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Planning Against Expropriation

A company is confronted with the expropriation of a foreign affiliate. The company's lawyer believes that on the face of it the company has a good case for compensation under the norms of public international law. Those norms, so ably articulated by Professors Sohn and Baxter in the Harvard Draft Convention on State Responsibility,[1] and later generally sustained by the Restatement[2] and by recent decisions of the Iran-United States Claims Tribunal,[3] appear to provide a solid framework for a just result. The lawyer consequently may believe that the principal problems in obtaining just compensation will arise from the quite different perspectives of the expropriating host country government as to the proper public international law norms regulating compensation for expropriation. This, however, is not always the case.

Differences in perspectives on public international law will continue to be important, but in real expropriation cases other critical problems arise. By hindsight, it often appears that more assets related to the business, including supply inventory and product inventory as well as other assets, were owned by the expropriated entity and were under the jurisdiction and control of the government of the expropriating country than was necessary. It also can appear, by hindsight,

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[1] Professors Louis B. Sohn and R.R. Baxter were the official reporters for the 1961 Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens. *See* Sohn & Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens*, 55 AM. J. INT'L L. 545 (1961).

[2] *See* RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 164-214, introductory n.2 (1965), which officially recognized the Harvard Draft Convention as the primary source for the Restatement Text.

[3] A number of international decisions have continued to rely on the international norms set down in the Harvard Draft Convention. *See* American Int'l Group v. The Islamic Republic of Iran, 4 IRAN-U.S. C.T.R. 96, 105 (1983) (adopting the traditional norm that aliens are entitled to "the value of the property taken," and that the going concern or fair market value must be considered in making the determination); Texaco Overseas Petroleum Co. v. Libyan Arab Republic (1977), 17 I.L.M. 1, 27-30 (1978) (international arbitration holding that the traditional rules regarding expropriation of alien property would govern).

that the government of the expropriating country was really interested only in taking the core business of a particular industrial sector, and that the government took peripheral assets only because peripheral or even unrelated businesses were maintained under the same corporate umbrella and ownership as the core business. It can also happen that a foreign parent of the company taken lacks adequate records and information, outside of the host country, to prepare a convincing case for full compensation or to defend adequately against counterclaims of the expropriating government. It is too easily forgotten, until a company must confront the practical consequences of expropriation, that public international law provides only the abstract standard of just compensation. The company still has to prove the affirmative valuation case, and defend against counterclaims, with detailed factual evidence that may be difficult to obtain once the records on the spot are no longer within its control.

This article discusses planning against expropriation risks from three time perspectives by studying the following: considerations that require planning long in advance; steps that can be taken within a few months when there is not time for any structural changes to the enterprise; and matters to consider if expropriation appears to be imminent.

I. Long-Range Planning Against Expropriation Risk

The basic principle of long-range planning against expropriation risk is to minimize the assets and activities under the host country's jurisdiction and control that are owned directly or indirectly under one corporate umbrella by the enterprise likely to be an expropriation target. There is nothing new about this basic principle. At a relatively low level of confidence in the host country a company may trade with the country, but does not invest in it. At a slightly higher level of confidence a company might construct an industrial project on a pay-as-you-go basis and provide management services or consulting services thereafter for a fee. At a higher level of confidence a company might engage in a contractual joint venture in which it gets a share of the product. At a still higher level of confidence a company might engage in an equity joint venture in which it gets a share of profits, and so on.

This discussion assumes a high enough level of confidence, at least when the investments were made, that the company has a substantial investment in business assets in the host country that are available for expropriation. Nevertheless, the same basic principle applies, regardless of the confidence and investment levels. The company should consider organizing its assets in the host country so as to minimize the assets that are both under the host country's jurisdiction and control and owned directly or indirectly by the enterprise likely to be an expropriation target.

