Lump Sum Agreements in Spanish Practice

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CONTENTS

I. GENERAL CONSIDERATIONS ON THE CONCEPTS OF NATIONALIZATION AND EXPROPRIATION IN THE LIGHT OF CLASSICAL INTERNATIONAL LAW

It is difficult to address the meaning of the expression "lump sum agreement" without initially referring to other concepts that constituted the legal basis of its origin. These are the state practices of nationalization or expropriation for reasons of public necessity.[1] In this sense, it seems correct to state that:

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[1] The conceptual distinction between nationalization and expropriation has been drawn by international doctrine and case law, as although both sprang from public necessity and use, their legal nature differed. Whereas *expropriation* was an individual nationalization performed through implementing legislation, involving the provision of an economic compensation to the individual, *nationalization* is a form of expropriation that entails the total and definitive suppression of a legal capacity in favour of the State. It is true that the distinction between the two concepts can also be quantitative, relating to the number of persons affected. Reality shows that both institutions have more factors in common than they do differences: based on reasons

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"Of the state acts which entail infringement of private property, *expropriation* undoubtedly has the greatest historical impact. Today it can be said that national Constitutions generally allow for and regulate the powers of the state to expropriate for reasons of public utility".[2]

This opinion, which we share, takes us back in time to a different era in political history when foreign-owned assets were nationalized and expropriated, that is, the "historical environment" that illustrates these processes.[3] By examining the international law in force at the time in each case, proven conclusions can be reached on how legitimate these institutions were in order to justify the subsequent conclusion of "lump sum agreements" as solutions to the conflicts arising between states.

We are less interested in the historical origin of the meaning of private property – which authors generally date to the 18th century with respect to its formulation by the 1789 Revolution, and to the early 19th century as enshrined in the internal laws of the western states – than in its *internationalization,* which can be dated to the mid-19th century and signifies the possibility and certainty of private property crossing the borders of states without damage or losses to the owner's investments.[4] This *internationalization* of private property rests on two basic pillars that characterize the society of hegemonic states of the time:

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of public utility, carried out pursuant to law, and provision of compensation, more or less fair, to those affected.

Other concepts such as *confiscation* are associated with individual penalization and therefore are not entitled to compensation; and *socialization* is more political than economic in nature and therefore, unlike nationalization, relates to a consequence of the general modification of the economic politico-social structure of the state organization in question, which is why socialist writers prefer to use the term *socialization* to refer to any general expropriation.

Some authors worth consulting on these concepts are W. Friedman, *Expropriation in International Law,* London, 1953, p. 5; K. Kattzarov, "Rapport sur la nationalisation", *ILA,* 1958, pp. 210 *et seq;* E. Novoa Monreal, *Nacionalización y recuperación de recursos naturales ante la Ley Internacional,* Mexico, 1974, pp. 44–49. E. Pecourt Garcia, *La propiedad privada ante el Derecho Internacional,* Madrid, 1966, pp. 19–31; H. Rollin, "Avis sur la validité des mesures de nationalisation décrété es par le gouvernement indonésien", in *Netherlands International Law Review,* 1959, p. 266; E. Vitta, *La responsabilità internazionale dello Stato per atti legislativi,* Milán, 1953, p. 124.

Only the terms expropriation and nationalization will be used, indistinctly, in this study.

2 *See* E. Pecourt Garcia, *La propiedad... op. cit.,* p. 19.

3 *Ibid.* p. 19.

4 In the late 19th and early 20th centuries, the emergence of new states which would be entitled to express their opinion on this, put an end to the exclusiveness of the nations that hitherto participated in international relations, generating new international regulations and breaking the homogeneity that had prevailed until then, since they were states whose religion, culture and political structure, etc. differed from those in the classical states.

capitalism and colonialism, and subsequent decolonization. The former affords *private property* a dimension that does not pertain to the law of men and citizens but rather to the law of enterprises, of finance and investment groups, monopolies, concessionaires, etc.; the latter broadens geographically the exercise of this law to territories located beyond the boundaries of the state, which, in most cases, had formerly been under the sovereignty of others.

We might place in this context the important application of the institution of *diplomatic protection,* which was to institutionalize the "internationalization" of the private property of individuals in order to ensure, in a lawful manner, respect for their right of property abroad.[5]

The aforementioned process led the Latin American states to invent a formula to protect themselves from this reaction which was so contrary to their internal security and interests – the so-called "Calvo Clause". This clause, which was included in some constitutional texts and in most contracts governing operating concessions, required foreign investors in these countries to expressly renounce the *diplomatic protection* that their state could exercise in the case of damage to, or loss of, their assets. It acted as "a means of prevention against the abusive practices of western states" in demanding compensation for losses arising from the application of legislative measures involving the nationalization or expropriation of those assets when insufficient compensation was offered in return. The aim of this clause was to resolve internally any disputes that arose between the investor and the state in which the latter invested.[6]

By applying *nationalising* measures that affected foreign nationals' assets, the states which had recently gained their independence gradually established a practice that was consonant with the principles underpinning the new economic

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[5] It should not be forgotten that protection of nationals' assets abroad was initially carried out through intervention of the armed forces or other forms of constraint applied by the state of which they were nationals against the state that dared to threaten its assets. *Cf.* E. Pecourt García, *La propiedad... op. cit.,* pp. 35–43.

[6] The "Calvo clause" could be considered the reason why certain authors maintain that diplomatic protection is a right not only of the state but also of its nationals, since when they do not obtain compensation from the foreign state, they file a claim with their own state which, in certain circumstances, is deemed obliged to compensate the individual owing to the lack of an international claim. This justifies the requirement of previously exhausting all remedies available within the nationalising or expropriating state before filing an international claim. This requirement has its origins in customary international law, as it is the basic consequence of the "assumption of risk by the individual" when investing in a foreign state, which has the possibility of repairing the damage any time after it occurs. *Cf.* I. Seidl-Hohenveldern, *International Economic Law,* 3 ed., The Hague, London and Boston, 1999, pp. 65–70. Also, *Cf.* I. Brownlie, "Treatment of Aliens: Assumption of Risk and the International Standard" in W. Flume, H. J. Hahn, G. Kegel and K.R. Simmonds, in *International Law and Economic Order: Essays in Honour of F. M. Mann,* 1977, pp. 309–311; and M. Sornarajah, *The pursuit of nationalized property,* Dordrecht/Boston/Lancaster, 1986, p. 10 and 11.

order, basically aimed at aiding their own economic development.[7] A further consequence was the principle of *minimum standard,* according to which foreigners' rights were equivalent to those of the nationals of the state in which they invested. The aim of these states was to prevent possible actions from investors, though they triggered more international claims through the way of *diplomatic protection,* particularly in cases of "denial of justice".[8]

II. DIFFERENT CASES OF STATE PRACTICE WITH RESPECT TO NATIONALIZATION

Bearing in mind that nationalization has not always been carried out for the same reasons, the following paragraphs describe three cases of nationalization performed at the same time by very different states motivated by different historic and politico-economic realities.

We will first refer to the nationalization measures which were adopted by a state that recently gained its independence and therefore stem from a situation of decolonization. We then deal with nationalization as a result of Russian socialization triggered by a major politico-economic revolution, that of the Bolsheviks. And lastly, we will take a look at the measures implemented by western states during the economic crises sparked by the First World War.

The *nationalization decreed by Mexico* under its 1917 Constitution (article 27) illustrates the first case mentioned in the previous paragraph. Before the aforementioned Constitution was drawn up, the dictatorship of Porfirio Diaz (1877–1910) had allowed and encouraged foreign enterprises, particularly American, to own most of the country's natural resources and industries. A law passed in 1935 marked the start of an agricultural reform with the same aims, and other parallel and subsequent provisions imposed the nationalization of petroleum resources. In the first case, the USA and Mexico came to sign an agreement aimed at negotiating the compensation to which the Americans affected by this measure were entitled. The agreement set up a commission that acted from 1927 to 1939. Regarding the measures stemming from the nationalization of the petroleum companies, whose capital was mainly American and British, the governments of these two countries were unwilling to acknowledge the measures. After various jurisdictional and diplomatic clashes, the USA and Mexico set up a joint experts' commission in 1942. The commission settled the dispute by proposing the granting of compensation (part of which was to be deferred, which was accepted by both governments and by the petroleum companies concerned). In the case of Britain, the negotiations on compensation were more problematic. After diplomatic relations between the two states were

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[7] *Cf.* M. Somarajah, *The pursuit... op. cit,* pp. 13 *et seq.*

[8] *Cf.* F.V. Garcia Amador, "State Responsibility in the Light of New Trends in International Law", *AJIL,* 1955, vol. 49, p. 339; also in *Anuario CDI,* 1957 and 1958.

temporarily broken off, the states reached an agreement on compensation under the same terms as the former in 1947, through an exchange of notes.[9]

Second, we will refer to *Russian socialization* (1917–1918). In this case, the practice of this type of nationalization stemmed from the interventionist policy of the Soviet state, which used nationalization and expropriation to transform private- owned enterprises into collective property. The URSS considered that the role of employer should be played by the state, not by individuals. Such practice would naturally be unthinkable in an individualist system based on full industrial freedom. The historic emergence of this Soviet economic policy thus took place in the context of triumph of the October Revolution and establishment of the dictatorship of the proletariat by the first Bolshevik Russian government that began to develop an economic policy of nationalization and expropriation in the name of "Socialist property".[10] This attitude triggered complaints from the western states, which represented an important source of foreign capital in Soviet territory and denied the legality of Soviet nationalization, which provided no economic compensation for their nationals. However, after the western states acknowledged the Soviet Union, their national case law accepted and recognized the exclusive powers of every sovereign state to determine the legal condition of assets located in its territory and the duty of aliens to abide by the internal regulations of the states under whose jurisdiction they found themselves.[11] Nonetheless, the Soviet Union came to sign compensation agreements with the USA to compensate American nationals who had suffered the consequences of these nationalization measures, though reserving the right not to be obliged to pay.[12]

Soviet economic policy on nationalization spread to the states within its area of influence, particularly those of Eastern Europe – Yugoslavia, Romania,

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[9] *Cf.* E. Pecourt García, *La propiedad... op. cit.*, pp. 54–59. Mexican regulations on the nationalization carried out during this period can be found in L. González Aguayo, *La nacionalización de bienes extranjeros en América Latina*, Mexico, 1969, vol. II, pp. 216–239, 258–269 and 284–294.

