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## Expropriation Procedures in Central America

American lawyers counselling international business clients have always been concerned about the expropriation laws and practices of the countries in which their clients have property interests. Concern of that sort certainly has not abated in the face of recent well-publicized nationalizations of American enterprises in Chile, Peru, Libya and elsewhere. Nationalization, of course, usually is carried out under special legislation, not under general expropriation laws and procedures, but the special laws usually must meet the same constitutional guaranties as the more general expropriation laws, and often concepts, techniques or procedures are borrowed from the general expropriation process.

In view of this, the Latin American Law Committee of the International and Comparative Law Section of the American Bar Association adopted as one of its projects for 1972-73 a survey of expropriation procedures in Latin America. This summary of the study will survey the six countries of the Central American isthmus: Guatemala, El Salvador, Honduras, Nicaragua, Costa Rica and Panama.<sup>1</sup> For each country, the relevant constitutional provisions are shown and such matters as the form and timing of payment, methods and standards of valuation, remedies available to the expropriated owner, and the possibility of judicial review are highly sketched.

In the United States, of course, expropriation is normally accomplished

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<sup>1</sup>The basic material for the study consists of six reports prepared by lawyers of the six countries. These reports were commissioned as part of a comparative law study focussing on expropriation procedures in these six countries undertaken by Professors Robert Casad of the University of Kansas School of Law and Rogelio Sotela of the University of Costa Rica School of Law. The study received financial support from the Ford Foundation through a general grant for collaborative research in matters relating to Central American development. Indebtedness for inspiring the undertaking must be acknowledged to the study, *Expropriation in the Americas* by Professor Andreas Lowenfeld and collaborators. The following members of the Latin American Law Committee of the Section on International and Comparative Law also assisted in the preparation of this study: Roman de la Campa, Sioux City, Iowa; John Hurt, San Diego, California; Robert Park, Balboa, C.Z.; Stephen Robbins, St. Louis, Missouri; and William Saltsman, New York, New York.

through a judicial decree of condemnation. In some states a non-judicial administrative procedure is provided for certain types of cases, but the owner has a right to a judicial determination at some stage of the legality of the taking and the justness of the compensation. This is implicit in U.S. notions of due process of law.

Most Latin American Countries, however, have a different conception of the role of the judiciary, as well as differing views regarding the implications of the principle of separation of powers. In most cases, provision is made for judicial consideration of the constitutionality of acts of the legislature through the *recurso de inconstitucionalidad*, an extraordinary procedure brought usually before the entire bench of the country's highest court and usually requiring more than a simple majority vote of the justices to invalidate legislation. Acts of the executive and administrative organs alleged to violate fundamental constitutional rights can in some instances be challenged through the *recurso de amparo* or some similar procedure. Otherwise, courts are not usually empowered to review the legality of administrative decisions or actions unless some court has been specifically endowed with what is known as "contentious-administrative" jurisdiction (*jurisdicción contencioso-administrativa*). Of the countries in this survey, three (Costa Rica, Guatemala and Panama) have provided for contentious-administrative jurisdiction: the remaining three have not. Two of the three that have not (Honduras and Nicaragua) have established expropriation procedures that are basically judicial, conducted by the ordinary courts of first instance, but those courts apparently have no authority to pass upon such questions as whether the purpose for which the expropriation is sought is one of "public utility." That decision is committed to administrative determination and apparently no right of judicial review exists, except perhaps through the *recurso de amparo*.

### I. Guatemala<sup>2</sup>

This northernmost and most populous of the six countries is also the only one of the six ever to undertake a program of nationalization and expropriation with serious international consequences. In 1952, an agrarian reform law (Decree No. 900) was promulgated by the government of President Jacobo Arbenz Guzman. During the two years that followed, much privately-owned land was taken by the state, including about 3/4 of the land holdings of the country's largest landowner: a subsidiary of the United Fruit Co. It is generally recognized that opposition to the Arbenz land reform measures was a major factor leading to the overthrow of his government in 1954. The succeeding regime ordered the return of most of the property that had been taken, abolished Decree No. 900

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<sup>2</sup>The basic report was prepared by Dr. Edmundo Vasquez Martinez, Professor of Law at the University of San Carlos of Guatemala. The commentary appearing here was prepared by Robert Casad.

and established a new constitution, which has since itself been replaced.

The present Constitution of Guatemala, promulgated in 1965, contains language seemingly designed precisely to guarantee that the experience of 1952-54 not be repeated. The Articles covering the rights of property ownership and expropriation are as follows:

*Article 69.* Ownership of private property is guaranteed.

The state has the obligation to ensure to a property owner the conditions necessary for the development and utilization of his property. The law shall specify the rights and obligations of a property owner.

Property rights may not be restricted in any way by reason of a political offense. Confiscation of property, and confiscatory and excessive fines are prohibited. Fines may not exceed the value of an unpaid tax.

*Article 71.* In special cases private property may be expropriated for reasons of the collective good, benefit, or public interest, duly proved. The expropriation must be carried out in accordance with proceedings prescribed by law and the property affected shall be appraised by experts on the basis of its actual value.

In appraising the value of a property, all elements, circumstances and conditions that determine its real price are to be taken into account, without depending exclusively on official statements or registers or preexisting documents.

The compensation must be paid in advance in currency of legal tender, unless some other form is agreed upon. Only in the event of war, public disaster, or serious disturbance of the peace may property be occupied or seized, or expropriated without prior compensation, but this must be made effective immediately after the emergency has ended.

The property of states at war with Guatemala or of their nationals may be expropriated, occupied, or seized without the formalities required under the foregoing paragraph. This subject shall be regulated by a law.

No compensation of any kind may be demanded for the establishment of servitudes for public utility, except as compensation for damages actually caused to property.

In the case of expropriation of land for the construction of roads or highways, the compensation need not be paid in advance. The law shall prescribe the procedure and form of payment.

For the carrying out of national electrification projects any area of the affected property that is indispensable may be occupied, but the amount of the assessed valuation must be previously deposited in a banking institution by the authority in conformity with the law.<sup>3</sup>

One thing that is noteworthy about Article 71 is the absence of any reference to property as a "social function," a conception that has come to be expressed directly in many, if not most, of the Constitutions of Latin America. Although the Constitution does say that the rights and obligations of the owner shall be determined by law, instead of emphasizing as many do the obligation to society that property ownership entails, the Guatemalan Constitution (Art. 69) declares that the State is obliged to assure the conditions necessary for the development of the owner's property.

#### *Expropriation Under the General Law of Expropriation*

Although the Constitution of 1965 eliminated the reference to the "social

<sup>3</sup>Translation by the Organization of American States.

function" of property, and declared that expropriation can be accomplished only "for reasons of collective utility or of public benefit or interest," avoiding the use of the word "social," the aversion to that term is not reflected in the Civil Code of 1964 or in the general Law of Expropriation enacted in 1948.<sup>4</sup> Article 467 of the Civil Code declares:

Property can be expropriated for reasons of collective utility, social benefit or public interest, after indemnification determined in conformity with the law of the subject.

The general Law of Expropriation in Article 5 provides:

Every type of property, whether or not in commerce, can be the object of expropriation for causes of public utility or of social interest.

The power to declare that a project contemplating the use of expropriation is one of public utility or necessity, or of social interest, belongs to the Congress of the Republic.<sup>5</sup> The declaration is to refer precisely to the affected property, where possible, and shall be in terms that will not permit the extension of the expropriation to properties beyond those necessary for the designated ends.<sup>6</sup>

After the declaration has been promulgated, the next step in the ordinary expropriation process is an attempt on the part of the expropriating agency—which may be an agency of the State, a municipality, a public utility concessionary, private companies (in certain cases where authorized by law) and the University of San Carlos, depending upon the character of the project—to purchase the property outright from the owner.<sup>7</sup> This is accomplished by a communication address to the property owner, directing him to set a price that he will accept as the total indemnification for the property free of all encumbrances.<sup>8</sup> The owner's answer must be given in a period of five to ten days after receipt of the communication. If the owner is domiciled outside of Guatemala at a place unknown, notification will be through publication, in which event a somewhat longer period for response is allowed. This preliminary attempt at private settlement is eliminated in emergency cases, or when the property belongs to minors or incapacitated persons, or to Guatemalan domiciliaries who are absent.<sup>9</sup>

If the owner fails to respond to the request to set a price within the stated period, or if the price set exceeds by 30% the tax valuation of the property, or if for other reasons an agreement on the amount of indemnification cannot be reached, the formal procedure of expropriation will be undertaken.<sup>10</sup>

The procedure prescribed by the general Law of Expropriation is of an

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<sup>4</sup>All translations, except the constitutional provisions, by Robert Casad.

