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TANZANIAN NATIONALIZATIONS: 1967-1970

Clarence Dias

I. INTRODUCTION

The conflict of attitudes and doctrines resulting from the clash of interests between developed and underdeveloped countries has expressed itself in a number of international legal controversies. The most widely debated of these concern the "minimum standard" and the "standard of equality of treatment" with nationals in cases of expropriation of foreign property interests.¹ Many new states of Asia and Africa have expressed the view that a state's right of interference with private property, either for tax, police, health, or utility purposes, or for more basic changes in the political, economic or social structure, is not limited by the rule that the state must respect the property of aliens.²

The present note concerns the expropriations undertaken by Tanzania, one of the new African states. It will examine the motives behind, and the methods employed in, the takeover of foreign-owned property in that country. It will evaluate the short-run and long-run benefits to the Tanzanian economy resulting from the expropriations. Finally it will appraise the Tanzanian experience and its implications for the international community as regards the emergence of rules which are shifting the balance between the conflicting interests of nationalism and foreign investment.

Since independence in 1961, Tanganyika has had a stable government

under the able leadership of Julius Nyerere, aided by a one-party system of government that has been hailed as "an original contribution made to the art of democratic government." Tanzania came into existence in 1964 when the Republic of Tanganyika formed a union with Zanzibar. The Tanzanian Government has pledged itself to creating a socialistic pattern of society in a comprehensive policy statement called the "Arusha Declaration." Issued by the Government on February 5, 1967, the Arusha Declaration stresses the responsibility of the State to intervene actively in the economic life of the nation in order to insure the well-being of all citizens and to prevent exploitation or the accumulation of wealth to an extent that would be inconsistent with the concept of a classless society. National life is to be organized on the basis of promoting and encouraging free communal and cooperative activity for both general and individual benefit, and although private investment is to be encouraged, to a great extent economic activities must be promoted and owned by the State. The Arusha Declaration extensively treats public ownership of industrial and commercial property. After declaring that the way to build and maintain socialism is to insure that the major means of production are under the control and ownership of the Government, it lists these "major means of production" as

- the land; forests, mineral resources; water; oil and electricity; communications; transport; banks; insurance; import and export trade; wholesale business; the steel, machine-tool, arms, motor car, cement and fertilizer factories; the textile industry; and any other big industry upon which a large section of the population depend for their living; or which provides essential components for other industries; large plantations, especially those which produce essential raw materials.

The Tanzanian nationalizations represented the first comprehensive program of nationalization to be undertaken in East Africa and were carefully planned in advance to maximize the benefit and minimize the risks attendant to such a dramatic step. Once the Arusha Declaration made clear the areas that would be under public control or ownership, the only way to avoid a dwindling of confidence and further decline of productive capacity was to act swiftly. Indeed, the economic situation in

5. THE ARUSHA DECLARATION, AND TANU'S POLICY OF SOCIALISM AND SELF-RELIANCE 3 (1967).
6. The only other prior nationalizations to take place in East Africa were the nationalization of the Kenya Broadcasting Corporation in 1964 (Kenya Broadcasting Corporation (Nationalization) Act, Tanz., No. 12 of 1964) and certain measures taken by the Revolutionary Council in Zanzibar after the 1964 Revolution (Nationalization (Motor Car Trade) Decree, Tanz., No. 15 of 1966).
Tanzania was such that the country had much less to lose than it had to gain from nationalization. The possible loss of confidence on the part of potential investors in Tanzania was not likely to cause too much concern since there had been a steady diminution of private capital there ever since independence. In addition, foreign aid from other governments was as scarce as private capital. Britain and West Germany withheld aid offers and the United States remained uninterested. Politically-caused interruptions in foreign aid had seriously embarrassed Tanzania to the extent of £25 million in the two years prior to the nationalization, and the inflow of foreign aid to Tanzania "had been a mere trickle." Thus, Tanzania was not particularly concerned about scaring off foreign investment and aid by its nationalization program.

The potential gains from nationalization included prospects of greater profits resulting from both the elimination of wasteful competition and the nationalization of industries. Another factor which influenced the decision to nationalize was the danger of leaving an industry in private foreign hands. There was also certain symbolic value to the takeovers which created a cohesive atmosphere of excitement and enthusiasm among Tanzanians.

Another reason could have necessitated the nationalizations. Would-be foreign investors sought guarantees that the enterprises they contemplated would not be nationalized. Until the areas of public control were defined, no such guarantees could be given. The Arusha Declaration sought to make this definition by defining the "major means of production". We should note, however, that the nationalizing legislation specifies the names of the firms to be nationalized and does not purport to nationalize all firms carrying on a certain activity. The nationalized firms are to be run by State Corporations but there is nothing in the

7. Tanzania's policy towards East Germany resulted in strained relations with West Germany. The United States was suspicious of Tanzania's growing ties with Communist China while on the other hand Tanzania viewed the United States with less than cordiality, suspecting American involvement in an attempted military coup in 1964. Tanzania's relations with Great Britain were strained to the breaking point over the sanctions to be taken against Southern Rhodesia.
9. "If the British Labour Party could find enough reason to want to nationalize coal, iron and steel, electricity and transport—all of which were private industries owned and run by the British themselves—how much stronger would have been their case if such industries had been in the hands of foreigners?" Temu, supra note 8, at 37.
10. President Nyerere is reported to have stated that the "little explosion about nationalization . . . has prepared the mood for everything" in a speech reported in The Nationalist, March 6, 1967, at 1, col. 2.
11. Whether the Arusha Declaration was successful in this respect will be considered in a later section of this paper. President Nyerere did however promise (after the nationalizations were announced) that he would go no further in his nationalizations. 222 Economir 613 (1967).
nationalizing legislation to prevent the firms which escaped nationalization from continuing and expanding their business in competition with the nationalized firms nor to prevent new firms from establishing themselves.12