[10] "It was the Soviet government which applied almost from the very moment in which it came to power – initially as sanctions from mid-1918, in order to reorganize the economy, and subsequently in accordance with the socialist economic pattern –the widest-ranging and most radical nationalization ever witnessed, which extended generically to undertakings owning means of production. They were applied indistinctly to nationals and to foreigners, did not establish any kind of compensation for the former owners and were intended to constitute "socialist property" throughout the country". See E. Novoa Monreal, *Nacionalización y recuperación de recursos naturales ante la Ley Internacional*, México, 1974, pp. 34.

[11] In 1922 the Conference of allied powers concluded that each state was free to choose its political organization and property ownership and economic systems, though this did not mean to say that the private rights of aliens should not be respected. *See* E. Pecourt García, *La propiedad... op. cit.*, p. 60.

[12] *Cf.* E. Novoa Monreal, *op. cit.* p. 35 *et seq.*, particularly note 7 which cites the case law of English, USA and French courts on this matter.

Czechoslovakia and Poland – which also practised nationalization and expropriation of assets and lands belonging to aliens, particularly in compliance with legislation on agricultural reform. This legislation actually provided for payment of compensation; the problem was that this compensation was more symbolic than real. This situation also led to complaints and claims from the western countries, which were debated at the *Second Hague Conference* in 1930. The conclusion was that disputes should be settled through mutual concessions between the interested parties by means of contracts that were finalized that same year.

Third and last, *the western countries,* staunch advocates of private property and individual freedom as the cornerstones of their economic policy, used and regulated this technique of collective appropriation in their national jurisdictions after the First World War (1919), though they differed as to how they exercised it. In general, nationalization affected the bodies responsible for the countries' means of production, included the payment of compensation in keeping with the possibilities of the state and the prevalence of public interest, and was motivated by the highest national interests. Even so, the amount of the compensation never represented the real value of the nationalized assets.[13]

In conclusion, it is our opinion that the international rules that existed before the Second World War were based on the reciprocal practices of states with respect to internationalising the right to private property. These rules both protected the exercise of this right and restricted its exercise, since the states, in a sovereign manner, had opted to control it in their territories as one of the manifestations of that sovereignty.[14]

Therefore, in the light of international law during the period, we may note the convergence of three regulatory areas concerning this matter: the international responsibility of states (concerning failure to fulfil the duties towards each other); the proper treatment that states should give aliens, arising from an

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[13] *Cf.* E. Novoa Monreal, *op. cit.*, p. 37. This author cites examples of claims between western states that performed nationalization and those that defended their nationals who had been paid insufficient compensation for having their assets nationalized. During the 18th, 19th and early 20th centuries, the western states had signed bilateral treaties (of amity, navigation and trade; of establishment; and of peace, putting an end to the First World War, etc...) among themselves and with other non-western states (China, El Salvador, New Granada, Turkey, etc.), which included clauses on the immunity of their nationals' property or, at least, the granting of proper compensation, reciprocally, in both states' territory. These states were therefore not unaware of this type of practice, which was consolidated by other different states.

[14] During the historic period we are dealing with, the right to private property was by no means considered an inalienable right of the individual. The communist states stressed this point, as a necessary means of eroding the classical view of property law, with a view to states' current needs. This was solved by justifying the interference of the state in the aforementioned property law. *Cf.* M. Somarajah, *The pursuit... op. cit.*, pp. 32 *et seq.*

international obligation, whether occasional or habitual, as part of their responsibilities (law on aliens);[15] and third, as a coda to the previous two, the exercise of the right of the state to provide diplomatic protection when one of its nationals has suffered a violation of an international obligation in respect of his assets abroad.[16] Naturally, these trends were a response to the socio-historic structure of the time, based on nationalistic conceptions of international law on aliens and on the imperialistic expansion of the major powers. However, they did not impair the recognition of a practice that was relatively widespread – in the conventional, case-law and regulatory spheres – of applying the following governing principles to the matter:

a) recognition of the state's right to expropriate for reasons of public utility;
b) international obligation of the state to respect treaties;
c) principle of non-discrimination;
d) obligation to provide fair, equitable and adequate compensation.

We will now examine the regulatory development of current international law on this matter, starting with the international regulation arising after the Second World War.

III. INTERNATIONAL REGULATION ARISING AFTER THE SECOND WORLD WAR ON THE EXERCISE OF ALIENS' RIGHTS TO PRIVATE PROPERTY

As in the previous section, it is firstly necessary to refer to the socio-historic background in which international law on private property was to develop thenceforth, since the deep, serious crisis of the period before and after the Second World War were followed by the emergence of a new legal and formal structure that was to meet the needs of the new international community.

The economic development of states was to acquire so much international importance following the Second World War[17] that states were referred to as "fully developed" or "underdeveloped ". Similarly, political bipolarization, by

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[15] With respect to this area of law, it is important to bear in mind the principle of recognition of a *minimum standard* in the sense of placing aliens on a level with a state's nationals as regards the exercise of the right to private property. This article does not deal with this issue, despite acknowledging that it is an interesting and complex subject to study. There is a very interesting study by Professor C. Jiménez Piernas, "El particular ante el derecho de la responsabilidad internacional: los problemas previos del standard mínimo y la protección diplomática", in *Cur. DI Vitoria*, 1987, pp. 67 *et seq.*, and also, by the same author: *La conducta arriesgada y la responsabilidad internacional del Estado*, Alicante, 1988.

[16] *Cf.* among others, E. Pecourt Garcia, *La propiedad... op. cit.*, p. 104.

[17] The Charter of the United Nations was to enshrine the principles of equality, independence and sovereignty of all the states comprising the current international community, as pillars of the world organization.

then consolidated, led to the drawing of a distinction between "communist" (socialist world) and "capitalist" (western world) states;[18] and we should not of course omit to mention those states that had recently gained their independence, which shared the same attitude based fundamentally on "heightened economic nationalism" and the "demand for economic sovereignty" vis-à-vis the colonizers or neo-colonizers.[19]

Neoclassical thought, which emerged after *decolonisation,* again favoured protecting subjects' investments abroad, particularly in the territory of the new states that had recently been decolonized. The justification apparently lay in "cooperation" between developed states and new states. However, it was no longer individual investors who performed this activity abroad; thenceforth the so-called "multinationals" were the main players in this new era of economic expansion.

This is an important fact to bear in mind, for as a cross-border pressure group they demanded greater guarantees to safeguard their overseas activities, and new standard models of diplomatic protection were thus created, such as the "Agreements on the protection of investments" signed between the investor's home state and the state in which the investment was made.

These agreements backed the "contracts of concession" or "agreements on

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[18] *Cf.* G. Berlia, "Contribution a l'étude de la nature de la protection diplomatique", *AFDI,* 1957, pp. 63– 72.

According to one of the most representative Soviet authors of his time, G.I. Tunkin, the developing states rejected the clauses on colonial conquests, colonial domination and racial inequality, unequal treaties, the doctrine of "acquired rights", western doctrine on legal succession pursuant to international treaties, and clauses on liability for damages to aliens placing them in a privileged situation with respect to the country's citizens, etc. According to the Soviet author this was due to the influence of the socialist states, since the former URSS succeeded in ensuring that "these reactionary clauses of international law" ceased to be compulsory for all states. *Cf.* G.I. Tunkin, *Curso de Derecho Internacional. Manual,* Moscow, Editorial Progreso, 1979, pp. 136–147.

This leads the author to draw one of his most categorical conclusions:

> "La politique étrangère d'un Etat est étroitement liée à sa politique intérieure et constitué en quelque sorte son prolongement. La ligne générale de la politique étrangère d'un Etat dépend surtout des principes de son régime social, de son essence de classe. En même temps, il édifie sa politique étrangère compte tenu des fluctuations de la situation intérieure et intemationale". See G. I. Tunkin, *Droit International Public. Problèmes Théoriques,* Paris, 1965, p. 174.

This opinion was also shared by K. Grzybowski, according to whom compensation is a measure that must be considered when implementing a nationalization policy, but if there is no obligation to grant compensation to nationals, neither is there to compensate aliens; *cf.* K. Grzybowski, *Soviet Public International Law. Doctrines and Diplomatic Practice,* London, 1987, pp. 253–257.

[19] *Cf.* Nguyen Huu-Tru, *Les nationalisations dans quelques pays d'Asie de tradition britannique: Inde, Sri-Lanca, Birmanie,* 3 vols, Brussels, 1984; esp. vol. I, pp. 4–6.

economic development" which in themselves could be described by the parties as *quasi-international contracts* as they included clauses institutionalising *ad hoc* "arbitration" or the setting up of permanent arbitration boards attributed with the function of settling disputes on these investments, furthermore undertaking to apply principles of international treaty law (e.g. the *rebus sic stantibus* clause, or the *pacta sunt servanda,* among others).[20] What is more, in certain cases, these contracts also included the so-called "stabilization clauses" which provided a guarantee to investors, as they translated into the inalterability of the content of the contract even if internal legislative changes took place, including amendments to the rules that had given rise to them.