<sup>5</sup>Ley de Expropiaciones, art. 2.

<sup>6</sup>*Id.* art. 19.

<sup>7</sup>*Id.* art. 19.

<sup>8</sup>*Id.* art. 20.

<sup>9</sup>*Id.* art. 22.

<sup>10</sup>*Ibid.*

administrative nature. The body empowered to resolve disputes and to order the delivery of the property in the first instance is not a court, but the Governor of the Department (political subdivision) in which the property is situated.

The petition for expropriation, besides identifying the expropriating authority, the owner and the property, will indicate the law that made the declaration of public need or utility or social interest, and, in the case of land, will contain a technical report showing that the property in question is needed for the particular work. The petition will also bear the certification of the office having cognizance over the tax valuation of the property showing what that declared amount is, and it will contain a statement of the amount the expropriating authority offers as indemnification, with a supporting explanation.<sup>11</sup>

The petition will be served upon the property owner, who has seven days in which to answer. In his answer, the owner will correct any erroneous data contained in the petition concerning the property, and will also indicate the existence of any mortgages, liens, and other encumbrances. The owner will express his agreement or opposition to the expropriation, with supporting arguments, and indicate the sum he claims as the total indemnification.<sup>12</sup> The answer of the owner will be accompanied by the title documents, if the property is registered land, as well as other documents the owner deems appropriate to justify his claims.

Upon completion of the six-day period for the owner's answer, the matter is open for proof for a period of twenty days within the first three of which the parties offer evidence in support of their positions. The valuation of the property is done by experts named by the parties and a third expert to act in case of the (customary) failure of the other two to agree on an amount.<sup>13</sup> The law specifies, however, that the indemnification for land in the capital city cannot exceed an amount 30% greater than the value as reflected in the records for tax purposes, taking into account improvements according to an official table. The indemnification for rural lands or lands in cities outside the capital cannot exceed the value set in a report to be issued by the Department of Agriculture and of Valuation of the National Mortgage Credit Bank of Guatemala.<sup>14</sup> Small agricultural land holdings are not subject to these limitations, however.<sup>15</sup> In cases where land remains to the owner, any increase in the value of that remaining land resulting from the work for which the expropriation is sought must be deducted from the amount of indemnification.<sup>16</sup>

When the issues have been resolved and the reports of experts have been

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<sup>11</sup>*Id.* art. 23.

<sup>12</sup>*Id.* art. 25.

<sup>13</sup>*Id.* art. 27.

<sup>14</sup>*Id.* art. 14.

<sup>15</sup>*Id.* art. 15.

<sup>16</sup>*Id.* art. 13.

received establishing the amount of indemnification, the expropriating authority will pay that sum to the owner or deposit it to his account in the National Treasury or one of its agencies. The Governor will then order the transfer of the property and its registration in the name of the expropriating party, if it is land or other registerable property.<sup>17</sup>

In emergency cases (i.e., in case of "war, public calamity or serious disturbance of the peace") the expropriating authority can immediately take possession, depositing to the account of the owner, as provisional indemnification, the value of the property as reflected in the declaration for tax purposes. If the owner can establish that he has the title free of encumbrances, he may withdraw the sum on deposit without giving up his right to obtain more in the proceedings that eventually must take place.<sup>18</sup>

Judicial review of the administrative proceeding that has been described is possible through the Court of Contentious—Administrative Matters.<sup>19</sup> The party seeking such review must first exhaust his administrative remedies by seeking a revocation of the expropriation resolution by the Governor who issued it. If revocation is not ordered, the aggrieved party may then proceed in the Contentious-Administrative Court.<sup>20</sup> Further review by way of *casación* is also theoretically possible.

Since the declaration of "collective utility or public benefit or interest" is made by the legislature, that matter cannot be challenged in the administrative proceeding before the Governor nor in the Contentious-Administrative Court. The only way review of that factor can be obtained is through a proceeding to test the constitutionality of the legislative act—either the *recurso de inconstitucionalidad* or the *recurso de amparo*.

Although judicial review is thus possible, within the past 20 years such review has never been sought: no contentious-administrative proceedings; no *amparo*; no *inconstitucionalidad* in connection with expropriations under the general law.<sup>21</sup>

The Guatemalan agrarian reform law, the Law of Agrarian Transformation,<sup>22</sup> contains extensive provisions relating to expropriation, including provisions for expert appraisals and for deferred payments (over a five year period). In fact, however, very few expropriations have taken place under this law, lands already held by the state being sufficient for the plans that have been implemented to date.<sup>23</sup>

<sup>17</sup>*Id.* art. 23.

<sup>18</sup>*Id.* art. 33.

<sup>19</sup>Article 18, Ley de lo Contencioso-Administrativo.

<sup>20</sup>*Id.* arts. 7 and 8.

<sup>21</sup>Letter of Dr. Edmundo Vasquez Martinez, March 6, 1973.

<sup>22</sup>Decreto 1551 of October 17, 1962.

<sup>23</sup>See *Análisis Parcial del Programa de Reforma Agraria de Guatemala*, in ESTUDIOS SOBRE ADMINISTRACION PUBLICA EN GUATEMALA, 89 (1969). Updated information obtained from

Special reference should be made to the matter of expropriation for highway purposes. The Constitution, it will be recalled,<sup>24</sup> dispenses with the requirement that indemnification be prior in such cases. The law allows the Executive to occupy on three days notice to the owner such lands as are necessary for constructing new roads or widening old ones.<sup>25</sup> The indemnification of the owner is presumed to be discharged by the value added to his remaining property by the new road,<sup>26</sup> although he can present proof of injury and where there has been destruction or removal of improvements, get a positive recovery.

The general scheme of expropriation in Guatemala contemplates only one award of indemnification out of which all who claim interests in the property taken must be satisfied. To this end, the general law requires the property owner who contests the expropriation to name in his answer the persons who could be affected adversely by the proceedings.<sup>27</sup> Mortgagees and other lienors have no right to separate indemnification, and must look to the expropriated owner for satisfaction of their claims.

Special provision is made, however, for lessees of real property whose lease was prior to the declaration of public utility or necessity or social interest under which the property is expropriated. The injuries attributable to the termination of the lease by expropriation are separately determined by the experts and a sum to indemnify the lessee will be set and paid.<sup>28</sup>

## **II. Honduras<sup>29</sup>**

The fundamental provisions of the Honduran Constitution of 1965 pertaining to the protections for private property and the power of expropriation are the following:

*Article 97.* The state guarantees, promotes, and recognizes the existence and legitimacy of private property in its broadest concept as a social function, and with only such limitations as may be established by law for reasons of necessity or public interest.

*Article 99.* The expropriation of property on grounds of public need or benefit must be accomplished through a law or a judgment based on law, and shall not take place without prior compensation.

In the event of war or internal disorder, it is not necessary that the compensation be paid in advance; however, the corresponding payment shall be made not later than two years after the end of the state of emergency.

*Article 100.* The right to own property shall not prejudice the right of eminent

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unpublished study, *La Expropiación en el Derecho Guatemalteco*, by Edmundo Vasquez Martinez, October 1972.

<sup>24</sup>Constitution of Guatemala, art. 71.

<sup>25</sup>Art. 1, Decreto 1000 of July 22, 1953, reformed by Decreto-Ley 110, September 24, 1963.

<sup>26</sup>*Id.* art. 2.

<sup>27</sup>Ley de Expropiaciones, art. 25.

<sup>28</sup>*Id.* art. 44.

<sup>29</sup>The basic report was prepared by Lic. Gautama Fonseca, attorney of Tegucigalpa. This commentary was prepared by Robert Casad, who is responsible for the translation, except for the constitutional passages, which follow the O.A.S. translation.



domain of the state, nor may it be placed above the rights held by institutions to national works.

