Denver Journal of International Law & Policy

Volume 2
Number 2 *Fall*

Article 2

January 1972

Proceedings - Expropriation Regional Conference American Society of International Law

Denver Journal International Law & Policy

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Keywords

International Law: History, Developing Countries, Investment

The Denver Journal
OF INTERNATIONAL LAW AND POLICY

VOLUME 2 FALL 1972

PROCEEDINGS — EXPROPRIATION REGIONAL CONFERENCE AMERICAN SOCIETY OF INTERNATIONAL LAW UNIVERSITY OF DENVER COLLEGE OF LAW APRIL 15, 1972

The morning session convened at 9:00 o'clock A.M. in the auditorium of the Law Center of the University of Denver, Mr. John A. Moore of the firm of Holland & Hart, Denver, presiding.

Dean Robert B. Yegge of the University of Denver College of Law and Terry Norbury, President of the University of Denver International Law Society welcomed the participants and guests to the conference.

The Chairman then introduced the speakers, Professor William Loehr, of the University of Denver Graduate School of International Studies, Professor Richard Lillich of the University of Virginia Law School, Professor Burns H. Weston of the University of Iowa College of Law, Fredrick Kirgis of the University of Colorado School of Law, and Keith Williams, Attorney at Law. Chairman Moore invited Professor Loehr to begin.

THE ECONOMIC IMPACT OF UNITED STATES CORPORATE POLICIES IN LATIN AMERICA

Professor William Loehr*

As many of you know, my only experience in Law is trying to get out of parking tickets. I am an economist; I look at the problem of expropriation from an economist's point of view. I might be playing the devil's advocate — I think the question and answer period will show that probably to be the case. I am not against private investment by people from the United States or anywhere else in the world. I believe that there are good and bad things that come from such endeavors. In fact I have on occasion been impressed with the type of investments Americans have made abroad. When you walk out to the edge of the Chuquicamata open pit copper mines and you look down, you say "My God, only an American could dig a hole this big." That has to have an impact on the surroundings. It does.

When we are talking about expropriation by the developing countries, we are talking about countries that are really at times in rather desperate straits trying to provide their citizens with what we would call adequate levels of well-being. If we look at the historical record, we can see that they are having more and more difficulty doing this as time goes on. Estimates made by Simon Kuznets show that the Gross National Product (GNP) per capita in the developed countries, that is here and in Western Europe, were over ten times the GNP in the underdeveloped countries in 1955, and that this disparity increased to a multiple of twelve times the GNP per capita in the underdeveloped countries by the late 1960's. So you see that our incomes are very much higher than those found in underdeveloped countries, and in fact the difference between these levels of living is becoming greater and greater.

Another thing that might put this problem into a little different perspective: Can you imagine that if it were possible to liquidate all the assets of General Motors, the largest single U.S. corporation, and then take the money generated and go to South America and begin to buy capital assets with the proceeds of the sale you could buy outright all the capital equipment that now exists in Chile, Bolivia and Peru — the whole shooting match — the whole routine. When we are talking about a large U.S. corporation, we are talking about something which is indeed very large in comparison to the economies of countries which are considering or practising expropriation.

* Professor of Economics, University of Denver School of International Studies.

Under these circumstances — the widening gap between the developing countries and the developed countries, their seeming inability to catch up to or even approach our living standards, and in view of the size of the corporations with which those developing countries have to deal on occasion — political decision-makers are put in a rather desperate position. The decisions they make for their populations are necessarily decisions of equal importance and impact as we make in the United States. They are literally making desperate decisions. They are not talking about raising the incomes of people already wealthy and making them wealthier. They are talking about raising people from an almost sub-subsistence level to a mere subsistence level. They must make very critical decisions with regard to these issues. Sometimes a life and death issue also pertains directly to the decisions maker's existence. His personal existence, as a politician at least, hinges upon the decisions he makes with regard to these corporations. So with this in mind, the paper that I have generated and which you probably all have, and have at least looked at the cover of, I have entitled *The Uneasy Case for Foreign Investment in Developing Countries*. I agree that private investment from abroad can help these countries. There are things to be gained under some circumstances. On the other hand, there are potential detriments inherent in these types of investments, detriments which on occasion cause developing countries to react in a way which is called "expropriation."

In the period from about 1962 to 1969, new investment in Latin America, by United States interests (excluding Venezuela, which is a separate case because of the inordinately large investments of the petroleum industry there) averaged about $580 million a year. Of this $580 million a large portion, approximately $280 million per year, did not come from funds that flowed from the United States to Latin America, but was generated internally; it was simply reinvested earnings. As a result, the real investment flow from the United States to Latin America was only about $300 million per year for this period. Now, there is a flow in the other direction, of course, on the earnings on those investments. This is the incentive for investors entering these ventures — to cause a flow to themselves — a perfectly rational thing to do. The earnings flow from Latin America to the United States on the investments already in place is $1.3 billion per year on the average — over four times the flow in the other direction.

One of the arguments favoring this type of investment I find to be offered mainly by economists that have been educated in the developed countries. Most of them teach in universities in the developed countries and most of them offer their advice from that position. One of the main things that these proponents of foreign private investment in developing countries offer is the balance of payments effect. We have money flowing in from investments that are being made; I have just shown that thought to be not entirely true about foreign investment because the balance of payment effect can be very adverse as in the case of Latin America. While we have, in the very short run, money flowing in to form new investments to the extent of $300 million per year on the average, we have $1.3 billion flowing in the other direction and so the effect of that alone is very adverse to the balance of payments.

Secondly, some proponents of the balance of payments argument say that these corporations owned by interests in the United States will produce things for a local market in Latin America which would have otherwise been imported — things it would have had to buy from the United States. This assumes that had those corporations not gone there, the people consuming these items would have consumed them in any event. I think the evidence is that they would not have consumed all of these items; that they would in fact not have consumed them at all. They would have shifted their purchases from things produced by U.S. corporations and purchased things produced locally. There is some of this substitution, there is some of this favorable impact in that some of these things that are sold by U.S. corporations and produced locally by U.S. corporations would have indeed been imported and purchased by locals under any other circumstances, but it is not necesarily a universally applicable example.

An argument in addition to the balance of payments argument is that as the capital investment in the underdeveloped countries increased, their productive capacity would increase. The assumption is that these countries are poor because their local businessmen do not have the ability to raise capital, and further, that their governments on occasion either do not have the ability to raise capital or do not have the ability to run productive enterprises even if they could raise the capital. Foreign capital is viewed as a substitute for these inabilities.

Another need that U.S. investors might fulfill is markets

expansion. Very often if a Latin American country could produce something, it might not be able to sell it on an international market because those markets are gravitating more and more toward the United States in absolute volume than through any other country, and in order to sell in international markets, Latin Americans often have to have access to markets that are controlled by U.S. interests, and U.S. investment interests assumed this access.

It is often said the presence of U.S. investors in Latin America would increase the productivity of Latin American workers or Latin American industry. They would lend their advanced levels of technology, or they would hire and train local people to work in their enterprise. They would leave behind residual knowledge or residual technology and skills to be applied generally throughout the economy. This argument hinges on the willingness of U.S. corporations to hire and train local people.

In order to increase the general productivity of the economy in which the investment is located, the technology used by the corporation or the investor has to be generally applicable throughout the rest of the economy. We run into troubles because we have what the economist calls "technological dualism." We have on the one hand an extremely modern productive enterprise, such as petroleum in Venezuela, and yet the technology used in those fields is very inaplicable to the rest of the economy which might be mainly peasant agriculture, handicrafts and very light industry. There is little transfer of the technology used by the U.S. investors to the rest of the economy in which they operate. We often see that the large corporations at times try to protect whatever technological knowledge they possess, and leak it out in doses just large enough to get the task at hand accomplished. They wish to guard their secrets as much as possible — a very rational decision from their point of view.

We often have what we economists refer to as external economies taking place. An external economy is simply a linkage between one industry and another, where one industry has an impact on the other. The existence of one industry might increase, for example, the profitability of some other industry. A U.S. investment might come in and produce something for sale locally which requires a distribution system. If that corporation comes in, sets up its firm, and produces something, it increases the incentive for someone locally to become a dis-

tributor. It makes it possible for him to do so, and therefore supposedly stimulates entrepreneurial activity in the form of a distribution system. The existence of the investment of a foreigner might create a demand for some input. For example, on the northern Chilean coast we had Marco Chileno, a Seattle corporation that produced fishing boats. It has since moved out; conditions turned a little adverse. The existence of Marco Chileno created a demand for flat steel, wood, metal hardware, labor and so forth. It creates a demand for things which someone must produce and transport and sell for the foreign interests. It creates a possibility of some other business development, some other business becoming profitable and therefore creating incentive. This would be favorable as well.

In view of all these potential benefits, I will agree that under some circumstances the benefits will predominate, that under some circumstances a foreign investor could show up in a developing country, set up a firm which would be profitable to himself, and in fact have all of the favorable things happen in the local surroundings.

Opposition, however, comes on several different issues. Opponents say that the above benefits are overstated; that, in fact, perhaps the technology of the firms concerned is not transferable to the rest of the economy. The rest of the economy just does not benefit from the existence of the technology in the country. The firm is like a country unto itself and its technology does not go beyond its borders. It is just not applicable anywhere else as you would find, for example, in the petroleum industry. There is not much in the petroleum industry, at least petroleum extraction, which is generally applicable throughout the rest of the economy. This is a very specialized type of technology, very capital-intensive.