Nevertheless, it is our view that this period in history witnessed the diminishment of the sovereign immunity of the territorial state in favour of the investor, and an increase in the latter's rights. As a result of the foregoing, the concept of property was modified decisively.[21]

The above explanation may justify the massive nationalization carried out after the consolidation of this situation. The basic reason was therefore the state's *need to exercise control over the national economy*,[22] which is hardly surprising in the case of states with socialist political and economic regimes, that is, those of Eastern Europe or those under Soviet influence.[23] Neither is it surprising in the case of the nationalization carried out in Latin American states, whether as a result of the application of full socialist policy (as in Cuba) or owing to the need to carry out reforms in the means of production of some industrial sectors (as in Peru, Uruguay, etc.).[24] We can still add two more arguments: consolidation of the rule of *ius cogens,* whereby states enjoyed full and

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[20] *Cf.* M. Sornarajah, *The pursuit... op. cit.*, pp. 56–65.

[21] This is the explanation given by Professors Sohn and Baxter for the rules on state responsibility, which were applied in cases of nationalization of foreign property when the investment sprang from the wish for economic cooperation with the new state. Therefore, in these authors' view, nationalization carried out in such circumstances was classified as "unjust" or "discriminatory". *Cf.* L. Sohn and R. R. Baxter, in "Responsibility of States for Injury to the Economic Interests of Aliens", *AJIL,* vol. 55, 1961, p. 545.

[22] Massive nationalization took place in France from 1945; in the United Kingdom between 1946 and 1949; in Austria, in 1946 and 1947; Dutch banks were also nationalized during this period; Norway nationalized assets in 1945; nationalization took place in Indonesia between 1950 and 1959; and also in Iran; the Suez Canal was likewise nationalized.

[23] Poland, Romania, Hungary, Czechoslovakia, Albania, Yugoslavia, the German Democratic Republic, the Democratic People's Republic of Korea, Bulgaria, etc. were to issue laws and decrees on nationalization, providing for compensation in such cases, though the compensation was considerably lower than the real value of the expropriated assets. *Cf.* E. Novoa Monreal, *Nacionalización... op. cit.* p. 38, E. Pecourt García, *La propiedad... op. cit.*, p. 139.

[24] The measures of socialization, nationalization and expropriation of aliens' assets were included in many constitutions drawn up after 1945. These are examined by Professor E. Pecourt García, in his aforementioned work *La propiedad...*, pp. 163–237.

permanent sovereignty over their natural resources, and acknowledgement of the rule of customary law that justified termination of a treaty if the circumstances that gave rise to it changed substantially, laid down in article 62 of the Vienna Convention on the Law of Treaties, 1969. These premises prevented the criterion of putting contracts between investors and states on an equal footing to international or quasi-international agreements from being maintained.[25]

The *Charter of Economic Rights and Duties of States*[26] and the *Declaration on the Establishment of a New International Economic Order*[27] likewise contain the "Calvo clause", which inspired future contracts on foreign investments signed thenceforward, committing the investor to assume the risks of possible nationalization in the host state with the idea of preventing his *unjust enrichment*, particularly if the concession from which he benefited had been processed irregularly. This meant that the "Calvo clause" was replaced by the existing general rules of procedure on this matter, which inspired more traditional international law.[28] Similarly, even today certain Latin American constitutions still contain this clause, which enjoys constitutional status and governs the contracts of concession the state signs with foreign investors.[29]

Having examined this more modern perspective of international law on private transactions abroad, and comparing it with the prevailing principles of

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[25] *Cf.* M. Sornarajah, *The Pursuit... op. cit.*, pp. 110–112.

[26] The United Nations General Assembly approved Resolutions *626 (VIII), 1803 (XVII), 3016 (XXVII), 3171 (XVIII)* which culminated definitively in the *Charter of Economic Rights and Duties of States, of 12 December 1974 (General Assembly Resolution 3281 (XXIX))*, article 2.2.c of which states that nationalising, expropriating or transferring the property of foreign assets shall be considered as a right of all states, nonetheless adding that in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent.

In any case, the *New International Economic Order* enshrined the *principle of compensating inequality, "desigualdad compensadora"*, which, in addition to leading to the classification of states on the basis of greater or lesser economic development, gave rise to a privileged situation for the less developed states, which obtained economic, food, technical and commercial assistance from the international organizations and more developed states. See A. Remiro Brotóns *et al. Derecho Internacional*, Madrid, 1997, pp. 1093 *et seq;* V. Abellán Honrubia, "Algunas consideraciones sobre el NOI", in ONU, vol. XL, Madrid 1987, p. 213; A. Fernández Tomás, *Las estructuras de cooperación para el desarrollo en NU*, Valencia, 1987, p. 132.

[27] *Resolution 3201 (S-VI)*, of the United Nations General Assembly, of 1 May 1974.

[28] *Cf.* R. B. Lillich, "Duties of States Regarding the Civil Rights of Aliens", *R. des C.*, vol. 161, 1978, pp. 333–371. By the same author, also "The Diplomatic Protection of Nationals Abroad: An elementary Principle of International Law under Attack", in *AJIL*, vol. 69, 1975, p. 359.

[29] For example, art. 19 of the Costa Rican Constitution of 7 November 1949; art. 16 of the Ecuadorian Constitution of 10 August 1979; art. 33 of the Constitution of the Republic of Honduras, of 20 January 1982; and art. 63 of the Constitution of Peru of 3 October 1993.

classical international law on this matter, the following conclusion can be drawn:

a) The state's right to expropriate, nationalize and confiscate is not only confirmed but even reinforced and internationally sanctioned, as evidenced not only by state practice in this field but also by the United Nations resolutions on this matter. The legality of this type of state action is based on the fact that there is no property which does not fall under state jurisdiction as a result of the state's sovereignty.[30]
b) Regarding the obligation to abide by treaties, this principle has not been altered by the practice of states; on the contrary, it is a manifestation of the maxim *pacta sunt servanda.*
c) The principle of non-discrimination has been reinforced in the sense of not expropriating or nationalising arbitrarily, inspired by a xenophobic sentiment, or as a political reprisal.[31]
d) Lastly, the obligation to provide prompt, adequate and effective compensation was institutionalized in the so-called "lump-sum agreements" which we mentioned earlier and will go on to analyse. However, it can be considered that this formula of overall compensation did indeed signify progress in international law on private property.[32]

We may infer from the foregoing that the current issue is not whether or not the nationalization or expropriation practised by states is lawful, but rather under what conditions the state should carry out these measures.[33] Accordingly, international law establishes two basic premises: that they should not be carried out arbitrarily, but for reasons of public necessity and that they should not be discriminatory actions based on political and economic reprisals.[34]

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[30] This was confirmed with the Swiss nationalizations in 1947 and the nationalization of the Suez Canal in 1956, backed by different UN resolutions. Regarding the resolutions of the United Nations General Assembly, important ones are *626 (VII)*, adopted on 21 December 1952; *1314 (XIII)* in 1958; *1803 (XVII)* on 14 December 1962.

[31] This was how the nationalization of Dutch investments carried out by Indonesia in 1958 to achieve the free independence of West New Guinea was classified. The Egyptian government likewise nationalized assets belonging to Belgian investors in 1960 as a reprisal for the breaking off of diplomatic relations between Belgium and the Republic of the Congo, and with the United Arab Republic. The USA classified the Cuban nationalization of American assets in that state as a discriminatory attitude *(Banco Nacional de Cuba c. Sabbatino)*, etc.

[32] *Cf.* M. Somarajah, *The pursuit... op. cit.*, pp. 214 *et seq.*

[33] By way of an example, see *Resolution* 1803 *of the United Nations General Assembly (XVII)*, point 4 of which takes this approach.

[34] In this respect, the nationalization of Dutch assets by Indonesia triggered a controversy that materialized in a Note of Protest sent by the Netherlands to the Indonesian government on 18 December 1959 stating that the first of the nationalizations constituted an arbitrary and discriminatory act against the assets of its nationals, *cf.* McNair, in *AJIL*, 1960, vol. 54, p. 485; and H. Rolin, "Avis sur la validité des mesures de nationalisation décretes par le Gouvemement Indonesien", *NILR*, 1956, n. 6, pp. 260–264.

In conclusion, it can be said that international law recognizes aliens' right to private property. This right, originating in a classical regulatory system, has evolved, not exactly into something new, but rather adapting to the current socio-historic structure and the legal and regulatory needs[35] of the latter. Currently, all the national systems that recognize the right to private property always include legislation which organizes the general system of administrative expropriation, specifically regulating the legal grounds for expropriation and the concrete purpose, normally stating the requirement of social, common or public interest of the state and naturally submitting it to jurisdictional control when relevant.[36]

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The USA likewise regarded the nationalization of its nationals' assets by the Cuban government from 1959 onwards as reprisals of a political nature, *cf.* P. Sigmund, *Multinationals in Latin America,* 1980, p. 98.

Regarding Libyan nationalization of British and American oil companies, these were also classified as political reprisals against both states, particularly in the case of the US, since the proceeds of the exploitation of oil in that territory basically constituted economic support for Israel, *cf.* G. W. Haight, "Libyan Nationalization of British Petroleum Assets", *International Lawyer,* 1972, vol. 6, p. 541; also *ILM,* 1974, n. 13, p. 767, and *AJIL,* 1974, n. 75, p. 486.