In order to establish the right of way for the construction of roads, railways, irrigation canals, power transmission and telegraph lines and other similar works, the state shall compensate owner for property expropriated only according to the value of the improvements, except in special cases that shall be indicated specifically by the law. Furthermore, works required for the security of the affected properties shall be for the account of the state.

There are three basic legislative enactments that develop and amplify these constitutional provisions: the Law of Compulsory Expropriation (*Ley de Expropiación Forzosa*) of 1914, the Law of Agrarian Reform of 1962 and the Code of Procedure of 1906 which contains the basic procedure for cases of expropriation under the law first cited.

#### *Expropriation Under the Law of Compulsory Expropriation*

The power of permanent expropriation extends only to immovable property, except when the country is in a state of siege.<sup>30</sup> Property, immovable or movable, may be temporarily occupied, however, in cases of grave emergency, such as those involving fire, earthquakes, flood, epidemic, etc.<sup>31</sup>

The basic purposes for which property may be expropriated are those of "public utility and necessity." The general Law of Compulsory Expropriation was promulgated in 1914, before the development of the "social function" concept, and accordingly that term, although embodied in the Constitution, does not appear in the general law. The Law of Agrarian Reform, on the other hand, contains extensive reference to the "social function" of property.

The procedure for expropriation under the Law of Compulsory Expropriation is as follows:

The expropriation referred to in Article 1 shall not have effect unless it is preceded by the following requisites:

1. The declaration of public necessity and utility of the work.
2. The declaration that its execution requires, indispensably, all or part of the land sought to be expropriated;
3. The appraisal of that which is to be transferred or ceded; and
4. Payment in cash of the price that represents the indemnification for that which is transferred or ceded under compulsion.<sup>32</sup>

Two separate kinds of proceedings are contemplated by these provisions. The first is an administrative proceeding that results in the declaration of public utility and necessity and the identification of the lands to be taken. The second is a non-contentious judicial proceeding to establish the amount of indemnification.

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<sup>30</sup>Ley de Expropiación Forzosa, art. 15.

<sup>31</sup>*Id.* art. 16.

<sup>32</sup>*Id.* art. 3.

## THE DECLARATION PROCEEDING

Article 8 provides for the declaration of expropriation (the first proceeding) by the Executive Power when the subject is one of national or department interest,<sup>33</sup> and by the municipalities (with approval of the Department Governing Council) when it is a matter of local interest. In situations where the law has empowered private companies to expropriate for works of public utility or necessity, the company conducts the proceeding for the declaration of expropriation.

The declaration proceeding includes a hearing in which the landowner is entitled to participate. The hearing is in the form of a "summary proceeding." Personal service is required if the landowner's domicile is known. If it is not known, or if the person to be served is hiding out or otherwise absent and has no legal representative, a special guardian will be appointed to represent the absent party.

No administrative appeal is provided from this declaration of expropriation, but the possibility exists for judicial review. Article 4 provides that one who has been deprived of his property without the prescribed requisites, including the declaration of expropriation and the hearing connected with it, can avail himself of the remedy of interdiction to retain or recover possession of his property. Even if the requisite formalities have been observed, it is possible to get judicial review in the form of an action for *amparo* on the ground that the action of the expropriating agency exceeded its constitutional authority, or was arbitrary. The determination that a particular work was one of public utility and necessity could, for instance, be challenged as exceeding the constitutional authority, thus necessitating a judicial interpretation of "public utility and necessity" as those terms are used in the Constitution. The right to resort to *amparo* in appropriate cases, as authorized by Article 58 of the Constitution, is expressly recognized in the Law of Compulsory Expropriation.<sup>34</sup>

## THE EVALUATION PROCEEDING

After the declaration of utility and necessity has been finally rendered, Article 11 of the law directs that further proceedings will be had in conformity with Title XIV, Book IV, of the Code of Procedure (Arts. 1082-1091). The further proceedings have as their object the determination of the amount of indemnification that must be paid to the owner. They are judicial, rather than administrative, in nature, although they are regarded as non-contentious proceedings.

The proceeding is initiated by filing a written request with the *Juez de Letras*

<sup>33</sup>Under Honduran law, the departments are not regarded as having any juridical personality, and so any action necessary to promote departmental interests must be undertaken in the name of the State.

<sup>34</sup>Le de Expropiación Forzosa, art. 4.

(the Judge of the major court of first instance) within whose territorial jurisdiction the property to be expropriated lies. Upon receiving the written request, the Judge will issue a summons both to the party requesting the hearing and to the landowner, directing them to name experts who will make the appraisal of the property.

Each party will name one expert, and by agreement they will name a third expert who will serve in the event of disagreement between the two. If the parties cannot agree in naming the third expert, the Judge will do it. If the landowner chooses not to participate in the evaluation proceeding, the Judge will appoint an expert in the landowner's name.<sup>35</sup>

A time will be set for a meeting of the three experts. They will make a detailed evaluation of the property sought to be expropriated and of the damages to the landowner that the expropriation will cause. The Law expressly declares that they are not to take into account the increased value that the properties taken would have as a result of the works for which the expropriation is sought.<sup>36</sup>

This last provision does not say that the effect of the new works in increasing the value of unexpropriated property remaining in the hands of the landowner is not to be taken into account in determining the amount of incidental damages he may suffer by reason of the expropriation. Nevertheless this apparently is not normally done. The principle of *plusvalía* followed in some other countries, that the benefit to the owner in the form of the increased value of his remaining land attributable to the public work should be taken into account in reducing the amount of his indemnification, is not generally recognized in Honduran law.

The standard for valuation is assumed to be the market value of the property taken, although the law does not expressly declare this. In actual practice, however, great latitude in fixing the amount is left to the experts, and the Judge.

If the two experts named by the parties agree on the amount of indemnification, that is accepted, the award is made accordingly. Normally, however, the two will not agree. In such a case, if one of the experts named by the parties and the third expert agree, that amount is accepted as the measure of indemnification. If there is no agreement, the measure will be established by adding the evaluations and dividing by three, although the Judge may modify the amount in the event that there are large differences between the three estimations.<sup>37</sup>

When the value of the property and the incidental damages have thus been established, the Judge will make a formal declaration to that effect and order that it be published five times in a designated paper and posted on the door of

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<sup>35</sup>Code of Procedure, art. 1083.

<sup>36</sup>*Id.*, art. 1084.

<sup>37</sup>*Id.*, art. 1085.

the Court for fifteen days. This is to give notice to third parties who may have an interest in the properties expropriated and accordingly claim a share of the award. If no third parties emerge by the time the period of notice has run, the Court will order that the money be delivered to the owner, or placed in a bank, or other credit institution to the owner's account or with some responsible person, if he is not present or refuses to accept the money.

When the payment has been made, the Judge will order the transfer of the expropriated property. If the owner does not execute the conveyance, the Judge can do so in the owner's name.<sup>38</sup>

If there are third parties, such as mortgagees or other lienors, or lessees whose term may have some time to run, they can claim an interest in the sum fixed by the Judge. The existence of third party claims, however, does not impede the expropriation. The value of their claims can be determined in an incidental proceeding and their rights in the expropriation payment fund established, but their rights in the property itself are extinguished by the expropriation order.

The Code of Procedure<sup>39</sup> allows for appeal from the evaluation proceeding, but the pendency of the appeal will not prevent the execution of the expropriation order. If successful, the appeal will re-vest the property in the owner. The expropriating authority can then initiate another evaluation proceeding, which may entail naming new experts to make a new evaluation, if the Court considers that necessary.<sup>40</sup> Presumably that will be considered necessary if the defect in the first proceeding was one that prevented the owner from presenting his own expert, or if the evaluation set at the first hearing was grossly out of line.

As has been seen in the case of Guatemala, there has been very little expropriation of private property in Honduras under the Law of Agrarian Reform. Several factors have contributed to that result. One is that sufficient national lands existed to permit the execution of such plans as have been developed to date. Another is the absence of sufficient appropriations of money to permit wide range expropriation of private property, given Honduras' constitutional insistence on prior cash indemnification. Furthermore, the Honduran authorities have been rather conservative in their approach to land reform despite the broad language of the law itself.