They also indicate at times that companies have been unwilling to hire as much local labor as they could. They were sometimes reluctant to hire local labor because of restrictive labor legislation, the threat of strikes, or just not knowing about the local labor market. For instance, if the foreign investor does not know whether local labor has the requisite skills, he does not know if they could develop these skills and he is therefore reluctant to use much local labor.

The productive techniques that we use in the United States are relatively capital-intensive and use a lot of capital and advanced technology. When you transfer this to the underdeveloped countries it looks odd to use a lot of labor (because

it is cheap) in production which is generally capital-intensive. You find that the foreign enterprises use very little labor for some reason. For instance, Venezuelan petroleum industry which produces sometimes as much as 30 to 35 per cent of the Venezuelan GNP, employed only about 2 per cent of the Venezuelan labor force. True, those laborers had incomes far in excess of any other laborers in the Venezuelan economy. The same thing was true of workers employed by American owned Anaconda Copper Company in northern Chile. Their incomes were approximately five times the general income of workers of equivalent skills in the rest of the economy.

Another major argument against the foreign firms is their impact upon local competition. Latin Americans say that local businessmen simply cannot compete with the superior technology, the superior administrative skills and the superior financial capabilities of the large multinational corporations. As a result, upon admitting these large multinational corporations, there is very little probability that a local extrepreneurship will develop. That local businessmen will get their feet in the door and somehow develop for themselves equivalent administrative, financial and technological skills is practically impossible. They say that if they do not admit foreign investment they can stimulate some class of local businessmen.

The underdeveloped countries also indict the monopoly power that many of the multinationals possess. Oftentimes just in local markets alone they constitute a monopoly. There is nowhere else to sell except through a large multinational corporation. Oil might be one example — I hate to keep using that one but oil is the illustration of most of the complaints that Latin Americans have. There is really very little chance of selling oil in large quantities unless it is sold through one of the large multinational corporations. As a result the only way that a country can take advantage of oil reserves is to invite in large oil concerns.

Latin Americans are particularly concerned about the absorption of local enterprises by multinational corporations or by interests from abroad. This is not extraordinary. Most countries resent this type of activity; Canada, Australia and Western Europe are beginning to complain about it. In Latin America, however, it is somewhat easier for a large corporation to take over local enterprise because of the incidence of recession in economies much more unstable than our own economy. During

a recession, local businessmen will approach bankruptcy and will sell out at bargain prices to anyone who can pay. Very often that someone is from abroad who can rely on independent financial markets for diversification of the risks involved. Multinational corporations can draw their finances from a country which is not in recession, such as the United States, and buy somewhere where business is in recession.

Also, multinational corporations and large U.S. corporations often have access to the local banking system. Often they are the best credit risks. They have the best collateral. They have fine credit reputations and they can borrow from local banks in order to buy local enterprises. In some instances it takes no investment flow from the United States to Latin America for multinational corporations to gain control of local enterprises. They simply borrow from the local banking system and use Latin American resources to buy Latin American enterprises and put them under U.S. control. This in particular is resented.

With regard to all of these issues there is a general frustration in Latin America. They see the dynamic sectors of their economy in the hands of foreigners. Decisions made outside their country affect their entire economy. This is particularly frustrating in countries that have now developed the capability to run these companies themselves. Perhaps originally when many of these large corporations gained a foothold in these countries, the local entrepreneurs could not have run an oil enterprise, a copper extraction enterprise, steel mills, a complex banking system or whatever it happens to be. But over the years these countries have in many instances developed the capability to run these enterprises themselves. They find themselves in a situation where they are able to run the show and yet it is in someone else's hands. Someone else is benefitting from nationally owned resources; copper, minerals of different types and so forth. The question is how they can get a piece of the action: how they can get into these enterprises. They have the capabilities and yet they find it difficult to enter these fields of enterprise.

So we indeed have an uneasy case for foreign investment in developing countries. It is not proven as a generality that the existence of foreign investors either helps or hinders development. In some cases it will help, in some cases it will be very detrimental. The outcome will depend upon the society in which the investment is made, the capabilities of the local

people and the technology that is needed to run the enterprise. Each situation requires a separate evaluation. There is no clear-cut case at all. U.S. policy, however — official U.S. policy concerning private investment — is based on the assumption that foreign private investment is good and that more private foreign investment is better than less in developing countries. Most official policies are to stimulate the flow of private investment from the United States to developing countries, Latin America being typical.

Some of the main policies that are being used are the Hickenlooper Amendment to the Foreign Assistance Act, with 1961 and 1964 amendments, and the Investment Guarantee Program begun originally in 1949 to help in the development of Western Europe after World War II and recently applied to developing countries. Those policies, which assume that foreign private investment is the greatest good, can only raise international tensions. They can only cause international conflict. Since the case for private investment is uneasy and can go in either direction — good or bad — any policy that is either all good or all bad will necessarily be wrong in some cases.

These policies of the United States are often seen from the Latin American point of view as an attempt to bully Latin America into an ideology that is favorable to the United States, as an attempt to force the Latin Americans to be like us. The Hickenlooper Amendment in particular is considered rather disgusting by most Latin Americans. It has been criticized very strongly by our own State Department and by businessmen's groups such as the Council for Latin America because it heightens tensions. Though it might protect the foreign investor during his entry into a developing country, once the investment is in place he finds himself in a real conflict situation. He is faced with potential expropriation despite the legislation in the United States; he is faced with some kind of confiscatory taxation; he is faced with a series of controls placed upon him which make the operation of his business very difficult.

The Hickenlooper Amendment was last used as a threat in the expropriation of the International Petroleum Company (IPC) in 1968. The situation there was one where President Fernando Terry Belaunde of Peru had tried without success to negotiate a settlement with the IPC for several years. When it eventually was reached, it was publicized in Peru and he was immediately overthrown because it was completely unacceptable to the Peruvian people. Shortly thereafter the new

administration expropriated IPC and refused any compensation whatsoever. The Hickenlooper Amendment was used as a threat — the United States would cut off aid to Peru if in fact IPC was not compensated for its losses. President Velasco simply said to keep the aid money, that Peru did not want it. IPC was expropriated and lost all of its properties with no compensation whatsoever.

Other properties were expropriated when Peru saw that, indeed, it was an empty threat. Other countries followed — Bolivia, Columbia, Ecquador, Chile — all of these countries expropriated properties shortly after the Hickenlooper Amendment was seen as an empty threat.

U.S. businessmen have indeed been hurt in Peru and other places in Latin America and have been hesitant to set up new operations in that part of the world. However, businessmen from other parts of the world are now competing for contracts in these and other countries that have expropriated United States holdings. It appears that the reaction on the part of Latin Americans was not so much against private enterprise as against private enterprise from the United States. They are presently seeking bids from international corporations based in non-United States countries to come in and set up an enterprise.

So I think that had the Hickenlooper Amendment been used in this or similar circumstances, it would have been shown to be a complete farce. There is no way to enforce it. The amount of nationalism involved does not permit them to bow to the United States. Upon rejecting the U.S. aid, President Velasco was raised to what I would have to call hero status. He was a hero because he stood up to the United States, called a bluff, and in fact found out that it was a bluff. So I think that policies like the Hickenlooper Amendment are doomed to failure. You cannot force the issue with something such as this.

The Investment Guarantee Program is a program whereby new investments by U.S. businessmen are protected against loss due to expropriation, due to insurrection and a couple of other minor things. Basically, I think this type of program might have possibilities on the international level if, in fact, an investment guarantee could be internationalized. This would require both the developed countries who are the investors and the host countries to participate in some way.

However, the way it has been run by the United States is simply to have the Agency for International Development (AID) guarantee the investments of U.S. businessmen. In order

to participate in the program, the host country has to sign an agreement with the U.S. government allowing the investors coming into their country to be covered by such insurance because it means that the U.S. government could subrogate the interests of the expropriated companies in the case of claims.

There is ample evidence to believe that these countries were forced into signing these agreements. There are statements in all kinds of official U.S. documents, subcommittee hearings and so forth where officials of the program said that pressures were placed upon the signatories of these agreements. They were threatened with cut off of aid, threatened with limitations on their trade in the United States. Again I see this as a method of political force to bludgeon Latin American countries into submission to our particular ideology.

My own suggestion is that any policy that assumes that foreign investment is good or bad is doomed to failure. If host countries in, for example, Latin America assume that all foreign private investment categorically is bad, I would say that that policy would be very bad for their interests and their own development. That is not my decision — it is theirs — let them make it. Similarly, any policy of the United States that assumes categorically that foreign private investment is good or bad and that the United States will act to either stimulate or retard it could also lead to failure of our policies in the development of corporations in developing countries. I myself would advocate that the U.S. government participation in investment decisions should be absolutely zero — that it play no part at all in investing, that it neither guarantee, nor include little things like the Hickenlooper Amendment into foreign assistance legislation, and that foreign multinational investors simply make their investment decisions based upon the situation as they see it in the countries concerned.

I think that there are benefits to be gained from foreign private investment and the Latin American countries will see that there are benefits. Most of them do see that. Witness the country of Peru, which expropriated the whole of local U.S. enterprise and yet has invited businessmen from other countries to make investments. They know that if they get an international reputation as being likely to expropriate they will not get any foreign investment. Industries will not be willing to enter countries which blindly expropriate foreign holdings.

