, in lieu of cash, plans to pay compensation in state bonds redeemable within a fifteen-year maturity period.[76] This time frame may violate the prompt payment requisite under both the Convention of Establishment and settled principles of international law. Further, the indemnification scheme inadequately computes the rate to be paid on the bonds since it neither sets a minimum interest rate nor establishes protections against depreciation of capital due to monetary erosion.[77] These problems apply equally to the effective requirement, which is also left unsatisfied because the indemnification plan fails to pro-

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[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] Loyrette & Gaillot, *French Nationalizations and Foreign Banks*, INT'L FIN. L. REV., June 1982, at 17.

[75] *Id.*

[76] Borde & Eggleston, *supra* note 61, at 426.

[77] Loyrette & Gaillot, *supra* note 74, at 18.

tect foreign shareholders against currency exchange risks.[78]

3. The Iranian Claims Cases

Within a short time after the 1979 revolution and the replacement of the Shah of Iran with the new Islamic government in Iran, numerous U.S. investment projects were nationalized.[79] This resulted in scores of lawsuits in U.S. courts against the new revolutionary government. United States firms asserted that the nationalization of their interests in Iranian companies constituted an actionable violation of the treaty of Amity, Economic Relations and Consular Rights between the United States and Iran[80] "because Iran allegedly failed to pay prompt, adequate and effective compensation for the nationalized interests."[81] On January 19, 1981, the United States and Iran entered into an agreement leading to the suspension of these suits pending resolution of claims by an international tribunal.[82]

Article IV, paragraph 2 of the Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran provides that:

> [P]roperty shall not be taken except for a public purpose, nor shall it be taken without the prompt payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof.[83]

Although article IV affords U.S. nationals and companies a basis to argue that the question of liability and measure of damages are fixed by the treaty, it does not resolve the problem of how to apply the prompt, adequate and effective standard. Further, it has no provision to offset the possible depressing effect on value which the expropriatory event or other government actions may cause. Consequently, the U.S. investor in Iran is insufficiently protected, and vulnerable to the possibility that Iran will provide a less than acceptable compensation amount.

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[78] *Id.* at 19.

[79] Eskridge, *The Iranian Nationalization Cases: Toward a General Theory of Jurisdiction Over Foreign States*, 22 HARV. INT'L L.J. 525 (1981).

[80] U.S.-Iran Treaty, *supra* note 29.

[81] Eskridge, *supra* note 79, at 526.

[82] Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, Jan. 19, 1981, *reprinted in* 20 I.L.M. 230 (1981).

[83] U.S.-Iran Treaty, *supra* note 29, 8 U.S.T. at 903.

III. A Comparative Evaluation

This section evaluates the effectiveness of the U.S.-Egypt Bilateral Investment Treaty[84] compensation terms, by comparing them to the terms used in a typical Treaty of Friendship, Commerce and Navigation.[85]

A. *Discussion*

1. Advantages of the U.S.-Egypt Bilateral Investment Treaty Indemnification Terms

a. Clearer Terms

The terms employed in the U.S.-Egypt Bilateral Investment Treaty (BIT) are clearer than those used in the U.S.-Iran Treaty of Friendship, Commerce and Navigation (FCN). For example, with regards to the definition of "adequate," the BIT treaty contains the wording "fair market value,"[86] whereas the FCN treaty provides for "full equivalent."[87] The standard of compensation used in the BIT treaty is "prompt, adequate and *freely realizable*,"[88] which differs from the "prompt, adequate and effective" standard used in the FCN treaty.[89] As for exchange control requirements, the BIT treaty requires that compensation be "freely transferable,"[90] whereas the FCN treaty merely requires "reasonable provision for withdrawal."[91] Furthermore, the BIT treaty defines "prompt" as "diligently and expeditiously,"[92] whereas the FCN treaty contains no similar provision. These changes provide more specific provisions that should effectively minimize disputes over the meaning of treaty terms.

b. Greater Legal Protections

In addition to clearer terms, the U.S.-Egypt Bilateral Investment

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[84] U.S.-Egypt Bilateral Investment Treaty, *supra* note 11.

[85] U.S.-Iran Treaty, *supra* note 29. This treaty is being used for illustrative purposes because of the relevance of the recent Iranian expropriations of U.S. investments. It is also similar to other Friendship, Commerce and Navigation Treaties concluded by the United States.

[86] U.S.-Egypt Bilateral Investment Treaty, *supra* note 11, 21 I.L.M. at 935 (art. III(1)).

[87] U.S.-Iran Treaty, *supra* note 29, 8 U.S.T. at 903 (art. IV(2)).

[88] U.S.-Egypt Bilateral Investment Treaty, *supra* note 11, 21 I.L.M. at 935 (art. III(1)(d)).

[89] U.S.-Iran Treaty, *supra* note 29, 8 U.S.T. at 903 (art. IV(2)).

[90] U.S.-Egypt Bilateral Investment Treaty, *supra* note 11, 21 I.L.M. at 935 (art. III(1)).