To what extent may short-run internal political considerations be said to have influenced the decision to nationalize? President Nyerere was (and is) firmly in control in Tanzania and most certainly did not need to resort to a nationalization program to help his government entrench itself in power. Just before announcing the nationalizations, President Nyerere had undertaken a tour of Tanzania which helped draw his attention to the widening gap in the standards of living of rural and urban workers.13 He was also becoming increasingly concerned about the political profiteering that had been going on in the nation's capital.14 The President began to realize that new elite-groups were developing in the country, and he decided that the time had come to make a formal declaration of his government's policy. This he did in the Arusha Declaration which stresses (paradoxically) both socialism and self-reliance.

The nationalization program was the inevitable result of the Arusha Declaration since the program reflects the ideological precepts of the governing group. Its purpose was to achieve national economic independence and to assist the successful completion of the national development plans. The purpose of nationalization was primarily to extend the political control which the people secured upon independence in 1961. The nationalization can, and should, be viewed as part of a policy of self-reliance — "a measure to allow for the full mobilization of national assets for development."15 The nationalization program was bound to attract a great deal of attention abroad. But there was nothing either in principle or in implementation which was striking about it except perhaps that it "defied the notion that tropical African countries are too weak and too reliant on foreign capital and expertise to get away with it."16

12. But official permits may be needed from the Government to set up new firms under other Tanzanian legislation such as the National Industries (Licensing and Registration) Act, Tanz., No. 10 of 1967, and Trades Licensing Ordinance, Cap. 208. Judging by Government statements, new private investment in areas affected by nationalization will be discouraged.

13. The Tanzanian economy is based mainly on agriculture which accounts for 57.6% of its Gross National Product. 45% of the arable land in Tanzania is owned by 0.5% of the landowners, and 74% of the population of Tanzania is packed into 7% of its total area. Tanzania's main exports are sisal, raw cotton, coffee, and cloves. See generally G. RUTMAN, THE ECONOMY OF TANZANIA (1968).

14. The word *wabenze* meaning "the Mercedes-Benz tribe" had become something of a sick national joke with more and more TANU leaders acquiring the luxury cars.


II. IMPLEMENTING THE ARUSHA DECLARATION

As a first step in carrying out the policy of the Arusha Declaration, the government announced in February of 1967 the nationalization of nine commercial banks, eight import-export firms, and seven milling firms with associated food manufacturing interests.\footnote{The nationalization was effected through Presidential Orders on February 6, 8, and 11, 1967; and shortly thereafter the National Assembly enacted legislation unanimously accepting the political decisions already taken. For the text of these nationalization laws see 6 INTERNATIONAL LEGAL MATERIALS 1196-1228 (1967).} The announcement contained no mention of compensation.\footnote{Minister of Finance Jamal did give assurances, however, of "fair treatment" to investors. 7 AFRICA DIARY 8291 (1967).}

The immediate nationalization of the eight foreign-owned commercial banks would allow the commencement of several development plans which were being hindered by a shortage of money.\footnote{Chairman Bomani drew attention to this fact in the First Report of the Tanzania Development Corporation. See 12 EAST AFRICAN TRADE AND INDUSTRY, Sept.- Oct. 1966, at 25.} Profits that were theretofore being remitted would now be available for Tanzanian development. The banks would be able to redirect funds to public programs aimed at increasing productivity by limiting the number of loans for private consumption or for investment in realty. Money could be diverted to interests such as agricultural credit which the government thought had not been adequately served hitherto, and the trend of prior years whereby the commercial banks lent little money to the government would certainly be reversed.\footnote{Suggestions that the sudden nationalizations were a result of a fear of large outflows of capital from Tanzania following expulsion notices to Arab and Asian traders have been denied by Minister Jamal. The Standard, Feb. 8, 1967, at 5, col. 3.}

Specifically, the nationalization of the banking industry did not affect the People's Bank of Zanzibar and the National Cooperative and Development Bank of Tanzania. All other commercial banks were nationalized. These included three British, two Indian, one Dutch, one Pakistani, one African, and one Tanzanian bank.\footnote{The fact that one Tanzanian bank was included would probably make the taking non-discriminatory. In any event, special reasons existed for exempting the two banks from nationalization since one was a cooperation and development bank and the other a Zanzibar bank (the latter probably being protected by a sort of quasi-federal principle).} The National Bank of Commerce (NBC) was set up to conduct the national banking business, and all the assets of the nationalized banks were vested in it.\footnote{National Bank of Commerce (Establishment and Vesting of Assets and Liabilities) Act, Tanz., No. 1 of 1967 as amended by Tanz., Act. No. 21 of 1967 § 8.} The NBC was designed to provide adequate and efficient banking services and is under a duty to conduct its business without "discrimination except on such
grounds as are appropriate in the normal and proper conduct of banking business.\textsuperscript{23} The NBC has a virtual monopoly of commercial banking and unless present government policy changes, no new licenses will be granted under the Banking Ordinance.\textsuperscript{24}

The takeover of the Tanzanian businesses of the eight export-import firms and the two mills, all foreign-owned corporations, was accomplished by the acquisition of their entire share capital. As in the case of the banks, a new public corporation, the State Trading Corporation, was created to conduct the export-import business. In addition, it may handle wholesale distribution and retail sales if approval of the appropriate Minister is obtained.\textsuperscript{25} The management of the nationalized mills and food manufacturing firms is handled by the National Agricultural Products Board, an existing public corporation.\textsuperscript{26} Domestic Tanzanian corporations taken over have remained in existence, even after the nationalizations, and their juridical personality is unaffected by the change in ownership. The Board of Directors in each of these firms was changed.