I would say that should there be no U.S. governmental intervention in these types of decisions the investment climate

would improve. Investors would see which countries engage in expropriation. They would see where they were wanted. They would see which countries would offer them concessions. They would see which countries want private foreign investments in their midst. I do not think there would be a rash of expropriations expressing opposition. If the United States had stayed out of it there would not be this problem. There would not have been this landslide of expropriationary measures in Latin America simply because most of the countries recognize that there were benefits to be gained and that they would be losing those benefits should they get a reputation for adopting expropriationary measures.

I could go on with my policy of non-intervention by any government in favor of a policy that would allow the investment decisions to be made purely on the merits of the investment itself and on the merits of the government contracted with. I will leave it at this and perhaps some of these issues will come out in subsequent discussions. Thank you.

THE RECENT CHILEAN EXPERIENCE AND FUTURE PROSPECTS

PROFESSOR RICHARD LILLICH*

I would like initially to say a few things with respect to what Professor Loehr has said. I just would like to mention one or two things in the broad context of protection of foreign investments, because I think we have to make some distinction between his broad overview, which is not really concerned with law *qua* law, and mine, which basically focuses on some of the legal problems.

The whole problem of foreign investment is a very difficult and confusing problem, and Professor Loehr rightly recognizes in his paper the needed challenge to received wisdom about foreign investments, particularly by American companies in sensitive areas such as Latin America, I of course do not challenge this point. While I accept our government's policy, as codified in the first section of the Foreign Assistance Act of 1961, as amended, that foreign investment is generally a good thing, there can be no hard and fast rule. One must also consider what happens if that foreign investment is taken. What consequences, particularly under international law, result from

* Professor of Law, University of Virginia.

that decision? I could go on and elaborate with respect to Professor Loehr's paper and his references to the Hickenlooper Amendment, which I think is an exceptionally irresponsible piece of legislation — but a piece of legislation which has had no practical impact at all. It has only been invoked once — with respect to Ceylon. Ceylon did compensate the American oil companies for the property that was taken, but not because of the imposition of the Hickenlooper Amendment. They had a domestic coup.

Peru is a similar example. Velasco became a popular hero because he used not-so-latent anti-Americanism to arouse the people. It had nothing to do with the imposition of the Hickenlooper Amendment as no funds had been coming to Peru for about five years anyway. As Dick Goodwin pointed out in an article in the *New Yorker,* which Mr. Loehr mentions in one of his footnotes, you do not have to have domestic legislation to cut off aid. No country is willing to give aid, whether it be France, Great Britain or what have you, to another country which has just expropriated their properties. We had not given much aid to Peru from 1963 on. That was a pretty stupid thing to do because a very good man, Fernando Terry Belaunde, was President. Peru had a very good opportunity during that time to go ahead and salvage some kind of democratic regime. As a matter of fact we cut off the aid — there was no imposition of the Hickenlooper Amendment — because the Kennedy and Johnson administrations thought that by turning off the spigot, in effect, Peru would decide not to expropriate IPC. Of course, Peru expropriated the IPC anyway.

Now if I can proceed from this very brief introduction, an introduction which I hope has indicated my sympathy and appreciation for what is a rather complex mixture of problems which foreign investments generate, I would like to get into the specific problem of what happens when property is taken.

What is the international law applicable in the case of expropriation? The Western powers reached the conclusion, I suppose way back in 1938, that the old international law rule that a country could not take the property of aliens was no longer valid. No one today challenges the right of Chile or Peru, or Albemarle County for that matter, to take property as long as there is some compensation paid. Now the question is basically what amount of compensation should be paid, and whether distinctions in this regard should be made between

old and not so honorable investments, such as IPC, and new investments, such as many in Chile. Therefore, it is really, to my way of thinking, not a question of arguing, as many international lawyers have, between prompt, adequate and effective compensation (whatever that may mean), and partial or no compensation. The idea is to find some equitable standard of compensation that will allow a foreign country to decide for its own reasons that it wants to nationalize its natural resources and to do so and pay a reasonable amount of compensation. That is what the Founding Fathers had in mind in the Fifth Amendment of our Constitution. I think Professor Weston, who wrote the definitive article that has been miscited several times by the Supreme Court, may want to comment on that, as his article goes in some depth into the whole standard of what compensation is fair. He suggests obliquely, and I would suggest a little more strongly, that this whole question would have been avoided, in effect, if we had not focused on some of the adjectives like prompt, adequate, effective and what have you but had just used our own constitutional standard of just compensation. Actually the correspondence in 1938 does indicate that just and equitable compensation would have been an acceptable standard insofar as the United States was concerned.

If I may digress for a moment, when the Hickenlooper Amendment was first enacted it had a provision that the compensation to be paid by the foreign country had to be just and equitable compensation. I wrote a little piece that indicated that this was a fine standard because it supposed a certain degree of flexibility. Senator Hickenlooper's legislative assistant happened to have the article called to his attention by a certain prominent company which shall remain nameless, and as a result in 1963 they amended the Hickenlooper Amendment so far as the whole concept was concerned to strike out "just and equitable." The feeling was that we cannot have anything like that even if it is our own constitutional standard and we should substitute prompt, adequate and effective compensation in convertible foreign exchange as required by international law. What we were doing was imposing a higher standard on foreign countries taking property than on our own country's taking of property within the U.S.

As I have said, I do not think there is any dispute about a country's right to take property, and I suggest that the real

dispute today is not in conceptual terms, but in determining the standard of fair and just and equitable compensation to be paid. I think that by taking this approach we avoid what I call "the fallacy of the meticulous jurist." It comes from a statement by Professor Ronning who says that most international lawyers, like indeed most economists, construct knit-picking rules which they fashion and polish until they glitter in the sun, and while doing so they of course ignore the realities of the situation.

What we are concerned with is whether compensation should be paid in a case like this and whether the compensation paid meets the international law standards, whatever they may be. I have a little quotation from Mr. Rogers of Arnold & Porter in Washington, D. C., who becomes President of the American Society of International Law next week, in which he indicates that if we go with the Chileans on one side saying "we'll pay what we want," or with the U.S. government saying "we've got to have full compensation," we will only obscure thought, comfort the parties with notions of ideological certainty and moral perfection, and inspire them to dig their trenches deeper. The actual issues in real life are too complex, the cases to be decided and the precedents of decision too disparate and unique for easy, simple principles.

I think it is useful to give some background to the Chilean experience. The Chilean legislation is a sophisticated case study of how one country has nationalized the foreign investments in its country. It is quite interesting to compare the situation in Chile with the situation in Cuba. There is a big contrast between the Cuban situation and the Chilean situation. Cuba made no effort in its statutes even to make a prima facie case for any reasonable amount of compensation at all. It was obviously a political act since the compensation that was to be paid was to be paid out of increased sugar subsidies that the U.S. was supposed to pay Cuba for sugar. The bonds that were to be issued in payment and which were not be become due for thirty years at zero interest never were printed. The compensation standard in the Cuban legislation was completely illusory. Of course, they got into all kinds of difficulties — the *Sabbatino* case, the *First National City Bank* case — and many others. At the time many of us said that what the Cubans really ought to have done was to have hired some Wall Street international lawyers. If they had wanted to take property

without compensation, they should have tried to do it by some neat drafting.

The Chileans have taken that advice to heart. The *New York Times* characterizes this whole constitutional and legislative program as a movement by "a radical with a flair for legal niceties." Those legal niceties, of course, began with the amendment of the Constitution last summer. Now of course there is nothing wrong with adding a constitutional amendment, but as you know, international law does not allow a country to commit an international wrong and then justify it by the fact that the international wrong is permitted under domestic legislation.

A point which has not yet been made, except by myself indirectly, is that there is a big difference between old investments like IPC, and relatively new investments that have just gone into a country, such as Gulf Oil which went into Bolivia in 1955 and was nationalized in 1968. The Bolivians very carefully waited until the oil installations and the refinery equipment, the distribution system, all these things were in working order — these things that are so important and that require such an immense capital outlay — were in place. They allowed Gulf Oil in effect to get out their investment in returned earnings. Just when Gulf Oil had broken even after thirteen years they took over its operations.

Obviously one may talk about the sympathy one has for Bolivia or Peru, but there is a vast difference in the amount of sympathy one has for Peru, going back to the origin of the IPC problem in an 1820 piece of legislation, and the current problem in Chile. In Peru it is rather an old dispute with a company that has made many, many times over its investment. The situation in Chile is that the company took a bath under President Frei in 1968, at which time they in effect were Chileanized. As we know, all American investments in Mexico were Mexicanized over the last thirty years or so, with the Mexicans now having a majority interest. And this is what happened in Chile in 1968, and at the time that was thought by some people to be a horrendous thing. Companies thought they were losing a lot of money. But in any event at that time the decision was made by the companies to go along. The Chilean government thought that this was the way for Chile to gradually get control of their own natural resources and yet have a very effective partnership with these companies.

Therefore, we do not have in these situations companies that have been exploiting for generations and generations without any reassessment of that exploitation — the situation supposedly in Peru. We come into this situation with the taking of American copper companies in 1971, when the value of the companies had been fixed almost unilaterally by Chile just three years before. In the new pattern of legislation that we have in Chile, the old constitution has been entirely wiped out. The legislative history the speeches of the Senators who introduced this bill last July and last August, clearly indicate that they realized that under their prior constitutional provisions they could not take this property and pay the minimal compensation they wanted to pay. They wanted to pay as little compensation as possible and they therefore had to amend the constitution. The compensation that they are to pay under the amendment is book value as of the end of 1970, less all kinds of deductions which I shall go into only briefly.