### III. El Salvador<sup>41</sup>

The political Constitution of El Salvador, promulgated in 1962, contains the

<sup>38</sup>*Id.*, art. 1086.

<sup>39</sup>*Id.*, art. 1087.

<sup>40</sup>*Id.*, art. 1088.

<sup>41</sup>The basic report was prepared by Dr. Napoleon Rodriguez Ruiz of San Salvador, El Salvador. This commentary was prepared by Robert Casad. Constitutional provisions are shown in the O.A.S. translation.

following basic provisions relating to the rights of private property ownership and the state's power of expropriation:

*Article 137.* Private property as a social function is recognized and guaranteed. . . .

The subsoil belongs to the state, which may grant concessions for its exploitation.

*Article 138.* Property may be expropriated for reasons of legally proven public utility or social interest, and after fair compensation. If the expropriation is caused by the necessities of war or public disaster or if it is for the purpose of supplying water or electric power, or for the construction of housing or roads, compensation need not be made in advance.

Whenever justifiable, the amount of compensation fixed for expropriated property, in accordance with the preceding paragraph, may be paid in installments over a period not to exceed twenty years.

Entities that have been created with public funds may be nationalized without compensation.

Confiscation of property is prohibited, either as a penalty or on any other grounds. Officials who violate this provision shall be liable at all times with their persons and property for damages incurred. Confiscated property is imprescriptible.

The Constitution of El Salvador thus appears to impose fewer restrictions on the exercise of the power of expropriation than do some other Constitutions by eliminating the requirement of priority of indemnification in some important cases and in permitting deferred payment.

#### *The Law of Expropriation and Occupation of Properties by the State*

The general law relating to expropriation in El Salvador was enacted on July 25, 1939. The Law required the party seeking to acquire property to try first to obtain it by private agreement with the owner before proceeding to formal expropriation. If it can be procured in that way, of course, the procedure described below can be circumvented.<sup>42</sup>

The first step in the process of expropriation provided by the law is the formation of a plan requiring particular property by the state, a municipality or a private concessionary. This plan and other details are submitted to the Ministry of the Interior, along with a request that the designated properties be acquired.<sup>43</sup>

The Ministry determines whether the work or program is one of "public utility" and whether the particular property is necessary and makes a declaration to that effect.

The request for expropriation is then forwarded to the Judge of First Instance in the district in which the property owner lives. The Judge receiving the request follows the procedure specified in the Code of Civil Procedure for a summary action. The property owner is notified of the decree declaring the "public utility" purpose and the need for the particular land. The owner must respond

<sup>42</sup>Ley de Expropiación y de Ocupación de Bienes por el Estado, art. 3.

<sup>43</sup>*Id.* art. 8.

within three days giving the names of all third parties who have interests in the property.<sup>44</sup>

All of the interested parties are permitted to respond to the request for expropriation, but the only issue that can be considered in the summary action at this stage is whether the particular property is needed or not.<sup>45</sup> The issue of the "public utility" of the cause cannot be contested in the expropriation proceeding. The only possibility for judicial review of the declaration of "public utility" would be through the *recurso de amparo* before the Supreme Court to test the constitutionality of the governmental act.

A term of eight days is allowed for proof on the issue of the necessity of the taking.<sup>46</sup> If the Judge finds that necessity is shown, he will decree the expropriation of the property, and direct the parties to reach an agreement on the price within eight days.<sup>47</sup> If agreement is not reached, the Ministry of Interior will notify the Judge to that effect, and the Judge will proceed to name two experts to appraise the property and determine the amount of indemnification.<sup>48</sup> If the experts do not agree on the amount, the party seeking the expropriation has the right to have the price set at the amount at which the owner estimated the value of the property in declarations made for tax purposes.<sup>49</sup> If the owner shall have made no such declarations, the indemnification can be set at the price the owner paid for it, if it was acquired within the past two years. If neither of these measures are appropriate, the Judge will name a third expert who will be expected to resolve the disagreement by adhering to the opinion of one of the other experts.<sup>50</sup> If the property expropriated is land subject to a lease or profit duly recorded prior to the demand for expropriation, the holder of that interest will also be entitled to indemnification.<sup>51</sup>

When the amount of indemnification has been set, the Judge will issue an order declaring the amount and directing that it be paid to the owner.<sup>52</sup> The decree will also order the property to be delivered over and transferred of record to the expropriating party.

### *Expropriation for Urban Housing Purposes and for Purposes of Agrarian Reform*

Unlike the other countries in this study, El Salvador does not have extensive areas of undeveloped land. It is the smallest of all Latin American republics, but

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<sup>44</sup>*Id.* art. 11.

<sup>45</sup>*Id.* art. 13.

<sup>46</sup>*Id.* art. 11.

<sup>47</sup>*Id.* art. 13.

<sup>48</sup>*Id.* art. 14.

<sup>49</sup>*Id.* art. 8.

<sup>50</sup>*Id.* art. 17.

<sup>51</sup>*Id.* art. 24.

<sup>52</sup>*Ibid.*

its population is the second largest in Central America. With a population density of almost 430 per square mile, virtually all land is occupied and used. Accordingly, there are no areas of national lands that can be utilized to promote agrarian colonies, as there are in the other countries. Land reform and colonization projects, then, inevitably entail expropriation. For that very reason, perhaps, such projects have been rarely mounted.

For El Salvador, the problem of providing urban housing has been a particularly difficult one, and there is special legislation covering expropriation for such purposes: Law No. 239 of December 17, 1952. The basic procedure for expropriation, however, is that of the general Law of Expropriation and Occupation of Properties by the State of 1939, described above.

According to a Salvadorean commentator, instances of actual formal expropriation in El Salvador have been very scarce. Perhaps this is due in some degree to fear on the part of property owners of reprisals if they were to oppose actively the government's plans. The constitutional allowance of deferring compensation for up to 20 years in some cases may also be a factor encouraging private settlement. In any event, in most cases, the acquisition of properties by the government is accomplished by arrangement with the owners, and cases in which the entire formal procedure for expropriation is followed rarely occur.

#### IV. Nicaragua<sup>53</sup>

Chapter IV of the current Political Constitution of Nicaragua (promulgated in 1950, with certain reforms in 1955), concerns itself with fundamental rights and guaranties of property ownership, and also establishes limitations on the use and enjoyment of property.

*Article 63.* Property is inviolable. No one may be deprived of his property except by judicial judgment, a general tax, or for public use or social interest according to law and upon prior payment in cash of just compensation.

For purposes of agrarian reform, insofar as concerns uncultivated *latifundios* the indemnification can be paid in the form of bonds, the terms, rates of interest and conditions of which shall be fixed by the law.

*Article 65.* Property, by virtue of its social function, imposes obligations. The law shall determine their amount, nature, and extent.

*Article 66.* The right of property, as far as its exercise is concerned, is subject to the limitations imposed by the maintenance and progress of the social order. The law may impose obligations or easements of public use and may regulate questions of rent.

*Article 70.* For purposes of general interest, the state may take part in the development and management of public-service enterprises, and may even nationalize them, in the latter case paying prior compensation.

*Article 71.* The state shall encourage the proper division of uncultivated large landholdings (*latifundios*), and will favor the preservation and spread of medium and small rural holdings.

*Article 72.* There is no confiscation of property, except against enemy nationals.

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<sup>53</sup>The basic report was prepared by Dr. Edgardo Buitrago and Dr. Armando Rizo Oyanguren of León, Nicaragua. This commentary is by Robert Casad, who is responsible for the translation except for the constitutional provisions, which are shown in the O.A.S. translation.

When the latter have a Nicaraguan spouse or children, at least fifty percent of the property confiscated shall be applied to the benefit of the spouse and children.

The proceeds from the property confiscated or the remaining amount, as the case may be, shall be applied in the first place to compensate for confiscations and other damages suffered by Nicaraguans at the hands of the enemy country.

The right to reclaim property that has been illegally confiscated is imprescriptible.

From these Articles it may be seen that, while property is broadly declared to be "inviolable" in Nicaragua, the text of the Constitution tends to lay more emphasis upon the obligations of property and the State's powers of control and regulation than on the traditional rights of ownership.