[35] Regarding the current treatment of the issue in question, see, among others, the following works: L. M. Díaz González, *Globalización de las inversiones extranjeras,* México, 1989; by the same author, "La inversión extranjera. Promoción intemacional de la inversión extranjera: el MIGA", *R. de Investigación Jurídica,* 1990, pp. 457 *et seq.;* P. Merciai, *Les entreprises multinationales en DI,* Brussels, 1993; A. Miaja, "El Derecho Intemacional ante las sociedades multinacionales", *ADI,* 1975, pp. 169 *et seq;* A. Mouri, *The IL of Expropriation as Reflected in the Work of the Iran–US Claims Tribunal,* Dordrecht, 1994; E. Pecourt, "La dimensión economica de la soberania estatal", *REDI,* 1963, pp. 459 *et seq.*; R. Pérez Miranda, "La inversión extranjera directa" in *R. de Investigación Jurídica,* 1990, pp. 545 *et seq.*; A. Pigrau, *Subdesarrollo y adopción de decisiones en la economía mundial,* Madrid, 1990; R. Pritchard (ed.) *Economic Development, Foreign Investment and the law,* London, 1996; I. Seidl-Hohenveldern, *Corporations in and under IL,* Cambridge, 1987; M. Sornarajah, *The IL of Foreign Investment,* Cambridge, 1994.

[36] This does not mean that certain developing states that respect the right to private property always guarantee it, owing to an evident state of necessity. *Cf.* H. T. Nguyen, "La validité internationale des mobiles d'expropriation", *RBDI,* 1990/2, pp. 441–463.

The same is not true of states which have been or continue to be "socialist". These states remain loyal to a policy of nationalization, which they attempt to justify through their constitutional political principles. This furthermore leads them to avoid adopting the promise to provide economic compensation by granting the compensation requested by the states whose nationals' assets are seized as a result of the application of intervention measures. The justification which is most commonly alleged in this connection is, again, the lower level of development and the application of a planned economy system. *Cf.* C. M. Díaz Barrado and C. R. Fernández Liesa, *Indemnizaciones a españoles..., op. cit.,* pp. 15 and 16.

IV. LUMP SUM AGREEMENTS

a) Concept

"Lump sum", "en bloc", or *"global"* agreements can be defined as international agreements establishing the commitment by one state to provide, and by another to receive, a *lump sum* agreed upon by means of negotiation between the two governments. This type of agreement thus ends in an international claim deriving from the exercise of diplomatic protection, though the state receiving the compensation can distribute it unilaterally among the parties affected, in accordance with internal procedure.[37] The aim is to repair the consequences of an internationally wrongful act arising from incorrect procedure of nationalization of assets belonging to foreign nationals, *where there is no provision for granting proper compensation in return for the injury arising from the application of the legislative measure, or because it produces a consequence affecting hundreds or thousands of individuals "en masse"*.[38]

This practice became widespread with the nationalization carried out after the Second World War and coincided with the progressive development of "Law of international claims" and "Law of the responsibility of states".[39] As pointed out earlier, nationalization was carried out by states which had recently gained their independence, by states with a socialist political ideology and by western states, though the former, as mentioned, initially had misgivings, to such an extent that they are described by some authors as "persistent objectors" regarding the application of principles originating in custom.[40]

Lump sum agreements are therefore a *lex specialis* between the Parties with respect to general international law on this matter, and are an appropriate response to an international claim made by the state of which the investors are nationals, motivated by the exercise of diplomatic protection of a collective nature.

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[37] *Cf.* R. B. Lillich, B. H. Weston, *International Claims: Their Settlement by Lump Sum Agreements*, Charlottesville, 1975, vol. I, pp. 36.

[38] *Cf.* C. F. Amerasinghe, "Assessment of Compensation for Expropriated Foreign Property: Three Critical Problems", *Essays in Honour of Wang Tieya*, The Netherlands, 1994, pp. 55–66.

[39] In 1953 the United Nations General Assembly requested the *ILC* to begin a study on the principles of international law governing the responsibility of states as a result of internationally wrongful act committed by them. In 1955 the Commission appointed García Amador special rapporteur. In his 1957 draft, he proposed an article 9 establishing the following:

> "El Estado es responsable de los perjuicios que causa a los extranjeros expropiándoles sus bienes salvo si esta medida se justifica por razones de interés público y si el Estado paga una indemnización adecuada".

See *Anuario CDI*, 1957, vol. II, pp. 104–131.

[40] *Cf.* M. Sornarajah, *The pursuit... op. cit.*, pp. 214–225.

On the one hand, this solution constitutes direct recognition of the authorship of an internationally wrongful act by one state, namely infringement of the assets or interests of another state represented by its nationals without granting any compensation in return; and on the other, it avoids the need for intervention of an international judicial body, as in itself it is an autonomous form of peaceful settlement of disputes based on its conventional origin.[41]

Lump sum agreements are thus finalized between the perpetrator and victim states, though they can be preceded or accompanied by another peaceful conflict-settlement mechanism such as conciliation or arbitration. They allow the requesting state to receive, if not full economic compensation, at least a part, to be distributed at will among the individuals who have suffered the damages and are considered as injured parties according to selection mechanisms established internally by the state of which they are nationals. The amount may be provided in a single payment or in several payments over a period of several months or even years.[42] Basically, with respect to the right to nationalize, we have seen that the obligation to provide compensation arises in certain circumstances (for there is a possibility of adopting licit economic countermeasures); therefore *expropriation or nationalization is in principle an internationally wrongful act when it is not compensated for economically.*[43] However, in accordance with states' new economic principles arising from the *New International Economic Order, the compensation regulated in these agreements was to take into account "the capacity of payment of the country which nationalized and the limit of its* willingness to compensate, in addition to general political considerations."[44]

Therefore a constant practice among developing states or states with a "socialist" regime has been to sign, on different occasions, lump sum agreements characterized generally by offering a lump sum far lower than the compensation they actually should have provided for, and not even ensuring full reparation for the injuries caused. This issue has had negative consequences in the claimant state regarding the internal distribution of the compensation granted to the nationals in question.[45]

Even so, these lump sum agreements were a significant step forward, since they prevented the consolidation of the precarious technique of nationalization

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[41] *Cf.* G. Tesauro, *Nazionalizzazioni e diritto internazionale,* Naples, 1976, pp. 214–219.

[42] R. B. Lillich, B. H. Weston, *International Claims, op. cit.*, vol. II, p. 5. This volume also includes a substantial collection of existing international practice on this matter.

[43] *Cf.* CPJI, *Serie A,* n. 9, p. 21 *et seq.*

[44] *See* A. Remiro Brotóns *et al., op. cit.*, p. 1, 100.

[45] It is interesting to analyse USA practice regarding the conclusion of lump sum agreements with other former Eastern European states (East Germany, Poland, Hungary, Czechoslovakia) whose communist regimes had confiscated property owned by American citizens residing in these territories, *see* M. L. Neef, "Eastern Europe's Policy of Restitution of Property in the 1990s", in *Dickinson Journal of International Law,* vol. 10/2, 1992, pp. 357–381.

without compensation, in addition to being intended to prevent litigation and more serious confrontation between the states concerned, thus avoiding the intervention of arbitration boards or international courts.

From the foregoing we may infer that lump sum agreements may be classified as international agreements in which the political factors of the parties are taken into consideration when establishing the relevant conditions for repairing the damage caused.[46]

b) General characteristics of lump sum agreements in the conventional practice of states

Despite the criticism levelled at the system regulated by means of lump sum agreements, practice has shown that they are an improvement, often possibilistic, on the international institution of the *diplomatic protection* afforded to the nationals of a state who have suffered personally, or whose interests have been damaged by, the injurious effects of an internationally wrongful act, that is, failure to fulfil the existing international obligation of provision of compensation as a result of nationalization affecting the assets of its nationals.[47]

The general characteristics of this type of international agreement, in the conventional practice of states, can be summed up as follows:[48]

a) Claims have normally been raised *within the context of international responsibility*. In the case of expropriation (not for reasons of public utility or without the relevant compensation), this would justify the exercise of the related diplomatic protection.

In another respect, for the countries which have implemented internally rules on the nationalization of foreign owned assets, the law covering these assets was not based on general international law; rather, its only source of reference was the *internal law of the nationalising country,* and it was therefore this law which would determine the nature and scope of the compensation that *should be paid in each specific case and on a fully equal footing with those granted to the country's own nationals.*

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[46] *Cf.* R. B. Lillich; B. H. Weston, "Lump Sum Agreements: Their Continuing Contribution to the Law of International Claims", *AJIL,* vol. 82/1, January, 1988, pp. 69–80.

[47] On this specific question, *see* Cuthbert Joseph, *Nationality and Diplomatic Protection. The Commonwealth Nations,* Layden, 1969.

[48] *Cf.* A. Giardina, "Compensating nationals for damage suffered abroad: Italian practice", *IYIL* 1986/87, pp. 3–25; G. Berlia, "Contribution a l'étude de la nature de la protection diplomatique", *AFDI,* 1957, pp. 63– 72; J. A. Westberg, "Compensation in Cases of Expropriation and Nationalization: Awards of the Iran–United States Claims Tribunal", in *Foreign Investment Law Journal,* n. 5, 1990, pp. 256–291; M. L. Neef, "Eastern Europe's Policy of Restitution of Property in the 1990s", in *Dickinson Journal of International Law,* vol. 10/2, 1992, pp. 357–381, amongst others.