One threshold alternative to consider, in countries where it is permitted, is to conduct the business in the host country through a branch of a U.S. or other foreign corporation. The principal value of this type of organization from the expropriation perspective is that it creates the most clear and simple foundation for the claim that those assets of a foreign company that have a situs outside the host country are not subject to expropriation by the host country. To keep out of the hands of the expropriating government assets with a situs in the United States or other countries apart from the host country, the argument is relatively simply and straightforward: those assets are owned by a U.S. or other foreign company. The clear and simple follow-through to that argument, though it does not guarantee success, is that the host country simply lacks the power under international law to take assets outside of the host country that are owned by an alien.[4]

On the other hand, if the company operating in the host country is incorporated under its laws, the host country government may take the shares of that company and thus be in a position to argue in a similarly clear and simple way that the company's assets in the United States or elsewhere outside the host country are still assets of the company and remain under the company's control; it is just the ultimate stock ownership of the company that has changed hands. At least in these circumstances, to protect assets in the United States or elsewhere outside the host country the companies would have to maintain the argument that the expropriation was in violation of local public policy or international law. This argument may be difficult to sustain in the period immediately after the expropriation, when such assets must be protected, unless the host government has repudiated its obligations under international law.[5]

[4] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(b), comment a (1987) [hereinafter RESTATEMENT (THIRD)] sets forth as "universally recognized" the principle that, with respect to aliens, states can generally only exert control over "the status of persons, or interests in things, present within its territory." *See also* United Bank Ltd. v. Cosmic Int'l, Inc., 542 F.2d 868, 876 (2d Cir. 1976). However, at least three issues arise that may weaken the safeguards of this principle. First, the Restatement also contains a provision permitting state regulation of "certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests." RESTATEMENT (THIRD) § 402(3). Second, the act-of-state doctrine precludes United States courts from reviewing acts of sovereign states. Despite the fact that the Foreign Sovereign Immunities Act of 1976 (the Act) recognizes a limitation to the act-of-state doctrine for expropriations of property with a situs outside the host country, the expropriating government might argue that this exception does not apply because the property was not related to commercial activities as required by the Act. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1605(a)(3) (1982). Third, controversy may arise as to the actual situs of the property. This may happen especially with respect to intangible property such as accounts receivable and goods in shipment. *See, e.g.*, Tchacosh Co. v. Rockwell Int'l Corp., 766 F.2d 1333, 1337–39 (9th Cir. 1985) (going against traditional situs norms and holding that the situs of debt is the location of the creditor, i.e., in the expropriating country despite the fact that the debtor and all its assets were outside the expropriating country). *See generally* Note, *Act of State: The Fundamental Inquiry of Situs Determination for Expropriated Intangible Property: Braka v. Bancomer S.N.C.*, 11 N.C.J. INT'L L. & COM. REG. 121 (1986).

[5] Expropriation is clearly not illegal per se. Indeed, the Restatement sets out the conditions that, if met, would create a legally acceptable expropriation. RESTATEMENT (THIRD), *supra* note 4, § 712. However, an expropriation of property of an alien violates international law if: (1) it is not for a public purpose; (2) it is discriminatorily applied or targeted; (3) it is not accompanied by provision

As compared to a company organized under local law, a U.S. company may not be permitted to operate a branch, or may be permitted to do so only with tax or other disincentives.[6] In the event that organization as a corporation under host country law is either required, or is more desirable for other reasons that outweigh the expropriation risk, consideration should be given to minimizing assets that are owned directly, or through subsidiaries, by the company incorporated in the host country that holds the core business assets.

To the extent possible, arrangements for imported supply inventory and capital imports should be made so that the company organized in the host country does not own them until that company has been able to pay for them in hard currency with its own credit or until the goods have actually been delivered to a receiving port in the host country. It is sometimes possible to structure import arrangements so that even goods on the high seas that are not yet paid for by a company incorporated in the host country can be diverted, if necessary, after an expropriation.[7] One way of so doing might be to retain title to the goods in another foreign entity, not owned by the target company, until they reach the receiving port in the host country. Whether it would be wise to divert shipments of essential spare parts or supply inventory in the event of an expropriation is another matter, discussed below in connection with matters to consider if expropriation appears imminent.