Now, first of all, book value as a standard of valuation in international law may in many instances be adequate compensation that all parties can agree upon, but certainly one cannot say in all instances that it is equitable as a matter of law. For instance, the book value of General Motors in 1962 was fixed at six billion dollars. The market value was seventeen billion dollars. In other words, the book value represented only about one-third of the worth of General Motors. This is true of many other companies as well. Good accounting practice not only in the U.S. but in all countries indicates that book value is not exclusively thought to be the best form of determining "going concern," or market value, or whatever standard that would result in a more equitable determination of compensation. Indeed, accountancy practice in the U.S. and most other countries that have a free-market economy is based on all kinds of other alternatives — all kinds of equations which result in something that is approximately what a free market price would be. There is very little international precedent for this because until recently there has been very little taking of foreign property — by recent, of course, I mean the last twenty-five years.

Whatever international precedents we have indicate that book value is not going to be deemed the fair and adequate value that international law requires. In the words of the *Lena Goldfield's Arbitration,* which is cited most frequently because it involves a situation which is very similar, the test is the

fair purchase price as a going concern in a free market. So I think it is fair to say, as Assistant Secretary of State Meyer has said, that this is really a dubious standard of international validity that has been adopted by Chile. Nevertheless, the interesting thing is that the companies, or at least the counsel for the companies, are prepared to accept book value. The book value was, of course, established by the Chileans in 1968 because they had to have a value to determine what Chile should pay for the 51% of the stock of the companies which it was about to buy. That book value was a jointly arrived at book value and as applied to the 49% that the company still owned results in about $365 million. Various other tests, like going concern, like some reconstructed potential market value, place it substantially higher than that. In any event, $365 million for Kennecott, which has published the data on it; Anaconda has been a little more secretive in its figures and statistics.

Now assuming that even though book value prima facie is inadequate, the companies would have been happy, or at least Kennecott in this instance would have been happy, to accept $365 million, even though it may not be adequate under international law. That is not the end of the story, of course, because then starts a series of deductions. They put aside funds to pay for retirement of workers, to build houses for workers, to continue that construction program and keep up the maintenance. These items were deducted from book value. The basis for these deductions was that the companies' rights to the mining property were not valid rights under Chilean law despite the fact that three years before the Chileans had said they were. They deducted these figures from the $365 million and came down to $319 million.

Now I am not saying, although I would be prepared to argue if pressed, that these deductions are impermissible under international law. But you will note that in readjusting book value, which itself is not necessarily an adequate indication of the worth of the company, it all goes one way. It is a one-sided situation. There is no potential for the companies to increase book value for a variety of reasons. For example, the growth in the operations since Kennecott entered into a participation arrangement with Chile in 1965 and the earnings of the company and the fact that they were ploughing back these earnings to develop these gigantic mines that were referred to before — none of these things are allowed to be taken into

account. In other words, anything you want to do to depress the price by knocking off things from book value is permissible, but you cannot touch book value if you increase it. This one-sided application of this one-sided accountancy principle is obviously inequitable, not only to my way of thinking but to the way of most international lawyers.

Secondly, Chile deducted thereafter $198 million for re-evaluation and $21 million for deficient installations. No one knows what the latter means. The $198 million for reevaluation was made in the company's books between 1964 and 1968 as required by Chile. The theory now urged by Chile is that the company inflated the book values and as a result Chile should deflate it by taking the $198 million. In any event, taking that sum away leaves $100 million. Once again it seems to be that these are strictly one way deductions — they are not deductions which follow good accounting principles and they certainly have no precedent in international law.

Chile then deducted excess profits. No one has ever referred to deducting excess profits in international law. There was an excess profits law in the U.S. during the Second World War and the Korean War, and we should have had one during the Vietnam War and now during Phase II. In any event, it is not an unfamiliar device even in the Western world, but it is never applied retroactively. Chile applied this retroactively to 1965. The companies have to pay compensation based upon excess profits when, of course, Chile was making a healthy tax on these profits for the last three or four years. The company is actually being double charged. The excess profits amount to $410 million, which figure exceeds Kennecott's entire earnings during the last 17 years.

This determination was not made by a tribunal at all, but by President Allende, and his decision can be appealed only to a special ad hoc copper tribunal that is controlled by his political appointees. The excellent Chilean judiciary is completely cut out of this procedure. There is no appeal to the Supreme Court of Chile. Despite the fact that an appeal is pending before the special copper tribunal, there is no way to attack this excess profit figure. It is completely without any precedent in international law. Taking away $410 million from $100 million, you come out with the company owing Chile nearly a third of a billion dollers.

I think it is fair to say that this entire machinery has

been designed very carefully to make people think that some kind of judicial process is going on. Of course, this is not the administration of justice in any real way; it is a denial of justice under international legal concepts. It is almost impossible to reach the conclusion that this is a good faith attempt to work out any equitable compensation standard, even taking into account all the claims that Chile might have.

Nor are we going to learn anything more of value, I am afraid to say, from the Chilean nationalizations than from the Cuban nationalizations. I think these have been handled in a very strategic way in Chile, by providing the semblance of a legal proceeding, despite the fact that it is not a proceeding under the regular constitution and the regular law. Despite the fact that it is not a proceeding under the regular judiciary system of Chile, which is the most highly respected judicial system of any country in Latin America; despite the fact that the key decision on excess profits has been made unilaterally by the President and is based upon no evidence; despite the fact that the excess profits are greater than the entire earnings of the company over the last 17 years; in spite of all these obvious indications of denial of justice under international law, the fact that the process has been going on to some extent diffuses a lot of adverse comment. The U.S. cannot point to it, as the U.S. was able to point at the Cuban situation, and say that there is no procedure to obtain compensation at all. Chile has not been that direct, and it has not taken the approach the Soviets took in 1917 and the Mexicans took in 1938 which was that no compensation at all was required. They have indicated that they are willing to pay compensation. Having acknowledged this obligation, they completely cut the guts out of the compensation.

It is rather sad what has occurred. The result is that I do not think we are going to get what I and others had hoped would occur when the Chileans decided to take the copper companies. We then thought that we would have the first example of a communist country taking property, but giving at least an adequate amount of compensation for the taking of that property. The result of this would have been that investments which the country purports to be interested in, access to the international copper market, international trading arrangements, what have you, would not have been simultaneously cut off. The foreign countries that had their property taken would not feel compelled to take retaliatory action be-

cause of the pressure of business interests or because of the tremendous losses they have suffered as a result of the Chilean action. Unfortunately, I am afraid to say that that is happening now. Certainly my information through the Treasury Department indicates that the rather hard line position which the U.S. is being forced into is going to result in the same kind of polarization we had with respect to Cuba. This is very unsatisfactory, but I suggest that in this instance, at least, the blame resides with the Chilean government much more than it does with the American companies.

COMMENT

BURNS H. WESTON: I would like to react to a number of things that were said both by Professor Loehr and by Professor Lillich. It may come out in somewhat jumbled confusion, but I believe my comments are in order in light of what everybody else has done this morning. I want to point to a few things which perhaps will give a slightly different gloss to what else has been said.

When one gets into discussions about expropriations, nationalizations and related problems, as I have repeatedly done over the last few years, I find that there always are a few new ideas to ponder — usually the result of what people better qualified than I have had to say. This is what has happened to me again this morning. A few new things have struck me, and while I have no right to say that I have crystallized my thinking on the two points I would like to address, I think they are worth mentioning.

I just want to say now that I agree completely with the general thrust of Professor Loehr's statements this morning, since, as he points out, it is dead wrong to talk about foreign investments being all good or all bad; sometimes foreign investments are good, sometimes they are bad. Where I disagree with Professor Loehr — that is too strong a word — where I question Professor Loehr's remarks — is in his emphasis. I have the impression that he is inclined to leave the matter of foreign capital flows entirely up to free market mechanisms, although he said things which tend to belie that inclination, to wit, that he saw the value of having an internationalized investment guarantee program.

My main concern with leaving foreign capital flows to free market mechanisms is that, if one can judge from history,

we may end up with a pattern of wealth allocation or distribution not any better or more equitable than the one we have already. My reaction to Professor Loehr's emphasis, in other words, is that it does not take sufficiently into account the power realities that are involved in the foreign investment process. Let's face it, we are not talking about mere corner store operations; we are not talking about minor entrepreneurs. We are talking about giant corporations that have annual budgets that oftentimes far exceed the annual budgets of many countries. To leave the foreign investment process entirely or nearly exclusively to free market mechanisms, without any kind of international regulation or direction, strikes me as short-sighted.

I think there is a very strong need, today perhaps more than ever before, for work to be done at the highest levels of internationalism to develop bilateral and multilateral agreements and mechanisms. Examples would be an internationalized investment guarantee program and greater use of, and elaboration on, the precedent established by the Centre for the Settlement of Investment Disputes attached to the World Bank. In short, it is naive to assume that small underdeveloped countries are going to have the political and economic muscle to call the tune to companies like ITT. There has to be some kind of control.

One of the controls we are learning about here today is the rule of compensation and its sidekick the rule of valuation. It is in connection with this rule that I find myself reaching some conclusions I have not been wholly sure about before.

In the first place, it is important to know what we mean by rules of international law. They are outcomes of decisions about specific past conflicts. As far as the future is concerned, however, they are general "guesstimates". That is true as much in domestic law as in international law. The international legal order, however, is more a horizontal than a vertical legal system, especially in the area of foreign investment control and the regulation of nationalization, expropriation and the like, and this means that we are bound to have more "guesstimate" outcomes internationally than we will have "guesstimate" outcomes domestically: In any event, the latitude for "guesstimates" will be greater in the transnational sphere where most effective decisions are made on a foreign office to foreign office basis, and in the absence of an international West Digest

system we cannot face the rules with the same confidence we do in the domestic sphere.