The nationalizing legislation attempted to protect those firms which were not taken over from the public corporations which now virtually controlled the economy by placing the latter under a duty to conduct their business without "discrimination" against the former.\textsuperscript{27} This may prevent the national corporations from indulging in acts of "creeping expropriation." For example, the National Agricultural Products Board might be tempted to cut down supplies to those privately owned mills which were successful competitors against the Board's own mills. It could easily accomplish this since it has powers over marketing of agricultural products. As a consequence, a private mill owner so affected might be able to allege the practice of discriminatory treatment against him under the antidiscrimination statutes. The protection of the antidiscrimination statute is rather illusory since an enforcement mechanism is not provided. A further statute provides that the antidiscrimination provision does not impose upon the Board, "directly or indirectly, any form of duty or liability enforceable by proceedings before any court."\textsuperscript{28}

In the next phase of the nationalization program, the Tanzanian government announced that it was assuming the power to take majority holdings in eight manufacturing firms.\textsuperscript{29} The Minister for Commerce

\textsuperscript{23} Id., § 4.
\textsuperscript{24} Cap. 430, Revised Laws.
\textsuperscript{26} National Agricultural Products Board (Vesting of Interests) Act, Tanz., No. 3 of 1967 amended by Tanz., No. 14 of 1967 § 4.
\textsuperscript{27} Tanz., No. 3 of 1967 § 23; Tanz., No. 2 of 1967 § 4.
\textsuperscript{28} Id.
\textsuperscript{29} Industrial Shares (Acquisition) Act, Tanz., No. 5 of 1967.
and Industry stated, however, that this power would not be exercised unless the Government and the owner failed to agree on a price arrived at after arm's-length "willing seller — willing buyer" negotiations. It was the intention of the Government to vest these shares in the National Development Corporation (NDC). As a result, these companies would join the rapidly-growing list of industries acquired by the Government. The Government did succeed in obtaining majority holdings in seven of the eight firms on what it called a "willing seller — willing buyer" basis, but the last, the Tanzanian subsidiary of the Bata Shoe Company, refused to transfer a majority holding to the Government. After fifteen months of futile negotiations, on May 2, 1968, the Government finally exercised its powers and seized 60% of the shares in Bata.

The nationalization program continued with the complete acquisition of the National Insurance Corporation, a company in which the Government already owned a 51% interest. It was then given a monopoly over the insurance business in Tanzania. The sisal industry, Tanzania's most important export and until 1966 the foremost earner of foreign exchange, was taken over in October of 1967 after the 1966 economic reports showed a 50% decline in production. The Tanzanian Sisal Corporation was set up to run the industry. In February, 1970, the only privately-owned English language newspaper, The Standard, was taken over by the Government. Other nationalizations since 1967 include four privately-owned ginneries and three oil mills. In August 1968 the food distribution monopoly was given to the newly formed National Distribution Company and the government was also considering the gradual takeover through consumer cooperatives of the retail business in foodstuffs and other essentials. The Government also took up a 50% shareholding in the Tiper Oil Refinery. In March, 1969, it acquired the interest of the principal investors in the Kilombero Sugar Co., Ltd., and on the third anniversary of the Arusha Declaration in February, 1970, the takeover of the entire wholesaling system was announced. It must be emphasized that all of these takeovers have been within the framework of the Arusha Doctrine. The nationalizations go on.

31. The NDC was later split up (in March 1969) into three different corporations: National Agricultural Corporation, National Industrial Development Corporation and Tourist and Hotel Corporation. This split was achieved by the Public Corporation Act in 1969 (passed on March 26, 1969), which Act also empowered the President to set up new corporations by order.
32. Insurance (Vesting of Interests and Regulation) Act, Tanz., No. 4 of 1967 § 3.
33. Id., §§ 8, 13.
34. In an attempt to buoy the sisal market, the Tanzanian Government has been considering setting up a plant to produce paper out of sisal, and has desperately been seeking to find other uses for this hard fiber.
35. Supra, note 5.
III. COMPENSATING THE NATIONALIZED INTERESTS

Minister Jamal’s original statement regarding compensation was rather ambiguous: “We shall pay if there is a case for it.”\textsuperscript{36} The nationalization legislation however was much more specific and provides for the payment of “full and fair compensation.” Even this more specific statement, however, does not enlighten us concerning the precise criteria applied. In the case of companies registered in Tanzania where all or part of share capital is acquired, compensation is with respect to the shares acquired.\textsuperscript{37} In all other cases, compensation is with respect to the net value of the assets taken over.\textsuperscript{38} But, as may be expected, problems arise in trying to ascertain the value of the shares acquired or of the assets taken over, and surprisingly little guidance is available. The two methods of evaluation that have been used do not help either. The nationalization legislation itself may contain a detailed statement of the measure of compensation but not the means by which the figure was determined. Similarly, when the amount of compensation is settled through negotiation, the agreements reached do not disclose the principles employed in assessing the compensation.

In valuing shares, the fair market value might well be used, and any compensation should not be less than the price which would be paid by a willing buyer to a willing seller. There would, however, still remain the difficulty of imagining the circumstances in which a sale on the open market of the nationalized undertakings might take place. To meet this difficulty one may use the rule of the House of Lords in \textit{Short v. Treasury Commissioner}\textsuperscript{39} that the valuation could properly be based on the stock exchange prices of the shares immediately before they were compulsorily acquired. But even here one would have to take into account both the effect of measures of “creeping expropriation,” which might have reduced the value of the shares, or circumstances connected with the overall nationalization program, which may have caused the value of shares to increase. In the case of the firms in which up to 60% of the shares might be acquired, there is the prospect that the value of shares may decrease in market value or perhaps even increase, due to the fact that the firm will be linked to a larger governmental “conglomerate” and may derive benefits therefrom.