Similar considerations may apply on the product sales side of the enterprise, at least as to export sales from the host country. Particularly in cases where the U.S. or other foreign parent company is a customer of the target company incorporated in the host country, product sales should be arranged so that title passes from the target company to the U.S. company as customer as soon as the export goods are placed on board an international carrier at the exporting port in the host country. At the very least, the purchaser should not be in the position of having to pay for the goods before it obtains title to them and before they leave the jurisdiction of the host country. Also, to the extent possible, patents, trade-

for just compensation; or (4) the expropriating body lacked jurisdictional power over the expropriated property. RESTATEMENT (THIRD), *supra* note 4, §§ 402–03, 712(1).

[6] *See, e.g.*, Supreme Decree No. 300-85-EF, of the Government of Peru, subjecting income of the branch of a foreign corporation to a dividend withholding tax, regardless of whether or not any such branch income is repatriated to the country of the parent company.

[7] If the company operating in the host country is a U.S. or other foreign corporation operating locally by a branch, a straight non-negotiable bill of lading from the company to itself (i.e., the company is both consignor and consignee) may be subject to diversion upon order by the corporation. *See* Federal Bills of Lading Act (FBLA), 49 U.S.C. § 90 (1988); *see also* Estherville Produce Co. v. Chicago R.I. & P.R. Co., 57 F.2d 50 (8th Cir. 1932). Even when the company is incorporated under the host country laws, there is support for the proposition that with a straight non-negotiable bill of lading the foreign sender, or consignor, retains the right to divert the shipment while it remains in transit. *See* Southern Pac. Co. v. Agencia Joffroy, S.A., 65 Ariz. 65, 174 P.2d 278, 281 (1946). The FBLA would yield the same result as long as the applicable law of sales designates the consignor as the owner of the goods until they are delivered. *See* Missouri Pac. R. Co. v. Clay, 207 Ark. 714, 182 S.W.2d 467 (1944).

marks, copyrights, and other intellectual property rights should be registered in the United States or other foreign countries, as well as in the host country.

A significant contributing factor in reducing expropriation risk can be that of running a lean business in accordance with the best contemporary management principles. Inventories of materials and supplies in developing countries are often higher than they should be. True, inventories of imported materials and supplies often need to be higher in developing countries than they need to be in the United States. Long distances from sources of supply and periodic import restrictions provide a legitimate incentive for stockpiling to the level that would be regarded as hoarding in the United States. But in developing countries, where people with good management skills are in relatively short supply, the tendency is toward loose management, resulting in excessive assets (as well as excessive numbers of employees) for the job at hand. Another technique for reducing net tangible assets is to finance or lease assets to the extent that financing is available without involving credit or guarantees of any company with assets outside of the host country.

Countries that expropriate foreign-owned assets or companies are often countries with inconvertible currencies and stringent exchange controls. Exchange controls limit the ability of the foreign owner to minimize financial assets in the country. In the absence of such controls those financial assets could be limited to the short-term working cash needs of the enterprise in the host country. Exchange controls typically require that all export sales proceeds be brought back to the country and typically restrict or effectively prohibit repatriation of capital. In periods of relatively severe foreign exchange shortages, foreign exchange controls may also restrict or prohibit the remittance of income to the foreign owner.[8]

Exchange controls may require the company to keep financial assets in the host country, but there may still be ways of putting such assets to use that diminish the likelihood that they would be included in an expropriation of the core business. To the extent that the core business has blocked financial assets in the host country beyond the needs for reinvestment in the business, the company should consider diversification of investment in the host country in different corporate entities that may be affiliates, but not subsidiaries, of the company that conducts the core business enterprise. Even if spinning off assets through a reduction of