Now in aproaching the "guesstimate" we call the rule of just compensation for the taking of foreign property, we encounter two difficulties which derive from its inherent ambiguity.

First, what is a "taking"? Even in this country we know that the State can zone people out of existence without paying compensation. Is such an action any different from a nationalization measure or some other equivalent to what we call an exercise of the power of eminent domain? In short, the so-called rule of just compensation cannot be tied too closely to the form through which the wealth deprivation is effectuated.

Second, what is "just compensation"? It is a presumption and no more, and this is why Professor Weigel and I, in our joint valuation article, have suggested that there may be occasions in which it is inappropriate to pay any compensation at all even under an eminent domain type proceeding. This would be the situation, referring back to Professor Loehr's remarks, where the investment is not of benefit to the host country and therefore to be discouraged. In short, even where the rule has been said to operate, we ought not always to say that "thou shalt pay just compensation". What I am saying is, simply, that there should be a presumption of compensation for the taking of foreign-owned property (however one defines "taking"), but that there is a burden to demonstrate that the investment was beneficial to the host country involved. In the absence of such a demonstration, we ought really to think seriously about whether compensation should be given at all.

So, while we need international controls, they must be controls that work to everyone's benefit. Otherwise, international law would have little reason to be called international law.

COMMENT

PROFESSOR FREDERIC L. KIRGIS* — I would like to start with simply a few comments on Professor Loehr's presentation and skip over to a comment on Professor Lillich, and perhaps lead into a thought or two of my own that I would simply like to put forward for your consideration.

* Professor of Law, University of Colorado.

Professor Loehr may overemphasize somewhat the adverse effects of some U.S. government participation in the foreign private investment scheme of things. I would agree with all speakers so far with respect to the Hickenlooper Amendment in that it is counter-productive. But I would like to focus a little bit on the investment guarantee portion of Professor Loehr's comment.

He implied, I think, that the Overseas Private Investment Corporation which administers the U.S. investment insurance and guarantee program may be pushing private investment from the U.S. onto unwilling recipients in a way which really does not contribute to the foreign economies and which is not welcome in those countries. I think it should be noted that OPIC does require approval by foreign governments of every investment that it insures, so there is some assurance that the foreign governments want the investment. And I think OPIC does try carefully to be circumspect in this area now. I do agree, too, that perhaps the multilateral insurance investment scheme perhaps has some advantage over the unilateral United States scheme. Several other countries have private investment insurance schemes somewhat on the pattern of the United States and I think there is some possibiliy that we may all be able to get together on this and have an international scheme. I understand, though, that some of the developing countries are dragging their feet on this, and I think that reflects some of the concerns that Professor Loehr rightly emphasized.

Also I would like to associate myself with Professor Weston's comments about the so-called market solution. But I do think that some of what I gather to be Professor Loehr's conclusions assume a certain amount of political and economic stability in developing countries which recent experience suggests just is not always there. You can have a market solution — and again, I realize that Professor Loehr is not talking about a market solution in a classical Adam Smith sense — but I do not think you can have anything very close to that unless you have some kind of stability. Stability allows investors to make decisions and have some confidence as to the outcome of those decisions and also allows foreign governments to make decisions with some confidence that they are going to be around for a while to carry out the policies that those decisions reflect.

This leads me into Professor Lillich's remarks. He em-

phasized the fact that the real dispute about compensation in expropriation situations is to fashion a just and equitable standard for compensation. And I have some problem with that. When talking about equitable solutions, one talks about what is equitable to the participants involved. When participants have widely varying cultural and geographic backgrounds, when their values in other words are not the same in respect to the matter at issue, one has a lot of trouble in finding any common grounds for what is equitable and what is not. As we know, equity is a nebulous concept. It has to do with values and values are important and meaningful when they are shared by the participants. The question is how to arrive at enough of a sharing of values, when we are talking about the giant corporations representing giant economies such as that of the United States, Europe and Japan, and the developing countries who come to the situation with quite different sets of values.

I wonder if some kind of bargaining process could be set in motion under which the United States and perhaps other capital exporting countries can bargain with some of the capital importing countries. Perhaps it is better to talk about this process strictly in a bilateral sense at least at first — the United States with individual capital importing countries — whereby we could arrive at some agreement as to the standard of valuation that needs to be applied. The United States might, for example, agree that it would not espouse claims of its nationals. We are talking now of course about corporations, primarily. If the nationals have not substantially performed according to a code of fair practices that is agreed upon between the United States and the developing country involved, the bargaining process could be invoked. This kind of thing could not work unless you also had some kind of arbitration provision in it so that there would be a third party determination in case of dispute as to whether the participants have lived up to the standards. This would also be applicable in case of a dispute as to the application of the compensation standard.

The reason I suggest this is that I think it is evident from all that has been said today and from simply reading the newspapers that what is called the investment climate, particularly in Latin America, is getting worse. And it seems to me that we should say to the Latin American countries that we would like to avoid those agreements which are of the old style (the old style being one where the duties are all on the host country and the rights are all with the investor); we would like to

make agreements in which some of the rights are in the host country. The host country may insist on this code of fair practices, but it also has some duties. The bargain includes some duties and yet it is not a one way street anymore. I wonder if perhaps this would not only do something toward improving the compensation standard but perhaps in addition foreclose the expropriations in some of the marginal cases. With a better investment climate the expropriation, when the expropriation would be economically unsound, may not occur. Thank you.

CHAIRMAN MOORE thanked the speakers and asked if there were any questions which might be directed to the speakers or panel.

MR. HARLEY SHAVER*: I am wondering to some extent if the countries that are under consideration may not be, with regard to the investment climate, in the position that Mexico was some forty years ago. I am going to disagree somewhat with Professor Kirgis' remarks. I think in regard to the investment insurance that has been criticized we have seen the pendulum come full swing. I think the assumptions at the beginning of this type of insurance resulted from benevolence on the part of the U.S. and pressures from less developed countries to get investments in areas that would otherwise be high risk ventures. So what is now the Overseas Private Investment Corporation is a successor to similar previous agencies that did intend to guarantee investments in high risk capital ventures because of the location in less developed countries. This was thought to be a good thing at the time. Now we are seeing it criticized because the type of investment may not be beneficial to the host country. But I think the historical perspective on that is somewhat important.

Professor Kirgis suggested some type of arbitration agreement. I do not think that at this stage that is any answer. In other words, when a foreign licensing agreement or an agreement with a foreign government can be abridged by a successor regime, perhaps on the basis of unequal bargaining power, we have at one edge of the spectrum the Soviet experience — maybe the Cuban experiences similar to that — saying that at the time the agreements were made it was either a non-legitimate power or if that does not work, at least the bargaining positions were so unequal as to be unfair in historical perspective. I think we see under the veil of constitutional process a similar type of argument made by the Allende

* Attorney at law, Denver, Colorado.

regime. If there is to be a minimum standard of due process for compensation, I think there has to be, before that, a minimal due process standard for ascertaining how and when an agreement is binding upon a successor regime. What arguments are valid — what arguments are invalid?

PROFESSOR LOEHR: I would like to make a comment on the relationship between the instability in different governments. There was some concern expressed that where there was this free enterprise type of thing, which I do not carry too far, really this market solution, that there is not likely to be too much investment, because of instability of the government concerned, where contracts made with one government might be broken by governments which come to power through one means or another in a few years.

However, I think that there is some relationship between instability and inappropriate foreign private investment in developing countries. You can see, for example in Cuba, one of Castro's main appeals was that he in fact would expropriate. He promised to expropriate foreign holdings. And this was part of Castro's charisma. His promise to expropriate holdings which were considered to be inappropriate by the Cuban population actually caused the instability that brought him to power. In the Peruvian case the main thing, I think, that overthrew the Belaunde regime and brought in General Velasco was an agreement between the Belaunde administration and IPC which was unacceptable to the Peruvians. It was easy at that point for the Velasco followers to take over and the main justification for taking over at that time was that Belaunde was bowing to the international corporations. Again, existence of a concern considered inappropriate by Peruvians could be related to the instability.

In the Chilean case, the government is very stable and yet we find that this is where the main expropriations have now taken place. Chileans are very proud of their long-lived democratic institutions. They have only had one unscheduled change of government in the twentieth century — in the 1920's when there was a strange series of events. So this is one of the most stable countries in Latin America, and yet this is where we see the expropriations taking place. We might allude to Mexico. Mexico was very unstable thirty to forty years ago and went through a series of expropriations. Now that this phase is over you find that Mexico is one of the most

stable countries in Latin America; one of those that in its past has had very substantial expropriations with very little compensation. Mexico is now one of the favorite targets of private investors from the United States. This is where they want to put their money. I think that these expropriations, getting this out of their systems, relieving these pressures, had a substantial influence on the future stability of Mexico — the stability that we see now. Thank you.

PROFFESSOR LILLICH: I will just respond to Mr. Williams' question about excess profits and then elaborate briefly on the problem of obtaining agreement on a just and equitable compensation standard. First of all, one can provide no answer to what excess profits meant in this context because the President of Chile, in a one page decree, which really was a political document describing why he felt it necesary to take the copper companies, ended with two lines saying the excess profits were this figure of $400 million and that was the end of it. I talked with both the general counsel of Kennecott and also the members of the firm that represents Anaconda and they have no idea of where this figure came from. I have also talked with people from the Chilean Embassy in Washington, and they have no idea about it either. Unfortunately, of course, it cannot be appealed because the Chilean constitution and legislation state that the special tribunal which I mentioned before has no jurisdiction to review this matter.