A comprehensive elaboration of the power of expropriation appears in the Law of Expropriation, promulgated April 4, 1961, replacing an earlier law that had been in force since 1883. The 1961 Law differs from the earlier one in two very important respects. First, implementing Article 63 of the current Constitution, it treats expropriation for causes of "social utility." Secondly, it abolishes the administrative procedure for expropriation which the old law provided, and replaces it with a judicial procedure. All property is subject to expropriation, and the properties of Nicaraguans and foreigners, of individual persons and private institutions are subject to the same rules.<sup>54</sup>

Article 4 of the Law of Expropriation provides as follows:

No expropriation can be carried into effect without the following prerequisites: 1) a declaration that the work, service or program projected is of public utility or of social interest and 2) a declaration that designated property, or part thereof, is affected by public utility or social interest. . . .

Article 5 of the same law provides:

In relation to the expropriation of immovable property, public utility is understood to be implicit in all plans of work and services of the State, National District and municipalities, upon which entities, respectively, shall fall the duty to declare it. In other cases of public utility and in cases of social interest, the declaration is to be made by the Executive Power by means of a decree of the appropriate ministry. Nevertheless, in the case of public utility that benefits only one department or two or more localities of it, the declaration will be made by the respective Political Chief (*Jefe Politico*) and the National District or by the municipal corporation if it benefits only one city or village.

Normally, the entity empowered to make the declaration of public utility is also the entity that makes the declaration designating the property to be affected by the work program or service. It is not necessary that the two declarations appear in the same decree, however.

The determination that a particular work, service or program is of public utility or social interest is an administrative matter, and since Nicaragua has no formal contentious-administrative procedure, the only possibility for judicial

<sup>54</sup>See No. 13 art. VI of the *Titulo Preliminar delCodigo Civil*: "Property existing in Nicaragua, whatever may be its nature or the qualities of the person to whom it belongs, is controlled by its laws." See also Constitution of Nicaragua, art. 24.



review of that determination would be through the procedure of *amparo* in the Supreme Court of Justice to test the constitutionality of the administrative act. The Law of Expropriation, in Article 12, does permit an expropriated owner to challenge judicially the "indispensability" of the taking of his property for the realization of the particular work, service or program. There is a presumption of "indispensability" which the owner must rebut, and the law expressly declares that showing that the work or service could be built or installed on other land will not refute that presumption, not even when it is shown that the planned route or location is more costly.

The decrees described above must be published in "*La Gaceta*," the official journal. When the publication is completed, the property owner and all the other persons who for any reason have an interest in the matter are considered to be notified of the declaration. Before the property in fact can be taken, however, the owner will necessarily receive notice in a more direct form: either the expropriating authority will attempt to obtain the property by a simple purchase, or a judicial proceeding will be initiated.

The Law of Expropriation does not command that an attempt be made to acquire property by arrangement with the owner before procedures for expropriation are initiated, but that is the normal practice of the Administration.

The judge competent to entertain the judicial action for expropriation is the District Judge of Civil Matters for the place where the property sought to be expropriated is located.

The only issues that can be dealt with in this expropriation proceeding are the "indispensability" of the taking of the particular property, and the amount of indemnification that must be paid.<sup>55</sup>

On receiving the demand, the Judge will cause the owner of the property, or, if he cannot be found or defaults, the possessor of it, to be made defendant, as well as any others who have duly recorded interests in the immovable property.<sup>56</sup>

The right of audience will then be given to the defendant (owner) or defendants for a period of three days, the time running from the date of notification of the last of them in case there are more than one. The primary function of this hearing is to give the defendant or defendants the opportunity to name an expert to evaluate the property. If there are two or more defendants, they must name one common attorney and agree upon one expert, and they will be cautioned that, if they fail to do so, the Judge will do it for them.<sup>57</sup>

The next stage in the expropriation action involves the submission of proof by

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<sup>55</sup>Ley de Expropiación, art. 13.

<sup>56</sup>*Id.* art. 14.

<sup>57</sup>*Id.* arts. 17, 18 and 19.

the parties and the rendition of the experts' opinions, which takes place over a period of eight days.

To arrive at their opinions, the experts are directed to evaluate the properties in specific detail. If the subject is immovable property, they are to evaluate the land, the planting, the plowing, the fences, the buildings and all other accessories of the tract.<sup>58</sup>

However, the law does not prescribe any standard for this evaluation. The experts undoubtedly take into account such things as the market value, the value indicated on fiscal records for tax purposes, and the value the property could have for its highest and best use, but the law leaves them free to fix the valuation in accordance with their own knowledge and experience. If only part of the tract is to be taken, only the part actually expropriated is to be evaluated, but the experts will make an appraisal of the actual damages that the land owner will incur as a result of the expropriation, so that they can be taken into account in the indemnification. At the same time, they are to evaluate the amount by which the unexpropriated land remaining to the owner will be augmented in value as a result of the work, service or program prompting the expropriation so that amount (the *plusvalia*) can be deducted from the indemnification.<sup>59</sup>

If one of the experts named by the parties fails to present his written opinion within the stated period, the report of the other will be accepted as conclusive.<sup>60</sup> If the written reports of the experts named by the parties do not agree on the evaluation of the property and the damages (and usually they do not), the Judge will appoint a third expert, chosen from a list of experts of the banking institutions of the Republic.<sup>61</sup> The third expert will render his opinion during the remaining days of the period.

When the eight-day term is concluded, the Judge will order the expropriating party to deposit the amount of indemnification, in cash. The amount will be determined by the reports of the experts. If only one expert has submitted an opinion, that opinion will determine the amount. If both of the parties' experts' opinions agree, that amount is taken as conclusive. If the parties' experts do not agree, the opinion of the third expert appointed by the Court is conclusive. The Judge will not depart from the amount of indemnification so determined, although in a case where the owner has petitioned for total rather than partial expropriation the judge will decide which it is to be.

Rights of parties claiming the property expropriated are deemed to be transferred to the indemnification fund, and the expropriating authority will

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<sup>58</sup>*Id.* art. 24.

<sup>59</sup>*Ibid.*

<sup>60</sup>*Id.* art. 23.

<sup>61</sup>*Id.* art. 25.

take the property free of all encumbrances leaving the competing claimants to resolve their contest in another action.

Either party will have a right to object to the evaluation for fraud, for errors in the measurements, or for notorious and serious errors in calculating the amount of indemnification. These objections can be raised by initiating an ordinary action in the same court within fifteen days after the property has been delivered over to the expropriating authority.<sup>62</sup> This action will be an ordinary action, not a summary one like the expropriation action itself.

The Law also provides for appeal by the defendant of the final judgment in the expropriation action. The appeal by the defendant-owner, however, does not suspend the execution of the judgment. The expropriating authority, on the other hand, can appeal even from interlocutory orders, and the appeal will suspend the proceedings in the lower tribunal.<sup>63</sup>

## V. Costa Rica<sup>64</sup>

Article 45 of the present Constitution (which became effective November 7, 1949) provides:

*Article 45.* Property is inviolable; no one may be deprived of what is his except for legally proven public interest after compensation in accordance with the law. In case of war or internal disorder,<sup>65</sup> it is not necessary that compensation be made in advance. However, payment shall be made not later than two years after termination of the state of emergency.

For reasons of public necessity, the National Assembly, by a vote of two thirds of its full membership, may impose limitations of property, in the social interest.

Other pertinent constitutional provisions are: Article 49, which establishes the "*contencioso-administrativo*" jurisdiction, and Article 65, which states that the "... State shall promote the construction of public housing and shall foment the creation of family patrimony for the worker."

### *Ley de Expropiaciones por Causa de Utilidad Publica*

This 1896 (amended in 1938) law is Costa Rica's general expropriation statute. Its opening passages specify that both of the following circumstances must occur before the constitutionally-required "public interest" which gives rise to the right of expropriation may be said to exist: (a) There is a project or a need the performance or satisfaction of which is the province of the national or local authorities or public corporations, (b) Occupation of the property to be expropriated is indispensable to such performance or satisfaction.

<sup>62</sup>*Id.* art. 36.

<sup>63</sup>*Id.* art. 29.

<sup>64</sup>The basic report was prepared by Lic. Rogelio Sotela of San José, Costa Rica. This commentary was prepared by John Hurt of San Diego, California with the assistance of Foster Knight also of the California bar. Constitutional provisions are shown in the O.A.S. translation.