[8] *See, e.g.*, Andean Pact foreign exchange restrictions, set forth in Decision 24 of the Commission of the Cartagena Agreement (Commission), Common Regime of Treatment of Foreign Capital and of Trademarks, Patents, Licenses, and Royalties, *adopted* Dec. 31, 1970, *repealed in part* by Decision 220 of the Commission, *effective* May 18, 1987. Brazilian income repatriation restrictions are contained in Law No. 4.131, art. 3, Law No. 4.390 (as modified by Decree No. 55.762), and Decree No. 85, 450, art. 555 (imposing severe legal and practical restrictions on an alien's ability to repatriate capital, the restriction being tied to the initial amount of capital investment). *See generally* Hughes, *Foreign Investment in Brazil*, 10 U. PA. J. INT'L BUS. L. 161 (1988). *See also* Supreme Decree No. 260-86-EF, *The Remittance of Foreign or National Currency Abroad by Natural or Juridical Persons Who Operate in This Country Is Suspended for a Period of 24 Months*, issued by the Peruvian Government August 7, 1986.

capital is not legally feasible, or is too costly, it may well be possible to use income blocked from repatriation in this way. Another consideration would be to have trademarks, trade names, patents, and copyrights owned by a separate affiliate, out of the host country, if possible, rather than by the core company. Further, peripheral local goods and services manufactured or provided within the company might be spun off and operated as independent businesses, potentially with additional customers and partially local ownership. If the separable activity has been conducted within the principal company in the past, that company should have a better basis for judgment than in most diversification situations as to whether the separable business is viable and has a potentially adequate management.

Diversification of peripheral activities into nonsubsidiary companies is a potential protection because the host government considering expropriation may have no interest in acquiring the responsibility for operations (and potential labor troubles and government subsidies) beyond the core businesses of a particular industrial sector or beyond the core business of a particular company. The core business is likely to be expropriated together with all additional and separable activities under the same corporate roof. The expropriating government, however, may have no incentive to take more than fulfills its objective if the entities conducting peripheral activities are not subsidiaries of the target company and are viable businesses. There may even be legal requirements, not lightly pushed aside, that the circumstances considered to justify the expropriation of the core business be applicable to different entities providing peripheral goods and services not only to the company in question but also to others.[9] Diversification of peripheral support activities into separate companies with local investors on an initially small scale may be feasible and sensible in circumstances in which it would not make sense for the company or its U.S. parent to take on local private or public sector investors in the core business.

Partial local private sector ownership of the core business, where not required by local law in the host country, may provide some political protection against the likelihood of expropriation. Even local ownership that is technically a minority interest, however, may create greater minority interest conflicts than might be expected with a U.S. minority interest. The very different conditions in the

[9] For example, in Peru an extensive statutory regime sets forth criteria controlling why (public purpose served), when (time limits for expropriation), where (location of property and jurisdiction of court), and how (agency responsible) expropriations may be legally carried out. General Law on Expropriations, Legislative Decree No. 313 of 1984. The law further requires that the proper governmental entity publicly and specifically declares how a potential expropriation will meet the statutory requirements described above. *Id.* arts. 2–3. Thus, if the government intends to expropriate, for example, a manufacturing company, the law requires a public statement of reasons why that particular expropriation meets the statutory requirements. The requirement of the public statement of these reasons gives ammunition to, for example, an affiliated truck rental agency or printing company to argue that the reasons given for expropriation of a manufacturing company have no relevance to the separate truck rental or printing businesses.

host country may well produce major differences of interest that would be less likely with a minority U.S. investor. The U.S. parent company may find itself in the unenviable position of having the responsibilities of control without really being able to exercise adequate control.

Though there may be merits in investing in mixed economy companies in which an entity owned by the host government has a partial equity ownership interest, the avoidance of expropriation is not generally regarded as one of them. In the best of circumstances, the host government takes organizational steps, such as placing its ownership interest in a government-owned company partially removed from the political arena, in order to avoid politicizing the government's participation in the enterprise. Nevertheless, the interests of any government in an enterprise extend sufficiently to matters beyond its direct profitability that partnership with the government is a difficult match. The resulting friction may be just as likely to lead to expropriation as to avoid it.

