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# Expropriation in Argentina and Brazil: Theory and Practice

KEITH S. ROSENN\*

Latin America is presently the repository of about \$13.5 billion in U.S. direct investment,<sup>1</sup> which is equivalent to about 43 percent of the total gross investment of the region.<sup>2</sup> With such a high percentage of their economies in foreign hands, the attitudes of Latin American nations towards foreign capital are predictably ambivalent. There is deep resentment of foreign economic domination and fear of overdependence, coupled with the recognition that domestic investment and technology are insufficient for speedy economic growth. Perennial balance of payments problems mandate restrictions on the outflow of dividends and royalties, but substantial reinvestment of retained earnings increases the amount of foreign ownership, aggravating the dependency concern. This ambivalence tends to be manifested in alternate cycles of wooing and eschewing foreign investment.

Given the extensive use of expropriation<sup>3</sup> in Latin America as a legal device for promoting socio-economic change, as well as the present spate of expropriatory activity directed against foreign investment,<sup>4</sup> knowledge of the protection given by Latin American domestic law to private property is essential to an informed investment decision. Such knowledge is particularly important in the Latin American context for three reasons: (1) since the time of the formulation of the Calvo doctrine (c.1870), Latin Americans have insisted that foreigners are entitled to no greater legal protection than nationals;<sup>5</sup> (2) expropriation may require a "denial of justice" in the local courts to trigger the host country's liability under U.S. Investment Guar-

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1. Lupo, *U.S. Direct Investment Abroad in 1972*, 53 SURVEY OF CURRENT BUS. 20, 26 (U.S. Dep't of Commerce, Sept. 1973).

2. INTER-AMERICAN DEVELOPMENT BANK, ECONOMIC AND SOCIAL PROGRESS IN LATIN AMERICA 36 (1972) [author's calculation].

3. Expropriation is used throughout this article to refer to any compensable taking or modification of private property rights through the government's exercise of sovereign powers. As such, it is virtually synonymous with condemnation or eminent domain, and the terms are here used interchangeably. No judgment about the adequacy of the compensation paid or owed is implied.

4. See Wesley, *Expropriation Challenge in Latin America: Prospects for Accord on Standards and Procedures*, 46 TUL. L. REV. 232, 234-44 (1971).

5. See generally D. SHEA, THE CALVO CLAUSE (1955).

anty Program;<sup>6</sup> and (3) the U.S. Government's refusal to bludgeon Latin American governments into favorable resolution of investment disputes through the use of devices like the Hickenlooper Amendment<sup>7</sup> portends even greater reliance on local judicial remedies.

This article will examine the constitutional and statutory provisions regulating expropriation in Argentina and Brazil, which between them account for more than one-fourth of all U.S. direct private investment in Latin America.<sup>8</sup> Its purpose is to assess to what degree these provisions have been and may continue to be effective safeguards of property rights.

### I. CONSTITUTIONAL EMINENT DOMAIN REQUIREMENTS

The Constitutions of both Argentina and Brazil, heavily influenced by the Constitution of the United States, have always provided, in essence, that private property<sup>9</sup> may only be taken for public use and upon payment of just compensation. The 1853 Constitution of Argentina, which is still in effect today, provides:

Property is inviolable, and no resident of the Nation may be deprived of property without a judgment based upon law. Expropriation for public utility must be authorized by law and is subject to prior compensation. . . . The confiscation of property is forever stricken from the Argentine Penal Code.<sup>10</sup>

Although the 1819 Constitution had required "just compensation,"<sup>11</sup> the change in wording to "prior compensation" resulted in no dilution of com-

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6. *E.g.*, Investment Guaranty Agreement with Brazil, Feb. 6, 1965, [1967] 2 U.S.T. 1807, T.I.A.S. No. 6327 (effective Sept. 17, 1965). This Agreement requires prior exhaustion of local remedies before the United States can espouse an investor's claim. The Agreement also stipulates that expropriation per se does not give rise to a question of public international law between the two countries unless there has been a denial of justice. In ratifying the Agreement, the Brazilian Senate added the reservation that "denial of justice" is "understood to mean the non-existence of the regular courts, or of normal means of access to such courts; refusal on the part of the competent authority to render a judicial decision in violation of internal procedural law." Carl, *Incentives for Private Investment in Brazil*, 6 COLUM. J. TRANSNAT'L L. 190, 248 (1967).

7. See Eder, *Expropriation: Hickenlooper and Hereafter*, 4 INT'L LAW. 611 (1970); Rogers, *United States Investment in Latin America: A Critical Appraisal*, 11 VA. J. INT'L L. 246, 251-52 (1971); Comment, *Argentina and the Hickenlooper Amendment*, 54 CALIF. L. REV. 2078 (1966).

8. See Lupo, *supra* note 1, at 26.

9. The constitutional concept of property is broadly defined in both Argentina and Brazil to include any right or interest which has a legally recognized economic value. See S. LOZADA, INSTITUCIONES DE DERECHO PÚBLICO 249 (1966); 5 PONTES DE MIRANDA, COMENTÁRIOS À CONSTITUIÇÃO DE 1967, at 364-66 (1968).

10. CONSTITUCION art. 17 (1853, as amended 1866, 1898, 1957) (Argen.).

11. CONSTITUCION arts. 123 & 124 (1819) (Argen.).

pensation requirements, for implicit in the Argentine juridical concept of compensation is the requirement that it be "just."<sup>12</sup>

From 1949 to 1956, the 1853 Constitution was temporarily supplanted by Perón's revised version. This 1949 Constitution displayed a markedly different attitude towards private property. It emphasized the "social function of ownership" and conspicuously deleted the adjective "invulnerable" used to characterize property under its predecessor. However, the requirement of prior compensation for the exercise of the power of eminent domain was retained.<sup>13</sup> Since the 1966 military revolt that brought General Onganía to power, the 1853 Constitution has had one foot in legal limbo.<sup>14</sup> The Perónist government has pushed it further into limbo by convening a constituent assembly in September of 1974 that is expected to restore a number of the modifications established by the 1949 Perónist Constitution.<sup>15</sup>

Brazil has had six constitutions, give or take one;<sup>16</sup> each has similarly protected private property.<sup>17</sup> The present Constitution provides:

12. *Provincia de Santa Fe v. Nicchi*, 268 Fallos 112, 114, [1967-IV] J.A. 115, 127 La Ley 164 (1967); *Administración Gral. de Vialidad Nacional v. Fojticova de Feith*, [1962-VI] J.A. 488, 490, 108 La Ley 685, 686 (Federal Chamber of Appeals of La Plata, *en banc* 1962) (vote of Dr. Fernández del Casal); Gordillo, *Argentina*, in *EXPROPRIATION IN THE AMERICAS* 11, 19-20 (A. Lowenfeld ed. 1971).

13. CONSTITUCION art. 38 (1949) (Argen.).

14. Article 3 of the Statute of the Argentine Revolution, [1966] Anuario 233, maintained in force only those portions of the constitution which did not conflict with the goals enunciated in the Act of the Argentine Revolution.

15. 7 *LATIN AMERICA* 415 (1973).

16. Two of Brazil's "constitutions" are somewhat dubious. The 1937 Constitution, a product of the Vargas dictatorship, technically did not take effect until ratified by a plebiscite, which was never held. But this technicality did not prevent Vargas from treating it as though it were in effect. The 1967 Constitution, a product of the 1964 military revolution, was reissued in its entirety (with a few significant changes in substance and many insignificant changes in style) as a constitutional amendment in 1969. Some characterize the product as the 1969 Constitution; others consider it the 1967 Constitution, as amended. The figure of six arrived at in the text counts the 1937 Constitution but not the 1969 "amendment."

17. CONSTITUIÇÃO art. 179(22) (1824) (Braz.) provided:

The right of property is guaranteed in all its plenitude. If the public welfare, legally verified, requires the use and employment of the property of a citizen, he shall receive prior compensation for its value. The law shall define the cases in which this unique exception shall apply and regulate the determination of compensation.

CONSTITUIÇÃO art. 72(17) (1891) (Braz.) provided:

The right of property is maintained in all its plenitude, except for expropriation for necessity or public utility upon prior compensation.

CONSTITUIÇÃO art. 113(17) (1934) (Braz.) provided:

The right of property is guaranteed, but it may not be exercised against the social or collective interest, as determined by law. Expropriation for necessity or public utility shall be effected in accordance with law, upon prior and just compensation.

The right of property is guaranteed, except in case of expropriation for public necessity or utility or social interest, in which event prior and just compensation must be paid in cash, subject to the provisions of Article 161 permitting the expropriated party to accept payment in government bonds with an exact monetary correction clause. In case of imminent public danger, the competent authorities may use private property, assuring compensation to the owner at a later date.<sup>18</sup>

Although the compensation must be both "prior" and "just," Brazilian jurists and courts, like those of Argentina, have considered the adjective "just" redundant.<sup>19</sup>

## II. STATUTORY REGULATION OF EMINENT DOMAIN

The Constitutional provisions of both Argentina and Brazil have been fleshed out by detailed statutes regulating the operation of eminent domain. The Argentines regard expropriation as a mixture of private and public law; hence the subject is regulated by both the federal and provincial governments.<sup>20</sup> While there are slight differences with respect to procedure and compensation, the provincial constitutions and statutes dealing with expropriation are quite similar to the federal provisions.<sup>21</sup> However, the provincial courts have tended to accord the condemnee slightly better treatment than the federal courts.<sup>22</sup> Although Brazil also has a federal system, expropriation is governed by federal rather than state legislation.<sup>23</sup>

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CONSTITUIÇÃO art. 122(14) (1937) (Braz.) provided in part:

The Constitution shall assure Brazilians and resident aliens the right to liberty, individual security, and property in the following terms:

. . . (14) the right to property except for expropriation for necessity or public utility, upon prior compensation. Its subject matter and its limits will be defined in the laws which regulate its exercise.

CONSTITUIÇÃO art. 141(16) (1946) (Braz.) provided:

The right of property is guaranteed, except in the case of expropriation for necessity or public utility, or social interest, upon prior and just compensation in cash.

18. CONSTITUIÇÃO art. 153(22) (1967), *as amended* 1969 (Braz.).

19. See R. BARCELLOS DE MAGALHÃES, *TEORIA E PRÁTICA DA DESAPROPRIAÇÃO* 185-90 (1968).

20. Gordillo, *supra* note 12, at 17. However, the current trend in Argentine doctrine is to regard expropriation as predominantly public law. G. Bidart Campos, *Régimen Constitucional de la Expropiación*, 144 *La Ley* 953 (1971).

21. For a comparison of the federal expropriation law with that of the province of Buenos Aires, see F. MANCUSO, *LEY GENERAL DE EXPROPIACIONES* No. 5708 DE LA PROVINCIA DE BUENOS AIRES ANOTADA Y CONCORDADA CON LA LEY NACIONAL 13.264 (1963).

22. Gordillo, *supra* note 12, at 18.

23. Under the 1934 Constitution the states could legislate with respect to expropriation, but only to complement or supplement federal legislation. This limited legislative competency was withdrawn in the 1946 Constitution. The 1967 Constitution has maintained the

The basic Argentine and Brazilian condemnation statutes<sup>24</sup> in force on the federal level are products of the Perón and Vargas dictatorships, respectively, when the normal political power of propertied groups was somewhat attenuated. Consequently, these statutes occasionally disadvantage the condemnee in ways which are inconsistent with the spirit, if not the letter, of the constitutional provisions protecting private property.

### A. *The Public Purpose Requirement*

The expropriatory process in both countries begins with a governmental decree declaring that the property is being condemned for a public purpose (*utilidad pública*). Argentina requires specific legislation designating a particular use as a public purpose.<sup>25</sup> Brazil, on the other hand, has statutorily designated a long list of generic public purposes.<sup>26</sup> Although in neither country is the concept of public purpose precise,<sup>27</sup> once the Executive has designated a particular piece of property for condemnation, it is seldom possible to prevent the taking in the courts.<sup>28</sup> However, the condemnation

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federal government's monopoly on expropriation legislation. 5 PONTES DE MIRANDA, *supra* note 9, at 384-85.

24. Law No. 13.264 of Sept. 17, 1948, Concerning Expropriation (Argen.) [hereinafter cited as Argen. Expropriation Law of 1948]; Decree-Law No. 3.365 of June 21, 1941, Concerning Expropriation (Braz.) [hereinafter cited as Braz. Expropriation Law of 1941].

25. Argen. Expropriation Law of 1948, art. 2.

26. Braz. Expropriation Law of 1941, art. 5.

27. In Argentina, "public purpose" is defined as "including every case aimed at satisfying a requirement determined by social betterment." Argen. Expropriation Law of 1948, art. 1. Brazil, as in many countries, distinguishes, somewhat artificially, between two classes of takings: "public purpose" and "social interest." Public purpose takings encompass typical public works, such as roads, schools, or hospitals. Social interest takings involve property which may later be redistributed to private parties, such as agrarian reform or urban renewal. See Seabra Fagundes, *Brazil*, in EXPROPRIATION IN THE AMERICAS 49, 61 (A. Lowenfeld ed. 1971).