The second comment I wish to make is in response to the question of whether a just and equitable standard can be fashioned. My plea is not whether we can codify a standard — I supose that we have to live with what the U.N. decided in its resolution about natural resources in 1962. But some adequate compensation consistent with international law should be paid. My plea is for a process, for a procedure, that we develop some forum. We have had reference to arbitration and to the International Center for Settlement of Investment Disputes of the World Bank, which none of the Latin American countries will participate in because of rather exaggerated fears of the arbitration process based upon what they think are bad experiences in the nineteenth century. I do not think these experiences are at all relevant to the contemporary context. My plea is to have some process begun by which some standard might emerge, perhaps on a case-by-case basis. The action by Chile is completely destructive of any opportunity to develop such a standard in the international sphere.

What I really am concerned with is that we disabuse ourselves of the notion that the rhetoric of prompt, adequate and effective or the rhetoric of partial compensation will solve the problem.

I have previously suggested that the United States formulate some kind of code for foreign investment. I do not think we should have this regulated directly by the government. Although this has not been done in statutory form, those who are familiar with the practice of the Legal Advisor of the Department of State know that the espousal of an international claim when one's company is taken overseas is entirely within the discretion of the Department of State. And, for instance, while there are no rules that say that an American corporation cannot invest in Southwest Africa, the statement has already been made on the record by the Department of State that if their companies' properties are eventually taken, the United States will not espouse their claims. This is certainly a sanction against American mining interests going into what is now called Namibia. I think it might be useful to take that approach, and not just do it on an administrative, executive, ad hoc basis, but to push it into a more formalized code.

CHAIRMAN MOORE thanked the members of the panel and adjourned the session at 11:45 A.M.

PROFESSOR VED P. NANDA* chaired the afternoon session which was convened at 2:30 P.M. again in the Law Center of the University of Denver. The CHAIRMAN introduced the speakers for the afternoon, Syed Muhammed Hussain, Esq., Senior Advocate, Bangladesh Supreme Court, Dacca; Harley Shaver, Esq.; Burns Weston; J. Robert Fowler, Esq.; Richard Lillich; and Julius Duru, President, Association of Student International Law Societies. The CHAIRMAN then suggested that, keeping the topic of the session, "Whither the Future of the Law of Expropriation" firmly in mind, the most effective procedure might be simply a roundtable discussion. The CHAIRMAN asked Mr. Hussain to begin.

SYED MUHAMMED HUSSAIN:** It is a great pleasure for me that while living in this country as a political refugee I find the question of expropriation of property being discussed. This issue is based in certain broad concepts sweeping the world at the present moment: the concept of the sanctity of private

* Professor of Law and Director of the International Legal Studies Program, University of Denver College of Law.

** Senior Advocate, Bangladesh Supreme Court.

property as opposed to property as a social contract. The region from which I come, Bangladesh, about three decades ago adopted a middle of the road stance, a social policy which we call a mixed economy of a mixed society. The country's economy is to be developed by a very harmonious cooperation between public and private capital on the one hand and foreign capital on the other. This cooperation from the full sector is considered essential for the growth of the national economy by many of the emerging countries.

In the 50's, legislation was passed by the Parliament of India taking over all intermediary land holding interests in India. These were viewed as revolutionary acts by the people at that time. But the unfortunate part of that legislation was that it was not a collateral thing, it was the executive government and the judiciary at that time. The Indian Supreme Court in the mid-50's struck down much of the social legislation of the Indian Parliament which tried to sequester the intermediary property class. I remember when the Indian Prime Minister, Nehru, in opening Parliament, characterized the Indian Supreme Court as a sanctuary of vested interests which created a great row in judicial circles in India. The right to property was adopted as a fundamental right in the Constitution of India in 1950. There have been a series of amendments in the Indian Constitution; the latest amendment was passed only three months ago which has completely obliterated the right to property as a fundamental right.

The basic notion of jurisprudence as it is being developed in the Indian subcontinent is that on the social level, property, to be a fundamental right, must be available to all citizens and persons universally. The right to property cannot be such a fundamental right because property owners constitute only ten per cent of the country's total population. Only the right to personal freedoms, which can be made available to all persons universally can be considered a fundamental right.

Thus in the context of the developing world the right to property is viewed with mixed feelings. The basic economic and social changes being undertaken approach a level which will cause these countries to approximate the welfare society. To reach that level, the state must initially assume an acquisitive character. That is, I think, a fundamental difference in jurisprudence between what has emerged in the Anglo-Saxon world and what is emerging in the developing world. We are

not interested at the present moment with the sensitive nature of the sanctity of property. What we are concerned with is the overall social progress of the general population. That automatically must give the state the right to attack certain interests in the community. Property by itself must be considered secular, there is no sanctity to be attached to it. Most of the emerging governments are assuming this character of an acquisitional state. From this point of view I think the entire question of expropriation of property is to be considered by all parts of the world.

Now the question is whether there is to be a special rule for giving adequate, prompt compensation of nationalized property owned by foreign interests. That is a sensitive question and the feeling that is developing in most of the emerging nations in the East is that it is highly dependent, not on a fixed rule of law, but on a flexible political situation. Most of these countries are asking for foreign investment — private investment, public investment from different foreign countries — in order to develop their national economies. And certainly it is not to be in the political interests of those who are inviting foreign capital to expropriate foreign property without compensation. But that is also dependent upon certain circumstances, such as how these international foreign corporations function in the country's economy. We have the image of the role of the United States Fruit Company in the rise and fall of many governments in Latin America as well as the role of the Standard Oil Company in the operation of government in the Middle East. And certainly these are viewed with a great amount of apprehension. While inviting the foreign capital of the other countries for the development of the national economy, the foreign corporation must not be allowed to interfere with the national sovereignty of the state. The most sensitive fact of the emerging world in the present day is encroachment on their national sovereignty.

In the Indian subcontinent today, I do not think there is any basic difference in applying the law of expropriation to national property or foreign property. The same principle applies: That the right to property is not a fundamental right of the citizens or anyone else. The right to property of any foreign owner is not considered to be an inalienable right. But it is the political and moral obligation of the government to see that they are protected because the foreign investor was invited for the improvement of the country's economy. From this

point of view, whether the foreign property and national property can be expropriated by giving adequate, prompt compensation is again dependent upon various political considerations. If the government is constituted in a fundamentally constitution democratic way, then I do not think that there is any fear of the foreign international property being expropriated without compensation. But if a revolutionary situation develops and the government is asumed by persons whose revolutionary ideas cut the very root of this concept, then this international rule of giving prompt and adequate compensation does not apply.

Protecting the rights and interests of the foreign property owner within the country is dependent upon various factors. One of the best ways of seeing whether property will be protected is to see if democratic institutions are deeply rooted in these countries. In the countries where a democratic process of law is allowed to function there is the least danger of these properties being arbitrarily expropriated. One of the best examples can be given by looking at India where the banks and insurance businesses have been recently nationalized. There is a clause in the legislation that foreign banks and insurance will not be nationalized. There is nothing in the Indian Constitution or the law passed by the Parliament to prevent the nationalization of the foreign sector. But that was not done. It was not done because of the democratic premise on which the government was established. Take in contrast the countries in the Middle East and Southeast Asia where the democratic rule of law does not prevail. They have expropriated their own property and every other property. Whether the expropriation of foreign property will be done or should be done seems to be dependent upon what type of policy is established there.

In my country of Bangladesh, many properties have been nationalized within the last few months, primarily properties belonging to Pakistanis. This had to be done because the country was at a state of war with the Pakistanis. We cannot allow these properties to stay in the hands of Pakistan, as it has not recognized our rights. There again, in nationalizing banks, insurance and foreign trade, although there is no legal bar on the sovereign will of the government of Bangladesh, a definite proviso has been made that where the banks and insurance and other businesses of foreign non-Pakistan interests are concerned, they will not be nationalized. That is because of the

basic democratic process of law that has been adopted in the country.

The international business community, whose help is being sought by the countries in our region to develop their economies, have a moral responsibility to see that the democratic process in these countries is allowed to develop. There are occasions, unfortunately, when these international companies have not always been faithful to the democratic ideals in which they are rooted. The companies occasionally are the cause of reaction which help the forces of dictatorship. Our interest is to invite foreign capital to help the development of our country. It is in the interest of international capital to see that the democratic process in these countries is deeply rooted so that ultimately there is no repression of foreign economic interests. I think that is the best way of creating a reciprocal promotion of business in the international world, particularly between the developed and the undeveloped countries which are emerging from economic backwardness. These countries want social and economic progress, but at the same time are willing to stick by the democratic constitutional process. Thank you.

MR. J. ROBERT FOWLER:* The revolutionary constitution of 1945, a very brief document which I think Sukarno probably wrote on the back of an envelope while on a train somewhere, says very clearly that the natural resources of Indonesia belong to the people. There has never been a method by which foreigners could obtain an interest in the oil in place, and that is the fundamental concept of the production sharing contract under which so many foreign corporations are operating today.