\textsuperscript{36} 16 KEESENGS CONTEMPORARY ARCHIVES 21914 (1967).
\textsuperscript{37} Tanz., No. 2 of 1967 § 22 (I); Tanz., No. 3 of 1967 § 17 (I); Tanz., No. 4 of 1967 § 6 (I); Tanz., No. 5 of 1967 § 4 (I).
\textsuperscript{38} Tanz., No. 1 of 1967 § 10 (I); Tanz., No. 2 of 1967 § 12 (I); Tanz., No. 3 of 1967 § 7 (I).
\textsuperscript{39} [1948] A.C. 534.
Where the nationalization is of physical assets as opposed to shares, compensation is in terms of net worth. Could compensation then be claimed also for loss of profits? There is some support for the view that international law does not recognize the right of a foreign company to the indefinite continuance of business in the nationalizing state free of legislative interference. Could goodwill be counted among the assets? A radical change of the existing conditions may eliminate altogether the value of certain intangible assets. Indeed, in a socialist economy operating under a strict state plan, the concept of goodwill or possession of customers largely loses its meaning.

It seems reasonable to conclude that the legislative introduction of a socialist structure does not require compensation for every interest which would have economic value.

Other questions arise as to the procedure for assessing and paying compensation, concerning which the nationalizing legislation is silent. It merely states that once the amount of compensation has been determined, the Minister of Finance is to issue a certificate setting out the amount which shall then be paid from the Consolidated Fund. The compensation is to be payable in such manner and in such installments as the Minister, after consultation with the person entitled, shall determine. If agreement cannot be reached on the compensation between the former owners and the Government, could the Government unilaterally fix the amount of compensation due? Could the former owners sue for compensation in the Tanzanian High Court or appeal to the East African Court of Appeals? The Government Proceeding Act of 1967 provides that "the Government shall be subject to all these liabilities in contract, quasi-contract, detinue, tort, and in other respects, to which it would be subject if it were a private person of full age and capacity." It therefore seems unlikely that the former owner can sue since the duty to pay compensation is not a matter of tort, contract or quasi-contract and is not the kind of "duty" to which any "private person would be subject." The issue of possible suit would assume

42. Tanz., No. 1 of 1967 § 12 (2); Tanz., No. 2 of 1967 §§ 12 (1), 22 (2); Tanz., No. 3 of 1967 §§ 7 (2), 17 (2); Tanz., No. 4 of 1967 § 6 (2); Tanz., No. 5 of 1967 § 4 (2).
43. The position would be different, as will be shown later, where the Foreign Investments (Protection) Act is applicable. See text infra at note 74.
44. Tanz., No. 16 of 1967 § 3 (1).
45. On the other hand it could be argued that the substantive duty to pay compensation arises under the nationalization acts and the Government Proceedings Act simply provides the machinery for suing. The reference to 'like proceedings between private persons' could be met by a submission that there is no reason in principle why one citizen should not sue another for statutory compensation due to him from the defendant. See Bradley, Legal Aspects of the Nationalisations in Tanzania, 3 E.A.L.J. 149 (1967).
portance if the question of diplomatic protection of the foreign company arose, for purposes of exhaustion of local remedies.

One other factor would affect the calculation of compensation for the two British banks. At the time of the nationalization, Barclay's Bank and the Standard Bank were holding in London 50 million shillings cash reserves attributable to Tanzanian customers. If the final offer of compensation made by the Government to these banks were less than these reserves and if the banks considered it unacceptable, the NBC might have to seek return of the balance in an English Court, which might thereby be called upon to rule as to the adequacy of compensation offered.

These problems may be illustrated by examining the "case history" of the banks. On May 20, 1967, a compensation agreement was reached with the first of the banks, The General Bank of the Netherlands. The Tanzanian Treasury made immediate payment to the bank of the sum of £27,400 of which £20,750 represented profits earned but not remitted before nationalization, and £6200 represented the "true" value of real property over previous balance sheet valuation. The balance was interest on the sum paid as compensation from the date of nationalization. The agreement was reached most amicably and no claim was made for goodwill.46 On June 2, 1967 settlement was reached with The National Bank of Pakistan, which sought no compensation since on the basis of reports of auditors for both parties, the Government and the nationalized bank had agreed that, fairly valued, the assets and liabilities were nearly balanced, with the latter exceeding the former.47

Not all the settlements were so prompt and amicable. Barclay's Bank and the Standard Bank began to exert pressures. Barclay's Bank made it clear that it felt it had been dealt

a blow of a type for which no material compensation is even possible. It is a blow to the spirit of cooperation with the countries in which it is established, in their striving to economic development. . . . Full and fair compensation has been promised but it remains to be seen in what manner this is fulfilled.48

Standard Bank used equally strong language:

Abounding enthusiasm and goodwill, where found dispensable without prior consultation, are not commodities to be retained through compensation agreements even assuming these to be full and fair.49

The British banks felt that Tanzania's reserves of foreign exchange would not provide sufficient cash to compensate them and that payment by installments would mortgage Tanzania's future export earnings. To exert pressure these banks announced their intention to phase out the