28. The Argentine courts either regard the public purpose issue as non-justiciable or reviewable only for extreme arbitrariness. *Provincia de Jujuy v. Ledesma Sugar Estates & Refining Co.*, 209 Fallos 35 (1947) (nonjusticiable); *Gobierno de la Nación v. Ingenio y Refinería San Martín del Tabacal, S.A.*, 209 Fallos 390 (1947) (reviewable only for extreme arbitrariness). *But see* *Nación Argentina v. Jorge J. Ferrario*, 251 Fallos 246 (1961) (taking overturned where former president Perón had arbitrarily ordered condemnation of a car for a friend's use). See generally 4 S.V. LINARES QUINTANA, *TRATADO DE LA CIENCIA DEL DERECHO CONSTITUCIONAL* 142-53 (1956); Luqui, *La Revisión Judicial de la causa de Utilidad Pública en al Expropiación*, 128 La Ley 1022, 1025 (1967).

The Brazilian judiciary has been precluded by statute from making an independent determination in the condemnation proceeding as to whether the use to which the property will be put does in fact benefit the public. Braz. Expropriation Law of 1941, art. 9. However, the Brazilian courts will review the issue of whether the taking has been for a public purpose in an ordinary action brought to set aside the taking. R.E. No. 14.454, 289 R. Trib. 889 (S.T.F. 1958); *Silva v. Prefeitura do Salvador*, R.E. 13.367, 141 R. For. 203 (S.T.F. 1949) (taking for

will lapse if there is neither a settlement nor institution of a condemnation suit within a specified period of time from the publication of the decree.<sup>29</sup>

### B. *Retrocession*

In addition, if the property is not used or ceases to be used for a public purpose, the condemnee has a chance to recover his former asset by invoking his right of repurchase (*retrocesión*). Though the question has been hotly contested, it would now appear settled that the right of retrocession is recognized in both Argentine<sup>30</sup> and Brazilian law.<sup>31</sup>

### C. *The Expropriating Agency*

Exercise of the power of eminent domain is restricted to the federal government, states or provinces, and municipalities. However, public utilities through contract or concession, condemnation power is often extended by statute to government instrumentalities, or to public utilities through contract or concession.<sup>32</sup> But designation of specific parcels for condemnation requires an executive decree.<sup>33</sup>

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use of a private club set aside as an abuse of power); *Luiz Hermany Filho & Cia. v. Prefeitura do Distrito Federal*, 26 R.D.A. 223 (7th Cam. Civ. T.J.D.F. 1951) (taking for use by private athletic club set aside as an abuse of power).

29. Argen. Expropriation Law of 1948, art. 47 sets this period at 2, 5, or 10 years, depending on the specificity of the expropriation designation. Braz. Expropriation Law of 1941, art. 14, provides a period of 5 years for "public purpose" takings; "social interest" takings lapse after only 2 years. Law No. 4.132 of Sept. 10, 1962, Concerning Expropriation for Social Interest, art. 3 (Braz.).

30. The Argentine Supreme Court has recently upheld retrocession as a constitutional right. *Ortega, Juan de Dios v. Dirección Gral. de Fabricaciones Militares*, 271 Fallos 42, [1968-V] J.A. 240 (1968).

31. Brazilian courts have reached an analogous result to that in Argentina by applying Article 1150 of the Civil Code, which provides:

The Federal Government, State, or Municipality shall offer the former owner the expropriated property at the price paid whenever the property is not being used for the purpose for which it was expropriated.

The Brazilian courts have restricted application of this principle to cases in which the condemning agency fails to use the property at all or unlawfully transfers it to a third party. *Espólio de Maria Emilia Cardoso de Magalhães Mexia Santos v. Pref. Mun. de Santos*, 59 R.T.J. 631 (S.T.F. *en banc* 1971); *Maria Carlota de Azevedo Penteado e outros v. Fazenda do Estado*, 57 R.T.J. 46 (2d Term S.T.F. 1970); *Seabra Fagundes*, *supra* note 27, at 73. The courts and commentators are divided as to whether the former property owner's remedy should be recovery of his property or merely damages. E. Chamoun, *Da Retrocessão nas Desapropriações* 47-65 (1959); 5 J. Cretella Júnior, *Tratado de Direito Administrativo* 169-72 (1968); R. BARCELLOS DE MAGALHÃES, *supra* note 19, at 276-305.

32. Gordillo, *supra* note 12, at 27-29. Braz. Expropriation Law of 1941, arts. 2 & 3.

33. To prevent embarrassment to the federal government, Brazil recently enacted a decree-law which forbids the states and municipalities from expropriating shares or capital rights

#### D. Settlement Procedures

In Argentina there is little possibility of a negotiated settlement without special legislation. To prevent fraudulently large offers, the expropriating agency is prohibited from offering the property owner more than 130 per cent of tax appraisal value.<sup>34</sup> Since this figure rarely reflects current market value,<sup>35</sup> the condemnee will usually reject the offer. In Brazil, on the other hand, there is no such constraint on the expropriating agency. Thus, some (though not a great many) offers are reasonable and result in settlements.

#### E. Appraisal Procedures

Judges in both countries rely heavily on the opinions of experts in determining the value of expropriated property. For real property appraisal in Argentina, the courts have been required to utilize the services of an administrative body—the Appraisal Tribunal (*Tribunal De Tasaciones*). For eminent domain valuation, the Tribunal is comprised of ten permanent members and two ad hoc representatives of the parties.<sup>36</sup> While the valuation of the Appraisal Tribunal is not conclusive, the Argentine courts have regarded unanimous (or nearly unanimous) decisions of that body as decisive.<sup>37</sup> Moreover, if either party's representative votes in favor of the

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in institutions or firms whose functioning depends upon authorization and inspection by the federal government, unless the President issues a decree authorizing such expropriation. Decree-Law No. 856 of Sept. 11, 1969. Brizola, ex-Governor of the State of Rio Grande do Sul, had considerably embarrassed ex-President Goulart by expropriating the property of the local subsidiary of International Telephone and Telegraph Co. in 1962 just as Goulart was preparing to leave for the United States to arrange external financing to shore up Brazil's tottering economy. See T. SKIDMORE, *POLITICS IN BRAZIL, 1930-1964*, at 244 (1967).

34. Argen. Expropriation Law of 1948, art. 13.

35. Two recent cases involving a rent ceiling based on tax appraisal values demonstrate how little of a relationship the tax values bear to present values. In one case the undisputed real value of the property was placed at twelve times the tax value; in the other at about nine times the tax value. *García y Martín, Narcisco v. Junta Nac. de Granos*, 138 La Ley 690 (C. Fed. Cap. Sala Civ. y Com. 1969); *Vaneskeheian, Arsen v. Gobierno Nacional*, 138 La Ley 698 (C. Fed. Cap. Sala Civ. y Com. 1969).

36. The ten permanent members consist of three representatives of associations of architects, engineers, and contractors; two taxpayer representatives (designated by the Executive); one employee each from the Army Engineers, the National Mortgage Bank, the General Administration of Sanitary Works, and the Municipality of Buenos Aires; and the presiding officer, the Director of Real Property Administration or his designate. Decree 15,715/59; Argen. Expropriation Law of 1948, art. 14. The operations of the Appraisal Tribunal are discussed in 2 J. CANASI, *TRATADO TEÓRICO PRÁCTICO DE LA EXPROPIACIÓN PÚBLICA* 605-11 (1967). See also Gordillo, *supra* note 12, at 35.

37. The Argentine Supreme Court has repeatedly held that the valuation of the Appraisal Tribunal, if unanimous except for the representative of the condemnee, is of "decisive importance." *Nación Argentina v. Transradio Cía. Argen. de Telecomunicaciones, A.A.*, 203 Fallos 88, 11 J.A. 428, 429 (1971).



Tribunal's appraisal, that party is estopped from subsequently challenging the appraisal.<sup>38</sup> For personal property, Argentina uses panels of ad hoc appraisers,<sup>39</sup> a procedure used by Brazil to appraise both real and personal property. In Brazil, there are typically three expert appraisers, one designated by the trial judge and the other two by the parties.<sup>40</sup> In theory, the judge places a "just" value on the property; however, in practice, the judge generally follows the report of the appraiser whom he has selected.

#### F. Valuation

The most difficult, and in many respects the most crucial, question on which to focus in appraising eminent domain legislation is valuation. Because property can be valued in many different ways, depending on the type of property and the purpose of the valuation, legislators tend to gloss over the valuation issue with vague admonitions to the courts or expert appraisers. The drafters of the Argentine and Brazilian expropriation laws were not exceptional in this respect.

The Argentine Expropriation Law simply states that compensation shall only include the "objective value" of the property taken.<sup>41</sup> The statute provides virtually no valuation guidelines, indicating only that personal circumstances, sentimental value, scenic view, historical value, lost profits, and hypothetical gains are to be excluded from compensation.<sup>42</sup>

In practice, however, the Argentine courts customarily permit appraisers to utilize one or more of the following valuation factors:

- (1) Market value of comparable property
- (2) Capitalization of net income
- (3) Location
- (4) State of repair
- (5) Tax appraisal value
- (6) Acquisition cost
- (7) Reproduction cost
- (8) Book value<sup>43</sup>

The weight ascribed to any particular factor and preference for certain techniques over others vary from case to case.<sup>44</sup>

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38. *Dir. Gral. de Ingenieros v. Musto*, 214 Fallos 73, 56 La Ley 292 (1949).

39. *Argen. Expropriation Law of 1948*, art. 16.

40. *Braz. Expropriation Law of 1941*, art. 14.

41. *Argen. Expropriation Law of 1948*, art. 11.

42. *Id.*

43. Goldman & Paxman, *Real Property Valuations in Argentina, Chile, and Mexico*, in 2 *THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW* 129, 146-63 (R. Lillich ed. 1973); Gordillo, *supra* note 12, at 30-32.

44. Goldman & Paxman, *supra* note 43, at 146-63.

The Brazilian Expropriation Law directs the court to pay special attention to the following factors in setting a value upon expropriated property:

- (1) Tax assessment value
- (2) Acquisition cost
- (3) Income derived from the property
- (4) Location
- (5) State of repair
- (6) Valuation for insurance purposes
- (7) Market value of comparable property during the past five years
- (8) Enhancement or depreciation of the expropriated party's remaining property.<sup>45</sup>

But, as in Argentina, the statute makes no effort to establish priorities or weights among the above factors,<sup>46</sup> nor does it spell out how these factors are to be determined. A reading of the technical norms presently being applied by court-appointed appraisers in São Paulo suggests that factors (1) and (6) are considered irrelevant; that factors (7), (8), and (3) are crucial for appraising land; and that reproduction cost less depreciation is the crucial factor for appraising improvements.<sup>47</sup> In valuing income-producing property, the most important factor would appear to be the amount of income being generated.<sup>48</sup>

#### G. *Consequential Damages*

As a general rule, the eminent domain laws of both Argentina and Brazil permit recovery for damages which are the "direct and immediate" consequences of condemnation. However, they diverge as to which items of damage are encompassed by the term "direct and immediate." This divergence stems from somewhat different doctrinal views as to the purpose of compensation. Until very recently, Argentine doctrine and case law specifically rejected the view that the purpose of compensation is to enable the condemnee to purchase a comparable asset. Rather the goal of compensation was perceived as ensuring that the condemnee suffered no patrimonial loss from the condemnation.<sup>49</sup> Brazilian doctrine and case law,

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45. Braz. Expropriation Law of 1941, art. 27.

46. Article 27 of the Braz. Expropriation Law of 1941 originally contained a paragraph limiting the maximum amount of an expropriation award for property subject to a property tax on a building to twenty times the rental value less the tax. This provision, which was regularly eviscerated by the Brazilian courts, was repealed by Law 2.786 of May 21, 1956. See Rosenn, *Expropriation, Inflation, and Development*, 1972 Wis. L. Rev. 845, 858-59.

47. *Normas Gerais para Avaliações em Desapropriações*, 449 R. Trib. 303 (1973).