We may therefore conclude that lump sum agreements are basically a *political solution* to the dispute arising between two countries, if we leave aside the formal considerations of the problems raised by the aforementioned application, we may conclude that:

b) Therefore, the essential element lies in the fact that the *nationalising state pays the claimant state a lump sum to cover all the claims filed with the latter, but without bearing in mind the real value or amount of these claims, due to the difficulties in reaching practical solutions through other channels. In most cases the solution of restitutio in integrum* is ruled out.

c) The agreements we are dealing with specify in different manners the *types of claims* the lump sum is intended to settle and establish the *form of payment to the individuals in question and the impossibility of* their lodging *future claims with the state that pays the compensation through any action whatsoever.* This is because the agreements also *specify that the distribution of the amount agreed upon* as compensation between the different claimants is the *exclusive competence and responsibility of the claimant state.*

In any event, the need to properly substantiate the claims that are settled translates into *clauses establishing that the debtor state must aid the claimant state by providing information and documentation* which the latter may require in order to assess these claims.

d) This leads us to a different problem, that of the *procedurc* laid down in the internal rules on the distribution of the compensation. The common characteristic of these classical agreements is that they provided for the setting up of *internal commissions* whose actions ended what was indeed a dispute, since their decision was based on the application of criteria that on occasions proved controversial, such as nationality, or the date from which the damage should be assessed, etc.

What is more, whereas some claims were perfectly justified or proven, others lacked sufficient justification and assessing them became a difficult task indeed, owing to the lack of an overall picture of the claims as a whole. Therefore, the commission became the decision-making body and the whole procedure became a quasi-judicial proceeding, so much so that certain states which regulated the action of these commissions in detail in their internal rules accorded their decision the status of *res iudicata,* which meant that a subsequent appeal could not be lodged with any higher court.[49]

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[49] Some possible examples are the cases of states like the Italian Republic, the French Republic (Commissions de Repartitions), the United Kingdom (British Foreign Compensation Commission) and the United States (United States Foreign Claims Settlement Commission), among others; *cf.* A. Giardina, "Compensating nationals for damage suffered abroad: Italian practice", *IYIL,* 1986/87, pp. 3–25; G. Berlia, "Contribution à l'étude de la nature...", *op. cit.,* pp. 66–69.

There is an interesting article on this question by J. A. Westberg, "Compensation in Cases of Expropriation and Nationalization: Awards of the Iran–United States Claims Tribunal", in *Foreign Investment Law Journal,* n. 5, 1990, pp. 256–291.

As for the role these Commissions played within the internal state structure, there is a varied practice. We can find three preferences. The commission could be an ordinary body attached to the government administration; a special body set up *ad hoc* within the government administration and entrusted specifically with the task of implementing the agreement; or a specific body but with a permanent nature that acted between the administration of justice and the government administration and performed a parajudicial task.[50]

e) Finally, it should be mentioned that in most cases the lump sum agreements signed by the Eastern European countries have been characterized very specially by the fact that they were concluded *in a framework of much broader negotiations*, either during the establishment of economic relations with other states or in the context of existing economic relations with other states. These economic bilateral treaties themselves emerged from the promotion of the importance of foreign investments in the territory of developing states by broader multilateral treaties.[51]

Indeed, *lump-sump agreements* were no longer necessary when states accompanied the aforementioned bilateral treaties on economic relations with the so-called *bilateral treaties on the promotion and protection of foreign investments*,[52] though these were to be effective if the investment was made by a legal person or by a multinational.[53]

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[50] In the case of Spain, which lacked a joint body like the latter, only the first two options were possible. There was a body of these characteristics before the civil war, the so-called *Servicio de Asuntos Contenciosos*, which disappeared as Spanish law evolved. *Cf.* Asesoría Jurídica del Ministerio de Asuntos Exteriores, *Expediente de reclamación del Sr. Isu Eías*, Exp. n. 1.878, Madrid, 13 April1972, pp. 2–4.

[51] In this connection Prof. A. Remiro points out the following: by 1996 1,010 bilateral agreements had been concluded between 159 states and Eastern European, Latin American and African countries. In particular, Spain had entered into treaties with Hungary in 1989, Poland in 1992, Romania in 1995, Argentina in 1991, Peru and Cuba in 1994, Mexico, Colombia and Venezuela in 1995, Morocco in 1989, and Algeria in 1994, among others. This same author cites as an example of an agreement that is more general in scope and multilateral in nature the IV Lomé Convention, which suggests that the EC member states enter into bilateral treaties of economic development with each of the ACP countries. *Cf.* A. Remiro Brotons *et al., op. cit.*, p. 1, 100.

[52] Examples of the latter are the agreement between Greece and Hungary of 1963, a simple treaty reflecting the existence of claims of limited quantity, signed at Athens on 27 April 1963, which entered into force on 19 October 1965. See R. B. Lillich and B. H. Weston, *International Claims: Their Settlement by Lump Sum Agreements*, Part II, New York, 1975, pp. 260 *et seq.* And the 1963 agreement between the Netherlands and Poland as an example of a more complex and far-reaching agreement, signed at Warsaw on 20 December 1963, in force from 10 July 1964, see *ibid.* pp. 280–283.

[53] *Cf. ibid*, p. 1, 100 *et seq.*

V. SPANISH PRACTICE IN THE CONCLUSION OF LUMP SUM AGREEMENTS WITH OTHER STATES

Spain has entered into treaties of this kind with different states, though it is curious to note that studies on this subject have not given rise to doctrinal writings of any consideration despite the economic, sociological and political impact of certain cases involving many Spanish nationals.

First, we should point out that Spain has not established a model for a *bilateral agreement for general use* with respect to the different states with which claims have been lodged for adequate compensation. On the contrary, each specific case has been analysed individually, assessing unilaterally the political and economic relations with each state in order to ascertain the appropriateness of proposing a lump sum agreement or an alternative reparation mechanism. In this study I shall refer only to the first type of case.

a) Agreements concluded between Spain and other developing states

The first agreement of this kind to be concluded with an African country was the *Hispano-Moroccan lump sum agreement on compensation for the lands recovered by the Moroccan state in the framework of the Dahir of 2 March 1973*, done in 1979,[54] The agreement evidences the evolution of the classical criteria applied by international law on this matter.[55] We thus find that, first, the entry into force of the agreement prevented future international or internal claims; second, the compensation offered is, in each case, a *symbolic reparation* or form of *moral satisfaction* rather than a *compensation on the basis of equivalence,* naturally ruling out an effective and just *restitutio in integrum.* In our opinion this solution merits criticism, as we consider that in this case, it would have been possible to return certain nationalized assets to their previous owners.

Despite the aforementioned shortcomings, the Spanish government agreed to the amount awarded by the Moroccan government without demanding a higher

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[54] *See BOE* 11 November 1985.

[55] The Kingdom of Morocco granted Spain compensation of 9,000,000 dirhams as a "lump sum settlement" to be awarded in a single payment and which the Spanish government would be responsible for distributing among the parties it deemed to be beneficiaries. The lump sum in question was established on the basis of the theoretical value of the following assets: "the land, plantations, habitable or operable buildings, machinery or holdings in cooperatives, and any other element transferred to the state within the Dahir framework of 2 March 1973"; to which it added "the material, livestock, products in storage and crop expenses ", and "the debts of Spanish farmers... contracted with the Moroccan state and public bodies established prior to the date of the present Agreement, except those of the undertaking "Eléctricas Marroquíes, Sociedad Anónima", payment of which shall be as established directly by this enterprise and the Moroccan state". See article 2 of the aforementioned Hispano-Moroccan Convention.

sum or a more equitable solution. We understand that the reason was to ensure Spain continued to enjoy satisfactory economic relations with the Maghrebi country. This treaty was more in keeping with Spain's agreements on development cooperation rather than a true *lump sum agreement*.[56]

Nonetheless, this agreement served as a model for subsequent conventions Spain concluded with other African states, such as the *Hispano-Egyptian agreement on compensation to Spanish citizens* of 1981.[57] On 11 April 1980, the Council of Ministers authorized the Ambassador of Spain in Cairo to negotiate and sign a Protocol between the two countries on compensation for expropriation and damages affecting the property of Spanish subjects arising from the provisions of that government following the 1952 revolution.[58] The scant number of Spaniards affected (no more than 55) and the small comparative value of the assets, according to an estimate by the parties concerned, hindered the formalization of the agreement. However, once both governments' representatives had calculated the appropriate amount of compensation, the agreement was concluded. In the opinion of the Ministry of Foreign Affairs and the *Abogacía del Estado,* the agreement guaranteed *appropriate and concrete* compensation for the Spaniards who had suffered damages, since *the full amount of the duly justified claims was paid without any reduction* unlike in other conventions signed by the Egyptian Arab Republic (including the interest on the amounts owed).[59]

The authorization of the *Cortes Generales* was required for the signature of this agreement, since the second part of art. 4.3 established that "In the event that Spanish nationals lodge such *claims directly with the Egyptian government, the latter shall refer them to the Spanish government which, pursuant to the present*

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[56] In the judgement issued by the Supreme Court (3rd division) on 17 February 1998 relating to a claim lodged with the Spanish administration by Spaniards who had lost their assets in Morocco as a result of the nationalization referred to in this Convention, the Court dismisses their claims as it considers that, according to the Agreement, Spain did not substitute the Kingdom of Morocco in respect of its pending obligations, unlike in the one signed with Egypt on 14 April 1982. On this judgement see the commentary by Prof. Andrés Sáenz de Santa María, highlighting the limitations of lump sum agreements from the point of view of individual interests, *REDI* 1999/2, vol. LI, pp. 619–621.

[57] See BOE, 22 June 1984.

[58] This revolution gave rise to a number of situations that were detrimental to the interests of foreign subjects (including Spaniards), mainly owing to the implementation of the laws on agricultural reform, the nationalization of certain sectors of the economy, the sequestration of goods, the so-called "conservative" measures, a new monetary policy, etc. To mitigate or compensate for these effects, the then Egyptian Arab Republic signed compensation agreements with Britain, Holland, Austria, France, Belgium, the USA, Italy, Switzerland, Greece and Cyprus, undertaking to provide compensation for the damage caused in varying proportions and periods.