47. The Standard, June 3, 1967, at 1, col. 7.
49. STANDARD BANK REVIEW, Mar. 1967, at 8; this is a publication of the Standard Bank and the Standard Bank of West Africa.
British staff numbering 52, over a 12-month period. President Nyerere, however responded by asking these British staff members to hand over duties by the end of March, 1967. Greater pressure was exerted when Standard and Barclay's refused to release to the NBC a sum of £2,250,000 consisting of net balances held by them in favor of their former branches in Tanzania. The three British banks handed in compensation claims for a sum amounting to £6 million, a figure the Government refused to accept. National and Grindlays', one of the British banks, later relented, and on December 21, 1967 agreed to compensation of £300,000 to be paid in six annual installments at 6% interest. An additional sum of £7000 was paid in compensation for National and Grindlay's interest in the former Tanzania Bank of Commerce. Similar settlements were reached with the two Indian banks, but Barclay's and Standard refused to come to any agreement. Barclay's and Standard modified their claim from Sh. 120 million to Sh. 80 million and continued to freeze Sh. 50 million in assets of their former Tanzanian branches. Finally, on June 5, 1969 (28 months after the nationalization) Standard Bank agreed to a compensation settlement of £1.6 million of which Sh. 8,571,428 was to be paid on June 30, 1969 and the balance (with interest at the rate of 6%) to be paid over a period of 10 years from that date. The Standard Bank in return was to release the sum of Sh. 10 million it had blocked plus 6% interest thereon. Two days earlier Barclay's Bank had settled for £1,305,569 payable on similar terms and in return released £687,642 it had blocked. The reverse was the case with the Commercial Bank of Africa for when the bank agreed to a settlement of Sh. 569,973 the National Bank of Commerce released an account equivalent to Sh. 652,800 that it had frozen since the nationalization took place.

Compensation for the import-export and milling firms was provided in the same manner as for the banks, and the same procedure was used to compensate those affected by the Government's acquiring a majority interest in the firm. For example, a settlement was reached with British American Tobacco in which the Government had acquired a 60% interest. Compensation was fixed at Sh. 60.3 million to be paid in 24 half-yearly installments, each with 7% interest on the balance outstanding. Payments were to start in January, 1968. In the meantime the NDC was to draw dividends on the 60% unpaid shares which could amount to

50. 7 AFRICA DIARY 3485 (1967).
52. Id., Dec. 22, 1967, at 1, col. 7. This was one-third of the original claim submitted.
53. Id., June 10, 1968, at 1, col. 2.
55. Id., June 4, 1969, at 1, col. 5.
56. Id., Oct. 11, 1968, at 1, col. 5.
£200,000 annually so that the net acquisition cost would be only £50,000 annually.\(^{57}\)

Another typical compensation settlement was negotiated with five firms in which the Government had taken majority holdings. These firms accepted compensation of £3.5 million. In most cases the parent companies are making loans at 7 to 7.5% interest to the NDC to enable them to purchase immediately the negotiated number of shares. These loans are repayable at from 75% to 100% of the NDC's share of the profits over periods of up to 12 years.\(^{58}\) Another common form of settlement was that reached with Chande Industries which accepted £7.5 million as compensation. An initial payment of £2.5 million was made in January, 1968, and the balance was to be paid in two annual installments with interest at the rate of 6%. Perhaps the reason the compensation was paid so quickly in this case is that Chande Industries agreed to reinvest the entire sum in Tanzania.\(^{59}\)

Two compensation settlements which are atypical merit scrutiny. In working out the settlement with Tanzania Millers Limited it was agreed that one of the parties entitled to compensation should receive it at an accelerated rate, "due to its special character as an industrial development financing institution in which the Government is a partner."\(^{60}\) The Compensation settlement with Bata Shoe Company is also in a class by itself. After 15 months of futile negotiations to get Bata to sell a majority holding to the Government on a willing seller — willing buyer basis, the Government simply took over 60% of the shares and announced that compensation will be based on the market value, taking into account the state of the factory and production position.\(^{61}\) This particular transaction could perhaps be termed "creeping expropriation," since during the 15 months of negotiation the company had run down very considerably.

Generally speaking, however, the Tanzanian Government has been eager to settle compensation claims in as fair and expeditious a manner as possible. By the end of 1967 compensation settlements had been worked out for half the total values acquired, "a record for a major nationalization program."\(^{62}\) During 1968, however, less progress was made in achiev-

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57. 14 BUSINESS INTERNATIONAL 291 (1967).
58. The Standard, Aug. 28, 1967, at 1 col. 7. A typical example is the NDC's acquisition of a 60% holding in Tanzania Ltd. ND, costing 1.98 million. A loan at 7% interest has been given the NDC by the parent company to make this acquisition. The loan is repayable in 12 years in semi-annual installments.
59. Id., Jan. 18, 1968, at 1, col. 7. This would of course mean that no foreign exchange would be involved.
60. The party concerned was the Tanganyika Development Finance Co., Ltd. Id., June 14, 1968, at 1, col. 8.
62. See Minister Jamal's statement, supra note 34, at 25.
ing settlement of compensation claims. But by June 7, 1969, 98% of all the claims for compensation for assets taken in February, 1967, had been settled on a mutually agreed basis. Among those claims remaining unsettled are the sisal interests, which are of a highly complex nature, not least because they are so widely scattered.

IV. LEGALITY OF THE TANZANIAN NATIONALIZATIONS

A. National Standards

The Tanzanian Constitution contains no Bill of Rights. The only reference to fundamental rights is made in a preamble, which stresses that the recognition of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace. The “inalienable rights” enumerated in the Preamble include the right to the enjoyment of property. The Preamble also mentions that it is the duty of men to conduct the affairs of the State so that its resources are preserved, developed, and enjoyed for the benefit of its citizens as a whole, and in so doing, prevent the exploitation of one man by another. The Preamble is not judicially enforceable and was not intended to be a part of the nation’s law, although in difficult cases, the courts would probably interpret the substantive provisions of the Constitution in the spirit of the Preamble.