48. Seabra Fagundes, *supra* note 27, at 63.

49. See Gordillo, *supra* note 12, at 29-30.

on the other hand, has viewed the purpose of compensation as restoring the condemnee to his prior position, *i.e.*, permitting purchase of a comparable asset.<sup>50</sup>

Consequently, Brazilian law has treated the condemnee more liberally than Argentine law in several respects. Brazil generally has permitted recovery for lost profits during the period reasonably required to relocate or acquire a comparable income-producing property.<sup>51</sup> It has also permitted recovery for good will when a commercial establishment is taken.<sup>52</sup> Argentina, on the contrary, has consistently excluded such items from compensation awards.<sup>53</sup> Brazil has also permitted, under certain circumstances, recovery of the expenses of reinvesting the award, such as payment of title registration fee, deed preparation, and transfer tax,<sup>54</sup> while Argentina has not. Finally, Brazil routinely has permitted the condemnee to cover his court costs, appraisal fees, and attorney's fee.<sup>55</sup> Argentina has permitted recovery of these expenses only when the compensation award exceeded the condemnor's offer by at least 50 percent of the difference between the offer and condemnee's demand.<sup>56</sup>

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50. See Seabra Fagundes, *supra* note 27, at 62-64. In *Provincia de Santa Fe v. Nicchi*, 268 Fallos 112, 114, [1967-IV] J.A. 115, 127 La Ley 164 (1967), the Argentine Supreme Court viewed the purpose of compensation as enabling the condemnee to purchase a comparable asset.

51. *Id.* at 63-64. However, there are numerous cases and doctrinal writings on both sides of this issue. The cases and doctrine are collected in Ferraz, *Desapropriação: Indicações de Doutrina e Jurisprudência*, 22 REVISTA DE DIREITO DA PROCURADORIA GERAL 344, 384-85 (1970).

52. Compensation for good will may be awarded in the condemnation suit if the property owner himself has operated a business on the condemned premises. A.C. No. 66.646 of the 6th Civ. Cham. T.J.S.P., summarized in R. BARCELLOS DE MAGALHÃES, *supra* note 19, at 226-27. A commercial tenant who has lost his business location because of expropriation may recover for loss of good will in a separate damage action against the condemnor. R.E. 9.557,151 R. For. 159 (S.T.F. 1951). *Candido dos Santos & Irmão v. Estado da Guanabara*, A.C. 36.856, 11 R.J.E.G. 205 (5th Civ. Cham. T.J.E.G. 1964); *Quaresma & Montinho v. Pref. Mun. de São Paulo*, A.C. 53.391, 145 For. 316 (1st Civ. Cham. T.J.S.P. 1951). Cases and doctrine on both sides of this issue are collected in Ferraz, *supra* note 51, at 390-91.

53. Lost profits: *Musso, Eugenio S. v. Nación*, 242 Fallos 254 [1958-IV] J.A. 471 (1958); *Administración General de Obras Sanitarias de la Nación v. Torquinst y Bernal*, 241 Fallos 73, [1959-III] J.A. 509, 92 La Ley 77 (1958); *Gobierno Nacional v. Dumas*, [1947-III] J.A. 174, 47 La Ley 865 (Sup. Ct. 1947). However, there are several lower and provincial court cases which have permitted recovery of lost profits. These cases are collected in 7 DIGESTO JURIDICO (La Ley) 896 n.152 (1968).

Good will: *Musso, Eugenio S. v. Nación*, 242 Fallos 254, [1958-IV] J.A. 471, 472 (1958); *Adm. Gral. de Obras Sanitarias de la Nación v. Garcia Espina, Julio*, 2 J.A. 427 (C. Fed. Cap. Sala Civ. y Com. 1969); *Fernandez, José v. Gobierno Nacional*, 100 La Ley 634 (C. Fed. Cap. Sala Civ. y Com. 1960); *Schinocca, Luis v. Dir. Nac. de Vialidad*, 10 J.A. 226 (C. Fed. Cap. 1st Sala Civ. y Com. 1970).

54. See R. BARCELLOS DE MAGALHÃES, *supra* note 19, at 230-31. Cases and doctrine on both sides of this issue are collected in Ferraz, *supra* note 51, at 395.

55. H. LOPES MEIRELLES, *DIREITO ADMINISTRATIVO BRASILEIRO* 506 (2d ed. 1966).

56. *Argen. Expropriation Law of 1948*, art. 28. The unconstitutionality of this article has been frequently, but unsuccessfully, urged. *Gordillo*, *supra* note 12, at 32.

### H. Form of Payment

In one respect, Argentina has treated the condemnee more liberally than Brazil: Argentina requires payment in cash before the court will transfer title.<sup>57</sup> Prior to the 1946 Constitution, Brazil permitted compensation in the form of bonds.<sup>58</sup> However, the difference in treatment was not invidious, for the Brazilian courts insisted that when compensation was paid in bonds, the relevant value of the bonds was market value, not face value.<sup>59</sup> Since 1969, Brazilian law has again recognized compensation in the form of bonds. As part of the lengthy process of gearing-up for agrarian reform, the military government amended the 1967 Constitution by fiat to permit expropriation of rural property upon payment in special bonds. The bonds have an exact adjustment for inflation, are redeemable in a maximum period of 20 years, and are acceptable in payment of up to 50 percent of the real property tax.<sup>60</sup> However, thus far, Brazil has seen a great deal of gearing-up, but little agrarian reform.

### III. EXPROPRIATION IN PRACTICE

The foregoing description of the constitutional and statutory provisions regulating expropriation provides only a partial answer to the question: to what extent do Argentine and Brazilian law prevent private property from being taken without just compensation? Even more important are the following considerations. To what extent have three decades of continuous,

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57. Gordillo, *supra* note 12, at 34-35.

58. Article 32 of the Brazilian Expropriation Law of 1941 permitted the legislature to authorize, in special cases, payment in negotiable bonds in accordance with the value at which they are traded on the day prior to the effectuation of payment. Decree-Law 3.532 of Aug. 21, 1941, art. 6, provided that compensation for property condemned pursuant to generalized urban plans should be paid half in cash and half in bonds, unless there was an allegation of urgency or the condemnee insisted on litigating, in which case the compensation was to be paid entirely in bonds. These provisions were later amended by Decree-Law 8.940 of Jan. 26, 1946, to permit compensation to be paid half in bonds and half in cash, or entirely in cash, at the option of the expropriating agency. In 1956 the law was again amended to eliminate the possibility of payment in bonds and to require payment in cash. Law 2.786 of May 21, 1956 (Braz.).

59. *E.g.*, Estado de Minas Gerais v. Pedro Miguel, Embargos 5.815, 142 R. For. 297 (1st Civ. Cham. M.G. 1949). Several commentators argued that bonds did not satisfy the constitutional requirement that compensation be "prior." *E.g.*, S. PEREIRA, O PODER DE DESAPROPRIAR 158 (1948); Seabra Fagundes, *A Desapropriação no Direito Constitucional Brasileiro*, 120 R. For. 5 (1948); Barreto Filho, *O Ajustamento da Lei de Desapropriações a Constituição de 18 de Setembro de 1946*, 264 R. Trib. 26 (1957). But there appear to be no reported cases contesting the constitutionality of this form of compensation.

60. Institutional Act No. 9 of Apr. 25, 1969, amending Article 157(1) of the 1967 Constitution. This provision was later incorporated into a Constitutional amendment where the use of bonds is limited to the expropriation of *latifúndios* (large estates). CONSTITUIÇÃO art. 161 (1967, as amended 1969) (Braz.).

severe inflation skewed the operation of the eminent domain process? To what extent will the courts protect private property from "creeping expropriation," i.e., indirect taking without compensation through the use of taxing, regulatory, or similar measures? To what extent has property, particularly that held by foreigners, been expropriated by the use of special or exceptional laws or decrees?

#### A. *The Grand Larceny of Inflation*

Argentina and Brazil have long been at or near the top of the list of countries with the most severe rates of inflation.<sup>61</sup> Between 1950 and 1960, the official cost of living index for Buenos Aires increased more than eleven-fold, rising more than 100 percent in 1959 alone. Between 1960 and 1973, consumer prices in Argentina rose by an annual average of 28.3 percent.<sup>62</sup> Between 1950 and 1960, Brazilian inflation ran behind that of Argentina, as Rio de Janeiro's cost of living index increased by a multiple of six-and-one-half. However, from 1960 to 1973 Brazil more than caught up; the official consumer price index for Rio increased by an annual average of 38.5 percent.<sup>63</sup> Such high rates of sustained inflation have decimated the currencies of both countries, as is readily apparent by comparison of exchange rates vis-à-vis the U.S. dollar, which has itself depreciated substantially during this period. In 1950, the rate of exchange was roughly 3.3 pesos and 18.7 cruzeiros to the dollar; today it is more than 1000 pesos and 7400 cruzeiros to the dollar.<sup>64</sup>

The author has elsewhere explored in considerable detail the ways in which inflation undermined compensation requirements in Argentina and Brazil.<sup>65</sup> To summarize, inflation prevents condemnees from receiving the approximate equivalent of the assets taken from them in three ways. First,

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61. See Adekunle, *Rates of Inflation in Industrial, Other Developed, and Less Developed Countries, 1949-1965*, 15 IMF STAFF PAPERS 531, 532 (1968).

62. Calculated from the price index published by Argentina's Instituto Nacional de Estadística y Censos.

63. Calculated from the price index prepared by the Fundação Getúlio Vargas and published in CONJUNTURA ECONÔMICA. There is reason to believe that the rate reported in recent years understates the actual inflation rate. See Penteado, *Índices do custo de vida e erros das interpretações*, Estado do São Paulo, Jan. 31, 1973, at 32, col. 3. See also Estado de São Paulo, Jan. 17, 1973, at 14, col. 1.

64. In 1967 Brazil adopted the new cruzeiro as its basic monetary unit. One new cruzeiro was equivalent to 1000 old cruzeiros. Decree-Law No. 1 of Nov. 13, 1965, as modified by Decree-Law No. 7 of May 13, 1966. In 1970 the adjective "new" was dropped. Argentina enacted a similar reform in 1969, making one new peso the equivalent of 100 old pesos. Law 18.188 of Apr. 15, 1969. To avoid confusion all cruzeiro and peso references in the text are stated in terms of the old currency. One should bear in mind that exchange rates in both countries were artificially established for much of this period.

65. See generally Rosenn, *supra* note 46.

"quick take" statutes, which permit the condemnor to obtain possession upon deposit of a sum linked to tax appraisal values, have been used extensively.<sup>66</sup> Tax appraisal values seldom correspond to fair market value even in the year originally made; rapid inflation sharply accentuates the disparity. Consequently, a substantial portion of the compensation which should be due is not paid prior to the taking.<sup>67</sup> Second, there has invariably been a lag between the time of valuation and the time of judgment. During this lag, which commonly stretched to several years, the real value of the peso or cruzeiro award depreciated substantially.<sup>68</sup> Third, judgments in eminent domain cases often remained unpaid for shockingly long periods. Particularly in Brazil, there are numerous cases in which awards have remained unpaid for more than a decade.<sup>69</sup> Though the courts awarded interest on the unpaid judgments, the legal interest rate was sharply negative.<sup>70</sup>

For more than twenty years, the highest courts of Argentina and Brazil stubbornly refused to prevent the partial confiscations resulting from inflationary distortions of the condemnation process.<sup>71</sup> Following a military *coup d'état* in 1967 that replaced the entire membership of the Supreme Court, the reconstituted Argentine high court finally permitted recovery of compensation for monetary depreciation of eminent domain awards.<sup>72</sup> Similarly, not until 1965, when a military regime committed to raising resources for development through private savings and investment enacted a statute providing for monetary correction of eminent domain awards which had been unpaid for more than a year,<sup>73</sup> did the Brazilian high court change its orientation. Though neither court assures complete protection of eminent domain awards from inflationary erosion, the change in their orientations has very substantially neutralized the effects of inflation.

#### B. *The Petit Larceny of the Police and Tax Powers*

Ascertaining when property has been "taken" for the purpose of triggering the Constitutional guarantee of just compensation is an extraordinarily difficult task. A variety of tax and regulatory measures operate either to deprive property owners of some, but not all, of their property rights, or to deprive them of virtually all of their property rights under circumstances

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66. Indeed in Brazil virtually every expropriation is a "quick take." *Id.*

67. *Id.* at 854-55.

68. *Id.* at 855-56.

69. *Id.* at 860-61.

70. *Id.* at 856-57, 860-61.

71. *Id.* at 861-62.

72. *Provincia de Santa Fe v. Nicchi*, 268 Fallos 112, [1967-IV] J.A. 115 (1967).

73. Law No. 4.686 of June 21, 1965 (Braz.).

in which the government claims that it has not taken private property. United States courts and commentators have experienced great difficulty in trying to draw the line between compensable takings and non-compensable regulation.<sup>74</sup> Given the U.S. origins of much of Argentine and Brazilian constitutional law, it should not be surprising that Argentine and Brazilian responses have displayed similar inconsistencies.