II. Planning Against Near-Term Expropriation

When expropriation appears likely in the near future and it is too late to consider any structural reorganizations of assets, important measures can still be taken to improve the company's position in the event that expropriation occurs. Chief among these is the collection of evidence to support the case for compensation. An expropriation case is not just an argument about the proper public international law standard. An expropriation case is a highly detailed factual case in which the company must prove income, cash flow, assets, and values, in addition to defending against counterclaims. Once the expropriation has occurred, documents and records within the host country will be in the control of an entity with the responsibility to minimize the company's affirmative recovery and to maximize the host country government's counterclaims. Here the lawyer can be of great help in listing and collecting, outside of the host country, the documents that will be needed. Business people, who will normally have a much better factual knowledge of the business than the lawyers, tend to underestimate gravely what it may take to develop a factual valuation case.

The appropriated company's lawyer will need recent local financial statements, particularly statements used for local tax purposes, with as much supporting detail as can be copied and moved. Even if the business is of such a nature that book values of assets should have little or no relevance to value, complete and detailed local financial statements will be needed to demonstrate the power to produce income and cash flow. Also necessary will be detailed financial information, as discussed below, to prepare defenses against probable counterclaims.

On the asset side the lawyer should obtain copies of evidence of land titles, concessions where minerals are involved, and copies of all agreements with governmental entities. Good records, outside the host country, of all registrations of intellectual property rights will be required. Where minerals are involved the lawyer shall obtain reserve information, even if the minerals not severed from the ground belong to the host country. Technical reserve information may be the most important information for the development of a discounted cash flow valuation. A discounted cash flow projection is likely to be the most important approach to the valuation of any business involving the extraction of minerals. Whatever detailed records that can be copied and moved of materials and supplies, fixed assets, equipment and machinery, and other tangible property are essential, as are copies of contracts with all important suppliers and customers.

Just as important as the collection of information related to values and power to generate cash flow, in preparing for a possible expropriation case, is the collection of information concerning potential liabilities to the host country government or to citizens of the host country. Governmental counterclaims are a customary and powerful device to try to reduce or eliminate awards of compensation for expropriations. Experience suggests that it is imprudent to assume in advance that all such counterclaims are groundless, or that they can be defeated by mere rhetoric.[10]

One of the most important categories of governmental counterclaims is tax claims, in part because many developing countries have enacted huge statutory penalties for tax violations. It is no defense to tax counterclaims or penalties that they are rarely imposed in practice, or that the customary level of tax compliance in the host country is poor. Collecting tax records outside of the host country that are adequate to defend against tax claims is thus necessarily a high priority. At the top of the list should be copies of any favorable tax rulings, or any documents reflecting an acceptance of any tax return as the final determination of the tax for a fiscal year. Next in importance are detailed records, outside the host country, of any ongoing and unresolved tax dispute or other material dispute with the host government.

The potential of environmental, safety, or toxic tort claims should not be overlooked. Even if no such claims have surfaced, after expropriation the records of the expropriated company will be examined in detail by governmental agents whose responsibility will be to discover wrongful acts or omissions prior to the taking as a basis for counterclaims. The host country's standards of compliance and enforcement of environmental and safety standards normally may be low.

[10] *See, e.g.*, Payne v. The Government of the Islamic Republic of Iran, Award No. 245-375-2 (Aug. 8, 1986), IRAN-U.S. C.T.R. 3, 14 (1986) (in determining the value of the expropriated property the court must look to the fair market value of the claimant's interests "taking into account the debts of the companies including tax liabilities"); Banco Nacional de Cuba v. Chase Manhattan Bank, 658 F.2d 875, 884 (2d Cir. 1981) (Chase's claims for compensation for expropriated bank assets offset by Cuban claims that Chase had significant outstanding financial obligations to Banco Nacional de Cuba); *see also* Brower, *Current Developments in the Law of Expropriation and Compensation: A Preliminary Survey of Awards of the Iran-United States Claims Tribunal*, 21 INT'L LAW. 639, 666 (1987) (in determining the value of expropriated property the court must consider "both the present value of reasonably ascertainable future profits as well as any outstanding obligations").