I think that the production sharing contract truly creates a partnership between the state corporation and the foreign corporation. The latter is clearly made the junior partner. The contract which is now almost a standard form, makes that very clear in many ways. The state enterprise reserves complete management control; in fact, it delegates that management control to the foreign contractor, but what it delegates it can in terms of the contract undelegate and take back. The foreign partners obtain all information that is derived from exploratory activities. All tangible personal property which the foreign contractor buys, imports and puts in place in Indonesia immediately becomes the property of the state corporation upon its being put in place. The foreign contractor has no title at any time to the undiscovered oil, it has no title to the drilling platforms

* Attorney at Law, Denver, Colorado.

which it has bought and paid for; its only rights are to recover out of 40% of the production its cost of exploration and equipping and to receive in addition thereto 32 to 35% of the oil for the term of the contract which is 30 years. Now these are two valuable rights. The question is, will it become Chile in Indonesia; because these rights could be expropriated.

I think that the present government is pretty satisfied with the deal that they made and formulated in 1966 in the first contract; they have of course since then attracted many other companies. I think the present government judges that it has made a good financing arrangement to develop its resources. I think that all of the companies operating there are happy in their relationship with this state enterprise. There is apparently a free exchange of information between the two groups and I believe that there is a general feeling of optimism on the part of the state enterprise and all the foreign contractors that this arrangement will work well in the next 30 years. But who knows for sure?

MR. MOORE: I have been wondering after this morning's talks, assuming that the predicted result occurs in Chile, where do the copper companies go? What remedies do they have and what procedures are available under international law if they find they have an unsatisfactory result in Chile. Are there any? Is this a justiciable claim before the International Court of Justice or other body? Has there been any development, thinking more broadly, toward international agreement on proper elements of value? Have proposals been made as to evaluation standards that might be agreed upon by multiparty conventions? Where the states, in other words, would have defined more clearly in advance those elements of value to which they agreed to be bound internationally when evaluation questions arise.

Another thought that I had on valuation standards and the great complexity of them: Professor Lillich talked about the arbitrary determination of excess profits. But I wonder if the determination was possibly not arbitrary, whether an element of historical profits is not absolutely essential in valuation of expropriated property. We are not very familiar with that concept domestically, at least in this country, because we are so used to trying to figure out the ways in which you value a going concern or fair market value, but the situation is a little different internationally. A foreign investor going

in will look at the years in which it will take him to get paid out. Let us say that he looks at a pay-out of six years. He has six million dollars and he figures that he will make a million dollars each year so that after the sixth year he is in a pure profit picture. Of course this is simplified because he probably would have additional capital requirements in the meantime, but he is out in six years and from that point on it is all profit. If he runs for another twelve years, would you value what he has that is expropriated at the end of that twelve years in the same way that you would value it at the end of the sixth year? Those are my questions, Mr. Chairman.

MR. WESTON: I am glad you asked those questions, John. I agree that questions of social welfare have to be taken into account. A number of years ago they were not; they were sacrificed almost always to doctrines upholding the sanctity of private property. Many companies, both of this country and others, perform considerable social service functions. They can and do bring considerable benefits to host economies, as Professor Loehr suggested this morning.

The real question, therefore, is not whether we are going to champion principles of social welfare or the principle of sanctity of property. The real question is, with the rich getting richer and the poor getting poorer, how are we going to get sufficient capital to help the process of economic growth in the Third World on a large-scale basis? Largely for political reasons, there simply is not enough capital to go around; yet there is an absolute need for foreign capital, and that is just something we might as well face. We cannot wish it away under concepts of social welfare nor ought we to safeguard it unduly under outworn concepts relating to the right to property. The real question, then, is how to encourage that kind of investment in the underdeveloped world (and for that matter in the developed world) that will assure benefit to those countries and therefore, over the long run, to the global economic process as a whole.

Countries like Chile, Egypt, Algeria, Indonesia, and so forth have been on a rampage in recent years, taking foreign assets by direct and indirect means. They do so for different reasons, and not all of them are sound. Part of the question of how to encourage investment into areas where it is needed and can be beneficial, therefore, is how to impress upon host country elites the necessity of dealing in an equitable and fair manner with the investments that are deliberately attracted there. We

have seen in the Chilean experience a kind of behavior that raises fundamental questions of equity and fair dealing, a kind of behavior that is likely to retard economic progress in that country. Surely Chilean policy is not designed to win the love of foreign investors of any sort, including the good ones. A basic problem, therefore, is how to impress upon host countries a recognition that they need foreign investment, that they cannot go it alone. When preemptory action is taken, to me it often represents an insufficient sensitivity to a host country's own and very real need for capital and all the external economies that come with foreign investment.

Likewise, however, it is necessary to impress upon foreign investors that they cannot pursue rapacious or otherwise politically insensitive policies and expect to be indefinitely welcomed. So what kind of investment do we want to channel into these Third World areas? It is easier to say what kind of investment should be discouraged than it is to say what kinds of investment should be encouraged. For example, one ought to discourage investment when it is aimed at clearly politically sensitive sectors of the economy; and I have in mind such investments as relate to banking, extractive industries, public utilities, and the like. This is not to say that foreign investment should not go into these sectors at all, but rather that they should not continue unmodified; in other words, they should not be left entirely in the hands of foreign entrepreneurs. We have to seek ways in which to multinationalize, if you will, those kinds of investments. Joint venture arrangements, licensing, franchising, opening up share ownership to indigenous populations, profit-sharing schemes similar to the oil consortiums in the Middle East — these and other techniques would be useful. Brand-use licensing would be particularly important in the manufacturing sectors. There are, in short, a variety of ways in which foreign ownership need not dominate, and if we want to see a lessening in the number of expropriations in the future we should strive to multinationalize investment as much as possible. Also, I think too much emphasis has been given to direct foreign investment in lieu of portfolio investment. Certainly there are other ways of pumping money into countries where it is badly needed.

But how do we go about encouraging the kinds of investments we are concerned to get into Third World developing countries where multinationalization is impossible or impractical? As I said this morning, and it is a truism that bears

repeating, we are living in a horizontal international legal order. There are few centralized mechanisms now available, or at least few immediately available or very effective, to regulate foreign investment flows, although there are all kinds of alternatives we could pursue. We have talked of multinational investment insurance schemes and there has been some reference to a code of fair business practice. There are good ideas. We can talk, too, about the creation of new and more developmentally sensitive arbitral procedures, and about Albert Hirschman's disinvestment proposals. Possibly we can consider international organizational licensing or incorporation of certain types of business activities. The fact remains, however, that as of now the supranational mechanisms that are available to us are either few or ineffective. We have, therefore, to resort to making sure that principles of compensation and valuation, or other principles which are designed to regulate and control the investment process around the globe, are designed to encourage the policies that are going to be in the best interest of all concerned.

Allow me, then, briefly to mention what my colleague Professor Weigel and I have fashioned in respect of this question of compensation and valuation. Basically, we have devised a valuation-compensation standard which is based upon the value of an enterprise to the host country when owned by the foreign investor. Let me give you some quick background.

By and large, foreign investment is enterprise; it is on-going operations. Therefore, notwithstanding the book value approaches taken in the Chilean situation, values that are based on some estimate of cost do not strike us as particularly helpful in getting a really accurate picture of the worth of an on-going enterprise. How can you say that Anaconda has a market value? Who is gong to buy it? Obviously it is not very rational to talk about a market value when there is no market in which to sell whatever it is you are trying to evaluate. On final analysis, therefore, one has to rely on valuation schemes that would value foreign enterprises on the basis of their future earnings capacity or projection. Of course, you have to ask whose projection to use? Is it the value of future earnings as seen by the foreign investor or the value of future earnings as seen by the host country which proposes to nationalize or already has nationalized? Professor Weigel and I have concluded that either way is one-sided. Either way is likely to

produce results which will be more beneficial to one side rather than the other.

Accordingly, our concern has been to recommend a value, based on future earnings expectations, that reflects the value of an enterprise to the host country while owned by the foreign investor. Is it worth more to the host country to have the particular enterprise in foreign hands or is it worth more to have that enterprise under its own control? I cannot go into all the details now, but the spinoffs or results of this scheme are essentially to encourage that kind of investment which is beneficial to the host country and to discourage that investment which is not beneficial to it; and, in the long run, this tends to work to the benefit of the foreign investor as well. Of course, the question remains: what is meant by "beneficial"? Well, obviously, the criteria can be and are many, and if there is any one area in which hard work needs to be done it is right here. One has to account not simply for economic factors, but as well, for social, political, ideological, ecological, and a whole range of other factors for purposes of determining whether a given investment is going to be of net detriment or benefit to the host country. But the complexity of the solution is not, we think, grounds for avoiding it.

Where do the copper companies go assuming they get no fair dealing from the Chilean Government? I suppose one can say that this is an issue that could be adjudicated by the International Court of Justice. But, frankly, after watching the Court operate in the *Southwest Africa Case* and after watching it operate in the *Barcelona Traction Case,* I'm inclined to doubt the Court's utility. On the other hand, I would prefer an adjudication even by the ICJ than a march by the Marines on Santiago. So I would say that this is a justiciable issue. International, even World Court, adjudication is a legitimate and policy-desirable alternative. Of course, another alternative is the old standby of diplomatic protection. But when you get involved in the potentially politically-charged atmosphere of the State-espousal-of-claims system, frankly my "guesstimates" are not hopeful.

At any rate, to sum up, I am concerned that we stop labelling private foreign investment as *ipso facto* good or *ipso facto* bad. We have to recognize that it is needed immediately and that we have to do everything we can to channel it in a beneficial way. And in the absence of highly specialized mech-

anisms that permit us to regulate this investment, we have to bend every effort at framing rules that are responsive to a more equitable world economic order. I believe Professor Loehr made reference to the fact that countries like Mexico and Indonesia, which have gone through economic bloodbaths in the past, are now welcoming foreign investment. The point is that foreign investment is not necessarily detrimental to the countries in which it is situated, and that it is pernicious in the extreme to assume that nobody should stand up for the foreign entrepreneur in these discussions. At the same time, however, if we expect to achieve a kind of global economic process that is going to benefit the world community as a whole, including the Third World, foreign investors have simply to recognize that they can not continue to hide behind the so-called sanctity of the private property concept. Thank you.