### 1. *Taxation*

Every tax is to some extent a taking of property by the state. But the exercise of the power to tax does not normally give rise to a claim that property has been unconstitutionally taken unless the tax rate is excessive, or the tax itself is discriminatory. Whether a tax constitutes an unconstitutional confiscation or discrimination is primarily a question of degree: does the tax take too much, or is it unreasonable under the circumstances? Also relevant is whether the activity taxed is one that the government might prohibit entirely without compensation through the exercise of its police powers.<sup>75</sup>

The Argentine courts have been zealous in their efforts to prevent confiscatory or discriminatory taxation. As a general rule, the Argentine courts will invalidate any tax which absorbs a substantial part of capital or a disproportionate amount of income, or which is arbitrarily directed at one person or a group of persons.<sup>76</sup> On several occasions the Argentine Supreme Court has declared that taxes which take more than 33 percent of the income from the taxpayer's capital are confiscatory.<sup>77</sup> It has also invalida-

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74. See Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63; Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964); Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971); Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. CAL. L. REV. 1 (1971).

75. Since socially undesirable activities such as gambling or narcotics can be prohibited entirely without compensation through the exercise of the police power, a confiscatory tax on such activities would not be an unconstitutional taking. The state would simply be utilizing its taxing power to perform a police power function. Cf. *Parsons Claim* in NIELSEN, *AMERICAN & BRITISH CLAIMS ARBITRATION* 587 (1925).

76. *Soficomar (S.R.L.) v. Gobierno Nacional*, 268 Fallos 56, [1968-II] J.A. 194, 195 (1967); 4 S. V. LINARES QUINTANA, *supra* note 28, at 446-54.

77. *Synge v. Gobierno Nacional*, 235 Fallos 883 (1956); *Devoto y González v. Prov. de Córdoba*, 214 Fallos 88, [1948-I] J.A. 532 (1948); *Santafésima de Inmuebles y Construcciones v. Prov. de Córdoba*, 211 Fallos 1781 (1948); *Bemvinda de Acevedo y Castro de Da Cámara Lomelino v. Prov. de Buenos Aires*, 32 La Ley 112 (Sup. Ct. 1943).

However, the Supreme Court has declined the invitation to hold that a province's imposition of a capital gains tax on the proceeds of an expropriation award ipso facto constitutes a violation of the constitutional guarantee of private property. *Dégo, Félix Antonio*, 242 Fallos 73, [1959-III] J.A. 402 (1959).

ted taxes discriminating against aliens.<sup>78</sup> Though it has sustained a higher tax rate on premiums paid to foreign insurers than on those paid to national insurers, the Court intimated that the result would have been different had the foreign insurance company been permanently situated in Argentina and investing its premiums within the country.<sup>79</sup>

The Brazilian courts are less likely to intercede in tax matters than their Argentine counterparts.<sup>80</sup> Despite income tax rates that, on occasion, reached 118 percent of a taxpayer's income,<sup>81</sup> or exchange rate "confiscation" on the exportation of coffee that absorbed more than half the price of the product,<sup>82</sup> research has disclosed no reported Brazilian cases invalidating such taxation.<sup>83</sup>

## 2. *Economic Regulation*

As in most nations, whether developed or developing, the governments of Argentina and Brazil in the twentieth century have felt the necessity to intervene in what had previously been regarded as strictly private economic activity. The tremendous economic dislocations wrought by the great depression, two world wars, chronic inflation, rapid urbanization, and industrialization; the political pressures generated by rising nationalism; and the development of a widespread expectation that governments can stimulate speedy economic growth have dramatically altered nine-

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78. *Gobierno de Italia, en Lora, Félix (suc.) v. Consejo Nac. de Educación*, 190 Fallos 159, 75 J.A. 48 (1941). In this case the Court invalidated a 100 percent tax on legacies to heirs domiciled abroad on three theories: (1) the tax was confiscatory, (2) the tax discriminated against aliens, and (3) the tax violated art. 67(16) of the Constitution. The third theory was a curious makeweight, for art. 67(16) provides:

Congress shall have power: . . . To provide whatever is conducive to the prosperity of the country, . . . promoting industry, immigration, . . . the importation of foreign capital, and the exploration of the interior rivers, by protective laws and by temporary concessions of privileges and the offering of awards.

79. *Guardian Assurance Co. v. Gobierno de la Nación*, 150 Fallos 104 (1927).

80. See, e.g., *Marques & Viegas v. Prefeitura Municipal de Santos*, R.E. No. 18.331, 145 R. For.164 (S.T.F. 1951) (upholding a tax increase of 1,040.4% on beach tents at Santos); *Micelli v. Prefeitura Municipal de Araraquara*, 5 Rev. Dir. Procur. Geral 135 (Dec. of Judge Hely Lopes Meirelles) *aff'd*, A.C. No. 69.883 (2d Civ. Cham. of the Trib. of Just. of São Paulo 1954). See generally A. BALEIRO, *LIMITAÇÕES CONSTITUCIONAIS AO PODER DE TRIBUTAR* 237-41 (2d ed. 1960).

81. See Rosenn, *Adaptations of the Brazilian Income Tax to Inflation*, 21 STAN L. REV. 58, 72-73 (1968).

82. See A. BALEIRO, *DIREITO TRIBUTÁRIO BRASILEIRO* 68-69 (1970). Cf. *Banco do Brasil, S.A. v. A.C. Israel Commodity Co.*, 12 N.Y.2d 371, 239 N.Y.S.2d 872, 190 N.E.2d 235 (1963), *cert. denied*, 376 U.S. 906 (1964) (exchange regulation required forced sale of coffee proceeds at 90 cruzeiros to the dollar instead of the free market rate of 220 cruzeiros).

83. There were, however, several early cases invalidating the coffee quota system because of its violation of the right of private property. The cases are discussed in A. VENANCIO FILHO, *A INTERVENÇÃO DO ESTADO NO DOMÍNIO ECONÓMICO* 87-89 (1968).



teenth century notions about the proper role of the state in the economy. In the past fifty years both Argentina and Brazil have progressively scrapped classical *laissez-faire* doctrines in favor of widespread governmental intervention in and control of the economy.<sup>84</sup>

Much of this intervention has substantially restricted exercise of private property rights. Thus, certain industries have been monopolized by the state.<sup>85</sup> Rent controls have restricted landlords' power to evict tenants and increase rents.<sup>86</sup> Price and wage controls have restricted contractual rights.<sup>87</sup> Crop quotas have restricted farmers' rights to plant more than specified acreage.<sup>88</sup> And zoning, set-back limitations, building codes, and subdivision regulations have directly restricted land use.<sup>89</sup>

Juridical responses to such encroachments on property rights in Argentina and Brazil have been predictably mixed. Leading constitutional scholars have considered state monopolization akin to expropriation, requiring just compensation to concerns forced out of business.<sup>90</sup> However, the issue

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84. The Brazilian experience is meticulously chronicled in A. VENANCIO FILHO, note 83 *supra*. For a brief resume and update, see Baer, Kerstenetsky, and Vilella, *The Changing Role of the State in the Brazilian Economy*, 1 *WORLD DEVELOPMENT* 23 (1973) [hereinafter cited as Baer]. An overview of the Argentine experience appears in 4 S.V. LINARES QUINTANA, note 28 *supra*; L. GONZÁLEZ AGUAYO, *LA NACIONALIZACIÓN EN AMÉRICA LATINA* 130-37 (1965).

85. The 1949 Peronist Constitution gave the Argentine federal government monopolies over all mines; petroleum, coal, and gas deposits; and natural sources of energy. CONSTITUCION art. 40 (1949) (Argen.); 4 S.V. LINARES QUINTANA, *supra* note 28, at 274. From 1955 to 1972 the Argentine government gradually divested itself of some of the monopolies which it acquired during the first Perón-era. However, it retained the railroads, as well as the telephone, telegraph, electric, and gas systems. See F. MUNSON, *AREA HANDBOOK FOR ARGENTINA* 253, 255 (1969). Since Perón's recent return to power, this trend has been reversed. New legislation has been enacted nationalizing bank deposits and foreign trade. See Bayitch, *Inter-American Legal Developments*, 6 *LAW OF THE AMERICAS* 93, 95-96 (1974).

The federal government in Brazil presently enjoys statutorily created monopolies on crude oil production (Decree-Law 3.236 of May 7, 1941); rubber (Laws 86 of Sept. 8, 1947 and 1.184 of Aug. 30, 1950); and telecommunications (Law 4.117 of Aug. 27, 1962). In addition, the government has quasi-monopolies in several areas, principally steel, electric power, and railways. See Gudin, *The Chief Characteristics of the Postwar Economic Development of Brazil*, in *THE ECONOMY OF BRAZIL* 3, 20-22 (H. Ellis ed. 1969).

86. See generally Rosenn, *Controlled Rents and Uncontrolled Inflation: the Brazilian Dilemma*, 17 *AM. J. COMP. L.* 239 (1969); Oria, *Algunos aspectos sociales de la legislación de alquileres*, [1971] *J.A. DOCTRINA* 491 (1971).

87. For a concise historical analysis of price controls in Brazil, see A. VENANCIO FILHO, *supra* note 83, at 225-39. See also Baer, *supra* note 84, at 31. A capsulized history of price controls in Argentina appears in M. CICHERO & A. COZZI, *MANUAL DE DERECHO ADMINISTRATIVO Y LEGISLACIÓN FISCAL* 120-22 (1963). For historical analyses of governmental regulation of wages, see R. ALEXANDER, *LABOR RELATIONS IN ARGENTINA, BRAZIL, AND CHILE* (1962).

88. See A. VENANCIO FILHO, *supra* note 83, at 80-113.

89. 4 S. V. LINARES QUINTANA, *supra* note 28, at 267; 5 PONTES DE MIRANDA, *supra* note 9, at 376-81.

90. See H. MEIRELLES, *DIREITO ADMINISTRATIVO BRASILEIRO* 127-30, 141-48 (2d ed. 1966); 8 R. SALVAT, *TRATADO DE DERECHO CIVIL ARGENTINO* 595-639 (3d ed. 1946).

does not appear to have been litigated, for state monopolies, in areas in which private firms have operated, have generally been created by negotiated purchase, eminent domain, or, as in the case of Brazilian oil exploration, have preceded private entry.<sup>91</sup>

Rent controls, maintained continuously since the early 1940's, have seriously disadvantaged Argentine and Brazilian landlords. By automatically extending leases at pre-existing rates, or with only minimal increases in rent, during long period of severe inflation, rent control statutes drastically reduced real rental income.<sup>92</sup> The Argentine courts have provided some protection to the landlord. As early as 1922, the Argentine Supreme Court made it clear that only a housing emergency would justify a rent control statute's invasion of property rights.<sup>93</sup> Finding three years later that any emergency had passed, the Court declared rent control an unconstitutional invasion of private property.<sup>94</sup> But Argentina's housing crisis has become chronic, and on several more recent occasions, the Supreme Court has sustained rent control legislation.<sup>95</sup> Nevertheless, the Federal Court of Appeals of Buenos Aires recently held that a provision limiting rentals, when the state is a tenant, to 30 percent of an unrealistically low tax appraisal value unconstitutionally interferes with private property rights.<sup>96</sup> Curiously, no Brazilian court has invalidated a rent control statute because it operated as a taking of private property without compensation.<sup>97</sup>

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91. *E.g.*, Brazilian Decree No. 53.701 of March 13, 1964, expropriating the shares of all private companies engaged in the refining of petroleum, and providing for compensation book value. See generally L. GONZÁLEZ AGUAYO, *supra* note 84, at 130-37, 164-66; W. NEZ, *Local Equity Participation in the Subsidiaries of Multinational Corporations: The Case of Brazil*, 14-16, Nov. 1973 (Working Paper in N.Y.U. Grad. School of Bus. Ad., No. 73-72).

One exception would appear to be Argentina's creation of a trade institute (Instituto Argentino de Promoción del Intercambio), which monopolized foreign trade in cereals, meat, and leather goods. Apparently, no compensation was paid to the exporters put out of business by this trade monopoly. Cf. L. GONZÁLEZ AGUAYO, *supra* note 84, at 132.

92. An index of real controlled housing rents for Argentina with a base period 1935-39 equal to 100 shows a rapid and steady decline. By 1948 the index had fallen to 48, and by 1965 the index had been reduced to 3. C. DÍAZ ALEJANDRO, *ESSAYS ON THE ECONOMIC HISTORY OF THE ARGENTINE REPUBLIC* 537 (1970).

An apartment rented in 1945 in Brazil for about \$100 (at the then prevailing exchange rate) would not have been permitted a rental increase until 1963, when the exchange value of the rental would have been reduced to about \$3.07. Commercial rentals were treated a bit more generously. A store rented for \$100 in 1945 would have been renting for the equivalent of \$15.35 in 1963. Rosenn, *supra* note 86, at 265.

93. *Ercolano v. Lanteri*, 136 Fallos 161, 8 J.A. 263 (1922).

94. *Mango v. Traba*, 144 Fallos 219, 17 J.A. 11 (1925).

95. *Galarza, Isabelino v. Dopació*, José, 42 La Ley 872, [1946-III] J.A. 401 (1946); *Nadur, Amar v. Borelli*, Francisco, [1959-III] J.A. 475 (1959). See generally Bidart Campos, *La Actual Legislación de Emergencia en Materia de Locaciones*, [1959-III] J.A. 459 (1959).