Under the Land Acquisition Act of 1967, land required for a public purpose can be acquired on the payment of compensation. But this requirement of compensation is applicable only to acquisition of developed land, not underdeveloped land or vacant ground. Less than full compensation will be allowed for land which is inadequately developed.

The individual’s position under Tanzanian law, so far as bringing suits against the Government for the recovery of compensation, has been dealt with earlier.

Under Section 6 of the Foreign Investment (Protection) Act of 1963,
if a foreign company which has received a certificate of approval is compulsorily acquired, the full and fair value of such enterprise or property shall be ascertained, and the holder of certificate relating to such enterprise shall be paid a portion specified in his certificate as the approved portion.\textsuperscript{60} If the property expropriated consists of shares or stocks representing participation in a corporate entity, then the certificate holder is entitled to the full and fair value of shares specified in the certificate.\textsuperscript{70} If the investor disagrees with the Government as to the valuation of the nationalized enterprise, "the question shall be referred to and determined by arbitration."\textsuperscript{71} These provisions failed to engender any enthusiasm in potential investors because they are guaranteed payment of only the portion specified in the certificate.

In 1967 the Tanzanian law underwent major change and now any foreign investor, including foreign shareholders in a company registered in Tanzania, has certain guarantees if his investment has been certified by the Minister of Finance for the purposes of the Act. When any nationalization or expropriation of an enterprise or property has been approved by the Ministry of Finance, the full and fair value thereof shall be paid. If a dispute arises as to this amount, there is recourse to arbitration. Compensation is to be payable in the approved foreign currency and is to be transferable from Tanzania at the official rate of exchange.\textsuperscript{72} In the absence of any agreement authorizing payment in installments, the government would seem bound to make a single lump sum payment.

Certain of the businesses nationalized were within the protection of the Foreign Investments (Protection) Act, and the nationalizing legislation makes it clear that it does not affect in any way their rights under this act.\textsuperscript{73} The nationalizations in Tanzania therefore conform to the national standard.

B. INTERNATIONAL STANDARD

The international standard applicable to the expropriation or nationalization of an alien's property prescribes three requirements.\textsuperscript{74} First, there is the limitation that the taking must be for some public purpose. This requirement is obviously met by the Tanzanian nationalizations, which form part of a social and economic program of the Government. The

\begin{footnotes}
\item[69] Act to Give Protection to Certain Approved Foreign Investments and Matters Incidental Thereto of 1963, § 6 (1).
\item[70] Id., § 6 (2).
\item[71] Id., § 6 (3).
\item[72] Foreign Investment (Protection) Amendment Act, Tanz., No. 25 of 1967.
\item[73] Tanz., No. 2 of 1967 § 12 (3); Tanz., No. 4 of 1967 § 6 (3).
\item[74] See G. White, NATIONALIZATION OF FOREIGN PROPERTY 4-11 (1961) for a general discussion of the international standard.
\end{footnotes}
second requirement is that the taking should not be discriminatory. This charge could not be leveled against the Tanzanian nationalizations, since many of the firms taken over were Tanzanian, a striking example being the government-sponsored Tanzania Bank of Commerce. The third requirement is that there must be fair compensation. The Government in Tanzania promised full compensation, and although the “Hull formula” test of promptness or the Hickenlooper requirement of speediness was not satisfied, the compensation settlements were worked out by mutual agreement between the Government and the affected interests and there were no complaints, formal or informal, from the latter about the fairness of the compensation settlements. The Tanzanian nationalizations therefore may be said to have complied with the international legal standard. The manner in which they may be said to have contributed to the development of international legal principles in the field will be examined in the concluding section of this note.

V. AN ASSESSMENT OF TANZANIA’S NATIONALIZATION PROGRAM

It was feared that President Nyerere’s action in embarking upon this program of nationalization was “certain to discourage badly needed investment from abroad and deal a blow at the remnants of unity and regional cooperation in East Africa.” Many felt that, while the Government could not be criticized for its ultimate goal, there was room for argument when it came to the method of execution. “Could not the same end have been achieved with less shock to the commercial and industrial sector and to foreign confidence?” It was feared that the nationalizations would have an adverse effect on foreign aid and on foreign investment. It was further feared that the nationalization program would cause skilled workmen to emigrate to non-socialist nations, decreasing pro-

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75. This “formula” was stated by Secretary of State Hull in a letter dated July 21, 1938 to the Ambassador from Mexico concerning expropriations of American-owned agrarian and oil properties between 1915 and 1940. For the text see HACKWORTH, DIGEST OF INTERNATIONAL LAW 655 et seq. (1942).
77. There were no bilateral treaties or agreements involved as regards the nationalization program. If an American AID investment guaranty had covered any of the nationalized investments the nationalization would certainly have constituted “expropriatory action.” Whether the “substantial interference” in the businesses not completely taken over would be expropriation under international law will be discussed presently. It would be “expropriatory action” for purposes of an AID guaranty.
80. Not that Tanzania is much concerned about this. “Dependence on foreign aid will take us nowhere, and if anywhere, it will lull us to sleep.” See the Ministry of Commerce and Industry of Tanzania pamphlet, SECOND FIVE YEAR PLAN 5 (1969).
ductivity, and profits in Tanzania. It was thought that money would be spent on compensation which was needed for developmental purposes. The fact that the Tanzanian nationalizations could have unforeseen repercussions caused anxiety all over the continent.