MR. JULIUS DURU:* Before I get in the middle of the problem, I would like to raise a few questions, which is a technique I learned from Professor Nanda. One I would like to raise is what actually is international law? Are you talking about international law as American law as applied in foreign countries? Are you talking about the law of nations as they operate as a whole? If it is the latter then we have to agree that there is not a single international law about expropriation because most of the countries you are talking about are in Africa. I do not remember any of those countries having developed a system of compensation for foreign companies in their own country. These have been simply beneficiaries of old treaties which they inherited after Africa became independent. They have begun to operate themselves quickly and without really understanding and without really being parties to these initial contracts. So when we talk about expropriation and international law, it would be better to discuss international law as African law, and as American law, and as English law as they function in the international arena. As it is today, international law is not really binding on the Third World.

A second point I would like to raise is about most underdeveloped countries. They are very worried that as developing countries they will never assume the status of a developed nation. To become a developed nation, which is their aspiration, they have to control the rate of exploitation of their natural resources. This throws a whole new light on the question of expropriation because these foreign corporations have

* President Association of Student International Law Societies.

a time schedule whereby they must get back their capital investment. They go about trying to get as much profit as possible in as short a time as possible. Therefore, they have to dig out the Nigerian natural resources at a fantastic rate. This means that the young people in those countries may be left bankrupt in the long run in terms of their natural resources. If you allow the countries that have developed technology to come in and quickly take out all the natural resources, it is incumbent on the young nationals to impress upon the government the need to take steps to preserve the natural resources for future generations. So then the question is whether there could be a means whereby those companies in the business of extraction could take off those natural resources at a controlled rate so that there would be a measure of how much is left for the country when it becomes developed. I very much doubt that if they have all of their natural resources taken out that they will ever be a developed country; they will forever be an undeveloped nation.

Now the next question I would like to raise is that since America has played a very vital role in classifying many countries as either developed or not developed by determining the rate of investment, I wonder if the United States will not champion the idea of creating a code of modern international investment. A code of investment may be meaningful when one takes as an example the EEC countries. If an American corporation goes into the EEC countries it will be very cautious because it will respect the laws about hiring local labor; they affect the company's welfare. But when the same corporation goes into the Third World it feels it can just shoot in a lot of dollars and maybe get in and out fast. This code will in effect prevent expropriation because, as I envision this code, it would set up standards of behavior. For example, it would tell companies not to operate in areas where there is slavery. In South Africa, Rhodesia, Mozambique, Guinea and all the places where there is slavery we have today the largest African investment by developed nations.

What are the corporations doing in those countries? Are not they really perpetuating the devastation of human rights? Is it surprising to find that the United States is truly hesitant to ratify a treaty on human rights? I find it amazing that the prominent international lawyers in this country do not advocate that the United States ratify these treaties that deal with

the protecion of human rights. The time has come to leave rhetoric alone and address ourselves to the real issues.

I would not be surprised to see a wave of expropriation of United States companies in Africa within the next five to ten years. In fact, I will predict it. It is going to happen because the United States companies really have a lot of investment in South Africa and the other countries there. This is viewed by Africans as insensitivity to the problems of the black people. And now Africans are recognizing the fact that expropriation really hits home; the expropriation of a United States company is a way to dramatize what they want to say. They are now begging these companies to change their means of operation in South Africa. I think it is extremely unfair for Gulf Oil to take Nigeria's oil and reinvest the money from it in South Africa. The African people are now awakening to such facts.

Since we are dealing with expropriation here, I think that we should start with these companies that bring these problems upon themselves, and create in them a sensitivity to the black African's problems. Until we do so we can talk about compensation, but it will be nothing but an academic exercise. If we really want to solve the problem we have to start by making these companies become sensitive to the domestic problems of the host countries and look upon those people as human beings of equal rights and dignity. They have a right to their natural resources, and a right to preserve them. Thank you.

CHAIRMAN NANDA: I would like to ask Professor Lillich how he thinks the operations of the Chilean Development Corporation and Banco de Chile would be affected by claims being made at the present time. And looking into the future, is it possible that retaliatory measures might be undertaken?

PROFESSOR LILLICH: There are all kinds of strategies of a retaliatory nature, and negotiations are going on in Paris to extend the time that Chile will have to pay its 3-5 billion dollars worth of obligations that have nothing to do with the nationalization of property. Lawsuits are pending in New York. The investors obviously have utilized domestic remedies in the absence of international remedies. Given the bleak picture of what the eventual outcome will be, it is assumed that even if the United States decided to take Chile into the International Court of Justice, the Chileans would probably plead by reciprocity the Connally Amendment and claim that it was a matter of do-

mestic jurisdiction and thereby deprive the Court of jurisdiction. I think it is to some extent discouraging that one opens up this kind of economic warfare, but on the other hand it seems inevitable that anyone who is associated with a company like Kennecott would approve of such action. We talk about these companies as monoliths, but there are some persons who own ten or twenty shares of Anaconda, like myself. They are somewhat disappointed that their property has been taken because the market value has gone down from 66 to 19 in the last three years. I suppose there is a large number of people who feel they have been unjustly deprived and would welcome any kind of strategy here of an economic nature, of a quasi-legal nature, of a legal nature that would provide an opportunity to obtain partial compensation. But it would only be partial.

The two points I really would like to come down a little harder on are based upon statements that I heard both this morning and from at least two members on the panel this afternoon. First, that there is either no law in this area or that the question of compensation is a political question. It seems to me that this is a complete denegation of international law. If we wish to build an international economy we have to have some rules by which both the investing countries and the host countries can plan their affairs, given all the facts that we can quantify. All kinds of political developments may occur; as Professor Weston pointed out, we cannot necessarily take all these into account. To say that there is no such thing as international law, no such thing as guidelines or principles, or to say that we should give up the effort to articulate some standards is, I think, a denegation of our job as international lawyers. We have seen that the Supreme Court in the *Sabbatino* case said it was not going to tackle tough questions. We have seen the International Court of Justice in the *Barcelona Traction* case say that it was not going to tackle tough questions. I think this approach is quite unsatisfactory.

The second thing: it seems to me that we are involved here in a very vicious and circular type of argument. The suggestion has been made several times that these corporations, despite modern, enlightened corporate stewardship, despite the Texaco and Esso ads, despite the building of clinics and playgrounds, despite the tours of Bill Russell and Arthur Ashe showing Africans how we play basketball and tennis — that all this adds up to a mere facade. The corporations are the

same kind of exploiters they were in the days of Rudyard Kipling. It is suggested that what they are interested in is the short-term buck, pound or yen — to get in and get out. As a matter of fact, everyone knows that in Malayasia or in Hong Kong you must get out your investment in four years or in six years, or you are not going to invest. This type of business judgment is quite unfortunate, but which comes first, the chicken or the egg?

It is the irresponsible behavior of the countries, and particularly countries which welcome in new investments and then nationalize them after a very short period of years, that creates this atmosphere, that forces companies to make this business judgment. If they can get no protection because we as lawyers are not concerned with the rules of international law, or devising procedures, which we really have not come to grips with today, or enforcing the rules of international law that we do devise, what can one expect? Therefore, these short-sighted countries are in many instances encouraging the very kind of behavior on the part of the corporations, the short run exploitation of natural resources that our colleague from Nigeria pointed out, that none of us would accept and that none of us certainly would recommend.

As I say, it is a vicious circle. When you have this irresponsible behavior by Chile, what is any lawyer or any man on the board of directors going to advise his corporation to do? To go in and invest a lot in hospitals, auxiliary roads and malaria control and earn 5% and hope that after 75 years there eventually will be some kind of return? Of course not; that would be nonsense. The businessman realizes that the life expectancy of a corporation in the average country may be 11 years or 18 years, and so he goes into make a short term buck in many instances. While I think this approach is certainly one to be discouraged, the point is that it is a circular type of thing. I do not know which comes first; I suppose we have to work on both fronts. Certainly we should encourage corporations to be good citizens, certainly we should encourage them not to exploit; on the other side of the coin, we should encourage countries not to nationalize precipitously, not to nationalize new investments, and not to nationalize when it is not in their own interest. Of course, you cannot excise political considerations and all kinds of other things that may come along. All we can do is the best we can, but it has to be done by both sides and not only one.

CHAIRMAN NANDA: There seems to be some kind of consensus emerging at this conference that if it were possible to effectuate it, wealth should be widely shared. Also, the concern has been expressed here that notwithstanding all aid, trade and financing efforts — bilateral, regional, and multilateral such as those undertaken by UNCTAD — the disparity seems to be widening between the developed and developing countries. Various international reports show that this unfortunate development is taking place. We must pool our expertise and resources to reverse this trend.

It is obvious that equitable and effective norms, procedures and instructions are needed to create world order in which all values, including wealth, are equitably shared. The international lawyer's role is important in fashioning the desired institutions, norms and procedures and setting standards. Perhaps we should close this conference today on this note — that we need rules and laws; the question is what kind of rules and laws and how to make them work.

I would like to thank the members of the panel for a most provocative discussion and thank the audience for their very active participation.

CHAIRMAN NANDA adjourned the session at 4:45 P.M.