<sup>65</sup>Or, under art. 180 of the Constitution, in cases of "urgent necessity" or "public calamity."

This Law confers upon the Executive Branch of the government the power to determine in its discretion whether both the above conditions are present in a particular case and, subsequent to an affirmative determination, to decree an expropriation. The Executive must, in addition, satisfy itself that the proposed expropriation is for the public good and that damage to private interests will be minimized to the extent possible under the circumstances.

The 1896 Law provides that an expropriation undertaken by the Executive is not final until reviewed and confirmed by a court of law. The statute does not, however, permit the Court to set aside the expropriation except where the Executive has exceeded his authority.<sup>66</sup> The Court's principal function is, rather, to determine with the aid of expert appraisers,<sup>67</sup> the amount of compensation which must be paid the expropriated owner.

Once the Court has reviewed an expropriation proposed by the Executive under the 1896 Law, and has found no circumstances which would require it to refuse to confirm the expropriation, it issues a written opinion confirming the expropriation and setting forth the amount of compensation to be paid. The Court then decrees that henceforth the government entity for whose benefit the expropriation took place shall have the exclusive possession of the property, and orders a deed to be delivered to that entity and the compensation to be delivered to the former owner.

The above account of the expropriation procedure under the 1896 Law eliminates several details (consisting, *inter alia*, of requirements as to time periods which must elapse between each of the steps in the expropriation procedure), and the cumulative result of those details has been to render the 1896 Law procedure cumbersome and impractical. One consequence of this state of affairs was the 1938 amendment which set forth a "procedure for urgent cases." Under that procedure, the Executive requests a Court to appoint expert appraisers; after the Court hears their opinions as to the value of the property, it may issue an order permitting the expropriating entity to take immediate possession of the property, on condition that the expropriating entity first deposits to the order of the property owner an amount which the Court determines, after hearing the appraisers, would fully compensate the expropriated owner. The property owner is informed that, if he withdraws the

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<sup>66</sup>More specifically, in the words of the statute, ". . . no cabe recurso alguno, excepto el de responsabilidad, ni discusion ulterior de ningun genero." The "*recurso de responsabilidad*" is, roughly, a right to damages from a public official who has exceeded his authority. The establishment, relatively recently, of the "*contencioso-administrativa*" jurisdiction, see note 71 *infra*, appears to have added the "*recurso de ilegalidad*" to the expropriated owner's heretofore meager arsenal; the "*recurso de ilegalidad*" requires, for its invocation, a technical violation of law (*i. e.*, statute or constitution) on the part of the tribunal or administrative authority whose decision is being appealed. The remedy may be reversal of the illegal order.

<sup>67</sup>The appraisers are appointed by, respectively, the government and the owner of the property to be expropriated. The Court of Cassation has held that the appraisers' function is merely to inform the court hearing the expropriation case, and the court is not bound by any appraiser's determination concerning the value of the property.

deposited sum, he will be deemed to have acceded to the expropriation and to have accepted such sum as payment in full. If the owner desires to contest the validity of the expropriation or the determination as to the compensation due him, he must leave the sum on deposit; the Court will then finally determine the amount due the owner, availing itself of the ordinary 1896 Law procedure to make such determination.

### *The "Coco" Expropriation Law and Its Progeny*

Over the years there were many in Costa Rica who advocated either a complete overhaul of the 1896 law or the enactment of an entirely new general law. The Legislature's sole response was the above-mentioned 1938 amendment which, because it applied only to "urgent cases," did not satisfy the proponents of reform. The Legislature has, however, in response to specific needs, enacted several specialized expropriation laws whose procedures are more expeditious than the 1896 Law procedure. Of this series of laws, the "Coco" Law was the archetype.

This Law (enacted in 1951) derives its name from the fact that it was enacted specifically to facilitate the acquisition of land for a new international airport, the name of which was to be "*El Coco*."<sup>68</sup> The procedure embodied in the *Coco* Law has been incorporated (intact or slightly modified) into most Costa Rican expropriation legislation enacted since.

The *Coco* Law's procedure may be summarized as follows: (a) The Executive issues an Expropriation Decree; (b) The *Procuraduría General de la República*<sup>69</sup> requests the *Tribunal Fiscal Administrativo*<sup>70</sup> to appraise the property in question; (c) The *Procuraduría* sends a telegram to the property owner which directs the latter to reveal within five working days whether he is willing to sell at a price equal to the *Tribunal's* appraisal; (d) If the owner is not willing to sell at that price, or if he does not respond within five days to the *Procuraduría's* telegram, the *Procuraduría* then requests the *Juzgado Civil de Hacienda y de lo Contencioso Administrativo*<sup>71</sup> to advise the property owner that he has five working days to designate an expert appraiser of his choosing and that if he does not do so the *Juzgado* itself will choose one from lists of appraisers drawn up by the Societies of Engineering and of Agronomy; (e) The appraiser thus named by the property owner or by the *Juzgado* renders an opinion within fifteen days following the date of his acceptance of the

<sup>68</sup>"Coco" means, of course, "coconut" or "coconut tree." The name of the airport (located near San José), was recently changed to Juan Santamaría, in honor of the Costa Rican whose heroism was instrumental in turning the tide against the filibuster from Tennessee, William Walker, who had been endeavoring to consolidate Central America into one country and install himself as Emperor.

<sup>69</sup>The *Procuraduría* corresponds to an attorney general's office in the United States.

<sup>70</sup>This tribunal was formerly called the *Tribunal de Avalúos de la Tributación Directa*. It is an administrative tribunal pertaining to the Costa Rican equivalent of the Internal Revenue Service and specializing in property appraisal appeals.

<sup>71</sup>The *Juzgado Civil de Hacienda y de lo Contencioso Administrativo* is a court in which any aggrieved party can bring an action contesting the legality of an administrative action.

appointment; (f) The *Juzgado* then issues a formal and binding opinion fixing the amount (which may not exceed the higher of appraisals rendered by, respectively, the *Tribunal Fiscal Administrativo*, and the appraiser appointed by the *Juzgado* or the owner) of compensation which must be paid the property owner, ordering that the former owner abandon the expropriated property, and authorizing the expropriating entity to go into possession, provided that the compensation sum fixed by the *Juzgado's* opinion is deposited to the order of the owner; (g) If the owner withdraws the sum deposited, he is deemed to be in accord as to its amount, and is foreclosed from claiming that he has not been fully compensated and from otherwise contesting the expropriation; if he wishes to contest the expropriation, or the amount of the compensation offered, he must leave the funds on deposit; meanwhile, however, the expropriating entity continues in possession;<sup>72</sup> and (h) If the owner does not contest<sup>73</sup> the expropriation or the amount of compensation tendered, or if he does, after such a contest, the *Juzgado* orders the *Procuraduria* to determine that the documents evidencing the foregoing proceedings are properly recorded in the Property Registry and to issue a deed in favor of the expropriating entity.

The *Coco* Law also contains a "procedure for urgent cases," authorizing the State to take immediate possession of the property, provided that it first deposits to the order of the property owner the sum designated by the *Tribunal Fiscal Administrativo* in accordance with step (b) above. If the owner withdraws the sum deposited, he is deemed to be in accord with the appraisal by the *Tribunal Fiscal Administrativo* and steps (d), (e), and (f) (see preceding paragraph) are dispensed with and the *Procuraduria*, without further ado, issues a deed in favor of the expropriating entity. If, on the other hand, the property owner elects not immediately to withdraw the deposited sum, he can force the government to proceed with the aforementioned steps (d), (e), and (f).<sup>74</sup> As to the final resolution which fixed the amount of indemnification, the expropriated owner may avail himself of the *recursos* of *revocatoria*<sup>75</sup> and of *apelación*.<sup>76</sup> He may not, however, appeal to the Court of Cassation.

<sup>72</sup>The constitutionality of steps "(f)" and "(g)" was at issue in a 1972 Supreme Court case. The majority of the justices voted to declare them unconstitutional, but the proponents of this point of view could not muster the necessary two-thirds majority. The majority reasoned that since possession is one of the most important aspects of ownership of property, the State should be required to compensate the owner before it deprives him of his possession, even though it has not yet technically deprived him of actual ownership. The prevailing minority was of the opinion that any discussion of whether possession is the most important attribute of ownership is irrelevant, since the only legally-recognized criterion of ownership of real property is recordation in the property register, and therefore property cannot be said to have been expropriated until a change in recordation has taken place.