The nationalizations had an immediate adverse effect on trade, coupled as they were with the temporary imposition of exchange restrictions between Tanzania and Kenya or Uganda. The shift in banking operations from private to public sectors brought a disruption in the financing of imports. Some capital left the country. But this downturn was temporary. By April 1967 new trade and business credit operations had been established and production was recovering. There was a steady revival of normal economic activity. By August 1967 the upheaval and dislocation had apparently been overcome and the nationalized undertakings were in the midst of active reorganization. The scarcity of skilled personnel was alleviated by replacements from abroad and by the centralization of various industries such as commercial banking.

The revenue for 1966-67 exceeded the budgetary estimate by £4 million and by the end of the fiscal year (June 30, 1967) the government was able to spare £8.5 million out of its own resources for developmental expenditure, and external resources provided another £6 million. The newly created public corporations were turning up huge profits. The NIC was able to report that its business had more than doubled during March, 1967 and all through the fiscal year 1967-68 was able to sustain this doubled rate of business. The NBC in its first full year of operation made a profit of Sh. 17.2 million despite a loss of about Sh. 12.1 million due to the devaluation of the British Pound. The Managing Director of the NBC made it clear that the "profit was realized not by monopolistic increases in lending or charges. In fact, depositors received more for their funds than in any previous year." During 1968-69 the NBC made a profit of Sh. 31.2 million. During 1968 the National Development Corporation was able to plough back profits of Sh. 30 million into developmental activities. The previous year, among the developmental activities completed were 57 bridges, 3283 miles of roads, 46 schools, 44 dispensaries and 44 new settlements. The State Trading Corporation made a profit of £250,000 in the first 8 months and, generally speaking, the public corporations had confounded those who had predicted that

82. The Nationalist, Jan. 1, 1969, at 1, col. 2.
84. These statistics are taken from JUHURI ZA WANANCHI KIJENGA TANZANIA, a booklet published by the Tanzanian Government in 1968. The booklet reveals that while these projects were originally estimated to cost Sh. 22.2 million in fact they cost Sh. 19.2 million because through self-help capital money was saved.
the public enterprises would be less efficiently run than the private businesses. On the second anniversary of Tanzania's nationalization program, Reginald Green, an American expert who was acting as economic advisor to the Tanzanian treasury, was able to remark that with a few exceptions every government-controlled industry "has a better profit record than before nationalization," and that the Government was getting $13 million a year that used to go as dividends to various shareholders.85

The nationalizations do not seem to have had the adverse effect on foreign aid that was feared. Tanzania has received a much larger inflow of aid — from both East and West — than before nationalization. China has offered considerable aid in the building of the Tanzam Railway and the United States last year gave $16.5 million in aid to Tanzania — the single largest allotment so far made by the United States to Tanzania.

It was also feared that the nationalizations would adversely affect foreign investment in Tanzania. President Nyerere felt otherwise, and thought that the nationalizations would in fact help stimulate foreign investment in Tanzania. He felt that all reasons for uncertainty in the private sector had been removed after the nationalizations. The future policy was clearly enunciated for foreign investors. No future foreign investment would be allowed in an industry manufacturing "weapons of death" or in any of the nationalized industries. Future investment in the industries subjected at present to majority control by the government would also be so subjected. Complete private ownership was welcome in the other industries, and the Arusha Declaration stresses that although plans for development are not based on receiving foreign capital, this does not mean that all foreign investment is unwelcome. In fact, President Nyerere stated, "We can now welcome the enterprise of private investors without reservations because we no longer have any cause to fear the effect of their activities on our social purpose."86 An assurance has been given that firms which have not been nationalized will not be taken into exclusive public ownership, and that firms which are not included in the public list may now rest assured that the Government does not desire to obtain majority participation in those enterprises. The Government feels that with the publication of these two lists of firms it has fulfilled its obligations under the Arusha Declaration.87 Certain investors seem to be satisfied with this statement of policy. Rothman's Tobacco Company, for example, indicated its willingness to invest in

86. AFRICA DIARY 3291 (1967).
87. Svedsen, Socialist Problems after the Arusha Declaration, 4 E.A. J., May 1967, at 16, reporting that this assurance has been repeated both by the Minister of Finance and the Minister of Commerce and Cooperatives.
Tanzania just two days after the initial nationalizations took place. "Some new investors have achieved a working partnership with the Government in the Tanzanian National Development Corporation."^{88}

It would be fair to say that the Tanzanian nationalizations have not had the adverse effect it was feared they would have on foreign investment. It would also be fair to say that the clear statement of policy by the Tanzanian Government has not attracted the foreign investment that it was hoped would be attracted. One possible cause of this is the rather vague phrase, "any other big industry upon which a large section of the population depend for their living, or which provides essential components for other industries" in the Arusha Declaration's definition of the "major means of production" to be brought under the control and ownership of the Government. If this phrase were deleted from, or made more specific in, the Arusha Declaration, great foreign investment might be attracted to Tanzania.

The Tanzanian nationalizations were expected to have serious repercussions throughout Africa and especially in East Africa. But Tanzania's lead has not been followed in either Kenya or Uganda.\(^{89}\)

It was also thought that Tanzania could not fully execute the nationalization policies and simultaneously fulfill its obligations under the East African Common Market Treaty.\(^{90}\) In fact, Tanzania has been able to do both, and with a reasonable degree of success. Paradoxical though it might seem, the Tanzanian nationalizations have probably done other African countries an indirect service. There are substantial foreign investments in Zambia and Kenya and investors may well decide that the best safeguard for their existing assets is to increase investments and to assist the governments in their development efforts. The more Tanzania appears to succeed, the more apprehensive should foreign investors in neighboring countries become, and the harder will they work toward African development.