[59] See C. M. Díaz Barrado, and C. R. Fernández Liesa, *Indemnizaciones a españoles...*, *op. cit.*, pp. 33–36.

Agreement, is fully and solely responsible for them.[60] This was an atypical clause which was not used in general international practice relating to this type of agreement.[61] The exemption granted under the agreement to the Egyptian government and relinquishment of the exercise of diplomatic protection of the Spaniards concerned was a matter included among the "fundamental rights and duties established under Title I" of the Constitution, which is why the executive was required to request prior authorization from the *Cortes Generales* as laid down in paragraph l.c of art. 94 of the Constitution; in any case, it was required to request the opinion of the Standing Committee of the Council of State.[62] However, in the opinion of the *Consejo de Estado,* the Spanish government's relinquishment of the exercise of diplomatic protection of its nationals established in the aforementioned agreement was not regarded as be a matter *affecting the fundamental rights of Spaniards as established in Title I of the Constitution.* The *Council of State* considered that article 94.1 c) of the Constitution referred solely to treaties affecting the "fundamental rights recognized in Title I" of the Constitution, when they had a bearing on rights recognized in the Spanish legal system, whereas the agreement submitted to the Council of State for consultation *had a bearing on the rights established in foreign laws.* The *Consejo de Estado* found, therefore more logically, that the authorization of the *Cortes* was required to ratify the Hispano-Egyptian agreement solely in connection with the first issue, *as it created financial burdens on the Spanish public Treasury through the exemption from responsibility of the Egyptian government,*[63] as the Spanish administration was attributed the

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[60] This agreement granted a sum of 1,400,000 USA dollars as a final settlement of all Spanish citizens' claims against the Egyptian government", payable in three payments. Like the Hispano–Cuban treaty, this agreement contained a "most favoured nation" clause in article 6, granting the Spaniards referred to in the agreement the same concessions as other foreign nationals granted greater concessions in other agreements of this kind that Egypt concluded with other states. See BOE, 22 June 1984.

[61] It is true that most of the agreements entered into by Egypt contain the clause exempting this government from responsibility and stating that the claimant governments relinquish the exercise of diplomatic protection, though neither are these governments shouldered with specific responsibility for their nationals' claims, as in the Hispano-Egyptian agreement. The only agreement containing a partially similar clause is the one concluded with the USA on 1 May 1976, article 5.3 of which is merely establishes that "en el caso de que nacionales de los EEUU presenten tales reclamaciones directamente contra el Gobiemo egipcio, *éste las referirá al Gobierno de los EE. UU",* it does not add that the said Government will be "total y exclusivamente responsable"

[62] The Council of State's own doctrine establishes this mandatory means of consultation. See also, J. D. González Campos, L. I. Sánchez Rodríguez and P. Andrés Sáenz de Santa María, *Materiales de Prácticas de Derecho Internacional Público,* Madrid 1992, p. 81.

[63] Resolution of the Plenary of the *Consejo de Estado* of 14 April 1994. In the opinion of the *Consejo de Estado,* the agreement fell within the scope of article 94.1 d) of the Constitution, and thus required the authorization of the *Cortes* in order to be ratified.

obligation to provide reparation in the case of justified claims (as recognized by the Supreme Court in its case law, in similar cases).[64]

b) Agreements concluded between Spain and socialist states of the former Eastern Europe

A study of Spanish practice regarding the filing of claims with states having this type of economic and political structure shows how before beginning negotiations, the situation of general diplomatic relations and, more specifically, economic relations with the state in question was assessed, in order to lodge the claim at the most suitable time and in the most appropriate manner.[65] This evidenced the political precautions that Spain took at the time in its relations with the former Eastern European and URSS states.

The *widespread practice of nationalization* carried out by the former Eastern European states, which affected a large number of Spaniards and persons of other nationalities, enabled the Spanish authorities to lodge claims through international treaties. By contrast, individual cases of expropriation were regarded as legitimate measures by those states in the light of the existing international law, which led them even to refuse to respond to single claims by individuals. In short, international practice from 1944 shows that the former socialist countries agreed to negotiate compensation for damage to foreign property in a global context: that of damages resulting from nationalization measures dictated by them. Once again, as in the previous cases, the major disadvantage of this mechanism of reparation by equivalent compensation lay in the scant amount granted by the state with which the claims were lodged, which lowered the real value of the damaged assets and the interests requested by the claimant state by 50 or 70 percent.[66]

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cont.

On the one hand, the possible rights affected were those enshrined in arts. 24.1 (legal protection of rights) and 33.3 (compensation) of the *CE;* and, on the other, opinion 43.320 of the Council of State of 23 April 1981 concludes that: "When doubts arise on the establishment of the cases laid down in art. 94.1 of the Constitution, the opinion of the Council of State shall also be required in accordance with art. 22.1 of the Organic Law", see *Repertorio Aranzadi de Jurisprudencia,* 1974, n. 4510.

[64] See *Repertorio de Jurispudencia,* 1974, n. 4510; STS of 29 December 1986, in *REDI* vol. X, pp. 175–176; STS of 6 February 1987, *Repertorio de Aranzadi Jurisprudencia,* 1987, n. 516; STS of 28 April 1987, *Repertorio Aranzadi de Jurisprudencia,* 1987, n. 2534; among others.

[65] Asesoría Jurídica del Ministerio de *Asuntos Exteriores, Asunto de la Reclamación de indemnizaciones por españoles contra paises de Europa Oriental,* Exp. n. 3.071, Madrid, 12 June 1978.

[66] See the practice collected by R. B. Lillich, B. H. Weston, *International Claims...*, *op. cit,* Part II. Also, C. M. Díaz Barrado and C. R. Fernández Liesa, *Indemnizaciones a españoles privados de sus bienes en el extranjero,...*, *op. cit.* pp. 31–36. C. Joseph, *Nationality and diplomatic...*, *op. cit.*, pp. 198–219, in R. B. Lillich and B. H. Weston,

Let us now examine some cases of Spanish practice which illustrate the foregoing.

The *case of the claim lodged by the Elias family* (1972) provides an example.[67] The moment chosen by Mr Elías's heirs to file their claim was 14 June 1966, after Spain had resumed consular and diplomatic relations with Bulgaria. The first solution adopted by the Spanish government was for Spain's representative in Sofia to ask the Bulgarian government for relevant compensation in 1971 through two Notes Verbales. By that time, according to the information held by the legal advisors of the *Elias family*, Bulgaria had already paid compensation to all foreigners owning property in the country. Nonetheless, the Spanish government envisaged two disadvantages of requesting compensation relating to the essential requisites for exercising diplomatic protection. The first was the requirement of having previously attempted *to use all other internal channels, which the claimant was not considered to have fulfilled;* because if they agreed on the initial impossibility of effectively doing so, the Bulgarian authorities could argue that the circumstances had subsequently changed.[68] Second, neither was the requisite of *nationality fulfilled in this case*, as the enterprise was of Bulgarian or Italian nationality but under no circumstances Spanish. For these reasons, the Spanish government considered that *a formal claim did not appear feasible* in the light of the principles of international law governing diplomatic protection.

The Spanish government solved these problems by following the methods *used by other governments to obtain compensation for their subjects' assets which had been expropriated in that same territory after the Second World War, furthermore bearing in mind the Bulgarian government's* request that the claim should be settled with a *lump sum agreement*.

This case highlights how Spain, using what was a good technique from the point of view of diplomatic protection, obtained individual compensation by concluding with Bulgaria a type of agreement normally used for collective claims, even though this individual claim was lodged together with one for the cash of the Spanish legation seized by the Bulgarian government.[69]

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cont.

International Claims... op. cit., Part II, pp. 94 *et seq.*, 117 *et seq.*, 244 *et seq.*, 266 *et seq*, 297 *et seq.*, 157 and s. 322 *et seq.*, respectively.

[67] In this case the claim was based on the losses which the *Elias family had* suffered to their assets as a result of the nationalization measures implemented by the Bulgarian government through a law of 27 December 1947. *Cf.* Asesoría Jurídica del Ministerio de Asuntos Exteriores, asunto *Expediente de reclamación del Sr. Isu Elías*, Exp. N. 1.878, Madrid, 13 April 1972.

[68] Mr. Elías justified this position claiming that "there was no possibility of availing himself of internal means since the entry of Soviet troops, the fall of the monarchy and the proclamation of the People's Socialist Republic gave rise to the prosecution of all the "capitalists" which cost many employers their lives, and those who did not pay for their guilt with their lives were sent to concentration camps"

[69] For this purpose, the ambassador in Sofia recalled the claim, also made by Spain, for the amount of cash held by the Spanish legation when it was seized by the Bank of

This same initiative of signing lump sum agreements with socialist states, stemming from individual claims, is found in the *Petition of HRH Prince Antonio de Borbón y Chartoryska relating to a possible claim of the Spanish government with the Democratic Republic of Poland.*[70] At the time the opportunity to claim through diplomatic channels was not backed by good diplomatic relations, which were non-existent with Poland's new regime. Nevertheless, the Spanish state considered asking Poland for reparation for the damages its subjects had suffered as a result of the political change, even if it did not proceed through the usual diplomatic channel but in the framework of any contact relating to trade relations. And this is precisely what was done, since although in principle the Spanish government considered the possibility of lodging a claim by means of individual diplomatic protection in favour of Prince Antonio de Borbón y Chartoryska – all the necessary requirements for a feasible claim were fulfilled as it was ascertained that the expropriation had taken place pursuant to internal legislation on the matter without discrimination on the grounds of nationality – it deemed it appropriate to collect information on other Spaniards affected by the measure and thus propose signing a lump sum agreement with the Polish government, as this would provide greater possibilities of receiving the proper compensation.