96. *GARCÍA y Martín, Narcisco v. Junta Nac. de Granos*, 138 La Ley 690 (C. Fed. Cap. Sala Civ. y Com. 1969); *Vaneskeheian, Arsen v. Gobierno Nacional*, 138 La Ley 698 (C. Fed. Cap. Sala Civ. y Com. 1969).

97. Rosenn, *supra* note 86, at 250.

As might be expected in chronically inflationary economies, price controls have become a more or less permanent part of the Argentine and Brazilian legal landscape. The constitutionality of price controls has been consistently sustained by the courts of both countries,<sup>98</sup> even when implementation has required firms to operate at a loss.<sup>99</sup> However, neither country has deliberately employed price controls, coupled with massive mandatory wage increases, to take over legitimate businesses without compensation, a technique utilized extensively in Chile during the Allende regime.<sup>100</sup>

The constitutionality of reasonable land-use regulations has also been sustained by the courts.<sup>101</sup> Only on rare occasions, such as when the state has prohibited a property owner from cutting the timber on his land, have the courts required payment of compensation.<sup>102</sup>

In short, the law governing police power regulation of private property in Argentina and Brazil fairly approximates that of the United States. Indeed, the cases and commentators have frequently cited U.S. Supreme Court decisions as precedents in this area of constitutional law. The courts have accorded a wide degree of latitude to the Legislature in dealing with socio-economic problems, and have tended to intervene to protect property rights only when the regulation has been unreasonable, discriminatory, or unfairly restrictive.

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98. Argentina: *Kloosterboer, Guillermo v. Gobierno Nacional*, [1946-III] J.A. 450 (Sup. Ct. 1946); *Martini e Hijos (Soc. de Resp. Ltda.)*, 200 Fallos 450, [1945-III] J.A. 633 (1944). The Brazilian cases are discussed in A. VENANCIO FILHO, *supra* note 84, at 230-37.

99. Argentina: *Martini e Hijos (Soc. de Resp. Ltda.)*, 200 Fallos 450, [1945-III] J.A. 633 (1944). Brazil: *Sociedade de Laticínios Domínio Ltda. v. União Federal R.E. 52.010*, 33 R.T.J. 720 (S.T.F. *en banc* 1965). In practice price controls have not seriously threatened the profitability of most businesses. The Brazilian pattern used to be to force increases by withholding products from the market, or to create a thriving black market. See R. RICHES, *IMPACTO DA AÇÃO DO GOVÊRNO SÔBRE AS EMPRESAS BRASILEIRAS* 158-59 (1963). Now a firm which raises its prices without adequate cost justification only risks having its credit curtailed. See Baer, *supra* note 84, at 31.

100. See J. Stasma, *Some Economic Aspects of Non-Violent Revolution in Chile and Peru*, with Emphasis on the Mining and Manufacturing Sectors 19-20 (unpublished paper presented at the Annual Meeting of the Latin American Studies Ass'n, Austin, Texas, Dec. 1961). See also Petras, *Political and Social Change in Chile*, in *LATIN AMERICA: FROM DEPENDENCE TO REVOLUTION* 9, 24-27 (J. Petras ed. 1973).

101. Argentina: *E.g.*, *Publicidad Eureka (S.A.) v. Municip. de Vicente López*, 48 J.A. 607 (Sup. Ct. B.A. 1934). See 4 R. BIELSA, *DERECHO ADMINISTRATIVO* 319-64 (5th ed. 1955). See also P. ALTAMIRA, *POLICIA Y PODER DE POLICIA* 240-42 (1963).

Brazil: *E.g.*, *Raimundo Magro v. Departamento de Estradas de Rodagem*, R.E. 70.795, 59 R.T.J. 91 (S.T.F. 2d Term 1971) (prohibition of construction on 15 meter strip along a roadway); *Mun. de São Paulo v. Olga Mercado Kury*, No. 88.128, 289 R. Trib. 456 (T.J.S.P. *en banc* 1958) (zoning prohibiting a gasoline station). See generally H. MEIRELLES, *DIREITO DE CONSTRUIR* 99-136 (2d ed. 1965).

102. Brazil: *Agro Florestal Giorgi Ltda. v. Fazenda do Estado*, No. 157.299, 431 R. Trib. 141 (5th Cam. Trib. de Açada Civ. S.P. 1971).

### C. *Treating the Foreign Investor "Specially"*

Argentine and Brazilian law discriminate against foreign investors in several respects, though in comparison with some of the other Latin American countries, such discrimination has been rather mild. The principal areas of discrimination are: (1) prohibition of foreign investment from certain sensitive spheres, (2) restrictions on profit remittance, (3) restrictions on capital repatriation, and (4) restrictions on borrowing.

#### 1. *Prohibition of Foreign Investment*

During the 1960's, prohibitions on foreign investment in Argentina were virtually eliminated.<sup>103</sup> But, since 1970, governmental authorization has become necessary for the entry of new investment into the country,<sup>104</sup> and foreign investment has been subjected to steadily increasing restraints.<sup>105</sup> The recent return of the Peronists to power has resulted in a new foreign investment statute prohibiting all new foreign investment in: (1) industries with limited or restricted export possibilities; (2) industries connected with national security; (3) public utilities; (4) insurance; (5) commercial banking, with the exception of branches of foreign banks where reciprocity exists; (6) financing institutions; and (7) the communications media.<sup>106</sup> With certain narrowly defined exceptions, the law also bars foreign acquisitions of existing Argentine companies, as well as all new foreign investment in marketing services, agriculture, ranching, forestry, and fishing.<sup>107</sup> The requirement of prior approval of all new foreign investment by the Argentine Government has been retained.<sup>108</sup> Previous foreign investment in in-

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103. See ERNST & ERNST, ARGENTINA: CHARACTERISTICS OF BUSINESS ENTITIES 9 (1971). For a summary of previous legislation, see Petrelli, *Capitales Extranjeros en la Argentina*, 13 ESTUDIOS SOBRE LA ECONOMÍA ARGENTINA 78, 82 (1972).

104. Law 18,587 of Feb. 12, 1970 (Argen.); Decree No. 182/70 of Jan. 19, 1970 (Argen.). The latter has been administered to screen out foreign capital which does not appear to promote development. See Comment, *Argentine Foreign Investment Incentives: Quixotic Nationalism Challenges the Windfall*, 12 VA. J. INT'L L. 240, 247 (1972).

105. See Schliesser, *Recent Developments in Latin-American Foreign Investment Laws*, 6 INT'L LAW. 64, 68 (1972).

106. Law No. 20,577 of Nov. 7, 1973, art. 6 (Argen.). An English translation of this law appears in 12 INT'L LEGAL MATERIALS 1489 (1973).

107. *Id.*

108. *Id.* at art. 4. Foreign investments will not be approved if they are subject to export limitations, refuse to abide by a Calvo clause, or allow foreign nations or international organizations to be subrogated to their claims. *Id.* at art. 6 (a) & (b). This last restriction appears to deny U.S. investors the option of insuring their investments with the Overseas Private Investment Corporation and to derogate the bilateral investment guarantee agreement in operation between the United States and Argentina since 1959. See note 237 *infra*. Recently issued regulations suggest that the government will automatically renew investment contracts, which have a five year term, at least once. However, the government can insist on a

dustries connected with national security and communications is subject to immediate expropriation.<sup>109</sup>

Brazil now has far fewer prohibitions on foreign investment than does Argentina. Foreigners are barred only from owning land in frontier areas and from participation in the communications media.<sup>110</sup> Other than a few minor restrictions such as a limit to the amount of rural acreage that can be bought up by foreigners, and the requirement that at least one-third of the stock of domestic airlines and coastal shipping companies be owned by Brazilians, foreigners are able to invest in virtually anything in Brazil.<sup>111</sup>

## 2. *Restrictions on Profit Remittances*

The rate at which profits on new foreign investment in Argentina may be remitted is to be set by the investment contract with the Argentine Government. But in no event may it exceed the greater of: (a) an annual rate of 12.5 percent; or (b) four percentage points above the interest rate paid by the leading banks on term deposits of 180 days or less.<sup>112</sup> Profits which exceed the remittable rate must be permanently reinvested in Argentina.<sup>113</sup> Previous foreign investment which investors do not agree "voluntarily" to register and be governed by the regime applicable to new investment is subject to a special surtax ranging up to 40 percent on repatriable capital. Similarly, all licensing and know-how agreements involving foreign remittances must be registered; those involving disproportionate royalties or other undesirable features may be denied registration.<sup>114</sup>

Brazilian law subjects all foreign investors whose profit remittances average more than 12 percent per year on registered capital over a three-year period to a steep supplemental income tax.<sup>115</sup> In theory, profit remittances are limited to 8 percent of registered capital for firms producing

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fade-out provision, which would require the concern be converted into one controlled by Argentine capital, within one year of the date the contract is to terminate. Decree No. 413 of Feb. 22, 1974, art. 14 (Argen.). An English translation of this decree appears in 13 INT'L LEGAL MATERIALS 1170 (1974).

109. Law No. 20.577 of Nov. 7, 1973, art. 20 (Argen.).

110. See B. CARL, A GUIDE TO INCENTIVES FOR INVESTING IN BRAZIL 11 (1972). See also BRAZILIAN EMBASSY, A GUIDE TO INVESTING IN BRAZIL 9-10 (1967).

111. BRAZILIAN EMBASSY, *supra* note 110, at 9. However, in some instances investment must be via the formation of a Brazilian corporation, but the stock may be owned by non-resident aliens.

112. Law No. 20.577 of Nov. 7, 1973, art. 13 (Argen.). But the right to reinvest dividends is lost if a foreign firm voluntarily accepts special promotional arrangements in Argentina. *Id.* at art. 18.

113. *Id.* at art. 15.

114. Law No. 19.231 of Sept. 10, 1971, regulated by Decree 6187 of Dec. 22, 1971.

115. Law No. 4.131 of Sept. 3, 1962, art. 43 (Braz.), as modified by Law No. 4.390 of Aug. 29, 1964 (Braz.). An English translation of this law appears in P. GARLAND, A BUSINESSMAN'S INTRODUCTION TO BRAZILIAN LAW AND PRACTICE 153 (1966).

luxury goods and services. However, no regulation defining "luxury" has ever been issued, and this restriction has remained a dead letter.<sup>116</sup> The only other serious limitation on remittances is the prohibition of royalty payments on patents or trademarks if the payor is a branch of a foreign company or the payee is a non-Brazilian which controls the Brazilian payor.<sup>117</sup>

### 3. *Restrictions on Capital Repatriation*

Argentina's new foreign investment statute prohibits all repatriation of capital for the first five years of a new investment.<sup>118</sup> Thereafter, repatriation is to be governed by the investment contract; however, in no event may it exceed 20 percent a year, or be so large as to impede the continued operation of the company.<sup>119</sup> In the event of a balance of payments crisis, all capital repatriation may be temporarily suspended.<sup>120</sup>

Brazil does not restrict repatriation of capital. However, should there be a balance of payments crisis, profit remittances and capital repatriation may be limited to 10 percent of registered capital.<sup>121</sup>

### 4. *Restrictions on Borrowing*

Argentina's new foreign investment law requires that a maximum limitation on short-term domestic borrowing be fixed in the investment contract.<sup>122</sup> Foreign borrowings by foreign investors operating in Argentina require authorization of the Central Bank, and the effective interest rate may not exceed by more than two percentage points the going rate for similar loans to prime borrowers in the country of the currency lent.<sup>123</sup> Moreover, foreign loans may not be guaranteed by any bank, unless the loan was obtained from an international financing agency to which Argentina belongs,<sup>124</sup> and any penalties incurred through the fault of the foreign investor shall be deducted from repatriable capital.<sup>125</sup>

All loans in foreign currency in Brazil require prior approval of the Central Bank, which may treat as repayment of principal interest that it considers excessive in view of prevailing rates in the country of origin of

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116. P. GARLAND, *DOING BUSINESS IN AND WITH BRAZIL* 99 (1971).

117. Law No. 4.131 of Sept. 3, 1962, art. 14, as modified by Law No. 4.390 of Aug. 29, 1964.

118. Law No. 20.577 of Nov. 7, 1973, art. 12(c) (Argen.).

119. *Id.* at arts. 12(a) & (b).

120. *Id.* at art. 16.

121. Law No. 4.131 of Sept. 3, 1962, art. 28 (Braz.), as modified by Law No. 4.390 of Aug. 29, 1964 (Braz.). This standby power has never been invoked.

122. Law No. 20.577 of Nov. 7, 1973, art. 17 (Argen.).

123. *Id.* at art. 26.

124. *Id.* at art. 25(a).