<sup>73</sup>In the *Juzgado Civil de Hacienda y de lo Contencioso Administrativo*, described in note 71 *supra*, or, less likely, in another court.

<sup>74</sup>A 1952 Supreme Court case held that the *Coco* Law's "urgent-case" procedure was constitutional.

<sup>75</sup>*Revocatoria* is, according to Prof. Boris Kozolchik, analogous to our "motion for a new trial."

<sup>76</sup>*Apelación* is an appeal to a higher tribunal.

The Legislative Assembly has used the *Coco Law* as the procedural model for other expropriation statutes.<sup>77</sup>

*Ley de Tierras y Colonización* ("Land and Colonization Law") (1961, as amended in 1962, 1963, and 1964) is the basic Costa Rican agrarian reform law, having among its objectives a just distribution of the land and, more specifically, extending to the peasant means of obtaining title to the land he is working. This law created, for the accomplishment of its objectives, another autonomous institute, called "ITCO."<sup>78</sup>

ITCO has the power under this law to acquire land and distribute it to the peasants who have for 10 years actually been in possession of it and working it. Usually, however, ITCO cannot avail itself of any powers of expropriation to accomplish this, but rather attempts to get the owner and the peasant to agree upon a price at which the former will sell to the latter. ITCO then finances the transaction, arranging a payment schedule that is geared to the productivity of the land, and charging interest only insofar as it is needed to cover ITCO's costs of administration.

ITCO's powers of expropriation come into play in certain special situations: for instance, where the totality of an area of land belonging to one person (this term includes corporations and other persons created by law, as well as natural persons) is classifiable as a "*latifundio*" (i.e., an extremely large<sup>79</sup> parcel of privately owned land), the *latifundio* is being worked by peasants acting on their own initiative, and in addition both of the following conditions<sup>80</sup> exist:

- (a) there are no nearby lands which are in the public domain (i.e., have never been appropriated by private owners) which would be suitable to turn over to the peasants to work instead of the *latifundio* land, and
- (b) The land proposed for expropriation is not serving its proper "social function," i.e., it (i) is uncultivated, or is "exploited indirectly by lessees, intermediaries, *colonos* and *ocupantes* . . .", (ii) has previously been parcelled or colonized (presumably through ITCO's intervention), and the colonies or parcels have not achieved their purpose, or (iii) is cropland which is being used to raise cattle; no category (ii) land will be expropriated until it is apparent that there is not enough category (i) land to accomplish the purpose of the expropriation, and so on.

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<sup>77</sup>The legislature has not yet enacted a new General Expropriation Law to replace the 1896 Law. Thus a Costa Rican government entity must still resort to the 1896 Law in any case in which the contemplated expropriation does not seek to fulfill a specific purpose which would give rise to a right to expropriate under one of the post-1896 laws.

<sup>78</sup>ITCO is the acronym for "*Instituto de Tierras y Colonización*."

<sup>79</sup>The statute does not specify how large a parcel must be to be classified as a *latifundio*; this decision is presumably left to the discretion of ITCO's directors.

<sup>80</sup>The imposition of these conditions is consistent with the constitutional requirement that a "legally-confirmed public interest" must exist before an expropriation may take place. This is especially so in light of the definition of public interest found in the 1896 Law.

Before expropriating any parcel of land, *ITCO* is in all cases obligated to attempt to negotiate an "amicable arrangement" with the owner, *i.e.*, attempt to get him to agree to sell it. *ITCO* must, in addition to the foregoing, follow the *Coco Law's* procedure when it determines that expropriation is necessary.

The maximum price which may be decreed in an *ITCO* expropriation is the value which the property owner has previously declared to the fiscal authorities as a basis of taxation. This value is usually less than the actual market value of the property. A majority of the Costa Rican Supreme Court declared this provision to be unconstitutional, but the vote fell short of the two-thirds majority needed to invalidate a law on constitutional grounds.

The *ITCO* law also provides for payment in bonds. A majority of the Supreme Court declared this provision unconstitutional also, but again the Court fell short of the required two-thirds vote. However, the lower *Contencioso Administrativo* Tribunal has mitigated the most obvious danger of payment in bonds by requiring that the bonds be valued at their current market price, rather than at face or par value. This decision was confirmed by the *Tribunal Superior Civil, Contencioso Administrativo*.

## VI. Panama<sup>81</sup>

The new Panamanian Construction, promulgated October 11, 1972 contains the following provisions relating to the protection of property rights and the power of expropriation:

*Article 43.* Private property acquired by natural or juridical persons in accordance with law is guaranteed.

*Article 44.* Private property entails obligations for its owner because of the social function that it must fulfill.

For reasons of public utility or of social interest defined by law expropriation can be accomplished by means of a special judgment (*juicio especial*) and indemnification.

*Article 45.* When in the application of a law enacted for reasons of public utility or of social interest the exercise of private rights would conflict with the necessity recognized by law, the private interest must yield to the public or social interest.

*Article 46.* In case of war, serious disturbance of public order, or urgent social interest, where prompt action is called for, the Executive can decree the expropriation or occupation of private property.

When the thing occupied is such that its restitution is feasible, the occupation shall last only for the duration of the situation that gave rise to it.

The State is always responsible for every expropriation thus brought about by the Executive and for the damages resulting from the occupation, and will pay its value as soon as the situation that prompted the expropriation or occupation ceases.

The second paragraph of Article 44 reflects a significant change from the text of the Constitutional provision it replaced (Article 46 of the 1946 Constitution). The former provision was as follows:

<sup>81</sup>The basic report was prepared by Lic. Aura E.G. de Villalaz of Panama. This commentary was prepared by Robert Casad. The assistance of Robert Park, Balboa, C.Z. and William Saltzman of New York, N.Y. is gratefully acknowledged. Translations by Robert Casad.



For reasons of public utility or of social interest defined by law, expropriation can be accomplished by means of a judicial judgment (*sentencia judicial*) and prior indemnification.

The new provision, it will be noted, substitutes the term *juicio especial* for the former *sentencia judicial*, and, more substantively, eliminates the requirement that the indemnification be prior.

It is a function of the Legislature to determine what kinds of works or other public needs will warrant expropriation.<sup>82</sup> The Legislature can, furthermore, declare what specific properties are to be taken for the given purpose. For the most part, however, the Legislature has exercised this function by declaring generically that certain kinds of public purposes are of public utility or social interest, without attempting to identify the particular property that may be subject to expropriation. Matters not specifically provided for in the law are left to the discretion of the administration in implementing the law. Thus, the general law, Law 57 of 1946, leaves most of the effective discretion to the national administration, or to the municipalities.

Once it has been determined that the state needs private property for some purpose of public utility or social benefit, it will summon the owner and inform him of the government's proposition in the attempt to acquire the land by mutual agreement. If the owner does agree, payment is made and the state, or municipality as the case may be, acquires the property. If the owner does not agree, however—whether because he will not accept the terms proposed, or because he intends to challenge the legality of the state's action, or because he simply fails to respond to the summons—a judicial action for expropriation will have to be initiated.

Articles 1468-1473 of the Judicial Code prescribe some additional preliminary steps that must be taken before the judicial action for expropriation is commenced. First, the agency seeking to expropriate will assemble all of the proof and substantiating data to show that the case is one in which expropriation is permitted.<sup>83</sup> Next, a formal resolution is issued ordering the initiation of the expropriation action, clearly expressing what it is that is to be expropriated, with what object and for what purpose.<sup>84</sup> If the work is one of national concern, the resolution will be issued by the Executive Power of the state. If it is of municipal concern, it will be issued by the *Alcalde* of the district.<sup>85</sup> All of the documents relating to the case are then passed to the functionary or person who will represent the expropriating authority in the judicial action.<sup>86</sup>

<sup>82</sup>MORALES SAENZ, LA EXPROPIACIÓN 177-182 (1964).

<sup>83</sup>Judicial Code, art. 1468.

<sup>84</sup>*Id.* art. 1469.

<sup>85</sup>*Id.* art. 1470.