It can be concluded that in view of the refusal of the then communist states to grant reparations for individual claims, however large (the two cases described relate to two individuals of great prominence in Spanish economic and political sphere: the major investor Elías and his family, and Prince Antonio de Borbón y Chartoryska), the choice of using diplomatic negotiations was aimed rather at seeking a political and economic solution through agreements which initially were not designed for such situations.

c) The Hispano-Cuban lump sum agreement of 1986

We will now examine the case of *Spanish claims with Cuba* resulting from the implementation following the 1959 Cuban Revolution of nationalising regulations which affected the assets and interests of Spanish nationals and which led to the conclusion of a treaty of the above characteristics in 1986 after Spain lodged a formal claim through diplomatic channels.[71] This treaty, which in turn gave rise to an internal law on its implementation, Law 19/1990, of 17

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Bulgaria. Therefore, the agreement was to bear in mind these two claims. Asesoría Jurídica del Ministerio de Asuntos Exteriores, issue *Reclamación bienes del Sr. Isu Elías*, Exp. n. 3389 bis, Madrid, 20 August 1980.

[70] Asesoría Jurídica del Ministerio de Asuntos Exteriores, Expedientes n. 1.322, Madrid, 2 February 1968; and 3.261, Madrid, 1 August 1979.

[71] See *BOE* 18 March and 19 April 1988.

December,[72] and Royal Decree 324/1991, of 15 March,[73] establishing the procedure to be followed by the Inter-ministerial Settlement Claim set up under the law. The Hispano-Cuban treaty was preceded by a prior agreement concluded in 1967, which enjoyed scant success owing to the complexity of its implementation.[74]

The preliminary Hispano-Cuban agreement of 14 March 1967 on *claims relating to Spanish assets affected by provisions of the Revolutionary Government of Cuba* was the first consequence of the application of the nationalising laws enacted following the triumph of the Cuban revolution, which led to the repatriation and loss of assets of many Spaniards who were then living in that country.

The importance of this preliminary agreement lies in the fact that the Cuban government expressly and publicly recognizes its debt to Spain. Spain therefore no longer needed to legally justify its claim drawing on international law with respect to the effects on the assets and interests of Spaniards residing in Cuban territory.[75] However, the major shortcoming of this agreement was that it was lacked effectiveness in practice, not only did it fail to envisage the proper figure, but it did not either specify the form of payment of compensation for the damages suffered.[76]

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[72] See *BOE* 18 December 1990.

[73] See *BOE* 16 March 1991.

[74] In general, this is the most comprehensive case of a claim in Spanish practice, particularly bearing in mind the large number of Spaniards affected by the Cuban nationalization laws, and the legislative measures deriving from the implementation of the compensation treaty signed by Spain and the Cuban Republic.

[75] In article I of the *agreement of 16 November 1986 concluded between Spain and Cuba on compensation for the assets of Spaniards affected by the laws, provisions and measures dictated by the Cuban government from 1 January 1959* the Republic of Cuba recognizes the damages caused to individuals and legal persons by the provisions adopted by the new regime resulting from the Castro revolution, stating that they deserved a compensation granted by that government. (See *BOE* 18 March and 19 April 1988).

[76] On the contrary, it established a confusing and complicated system for appraising damage, to be implemented by a joint Hispano-Cuban commission. This commission was to study on an individual basis the claims lodged by the Spaniards concerned with the Spanish Ministry of Foreign Affairs, and to present the aforementioned reports to both governments. The governments would then, by mutual agreement, conclude whether or not to grant the compensation and, if so, what amount should be paid. Nonetheless, the agreement did serve to establish, approximately, the overall amount of Cuba's debt, since the commission examined each claim individually, rejecting those regarded as inappropriate and excluding from the valid claims any concepts classified as not subject to compensation, thus establishing which claims were entitled to payment. An objective and uniform appraisal was likewise carried out of the amount owed in respect of the lost assets.

Another failing of the agreement was the short period of time it granted the Spanish government to submit the claims to the Cuban Ministry of Foreign Relations – only one year from the signing of the treaty. Claimants were furthermore required to prove their effective link with the property lost through state confiscation. This meant that

As pointed out earlier, the content of the previous agreement converted each of the individual claims filed with the Cuban government into totally contentious processes together with the confusion and discontentment generated by other Cuban laws on nationality applicable to these appeals, which marked stern protectionism of Cuban nationality,[77] led many people who considered themselves Spaniards pursuant to Spanish legislation to deposit their assets in an "irregular" manner at the Spanish Consulate in Cuba. This gave rise to a conflict for the Spanish consular authorities, particularly when proceeding to transport these goods to Spain by diplomatic bag, or when returning them when it was considered that there was no possibility whatsoever that the person who had deposited them enjoyed Spanish nationality.[78]

This preliminary agreement and its difficult and precarious implementation led the parties to change the system of settling the claims filed. They chose the other mechanisms traditionally applied, through international treaties concluded with other countries in similar situations. This is the system of *lump sum agreements*. Overall, this method, though not entirely satisfactory, displays much more advantages that the difficult – and occasionally impossible in practice – system of assessing claims individually, in which lack of evidence is frequently an insurmountable obstacle when trying to obtain compensation.[79] We will now examine specifically the content of this lump sum agreement.

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each claim included a number of concepts not entitled to compensation, which increased exaggeratedly and erroneously the amount. *Cf.* Ministerio de Asuntos Exteriores, Dirección General de Asuntos Consulares, Exp. sobre las Reclamaciones a Cuba de los españoles afectados por las imposiciones sobre nacionalizaciones, *Acuerdo sobre reclamaciones relativas a bienes de españoles afectados por disposiciones del Gobierno revolucionario de Cuba firmado en la Habana el día* 14 *de marzo de 1967.*

[77] The Fundamental Law of 7 February 1959 establishes as a basic criterion that nationality shall not be granted automatically through marriage (article 16 of the Fundamental Law). However, the Cuban authorities created a new nationality criterion *de facto*, depriving *all Spanish-born descendants of fathers who had acquired Cuban nationality as minors* of their foreign identity documents. This provision, which is not laid down in the Fundamental Law, deprives children who are minors of choosing when they come of age.

[78] Ministerio de Asuntos Exteriores, Dirección General de Asuntos Consulares, issue *Nota Informativa sobre la Reunión presidida por el Sr. Subsecretario sobre depósitos irregulares efectuados en el Consulado de España en La Habana,* Madrid, 11 November 1972.

[79] The treaty concluded subsequently by Spain and Cuba appears to be inspired by the 2 March 1967 agreement between the Swiss Confederation and the Revolutionary Government of the Republic of Cuba on the compensation of Swiss assets, rights and interests affected by the laws enacted by the Revolutionary Government of the Republic of Cuba from 1 January 1959. Also the treaty concluded between Cuba and the French Republic on 16 March 1967, concerning compensation for French property, rights and interests affected by the laws and measures enacted by the revolutionary government of the Republic of Cuba from 1 January 1959. These

The convention between Spain and Cuba on compensation for the assets of Spaniards affected by the laws, provisions and measures dictated by the government of the Republic of Cuba from 1 January 1959 was signed at Havana on 16 November 1986.[80]

In general, this agreement is in line with most of the treaties of this type. In the first place, in this convention the government of the Republic of Cuba undertook to pay the Spanish government a lump sum of 5,416,000,000 pesetas as "*full and final settlement* of the compensation" for all the assets, rights, shares and interests of natural and legal persons of *Spanish nationality* which were affected. This was the purpose of the treaty, which was intended to settle Spain's claim to Cuba. In addition, two different forms of payment were established. On the one hand, Cuba was to pay up to 1,805,333,288 pesetas in cash (payable at 6-monthly intervals); on the other hand, payment in kind, the amount being established at 3,610,666,712 pesetas, in products to be specified each year (Article II of the Convention). Spain in fact acted as "shopkeeper state" at the disposal of the Cuban state, since depending on Cuba's annual requirements, payment could be made in different products (sugar cane, coffee, tobacco...). The clause indeed seems surprising and only caters to the needs of the party internationally "responsible",[81] unless we take into account Cuba's real difficulties in effectively paying any other type of compensation.

The beneficiaries of the convention were identified as "*natural and legal persons of Spanish nationality whose assets, rights or interests in Cuba have been affected economically by laws and provisions of any legal status and measures dictated by the government* of Cuba from 1 January 1959 to the date of the present Convention inclusively". It is surprising that article III of a convention arising from the exercise of diplomatic protection should specify as direct beneficiaries the persons affected by the action of the Cuban government as opposed to the Spanish state.

On another note, article V included a *clause of relinquishment* of any further claims, whether with the government of the Republic of Cuba or with any other international legal or arbitration body, though this relinquishment would *not be*

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agreements establish a lump sum relating to Cuba's debt to Switzerland and France, and the payment of the interests in kind as opposed to in money; *Cf.* R. B. Lillich and B. H. Weston, *International Claims: Their Settlement by Lump Sum Agreements, Part II: Agreements,* 1975, pp. 339–345.

[80] *BOE* n. 67, 18 March 1988.

[81] However, when establishing payment in cash as one of the *forms of payment,* different periods were specified, that is, the sum would not be paid on a single date; rather, it would be paid in different instalments in subsequent years. Payment in kind was also deferred, and different products were stated as well as the different amounts of the products to be delivered in subsequent years. This part of the treaty actually seems to relate to a trade agreement between the two parties rather then one on compensation; See *BOE* n. 67 of 18 March 1988, Anexo al Convenio hispano-cubano.

effective until "full payment of the lump sum mentioned in article I of this Convention" had been made. This provided a guarantee for Spain with respect to the obligation undertaken by Cuba.