Also, workers normally may be reluctant to press health claims against a management with whom they expect to have continued dealings. Such normal circumstances, however, will provide no basis for prediction on these matters once expropriation has removed the prior ownership and management from the scene.

Acquiring adequate documentary evidence of assets and liabilities outside the host country is much easier if the parent company in the United States has routinely followed a policy of collecting and maintaining such information with regard to affiliates in unstable countries. Nevertheless, no matter how well such collection is routinely done, it will be worthwhile to press for additional current backup information during the period that expropriation becomes a near-term possibility.

Also important at this stage is the analysis of all assets of the threatened company that are located outside of the host country. These can include, among other things: (1) capital imports being manufactured, for which the threatened company may have made construction progress payments; (2) materials and supplies in warehouses abroad or in transit on the open seas; (3) stock or other investments in subsidiaries or affiliates; (4) products in transit to customers; and (4) debts owing to the threatened company. If the target company is a U.S. or other foreign company operating in the host country as a branch, the lawyer may be able to take the position that all such assets have a situs outside of the host country and the host country simply lacks power to expropriate them because they are assets of the foreign company outside the expropriating country.[11] As explained above, even if the target company is incorporated in the host country, it may have some chance to obtain or retain control of assets outside of the host country if the expropriation is accomplished in a manner that can credibly be characterized as illegal under international law. These positions, however, are neither free from doubt nor can they be sustained without action. If an expropriation should occur, the new management taking over for the expropriating government will have the responsibility to get control of all such assets as quickly and effectively as possible.

Though the U.S. parent or affiliate may want to avoid taking hostile action (such as diversion of essential spare parts) that would cripple operations of the company after the taking, it is desirable to analyze all such assets in advance to understand the options. In some cases, as explained above, it may be possible simply to divert assets from shipment to the host country or take physical possession of them. In other cases preparation for litigation in the places where the

[11] *See* Menendez v. Saks & Co., 485 F.2d 1355, 1364 (2d Cir. 1973), *cert. denied*, 425 U.S. 991 (1976) (stating traditional rule that situs is normally located with debtor). *But see* Tchacosh Co. v. Rockwell Int'l Corp., 766 F.2d 1333, 1337–40 (9th Cir. 1985) (going against traditional situs norms and holding that situs of debt instruments was the location of the creditor, i.e., in the expropriating country, despite the fact that the debtor and all its assets were located outside the expropriating country); F. & H.R. Farman-Farmaian Consulting Eng'rs Firm v. Harza Eng'g Co., 882 F.2d 281 (7th Cir. 1989) (following the *Tchacosh* test).

company claims the assets have their situs, in order to have a chance of preventing the agents of the host country from collecting them or taking possession of them, is the best approach.

If the threatened company is incorporated in the host country, the host country can take the position that its expropriation of the shares of the company gives it control of all of the company's assets worldwide. Even so, protecting assets in other countries may be possible by establishing that the expropriation was illegal, and thus that the expropriating government did not acquire good title to the assets beyond the host country's boundaries and physical control.

The likelihood of successfully proving an illegal expropriation is unpredictable. Most governments considering expropriation of foreign companies or assets know how to do so in a fashion that prevents effective arguments of illegality at an early stage after the taking (for example, by avoiding public declarations of an intent to deny just compensation). Expropriations frequently take place in an atmosphere of political turmoil, however. In such an atmosphere it may be more important for those organizing the taking to make dramatic and intransigent declarations for internal political purposes than to make the statements that would best protect their government's position under international law.

III. Planning for Imminent Expropriation

Many more expropriations appear to be seriously threatened than actually occur. It is usually desirable to avoid taking overt actions that the host country may interpret as a provocation in the politically charged atmosphere that often accompanies expropriation threats. Nevertheless, some actions may do no harm if the threat passes, and some may enhance the possibility that it will pass.