125. *Id.* at art. 25(b).

the loan.<sup>126</sup> Balance of payments and credit control considerations have led the Central Bank to discourage foreign borrowing by requiring a compulsory deposit of 40 percent of the value of the loan and a minimum term of ten years on all loans not guaranteed by the Brazilian government.<sup>127</sup> And, though it has never utilized it, the Central Bank has the power during periods of balance of payments disequilibria to restrict the access of companies with foreign capital to Brazilian sources of credit.<sup>128</sup>

#### D. "Special" Expropriations

An important part of the expropriation picture, especially for the foreign investor, lies outside the constitutional and statutory provisions regulating expropriation. A number of expropriations or confiscations of the property of foreigners, as well as nationals, has been effectuated through special legislation or decree, or has been disguised as a bona fide regulatory measure. Generally, when this has happened, the courts and the regular formal legal system have not been irrelevant, but neither have they been of controlling importance. Such investment disputes have been highly politicized, and their ultimate resolutions have turned more on political and economic variables than upon juridical issues. In a few cases court decisions have been critical, but in most cases satisfactory settlements have been negotiated outside of the courts.

##### 1. *The Vargas and Perón Dictatorships*

Dictators tend to be fickle in their regard for constitutional rights. Getúlio Vargas, who governed Brazil from 1930 to 1945, and Juan Domingo Perón, who governed Argentina from 1945 to 1955,<sup>129</sup> were not exceptions in this respect. Constitutional guarantees of person and property were frequently disregarded during the first Vargas and Perón eras.

Both Vargas and Perón resorted to thinly-disguised subterfuges to confiscate estates of wealthy French nationals. Vargas appropriated the estate of Paul de Leuze, a French newspaper owner, whose sole heir was his

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126. P. GARLAND, *supra* note 116, at 101. Generally, the Central Bank has registered foreign loans expeditiously, and has been realistic about the true cost of money in the international market. *Id.* at 100-01.

127. The 40 percent deposit requirement was dropped by Central Bank Resolution No. 279 of Feb. 7, 1974. The 10 year minimum term requirement has recently been reduced to 5 years. *BUSINESS LATIN AMERICA*, Sept. 18, 1974.

128. Law No. 4.728 of July 14, 1965, art. 22 (Braz.).

129. The dictatorial reigns of Vargas and Perón were ended in 1945 and 1955, respectively, by military coups. Curiously, both men staged comebacks at the polls. Vargas was constitutionally elected President of Brazil in 1950 and governed until 1954, when he committed suicide. Perón was re-elected President of Argentina in 1973 and governed until his death in 1974.

nephew. This was accomplished by enactment of a statute retroactively disinherit any nephew claiming as an heir, thereby producing an escheat.<sup>130</sup> Acting partly out of personal pique, Perón in 1948 launched an attack on the "Bemberg group," a large industrial and landholding complex owned by the estate of Otto Bemberg who, like de Leuze, had been a French national. The heirs of the estate were charged with tax evasion and fined more than \$10,000,000, an unprecedented sum in the annals of Argentine tax collection. The group was also alleged to have violated the antitrust laws by monopolizing the beer industry. Special legislation was enacted ordering liquidation of many of the group's companies and ranches.<sup>131</sup> Any compensation due was offset by tax claims. These properties, valued at more than \$100 million, were restored to their former owners in 1959 by the Frondizi Government.<sup>132</sup>

Perón launched a similar attack against Argentina's foremost newspaper, *La Prensa*. In 1946, that paper, along with *La Nación* (another leading daily), were charged with customs fraud for printing advertisements on duty-free newsprint. Two years later, the papers were required to pay retroactive duty back to 1939. In October of 1948, the government confiscated 8,055 tons of *La Prensa*'s newsprint, pleading a paper shortage. When the paper remained defiantly independent, Perón, utilizing the transparent guise of a labor dispute, "expropriated" *La Prensa*. A congressional committee set compensation specially at \$1,366,915, for a plant valued by its owners at \$20,458,650. However, not even the \$1,366,915 was paid, for more than \$5,000,000 was assessed in retroactive import duties and severance pay.<sup>133</sup> *La Prensa* was also restored to its former owners by the Frondizi government.

These are by no means the only instances of confiscation carried out by the former Perón regime. Since the entire judiciary was purged,<sup>134</sup> condemnation awards were occasionally set at ridiculously low levels by corrupt or intimidated judges. Even today the Argentine courts are still trying to undo the confiscations perpetrated under the guise of lawful expropriations during the first Perón era.<sup>135</sup>

130. K. LOEWENSTEIN, *BRAZIL UNDER VARGAS* 321-23 (1942).

131. Decree 9.997 of 1948 (Argen.); Law 14.122 of July 3, 1952 (Argen.). See generally N.Y. Times, Dec. 30, 1949 at 9, col. 6; *id.*, Mar. 19, 1950, at 16, col. 1; *id.*, Dec. 29, 1951, at 3, col. 3; *id.*, July 3, 1952, at 34, col. 4; *id.*, Aug. 28, 1954, at 19, col. 3.

132. N.Y. Times, Jan. 17, 1959, at 24, col. 6.

133. G. BLANKSTEN, *PERÓN'S ARGENTINA* 211-13 (1953).

134. An incisive account of the demoralization of the Argentine judiciary under Perón by a former Supreme Court justice is Orgaz, *Poder Judicial*, in *ARGENTINA 1930-1960*, at 124 (J. Paita ed. 1961).

135. *E.g.*, Campbell Davidson, Juan C. v. Prov. de Buenos Aires, 279 Fallos 54, 11 J.A. 231 (1971) (expropriation set aside because of removal of judges, threats by the governor against the expropriated party, and the ridiculously low value placed on the property by a court to which two ex-labor judges were added).



## 2. *Public Utility Expropriations*

Since World War II, foreign-owned public utilities have been buffeted by a wave of nationalizations throughout Latin America.<sup>136</sup> Argentina and Brazil have been prominent among the buffeters. Thirty years ago nearly all their utilities were foreign-owned; today most have been nationalized.

During the transition process some of these utilities were subjected to such harrassment and profit-squeezing that expropriation appeared like an act of euthanasia. The public utilities were the victims of a combination of economic and political forces which, in many cases, led to sales under duress (or quasi-duress) or expropriation pursuant to special legislation. The rapid urbanization, import-substitution, and industrialization of the post-World War II period placed unprecedented demands upon the public utilities. Even with investment of huge sums in new plants and equipment, satisfaction of all these demands would have been difficult. Such investment, however, was not forthcoming for essentially two reasons. One was that the postwar period was a time of rising nationalism, which was frequently manifested by outbursts directed against the most visible symbols of foreign economic domination — the public utilities.<sup>137</sup> Fear of takeover and fear of aggravating pressures for takeover made these companies reluctant to risk new capital to expand their activities. The second reason was diminishing profitability. Governments attempting to combat severe inflation have a natural reluctance to concede rate increases to regulated industries.<sup>138</sup> Rate-making legislation tended to be based upon the concept of original cost in local currency, a value which eroded rapidly in the inflationary spirals gripping the economies of Argentina and Brazil.<sup>139</sup> Moreover, shortages of foreign exchange led to periodic devaluations that raised the cost of imported fuel and remittance of profits.<sup>140</sup> The utilities tended to respond to this situation by overloading, and by cutting back on reserve

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136. See generally Bratter, *Latin American Utilities' Nationalization Proceeds Inexorably*, 66 PUB. UTIL. FORT. 1 (1960).

137. When Brazil's President Goulart suggested to President Kennedy that it was politically undesirable for United States companies to control Brazilian public utilities, Kennedy reportedly agreed, commenting . . . "that every month, when the electric bill came due, thousands of Brazilians were bound to think, 'It's that damned U.S. company.'" Quoted in J. LEVINSON & J. DE ONIS, *THE ALLIANCE THAT LOST ITS WAY* 145 (1970).

138. Public utility prices in Argentina and Brazil were strikingly repressed in relation to other prices. Taking 1935-38 in Argentina as a base of 100, by 1946-48 the price index level for public utilities had fallen to 55. By 1952-55 utility prices had declined still further to 35. C. DÍAZ ALEJANDRO, *supra* note 92, at 322.

139. See, e.g., J. TENDLER, *ELECTRIC POWER IN BRAZIL: ENTREPRENEURSHIP IN THE PUBLIC SECTOR* 48 (1968). See also M. FINK *et al.*, *REPORTS ON ELECTRIC POWER REGULATION IN BRAZIL, CHILE, COLOMBIA, COSTA RICA, AND MEXICO* 41-42 (1960).

140. D. CAVERS & J. NELSON, *ELECTRIC POWER REGULATION IN LATIN AMERICA* 6-7 (1959).

capacities and maintenance.<sup>141</sup> The resulting deterioration in service spurred nationalistic takeover demands.

*Argentina.* One of the key planks in Perón's platform of economic independence for Argentina was nationalization of the public utilities. Expiring concessions, which had formerly been renewed as a matter of course, were terminated and accompanied by purchase or expropriation of the concessionaire's physical assets. During the mid-1940's, when foreign reserves stood at record highs, Argentina could afford to buy out foreign investors on relatively generous terms.<sup>142</sup> Thus, in September of 1946 Argentina bought the United Telephone Company of the River Plate, a subsidiary of International Telephone & Telegraph Corp. (ITT) for a little under \$95,000,000, paying cash in New York.<sup>143</sup> The following year, Perón purchased the British-owned railways for \$600,000,000 in blocked sterling accounts,<sup>144</sup> as well as three French-owned railways for approximately \$46,000,000.<sup>145</sup>

Prior to 1949, Argentine case law and doctrine were in agreement that revocation of a public utility's concession required compensation for direct damages plus lost profits.<sup>146</sup> By 1949, this was no longer a rule with which

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141. J. TENDLER, *supra* note 139, at 81-88; Bratter, *supra* note 136, at 5.

142. This is not to suggest that all foreign utilities were accorded generous treatment during this period. Some were not. For example, the British-owned *Compania Primitiva de Gas de Buenos Aires* was expropriated in 1944 through judicial proceedings. The government originally deposited as compensation only 3,758,740 pesos for assets which were admittedly worth about five times as much. The government brazenly, if unsuccessfully, argued that a municipal ordinance required the gas company to remove its equipment from municipal property, and the cost of doing so should be deducted from the compensation owed. *Gobierno Nacional v. Cia. Primitiva de Gas de Buenos Aires*, 35 La Ley 528, 530 (Cam. Fed. de la Cap. 1944). The company ultimately received about half of what it claimed its property was worth. *N.Y. Times*, Mar. 6, 1945, at 27, col. 4.

143. *N.Y. Times*, Sept. 29, 1946, at 35, col. 5; *id.*, Oct. 4, 1946, at 27, col. 7. ITT also agreed to provide technical assistance for 10 years in exchange for a percentage of the profits of the enterprise, and the right to sell technical telephone equipment through another subsidiary. Business circles in the U.S. reportedly considered the settlement fair and adequate. *Id.*, Sept. 29, 1946, at 35, col. 5. Spruille Braden, then U.S. ambassador to Argentina, has charged that ITT made a payoff of \$14 million to ensure such generous terms. A. SAMPSON, *THE SOVEREIGN STATE OF ITT* 35 (1973).

144. The sale aroused mixed reactions in Britain. Some recalled that the railroads (for which they were receiving 150,000,000 pounds) had cost 250,000,000 pounds to build and 500,000,000 to replace. *N.Y. Times*, Feb. 17, 1947, at 28, col. 3. But most seemed content and rail stocks rose on the news. *Id.*, Feb. 13, 1947, at 12, col. 6.

145. L. GONZALEZ AGUAYO, *supra* note 84, at 133.

146. Oyhanarte, *La Expropiación de Empresas Concesionarias de Servicios Públicos*, 70 La Ley 809, 825 (1953). The "leading case" is *F.F.C.C. de Entre Ríos v. la Nación*, 12 La Ley 18 (1936), which held, *inter alia*, that: (1) concessions may be modified or abrogated by the state, but only upon payment of just compensation, and (2) that public utilities should be valued in accordance with the earnings they generate during normal times. This case is commented

the nationalizing Perón regime could live. By then the economy had begun to stagnate; in the previous three years, the country's foreign reserves had fallen by 75 percent.<sup>147</sup> To reduce governmental outlays for public utility nationalizations, the Perónists inserted the following provisions into their 1949 Constitution:

. . . [P]ublic services belong *ab origine* to the State, and under no circumstances may they be alienated or concessions granted for their exploitation. Those which are in private hands shall be transferred to the State via purchase or expropriation, with prior compensation, whenever national law so determines.