For its part, the Cuban government *released all Spanish natural or legal persons from any claim that could be related to the object of the Convention,* and Spain also undertook to release the Cuban government and *persons of Cuban nationality* according to the Cuban government from any measure affecting them in Spain as a result of the laws, provisions and measures dictated by the Cuban government from 1 January 1959 to the date of the aforementioned Convention.

Finally, the Convention also included a *"most favoured nation clause"*,[82] in article VII, which established that:

> "Any clause contained in agreements which the Republic of Cuba may conclude in future with the purpose of compensating property, rights and interests affected by similar measures to those mentioned in the present Convention shall be extended to Spanish nationals in the event that they are more advantageous than those deriving from the present Convention".

This clause may be very useful in future, in the event that Cuba concludes one day lump sum agreements with powerful states in the area, such as the US, for if this Convention is properly implemented, Spanish natural or legal persons would enjoy equal status as those of the nationality of the other contracting party according to the legal concept of succession of states in treaties on debts.

In our opinion, together with the particular observations on this treaty, one of the most important points relates to the final sum estimated as compensation, since it is considerably lower than the sum of the individual claims. Although this is a common characteristic of this type of treaty, it nonetheless constitutes an unjustified discrimination for those who have suffered the consequences of the action of the Cuban state. On the other hand, the greatest advantage we can highlight in this instrument is that it avoids individual claims, and accordingly the problems of proof and defence they entail, making the request for compensation a global request, saving considerable procedure and time.

After the conclusion of the Hispano-Cuban Convention, and to enforce it in Spain, the Spanish legislative, following an opinion of the *Consejo de Estado* of 20 April 1989,[83] drew up Law 19/1990, of 17 December, "on the early

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[82] The most favoured nation clause in treaties "consists of a conventional provision according to which one party (the granting party) undertakes to award the other (the beneficiary) party or to the persons and things which have a certain relationship with it a treatment that is no less advantageous than is granted to a more favoured third party of the same nature or to the persons and things having the same relationship with it". See A. Remiro Brotóns *et al., Derecho Internacional,* Madrid, 1997, pp. 373 *et seq.*

[83] Still in connection with the historic framework of Hispano-Cuban relations, which led to a lump sum agreement, epigraph II of *Opinion n. 53.073 of the Consejo de Estado of 20 April 1989 on the bill establishing rules for the early fulfilment of the Convention between the Kingdom of Spain and the Republic of Cuba, of 16 November 1986,* under

enforcement of the Convention between the Kingdom of Spain and the Republic of Cuba of 16 November 1986".[84]

Before commenting on the aforementioned law, we should point out that the ratification of the Convention was subject to *prior authorization by the Cortes Generales*. The preamble to the law states the purpose of the latter, namely to ensure that Spaniards harmed by the aforementioned acts obtain reparation for the damage suffered, as far as possible and with the least possible delay; providing that the public treasury may advance the necessary amounts without waiting for Cuba to settle in full its debt to Spain (article 1). For the purpose it regulates the setting up of an Inter-ministerial Commission (articles 2 and 3), and establishes the procedure to follow and criteria to use when distributing the compensation between the parties concerned. The prevailing criterion is set forth in articles 3 and 4, which refer to the continuity of nationality.[85]

The problem posed by these precepts on the requirement of the *continuity of Spanish nationality* for claimants lies in ascertaining which persons have continued to hold this nationality up to the required time, since many Spaniards in question voluntarily acquired a different nationality, such as American,

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the title of "Diplomatic protection", recognized that this term, in the international sphere of relations between states and pursuant to the latest doctrine, constitutes a right not only for the state which has been the object of violation of international law by another state, but also for its nationals who have been direct victims of this unlawful attitude. And in this case, by means of negotiations, it was possible to reach a preliminary agreement on the claims relating to the assets of Spaniards affected by the internal legislation of the revolutionary government of Cuba and, finally, the 1986 convention (See *Consejo de Estado, Recopilación de Doctrina Legal 1989*, pp. 9–13).

[84] The *Opinion of the Consejo de Estado* raises different questions, which subtly analyse the concept of diplomatic protection, the preliminary agreement and the Convention concluded between the Republic of Cuba and the Kingdom of Spain. First, the opinion qualifies the definition of diplomatic protection, for while this institution is defined as a right of the state intended to protect its nationals against damages suffered abroad, it must be interpreted – in accordance with modern doctrine – in the sense that when exercising diplomatic protection the state enforces not its own right or, at least, not only its own right but also that of the damaged subject, or both simultaneously". In the opinion of the *Consejo de Estado*, the Convention concluded by Cuba and Spain bears in mind the right of third parties, the injured parties, so that they benefit from the compensation provided for in the agreement, which at the same time serves as a limit to their requests.

[85] The precepts in question require that:

> "The natural and legal persons who are beneficiaries must have possessed Spanish nationality continuously from the date in which the laws and provisions were enacted or the measures justifying the claim were taken until 16 November 1986, or until the death of the natural persons or winding up of the legal persons, if occurring before the second date established.
>
> The rights recognized in this law shall be transmittable to the heirs of beneficiaries who provide proper proof of their condition as such".

seeking *better protection* from the US in the future despite lack of continuity of nationality, for as we will see later, the US grants considerable facilities with respect to acquisition of nationality in connection with the Cuban case.[86]

A subsequent Royal Decree passed on 15 March 1991 developed Law 19/1990 and specifically regulated the functions of the Inter-ministerial Commission established by the latter.[87] The deadline for the claims filed by Spaniards who lost their properties in Cuba was September 1991.[88]

VI. CONCLUSIONS

Lump sum agreements marked a new formula in principle under the *New International Economic Order,* taking shape as a method of "relativizing responsibility" of developing and socialist states. However, the abuse of this type of convention has currently caused them to lose the strategic value they held for the states that began this practice. Capitalist states or those with liberal economies, which invest in the territory of the former, have generated an

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[86] The Inter-ministerial Settlement Commission, attached to the Spanish Ministry of the Economy and Treasury, was thus in charge of deciding not only on the distribution of the compensation among the beneficiaries but also which beneficiaries were really entitled to compensation.

[87] The Royal Decree entered into force the day after it was published, that is on 17 March 1991. *Cf. BOE* 16 March 1991 (n. 65), Royal Decree 324/1991,15 March 1991.

[88] In accordance with a resolution of 3 December 1993 of the Undersecretariat of the Ministry of the Economy and Treasury, the provisional distribution of the lump sum set out in articles 3 and 5.2 of Law 19/1990 of 17 December and in article 5.5 of Royal Decree 324/1991 of 15 March was published. In this list the Inter-ministerial Commission refers to beneficiaries of claims in respect of assets or rights, with estimates of the latter, and a list of those excluded, stating the reason for their exclusion. These lists were published in the *BOE,* and a period of 15 days was established for lodging complaints with the Commission with evidence justifying the complaint; see *BOE,* n. 6, 7 January 1994. The Ministry of the Treasury later approved a list of a total of 1,460 claimants, together with the individual appraisals for each one. The final list of beneficiaries was published in the *BOE* on 22 June 1994, and also displayed at all civil government premises and at the embassies and consulates of the countries and cities where the interested parties resided. A total of 2,601 *cases were allowed* out of the approximately 5,000 which the Ministry sent to the Inter-ministerial Commission, from the claims lodged before Law 19/1990. 1,445 cases were *included* and 1,156 were *excluded.* 228 *appeals* were lodged, of which 216 received *negative reports,* 9 *presented after the deadline* and 3 *excluded* owing to lack of documentation. There were 19 *renunciations* of compensation. See Ministerio de Asuntos Exteriores, Dirección General de Asuntos Consulares. Subdirector General de Asuntos Consulares, Nota para el Sr. Ministro, *Indemnizaciones a los expropiados por Revolución cubana,* Madrid, 7 September 1994. See Ministerio de Economia y Hacienda. Comisión Interministerial Liquidadora, Ley 19/1990, de 17 de diciembre. "*Cuarta Comparecencia del Subsecretario de Economía y Hacienda y Presidente de la Comisión Interministerial Liquidadora Ley 19/1990, ante la Comisión de Asuntos Exteriores del Senado: 14 December 1994*"

alternative conventional method that seeks to protect its nationals' rather than finding themselves compelled to claim compensation for the damages suffered as a result of nationalization, in the so-called *bilateral treaties on the promotion and protection of foreign investments*. Undoubtedly, these treaties do not altogether remedy the situation, as damages caused directly to their subjects would continue to fall outside their scope.

Nonetheless, *lump sum agreements* have brought another important benefit as they took the place of Claims Commissions and even the intervention of international courts called upon to settle disputes of this kind. In this regard, their main disadvantage is that the compensation granted tends to be somewhat lower than the sum owed; therefore, they do not really represent a proper, fair or prompt compensation as upheld by related doctrine and classical practice, neither do they in many cases meet the current requirements on international law on proper compensation.

As for Spanish practice, our analysis shows how the Spanish government has systematically accepted, without major objections, the proposals of its debtor states. The practice of the Spanish government administration with respect to compensating through the channel of absolute liability (inactivity or improper activity) has become a technique that supplements the lack of sufficient reparation provided by these instruments, which invalidates the institution of economic compensation for international responsibility, for the Spanish state is in fact partially supplementing or even totally taking the place of the state which committed an internationally unlawful act.

Let us hope that this practice is amended in future and that the Spanish government exercises fully, without prejudice of any kind, the effective and full right to diplomatic protection of its nationals who are affected by this type of situation, including the technique of concluding lump sum agreements when the losses affect a large number of Spanish subjects unless it chooses other options examined in this article.