A U.S. company facing such a threat should make every attempt to brief State and Treasury Department officials in Washington, in addition to the U.S. embassy in the host country. (Contact with the Treasury Department is desirable in addition to the State Department, because of the Treasury's responsibilities in regard to foreign aid, United States government guaranteed financing, and international financial institutions.[12]) Since State and Treasury officials are busy, it

[12] In particular, the United States government has the power to impose three distinct and significant sanctions against a host country carrying out an illegal expropriation. The first and probably most significant sanction is set forth in the first Hickenlooper Amendment, which requires that the President suspend all foreign aid to a country that has illegally expropriated property belonging to citizens or companies of the United States and that has failed to comply with its international legal obligations within six months of the expropriation. 22 U.S.C. § 2370(e)(1) (1988). Second, the Gonzalez Amendment mandates that the President order the United States Executive Director of the Inter-American Bank to vote against any loan "or other utilization of the funds of the Bank" that would benefit any government that has conducted an illegal expropriation of property belonging to citizens or companies of the United States unless arbitration or good faith negotiations aimed at fulfilling the countries' international obligations are under way. 22 U.S.C. § 283(r) (1988). Finally, categorization as "beneficiary developing country" pursuant to the Trade Act of 1974 is denied to any country that has illegally expropriated property belonging to citizens or companies of

takes time and effort to get their attention. Nevertheless, their knowledgeable attention and prompt action could help to avert the expropriation or initiate appropriate actions if and when the crisis occurs. After an expropriation, in order to get United States Government assistance the lawyer may need to exhaust local remedies or demonstrate that effective local remedies are unavailable. The best time to explore possible local remedies is before the expropriation occurs.

Important among the necessary plans when expropriation appears imminent are plans to protect the expatriates working in the host country and to get them out of the host country if necessary. These plans need to be communicated (with discretion) in order to maintain morale. At times of high political turmoil when expropriation is threatened, it may be wise for senior management of the company to be out of the host country altogether.

The company should make every effort to afford protection and other employment to qualified expatriate personnel who want such protection. It may be unwise, however, to create either the substance or the appearance of forcing expatriates to leave so as to cripple the operations of the company after a taking. Some more junior expatriate personnel, particularly third country nationals without any direct ties to the U.S. parent or affiliate, may be induced by the taking authority to stay with the company after the expropriation if it occurs.

Also important at this time is to consider again whether to take aggressive action to protect assets outside the host country in the event that expropriation occurs. Though the final decisions may well be affected by the form and content of the actual expropriation declaration, it is impossible to act quickly and sensibly without careful prior preparation.

IV. Conclusion

Public international law deals with expropriation at a high level of abstraction, with very general rules of fair procedure and very general standards of just compensation. There are no clever tricks for making investments in unstable countries in a fashion to make the most of these standards. One can, however, apply in detail the principle of placing in or under a single company, and exposing to the power and jurisdiction of the host country, the minimum necessary assets to conduct the core business in the host country. The peripheral assets should be outside the exposed country or outside the exposed company, or both, to the extent it can reasonably be done without hampering the business. Nevertheless, other business considerations must be weighed. After all, threats of expropriation are far more frequent than there are actual expropriations.

the United States, unless arbitration or good faith negotiations aimed at fulfilling the country's international obligations are under way. 19 U.S.C. § 2461, 2462(b)(4) (1988). *See generally* Gantz, *The Marcona Settlement: New Forms of Negotiation and Compensation for Nationalized Property*, 71 AM. J. INT'L L. 474, 477–80 (1977).

Beyond whatever can be done in structuring the investment in the host country, the key lesson from expropriations is that international law provides a standard for which a lawyer can reach, although it may not establish the appropriated company's case. Differences between developed and developing countries as to the proper standard for just compensation may be important and even crucial. They may, however, be overshadowed by apparently plausible governmental counterclaims or by gaps in the available evidence in support of the affirmative compensation claim. It pays to be prepared.