The price for the expropriation of public service concessions shall be the historical cost of the assets of the enterprise, less the sums which have been amortized since the grant of the concession and the sums in excess of a reasonable profit, which shall also be considered as repayment of invested capital.<sup>148</sup>

While this provision appeared to invite expropriation of public utilities without compensation, the Argentine courts generally sought to minimize its confiscatory effect. One technique was to limit its application to cases which began and ended between 1949 and 1955.<sup>149</sup> Since most expropriation cases dragged on at least six years in the courts, this provision was ultimately applied to few expropriations. A second technique was to define original cost to include reinvested earnings.<sup>150</sup> And a third technique was to permit compensation for loss of the concession,<sup>151</sup> a holding justifiably

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upon in considerable detail in 1 J. CANASI, *TRATADO TEORICO PRACTICO DE LA EXPROPIACION PÚBLICA* 318-32 (1967).

147. At the end of 1946, Argentina's gold and foreign exchange holdings (blocked and unblocked) totalled \$1,688,000,000. By the end of 1949, they had fallen to \$370,000,000. Computed from Table 73 in C. DIAZ ALEJANDRO, *supra* note 92, at 486.

148. CONSTITUCION art. 40 (1949) (Argen.). A somewhat dubious defense, along with the legislative history of Article 40, appears in Oyhanarte, note 146 *supra*.

149. In *Prov. de Buenos Aires v. Cía. de Electricidad de Dolores (S.A.)*, [1959-VI] J.A. 258 (Sup. Ct. B.A.), the trial court had declared the expropriation of a subsidiary of the Swiss-controlled Cía. Italo-Argentina de Electricidad without compensation on the theory that the original cost of the investment had already been fully amortized. The Supreme Court of Buenos Aires refused to sanction such confiscation, holding that the repealed Peronist Constitution did not govern the expropriation, even though it had occurred in 1952. The court awarded compensation based upon the replacement cost at the time of the transfer of possession less depreciation.

In *Ottomello Hnos. y Cía. v. Prov. de Tucumán*, 225 Fallos 451, 71 La Ley 172 (1953), the Argentine Supreme Court refused to apply Article 40 of the 1949 Constitution to a concession expropriated in 1944 because the case had been decided before the new constitution came into force.

150. *E.g.*, *Prov. de Corrientes v. Cía. de Electricidad de Corrientes (S.A.)*, [1955-III] J.A. 47, 52 (Sup. Ct. 1954).

151. *Id.* at 53.

criticized as inconsistent with the 1949 Constitution.<sup>152</sup>

The expropriation of electric utilities, particularly those owned by American & Foreign Power Co. (AFPCO), the Swiss-controlled *Compañía Italo-Argentina de Electricidad*, and the Belgian-based Sofina group, dragged on throughout the first Perón era. Between 1944 and 1956, the generating capacity of AFPCO's Argentine plants was reduced by almost one-half as a result of governmental takeovers.<sup>153</sup> In some cases compensation was paid; in others it was merely promised. Not until Perón had been deposed was AFPCO able to negotiate a satisfactory settlement. In 1958 AFPCO agreed to sell all of its remaining power interests to the Argentine Government. Compensation was to be set by the Chief Justice of the Argentine Supreme Court.<sup>154</sup> In 1961, the Chief Justice, acting as an arbitrator, fixed \$53,632,000 as the compensation due, a sum regarded by the company as "mildly disappointing."<sup>155</sup> A similar arrangement was reached in 1958 for the Argentine Government to buy out the electric power interests of the Sofina group.<sup>156</sup>

*Brazil.* Unlike Argentina, there have been only two major incidents involving expropriation of foreign-owned public utilities in Brazil. Both took place in Rio Grande do Sul, Brazil's southern-most state, then governed by Leonel Brizola, a charismatic leftist and brother-in-law of João Goulart (Brazil's president from 1961-1964). Both were finally settled out-of-court through application of considerable economic and political pressure by the U.S. Government.

In February of 1962, just prior to President Goulart's departure for Washington to solicit aid to Brazil's crumbling finances, Brizola issued a decree expropriating Rio Grande do Sul's telephone company, a subsidiary of ITT. The company had been in financial straits during the period preceding its expropriation because its rates were fixed by the state "at a level which would not permit the recovery of depreciation, let alone a fair return on investment."<sup>157</sup> The state of Rio Grande do Sul deposited \$400,000 as compensation for the telephone company, which had recently been valued at \$7,300,000 by agreement between two appraisers (one of whom had been designated by Brizola himself) pursuant to an aborted plan to form a "mixed" telephone company.<sup>158</sup>

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152. Spota, *Expropiación de la Empresa del Concesionario de Servicios Públicos*, [1955-III] J.A. 48.

153. Bratter, *supra* note 136, at 6.

154. *Id.*

155. N.Y. Times, Apr. 28, 1961, at 43, col.3.

156. Bratter, *supra* note 136, at 7.

157. Adair, *Expropriation and Foreign Aid Funds*, 69 PUB. UTIL. FOR. 586, 589 (1962).

158. *Id.* at 589-91.

This particular expropriation triggered a virulent reaction in the U.S. Congress, which was antagonized by the coincidental request for financial assistance for Brazil and the takeover of the ITT subsidiary. This annoyance was manifested in the passage of the original Hickenlooper Amendment, which required the President to suspend all foreign aid to any country expropriating the property of a U.S. company unless effective steps were taken within six months to provide adequate compensation.<sup>159</sup>

Talks between Presidents Kennedy and Goulart about the ITT expropriation led to the issuance of a Brazilian decree, calling for nationalization of the public utilities with compensation to be determined by "mutual agreement and, when necessary, through expert evaluation and/or arbitration. . . ."<sup>160</sup> Compensation was to be paid on a deferred basis: an initial payment of not more than 10 percent, with the balance in installments compatible with the resources of the utility. Moreover, the investor was to assume an obligation to reinvest at least 75 percent of the indemnification in priority sectors or activities in Brazil.<sup>161</sup> In 1963, ITT reached an interim settlement on the basis of the 1960 appraisal; it received the equivalent of \$7,300,000 in cruzeiros, which it repatriated in dollars. It then reinvested \$4,650,000 in a Brazilian manufacturing subsidiary. In 1967, a final settlement resulted in the sale of all ITT telephone operations in Brazil for approximately \$12,000,000, about half of which was to be reinvested in manufacturing telecommunications equipment in Brazil.<sup>162</sup>

The second major incident in Rio Grande do Sul involved an electric utility company, a subsidiary of AFPCO. In May 1959, Brizola issued a decree expropriating the electric company, whose concession had expired the previous year. The state immediately brought suit to obtain possession, alleging urgency. In addition, the state offered to deposit the sum of one cruzeiro on the theory that the company had excess earnings which wiped out any compensation due. The trial court granted possession to the state, but ordered the deposit increased to 20,000,000 cruzeiros (then about \$200,000). The company unsuccessfully appealed to the state's highest court. While the company's appeal to the Supreme Federal Tribunal was pending, the court-appointed appraiser valued the firm's assets at 2,568,121,600 cruzeiros (then about \$26,000,000).<sup>163</sup> At this point, the state

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159. 22 U.S.C. § 2370(e)(1) (1970), *as amended*, 22 U.S.C.A. § 2370(e)(1) (supp. 1974).

160. Decree No. 1106 of May 30, 1962, art. 3 (Braz.). An English translation of the Decree appears in 1 INT'L LEGAL MATERIALS 124 (1962).

161. *Id.* at art. 2(c).

162. H. STEINER & D. VAGTS, TRANSNATIONAL LEGAL PROBLEMS 340-41 (1968).

163. Adair, *supra* note 157, at 587-88. The appraisers found that the imported components of the plant had a value of \$4,761,900, while the local components had a value of 2,091,931,600 cruzeiros. They converted the dollar figure into cruzeiros at the rate of 100 cruzeiros to a dollar, the official rate prevailing in 1959 and 1960. Had the free market rate prevailing at the time of the taking, 132.5 to the dollar, been used, the valuation would have been about \$19.5 million. *Id.* at 588.

made no effort to pay any compensation, adopting the tactic, so often employed in Brazil during the period, of waiting for inflation to scale down the sum to more manageable proportions.<sup>164</sup>

In the meantime, in August of 1962 Pernambuco, a state in Brazil's Northeast, expropriated another subsidiary of AFPCO, and other state governors indicated that they had plans to follow suit. After another meeting between Presidents Kennedy and Goulart in April of 1963, AFPCO reached an agreement under which Brazil would purchase all of the company's Brazilian electric utilities for \$135,000,000. One-fourth of this sum was to be paid in dollars with interest over a twenty-two year period, and the remainder was to be reinvested in Brazil. However, political pressures from the left and the right prevented Goulart from honoring the agreement.<sup>165</sup>

The leaders of the military coup which overthrew Goulart in 1964 were offered substantial economic assistance by the United States Government, contingent, *inter alia*, upon honoring of the agreement with AFPCO. In contradistinction to its predecessor, the new Brazilian regime welcomed foreign investment. It asked AFPCO to remain and promised it an adequate return on investment.<sup>166</sup> The company, however, had decided to withdraw from the power business in Brazil. A modified agreement, rammed through a purged, but still reluctant Brazilian Congress, retained the \$135,000,000 price but modified the terms of payment. A down payment of \$10,000,000 in cash was made, and the balance was paid in two promissory notes: one for \$10,250,000 payable over a 45-year period at 6.5 percent interest, and the other for \$24,750,000 payable from 1968 to 1989 at 6 percent interest.<sup>167</sup> The president of AFPCO termed the settlement "fair and reasonable," though he also stated that "anything we receive would be better than we've been getting."<sup>168</sup>

The Brazilian Traction, Light and Power Co., a Canadian holding company whose shares are about 36 percent U.S.-owned,<sup>169</sup> has continued in the electric utility business in Brazil. Though it sold several of its telephone subsidiaries to the Brazilian Government in 1966 upon condition that it reinvest at least 75 percent of the proceeds in Brazil,<sup>170</sup> the Canadian company continues to supply Rio and São Paulo with electricity, having

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164. See Rosenn, *supra* note 46, at 861.

165. J. LEVINSON & J. DE ONIS, *supra* note 137, at 145.

166. *Id.* at 145-46.

167. Contract for the Sale of American & Foreign Power Company Properties in Brazil of Nov. 12, 1964, 4 INT'L LEGAL MATERIALS 72 (1965).

168. R. LILICH, THE PROTECTION OF FOREIGN INVESTMENT 142 (1965).

169. Another 25 percent is held by Canadians, and the remainder is in bearer shares held primarily in Europe. J. TENDLER, *supra* note 139, at 30.

170. H. STEINER & D. VAGTS, *supra* note 162, at 341.

achieved a satisfactory working relationship with the state companies controlling the generating facilities.<sup>171</sup>

### 3. *Extractive Industry Concessions*

Control over mineral and oil resources has had a long career as a political soccer ball in Argentina and Brazil. There are few issues which can match the intense nationalistic sentiments generated by debate on exploitation of petroleum and mineral deposits by foreign capital. Perhaps in no other area is Latin American ambivalence over foreign investment so clearly reflected than in the extractive industries. It is not surprising, therefore, that two of the most intractable foreign investment disputes have involved oil in Argentina and iron ore in Brazil.

*The Argentine Oil Contracts.* Since the 1930's, Argentine oil production had been largely in the hands of Yacimientos Petroliferos Fiscales (YPF), a governmental corporation with a statutory monopoly. Though private companies had previously received concessions, all new exploration and development were reserved for YPF. But despite the existence of adequate reserves, YPF lacked the resources to increase production enough to keep pace with Argentina's rapidly expanding demand. Consequently, increased oil imports began to exert serious balance of payments pressures in the early 1950's.<sup>172</sup>

By 1954, the intensity of these pressures was enough to cause Perón to subordinate his nationalist sentiments and begin negotiations with American oil companies. The following year, a contract with a subsidiary of Standard Oil of California was signed according the company extensive rights to explore and develop nearly 50,000 square kilometers of Argentina. While the contract was still being vigorously debated in the Legislature, Perón was deposed by the military. The contract was never implemented.<sup>173</sup>

One of the most outspoken critics of the contract with Standard Oil was Arturo Frondizi, who became President of Argentina in 1958. Once in office, Frondizi quickly jettisoned his previous opposition to foreign oil companies operating in Argentina, and instructed YPF to negotiate secretly a series of contracts with private oil companies.<sup>174</sup> By 1963, ten

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171. See J. TENDLER, *supra* note 139. In November of 1964 the military government resolved the rate problem by issuing three executive decrees providing for automatic inflation adjustments in rates and capital accounts. *Id.* at 44.

172. Edwards, *The Frondizi Contracts and Petroleum Self-Sufficiency in Argentina*, in FOREIGN INVESTMENT IN THE PETROLEUM AND MINERAL INDUSTRIES 157, 161 (R. Mikesell ed. 1971).

173. *Id.* at 162.