VI. CONCLUSION

It remains only to assess the significance and contribution of the Tanzanian experiment to the development of the international legal system. One of the major differences in the effect of an expropriation and a nationalization program such as that of Tanzania is that in the former


\(^{90}\) McAuslan, Recent Developments in Tanzania, 24 World Today 29, 35 (1968).
there is a single act of taking and a single (or a limited number) of compensation liabilities to meet, while in the case of nationalization there usually is a series of takings with a corresponding series of compensation payments to be made. This inevitably affects one of the requirements of the international minimum standard, namely, that prompt and effective compensation be paid. The Tanzanian experience points out very clearly that in case of a *nationalization* program it is virtually impossible to make both prompt and effective compensation payments without draining the nation completely of foreign exchange reserves. It is clear that Tanzanian compensation settlements do seek to insure the payment of effective compensation even though such payment may have to be deferred in order to retain its effectiveness. This seems a realistic approach, and perhaps the international minimum standard would require effectiveness of compensation as a result of nationalization programs, even at the cost (within limits) of promptness.

As to the quantum of compensation, the nationalizing legislation which promised payment of “full compensation” in fact paid a lesser “fair” compensation due to the exclusion of a “goodwill” factor. The Tanzanian nationalizations seemed to indicate that compensation does not need to be paid for every interest which is of economic value in a capitalist system, especially if that interest (like goodwill) will have little or no economic value in the new social system being established. By this approach the Tanzanian experience seems to lend support to an international minimum standard requiring fair or adequate compensation.

The Tanzanian nationalizations also reaffirmed two other requirements which the international minimum standard may be said to prescribe, that the taking be for a public purpose and that it be non-discriminatory. But whereas the takings were non-discriminatory in Tanzania, the final compensation settlements cannot be so described. This seems to lend support to the view that while inadequacy of compensation (or discrimination as regards compensation settlements) may give rise to liability in international law it does not render the original nationalization wrongful.\(^9\)

The Tanzanian nationalizations also indicate that it is unlikely that diplomatic pressures will be brought to secure compensation settlements after nationalizations unless the deprivation involved is extreme. Indeed, another lesson to be learned from the Tanzanian Bank nationalizations is that the blocking of assets might not always work since the two British banks ultimately had to pay interest on the assets they had blocked. The

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taking over of the Bata Shoe Company stresses the need for the development of more effective rules regarding compensation after "creeping expropriation" has radically reduced the market value of the holdings seized.

The insurance nationalization and the taking over of majority control in certain businesses could possibly help in the fashioning of new rules in the international legal system. The creation of a State monopoly in insurance, of necessity, had the effect of depriving all Tanzanian private insurance firms of their business. The nationalizing act provides no compensation for losses resulting from the monopoly to such companies, who are therefore without remedy in Tanzanian law. Could a foreign insurance company that suffers loss through the legislation request its government to take up a claim for compensation internationally? In the Oscar Chinn case, a majority of the International Court of Justice held that aliens did not enjoy a vested right in retaining their customers and the government was not bound to maintain conditions under which they could continue to make a profit. The Tanzanian experience seems to bear out this view since, in fact, no claims were made for compensation by any of the insurance companies affected.

The cases of compulsory acquisition of majority shareholdings in the industrial firms pose other problems. If the foreign interests concerned wish to continue to participate in the Tanzanian economy, they have no choice but to do so as holders of minority interests. National political institutions may promulgate, and from time to time change, the conditions under which industrial activity (whether domestic or foreign) takes place. "The acceptance of a joint venture is sometimes the only alternative to desisting from or abandoning an existing enterprise by a foreign investor." If a company affected by the government's new powers wishes to continue activities in Tanzania it would have to accept holding a minority interest. The advantage to the company of establishing a good working relationship with the government is in the interest of the government would then have in the profitability of the company's enterprise.

But what if the company affected by the compulsory acquisition of the shares is unwilling to accept partnership with the Government? Could the company argue that the enforced loss of 60% ownership, and thus of control, amounts to an expropriation of its entire interest? Could the company then require the Government to acquire its entire holding? There is no provision of Tanzanian law which would enable the company

93. Fatouros, supra note 44, at 322.
95. Bata Shoe Company seems likely to advance precisely this argument.
to do this, but probably customary international law would support such a claim since "the right least subject to successful interference is the right of the owner to manage this enterprise." Thus, if the company could show some grounds for requiring the government to acquire the entire share capital of the company it could probably claim compensation for its entire interest. As a practical matter, of course, such an attitude by the company might act to its disadvantage and result in a less favorable award of compensation on arbitration than it might have been able to negotiate with the Government since the arbitral tribunal might hold that the company's own refusal to cooperate had depreciated the value of the undertaking and therefore the amount of compensation.

While the national standard has its uses in affording protection to foreign interest against nationalization, there can be no gainsaying that an international standard is vital too. The ease with which national laws can be done away with, even if embodied and entrenched in the constitution, has been dramatically demonstrated by the suspension of the constitutions of several governments in the current wave of coup d'etats in Africa. In view of this the international standard assumes crucial importance and therefore so does Tanzania's contribution to the development of such an international standard.


97. A workable solution might be to place the company under a duty to cooperate for a reasonably limited period, say three to five years, at the end of which the government would be required to assume complete ownership. One major limitation to such a solution is that obviously no long term advantage is to be gained by either side in a partnership to which one side continues to be opposed.

98. In fact, often no more than a declaratory function is often ascribed to the national standard as "representing formal expression of an attitude favorable to foreign investment." Fatouros, supra note 44, at 122.