<sup>86</sup>*Id.* art. 1472.

At the initiation of the action, the state's demand is served on the property owner. Several owners may be joined in the same action. Those who fail to answer in the time allowed will be taken to have agreed to the expropriation.<sup>87</sup>

If the owner, or one co-owner, does answer in a timely fashion and opposes the expropriation, the action will be handled according to the procedures for an ordinary action.<sup>88</sup> Since the only contestable issue is the amount of indemnification, proofs will be directed to that question.

The general law, Law 57 of 1946, Article 5, directs the courts to take as the base the tax valuation (*valor catastral*) of the land two years before the execution of the work. This is to be accepted as the value in the absence of other proof, except where it is shown that within the two year period factors other than those associated with the work for which expropriation is sought have affected the value of the property. The reference in these passages to the value "two years before the execution of the work" is confusing, for except in cases of "urgency,"<sup>89</sup> to be discussed later, indemnification must be paid before the work can even be begun. As it cannot be said at the time when the valuation must be made just when the work will be executed, it will be impossible to tell what the valuation was two years before execution. It is apparently accepted that the time referred to is two years before the first pronouncement that the property is to be expropriated.<sup>90</sup>

The *valor catastral*, translated here as tax valuation, is the value declared by the owner when the property is officially registered in the *catastro*. This value forms the basis on which the property tax is levied. The use of this figure as the basis for valuation in cases of expropriation is thought to be desirable, not only because it is a fixed figure, but also because there is a certain justice in requiring an owner who has used a low valuation as a means of avoiding taxes to take a sum less than the property may really be worth in the event of expropriation. Rarely will an owner overvalue his property for purposes of the *catastro*. Often the *valor catastral* is established at the time the owner acquires the property and is not subsequently changed.

It must be noted that these laws do not say that the *valor catastral* is the amount of indemnification: it is the *base* for determining that amount. The Judge can consider the testimony of experts on the question of what the value of the land is, as well as other proofs, such as recent sales of nearby similar land. A great deal of latitude is left to the Judge to set the amount, although his judgment is subject to revision on appeal.

Although the laws do not refer expressly to any factor other than the value of

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<sup>87</sup>*Id.* art. 1474.

<sup>88</sup>*Id.* art. 1477.

<sup>89</sup>*I.e.*, case where expropriation by executive decree is authorized by art. 46 of the 1972 Constitution.

<sup>90</sup>MORALES SAENZ, *op. cit. supra* note 82 at 225-226.

the land that must be considered in fixing the amount of indemnification, it is established that the owner can recover all damages suffered, including gains prevented.<sup>91</sup> To equalize the condition of the expropriated owner and other nearby owners whose property is not taken but may be increased in value by reason of the projected work, Article 7 of Law 57 of 1946 requires a determination of the amount of benefit the work will bring to the property of nearby owners, and each is required to purchase bonds in an amount corresponding to that benefit. The money thus raised is used to finance the project. In cases where only part of the land of a particular owner is expropriated, and the part remaining enjoys a benefit from the work, the amount of indemnification for the part taken is to be reduced.

When the Court has determined the amount of indemnification, it will issue a judgment ordering the payment of the sum fixed and the expropriation of the property. When the sum is paid, the property is turned over to the state.<sup>92</sup> If the owner refuses to receive the payment, it is deposited with some person or establishment, who will invest it with sufficient guarantees for the benefit of the owner.<sup>93</sup> If the property is encumbered with a mortgage or other security interest, an amount sufficient to cover the debt will be held back. The creditor will be notified so that he can assert his rights.<sup>94</sup>

The Constitution does not specify the form in which payment will be made. The principle of prior indemnification would seem to contemplate payment in cash, but some Panamanian laws dealing with expropriation expressly provide for payment in the form of bonds.

The expropriation proceeding, like all ordinary actions, includes the right of appeal. The court of second instance in such cases is the Supreme Court of Justice.<sup>95</sup>

Article 1481 of the Judicial Code authorizes a summary action in certain emergency situations and where the property is sought for agrarian reform purposes.

In such cases, the Court will proceed, *without* hearing the owner, to evaluate the property and order the expropriation within a few days.<sup>96</sup>

In cases where the Summary Proceeding is authorized, other than cases of expropriation for Agrarian Reform, the amount of indemnification is established in the same manner as was described in connection with the Ordinary Action, in the absence of a special law providing otherwise.

The judgment delivering the property to the state can be executed as soon as

<sup>91</sup>This case (Registro Judicial No. 23 of 17 March 1934, at 407 *et seq.*) is cited by MORALES SAENZ, *id.* at 225.

<sup>92</sup>Judicial Code, art. 1478.

<sup>93</sup>*Id.* art. 1479.

<sup>94</sup>*Id.* art. 1480.

<sup>95</sup>*Id.* art. 22.

<sup>96</sup>*Id.* arts. 1483 and 1484.

the payment is made, or consigned to someone to hold for the owner.<sup>97</sup> The owner, although not entitled to appear in the original proceeding, can, within five days after the judgment, petition the Court to revoke its decree, and can present proofs.<sup>98</sup> If the Court refuses to revoke its decree, the owner can appeal, but his right to appeal is limited.

The Agrarian Code contains some special provisions for determining the amount of indemnification that contrast with those in the general law (Law 57 of 1946), discussed above in connection with the Ordinary Action. In fixing the measure of indemnification in cases of expropriation under the Agrarian Code, the Court's discretion is more restricted. Article 45 of that Code specifies that during the first five years of the Code's existence, the indemnification paid to the owner shall not be more than the average *valor catastral* during the period 1956-1961. After the Code has been in effect for five years, the owner will be paid a sum no larger than the average *valor catastral* between 1956 and the date of the petition for expropriation. In any case, the payment shall not exceed the price at which the land was last sold. However, the Code recognizes that if there are improvements on the land, recovery can be had for their value, based upon the appraisal of experts. In some situations property can be expropriated without prior necessity of any judicial action. Such is the case with respect to the situations contemplated in Article 46 of the 1972 Constitution:

In cases of war, grave disturbance of the public order, or of urgent social interest, that demand prompt measures, the Executive can decree expropriation or occupation of property. . . .

It may be noted that many of the situations in which the summary action, just discussed, is permitted also fall within the terms of Article 46 of the Constitution. This means that, in such cases, the state can elect whether to expropriate by decree, with indemnification later, or to proceed in a summary action with prior indemnification. If the former course is chosen, the Executive power simply issues a decree ordering the occupation or expropriation of the particular property. No notice to the owner nor any other preliminary formality is prescribed in such cases.

The Constitution does require that the state pay the owner the value of property expropriated for purposes of "urgent social interest" and damages resulting from the temporary occupation of properties for such purposes "as soon as the situation that prompted the expropriation or occupation ceases." But there are no laws or regulations defining the term "as soon as the situation . . . ceases," nor is there any legislation prescribing how the amount of indemnification in such cases is to be determined or the form of payment. In practice, it is regarded as within the discretion of the Executive to determine

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<sup>97</sup>*Id.* art. 1488.

<sup>98</sup>*Id.* art. 1485.

when the "situation" has ceased so as to require the payment of indemnification. Moreover, although the judicial procedures for fixing the amount of indemnification in cases requiring prior payment could be followed in these emergency or "urgent social interest" cases after the state has decided payment is due, this is not normally done. The amount is fixed by administrative decision, and there is a decree of the Cabinet directing that payment is to be made in the form of bonds bearing interest of 1% for a term of 40 years in cases where the taking is for the purpose of bestowing title on squatters who have occupied and worked the land for an extensive period of time.<sup>99</sup>

Thus, in cases where the expropriation is for one of these purposes of urgency, the process is entirely administrative. Any judicial consideration of the questions involved in the expropriation will be at the initiation of the owner, not the state. The owner can attack the constitutionality of the decree expropriating his property in an action of "*inconstitucionalidad*" in the Supreme Court. He can challenge the amount or form of payment in a proceeding "*contencioso-administrativo*" in the Third Chamber of the Supreme Court. But in the cases covered by Article 46 of the Constitution, where prior indemnification is not required, judicial action is not an integral part of the expropriation procedure as it is in other cases.

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<sup>99</sup>Decreto de Gabinete, No. 44 of February 1969.