[91] U.S.-Iran Treaty, *supra* note 29, 8 U.S.T. at 905 (art. VII(2)).

[92] U.S.-Egypt Bilateral Investment Treaty, *supra* note 11, 21 I.L.M. at 948 (Protocol(5)).

Treaty offers additional advantages over the U.S.-Iran Treaty. First, it contains a provision for timing the calculation of compensation so that indemnification is not adversely affected by the possible depression of value which the expropriatory event may cause.[93] Second, it provides that compensation must include payments for delay under international law.[94] Third, it provides that the depriving state may not assert as a defense that a national or company will receive indemnification from a third party.[95] This is to protect investment guarantee programs carried out by the United States. Fourth, it provides for more comprehensive methods of dispute resolution than does the U.S.-Iran Treaty, including the right to submit the dispute to the International Center for Settlement of Investment Disputes[96] and the right to prompt review by the appropriate judicial or administrative body of the depriving state.[97]

c. Encourages Conflict Avoidance and Dispute Resolution at an Early Stage

The use of clearer terms and the greater availability of dispute resolution mechanisms increases the likelihood that disagreement will be resolved at an early stage. This is especially important since specific methods of valuation are not provided and may assist in minimizing problems likely to arise when a case by case approach to valuation is taken.

d. Negotiated Specifically for Protection of Foreign Investments

The U.S.-Egypt Bilateral Investment Treaty was concluded specifically for the protection of foreign investments.[98] This is more favorable to the foreign investor, since the U.S.-Iran Treaty included investment protection provisions only as part of a much broader treaty purpose.[99]

2. Disadvantages of the U.S.-Egypt Bilateral Investment Treaty Indemnification Terms

The greatest disadvantage of the U.S.-Egypt Bilateral Investment Treaty is its failure to satisfactorily address the problem of defining adequate compensation. For instance, although the fair market value at the date of expropriation is the agreed upon level of compensation,[100] the

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[93] *Id.* at 935 (art. III(1)).
[94] *Id.*
[95] *Id.* at 940-41 (art. VII(4)).
[96] *Id.* at 939-40 (art. VII(1-3)).
[97] *Id.* at 936 (art. III(1)).
[98] *Id.* at 928 (preamble).
[99] Asken, *supra* note 5, at 371-72.
[100] U.S.-Egypt Bilateral Investment Treaty, *supra* note 11, 21 I.L.M. at 935 (art. III(1)).

treaty does not specify a method to determine this figure. Furthermore, though the treaty provides compensation for delay under principles of international law,[101] it does not specify what that amount is or how it should be determined.

Another difficulty with the treaty is that even though it provides for prompt review of disputes by the appropriate judicial or administrative body of the depriving state,[102] it does not address the fact that many developing nations have underdeveloped legal systems which are not capable of dealing with such questions.[103] In addition, while the terms of recompense are clearer and provide substantial legal protection to the foreign investor, there is still a doubt as to how effective the treaty would be in instances when the depriving state is carrying out a program of extensive expropriation. Many underdeveloped countries lack sufficient capital or cash flow to provide the "prompt, adequate and freely realizable" compensation required by the treaty.[104]

B. Reaction to the U.S.-Egypt Bilateral Investment Treaty in the U.S. Business and Political Communities

Despite the difficulties, there appears to be an initial positive response from sectors of the U.S. business and political communities. For example, one international journal has reported that U.S. companies are now looking more seriously at Egypt as a place of investment.[105] Moreover, the Reagan Administration is hoping that the U.S.-Egypt Bilateral Investment Treaty will serve as a prototype for future investment agreements with other developing nations.[106] However, the U.S.-Egypt treaty has been vigorously attacked by the Egyptian Bar on the ground, among others, that the expropriation provisions are in conflict with the views of the developing world.[107] Due to this dispute, the U.S. Department of State is currently re-negotiating certain terms of the agreement with Egyptian government officials.[108]

IV. CONCLUSION

The U.S.-Egypt Bilateral Investment Treaty compensation terms of-

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[101] *Id.*

[102] *Id.* at 936 (art. III(3)).

[103] Letter from John A. Westberg to author (May 7, 1983).

[104] *See supra* note 36 and accompanying text.

[105] Meed News, Oct. 8, 1982, at 17, col. 3.

[106] *United States, Egypt Sign First Treaty on Bilateral Investments*, 18 INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA), at 17 (1982).

[107] Letter from John A. Westberg, *supra* note 103.

[108] *Id.*

fer the U.S. investor in Egypt greater legal protection than comparable indemnification provisions of other U.S. investment treaties. Although the problems of valuation still persist, the treaty is clear on permissible and non-permissible government actions and specifically states that compensation must equal the fair market value of the expropriated investment. Inevitably, disagreements will arise over the application of the "prompt, effective and freely realizable" formula, but the legal protections in the treaty should help to effectively minimize and resolve investment disputes at an early stage. Undoubtedly, the U.S.-Egypt Bilateral Investment Treaty will serve as a useful prototype for future investment agreements with other developing nations.