174. *Id.* at 163.

contracts were concluded, only two of which were with Argentine companies.<sup>175</sup>

The contracts, which obligated the companies to spend large sums for the exploration and extraction of oil in return for guaranteed sales at a fixed price to YPF, caused immediate political controversy. Despite undeniable success in stimulating Argentine oil production, opponents charged that the contracts were illegal, that they had been procured dishonestly, and that they unduly favored the foreign oil companies at the expense of Argentine patrimony.<sup>176</sup>

Frondizi was deposed by a military coup in 1962. The following year Arturo Illia was elected to the presidency. He promptly carried out his campaign pledge to revoke the oil contracts. On November 15, 1963, Illia issued a decree canceling the contracts but saying nothing about compensation to the companies.<sup>177</sup> Accordingly, the Solicitor of the Treasury filed a complaint against each of the oil companies in the Federal Civil and Commercial Court of Buenos Aires.<sup>178</sup> The complaint sought a declaration of the legal effects of cancellation of the contracts and an accounting of the sums due all parties.<sup>179</sup> In the meantime, the companies continued to manage and operate their wells. When the government failed to press its suit, some of the oil companies filed a suit for a type of preliminary injunction to preserve the status quo as a means of protecting their installations from governmental intervention. Though unsuccessful in the trial court, the companies prevailed on appeal. The court of second instance held that the contractual rights of the oil company were constitutionally protected,<sup>180</sup> and that in the absence of a regular expropriation proceeding, the company's possession of its physical property would be protected by court order.<sup>181</sup>

In the meantime, the Argentine Government appointed a committee to try to negotiate settlements with the oil companies. The desire to settle stemmed from several constraints on the country. First, Argentina was not prepared to invest the capital and technology necessary to increase production in the contract areas. Oil production in the fields operated directly by

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175. 2 A. CHAYES, T. EHRLICH, & A. LOWENFELD, *INTERNATIONAL LEGAL PROCESS* 826-27 (1969) [hereinafter cited as 2 A. CHAYES].

176. *Id.* at 826; Comment, *supra* note 7, at 2082-83.

177. Decree No. 744/63 of Nov. 15, 1963 (Argen.). An English translation appears in 3 *INT'L LEGAL MATERIALS* 1 (1964).

178. *See id.* at art. 6.

179. An English translation of the complaint appears in 3 *INT'L LEGAL MATERIALS* 112 (1964).

180. The Court relied primarily on CONSTITUCION art. 17 (1853, as amended 1866, 1898, 1957) (Argen.).

181. *Gobierno Nacional v. Pan American Oil Co.*, [1965-IV] J.A. 78 (Cam. Fed. Cap. Sala Civ. y Com. 1965).



YPF had declined in 1964, and it became increasingly apparent that some kind of arrangement with international oil interests would have to be worked out if Argentina were to meet her ever-increasing needs for petroleum. Second, though the United States never invoked the terms of the Hickenlooper Amendment, which was itself amended with Argentina specifically in mind, there were threats to do so.<sup>182</sup> Third, there were strong doubts on the part of key members of the Illia Administration about the legality of some of the contract annulments.<sup>183</sup>

The first settlement, announced in January of 1965, was with Astra, a German-Argentine firm. In exchange for all the wells drilled by Astra, YPF agreed to pay Astra the amount of its original investment, plus 15 percent on that investment prior to the annulment of the contract. Payment was to be made in promissory notes bearing 6.5 percent interest and payable in full in four years.<sup>184</sup> The second group to settle was Continental-Marathon, which had agreed to assume the risks of exploration and had found no oil. Marathon sought no compensation and was satisfied with a court-approved settlement which stated that the company had carried out its contract honorably.<sup>185</sup> All but three of the other companies settled later in 1965. With some minor variations, the settlement formula called for restitution of original investment in the form of promissory notes bearing interest at 6.50 to 6.75 per cent per year, and payable in dollars or British pounds in monthly installments. The term of the repayment varied from a low of nine years to high of 24 years.<sup>186</sup> None of the settlements provided for renegotiation of the contracts to permit the companies to continue operating in Argentina, though nothing prohibited the companies from submitting bids on future contracts.<sup>187</sup>

By 1966, when the Illia Government was ousted by a military coup, only the two largest claims, those of Cities Service and Pan American, remained outstanding. During this time, Cities Service had actually been expanding its production, while Pan American's production had fallen off by about 20 percent.<sup>188</sup> The new military regime welcomed foreign investment, and

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182. Comment, *supra* note 7, at 2083-86. Though the United States did not formally suspend aid to Argentina, disbursements were sharply reduced. 2 A. CHAYES, *supra* note 175, at 861.

183. See Memorandum from the president of YPF to President Illia, *translated in* Edwards, *supra* note 172, at 180-82. The adverse Court of Appeals decision also undermined the government's legal position. *Gobierno Nacional v. Pan American Oil Co.*, [1965-IV] J.A. 78.

184. Edwards, *supra* note 172, at 179.

185. *Id.*

186. The terms of the annulment agreements with Tennessee Gas, Esso, and Shell are translated in 5 INT'L LEGAL MATERIALS 103 (1966), 6 INT'L LEGAL MATERIALS 1 (1967), and 6 INT'L LEGAL MATERIALS 19 (1967), respectively.

187. Edwards, *supra* note 172, at 183.

188. 2 A. CHAYES, *supra* note 175, at 868.

was sharply critical of the Illia Government for annulling the oil contracts. One immediate consequence of this change in the political climate was the renegotiation of these two contracts on terms that permitted the companies to continue their oil operations in Argentina satisfactorily.<sup>189</sup>

*Iron Ore in Brazil.* During the 1950's, Hanna Mining Company acquired 52 percent of the stock of St. John d'el Rey, a British corporation that had been engaged in gold mining operations in Brazil. In addition to its gold mines, St. John owned nearly 100 square miles of adjacent land, which contained rich iron ore deposits.<sup>190</sup> When Hanna proposed a joint venture with European and American iron ore consumers to exploit these deposits, intense nationalistic opposition was aroused. In June of 1960, one hundred-twenty Brazilian deputies petitioned Brazilian President Kubitschek to cease negotiations with Hanna, pending a congressional investigation.<sup>191</sup>

Responding to the increasing popular displeasure at the prospect of foreign exploitation of Brazilian iron ore, Janio Quadros, who assumed the presidency in 1961, appointed two commissions to study Hanna's legal position. When these commissions failed to establish sufficient basis for challenging Hanna's title, a third commission was appointed. Some members of this commission found that Hanna's predecessor in title, St. John d'el Rey, had improperly registered the mineral deposits as mines since the requirement that such deposits be worked was not met.<sup>192</sup> The enigmatic Quadros resigned after serving only six months of his term, and his successor, João Goulart, was strongly opposed to permitting Hanna to exploit the ore.

The Goulart regime soon entangled Hanna in a web of legal controversy. In June of 1962, the Ministry of Mines and Energy cancelled registration of the mining rights on mineral properties which Hanna intended to lease to the joint venture's operating company. The Ministry also ordered the immediate cessation of all mining activity and the execution of measures to expropriate the surface land for the property of governmental corporations.<sup>193</sup>

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189. Edwards, *supra* note 172, at 184. The settlement with Cities Service is reproduced in 6 INT'L LEGAL MATERIALS 1073 (1967).

190. Mikesell, *Iron Ore in Brazil: The Experience of the Hanna Mining Company*, in FOREIGN INVESTMENT IN THE PETROLEUM AND MINERAL INDUSTRIES 345, 346 (R. Mikesell ed. 1971).

191. N.Y. Times, June 14, 1960, at 59, col. 5.

192. See Vote of Minister Vitor Nunes Leal, in *União Federal v. Companhia Novalimense et outro*, 88 R.D.A. 192, 232-33 (1966). See also Opinion of the Commission's Legal Consultant, 89 R.D.A. 192-93 (1966).

193. The text of the dispatch issued over the name of Gabriel de Rezende Passos, Minister of Mines and Engergy, appears at 89 R.D.A. 215. Professor Mikesell states that this dispatch was actually issued a few days after Passo's death by his subordinates. Mikesell, *supra* note 190, at 355 n.19.

Hanna promptly challenged the legality of the Ministry's actions in the Brazilian courts. It emerged from the Federal Tribunal of Appeals in September of 1963 with a split decision. By a vote of 4-to-2, that court refused to enjoin the cancellation of the mining rights; however, by a vote of 4-to-3, the court held that the Brazilian Government could not order the cessation of mining and the expropriation of land surrounding the mineral deposits without instituting an administrative or judicial proceeding in which the company would have the opportunity to defend its claims.<sup>194</sup>

Both the government and Hanna appealed to the Supreme Federal Tribunal. While the appeals were pending before that court, four significant events occurred: (1) Goulart was ousted by a military coup;<sup>195</sup> (2) the President of the new military government, Castello Branco, issued a decree favoring private development of export minerals, including iron ore, by both foreign and domestic firms;<sup>196</sup> (3) Hanna and Cia. Auxiliar de Empre-sas de Mineração (CAEMI), a Brazilian firm, agreed to a joint iron ore mining venture in which CAEMI would own 51 percent of the shares;<sup>197</sup> and (4) an "institutional act" was issued, permitting the government to add five new members to the Supreme Federal Tribunal.<sup>198</sup>

When it finally decided the appeals, nearly three years after the decision of the Federal Tribunal of Appeals, the Supreme Federal Tribunal split four ways. Six of the ministers, including all of the new appointees sitting on the case, voted to grant a writ of security<sup>199</sup> annulling all action taken by the Ministry of Mines and Energy.<sup>200</sup> Only one minister agreed entirely with the government's argument and voted to deny the writ of security on the merits.<sup>201</sup> Another voted to deny the writ of security on a procedural ground.<sup>202</sup> Four ministers voted to deny the writ in part, leaving the cancellation of the mining rights standing, but suspending any operative effect pending further decision by the President of the Republic.<sup>203</sup> Breaking the

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194. *Cia. de Mineração Novalimense v. União Federal*, 76 R.D.A. 268 (1963).

195. See generally *Brazilian Democracy Breaks Down: 1963-1964*, in T. SKIDMORE, *supra* note 33, at 253.

196. Mikesell, *supra* note 190, at 357-58.

197. *Id.* at 359-61.

198. Institutional Act No. 2, Oct. 27, 1965, art. 6 (Braz.).

199. The writ of security (*mandado de segurança*) is a uniquely Brazilian juridical institution, which combines into a single writ the effective characteristics of the Anglo-American writs of mandamus, prohibition, quo warrant, and injunction. See Eder, *Judicial Review in Latin America*, 21 OHIO ST. L.J. 570, 582-84 (1960).

200. 89 R.D.A. at 246. Only three of the five newly appointed ministers sat on the Hanna case. The other two excused themselves.

201. Vote of Hermes Lima, 89 R.D.A. at 227-31.

202. Vote of Evandro Lins, 89 R.D.A. at 221-27. Like a motion for summary judgment in U.S. civil procedure, the writ of security is inappropriate if there is an underlying dispute of fact. Minister Lins found that there was an unresolved factual issue.

203. Vote of the Reporter, Gonçalves de Oliveira, 89 R.D.A. at 209-17, and concurred with by Ministers Vítor Nunes Leal, Vilas-Boas and Lafayette de Andrade.

6-to-6 tie as to whether to grant the writ of security in toto, the President of the Tribunal cast his vote with the bloc of four.<sup>204</sup> The result of the Supreme Federal Tribunal decision was to declare the cancellation decree ineffectual and to remand the affair to the President of the Republic for any further action he wished to take consistent with "due process."<sup>205</sup>

A few months after the Supreme Federal Tribunal's decision, President Castello Branco issued a decree which rectified Hanna's right to mine the iron ore on its properties.<sup>206</sup> This presidential decree also cleared the way for the new joint venture between Hanna and CAEMI to construct port and transportation facilities.<sup>207</sup>

#### 4. *Expropriation via the Bankruptcy Court: the Ominous Experience of Deltec International in Argentina.*

The recent experience of Deltec International in Argentina is an ominous portent of the kind of treatment that multinationals may expect from Argentine courts. The country's largest meat packing firm, Compañía Swift de la Plata (a subsidiary of Deltec International Ltd., a Bahamas-based holding company) found itself unable to pay its liabilities as they became due. Swift's payment difficulties were characteristic of the industry at that time, which had suffered heavy losses because of a shortage of beef, a sharp rise in prices, and the government's imposition of restrictions on the slaughtering of beef for domestic consumption. Government banks extended credit to bail out national meat packers, but no such assistance was extended to the foreign-owned packing firms.<sup>208</sup>

Swift, which was insolvent only in an equity sense,<sup>209</sup> petitioned the bankruptcy court for approval of a composition of its creditors. The proposed arrangement called for payment of 100 percent on the principal of its outstanding debts (then about \$20,000,000) in four consecutive annual installments of 10 percent, 20 percent, 30 percent, and 40 percent, bearing interest of twelve percent per annum.<sup>210</sup> Despite approval of the arrangement by 86 percent of the general creditors representing 85 percent of the

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204. Vote of Ribeiro da Costa, 89 R.D.A. at 246-48.

205. That is to say, before the President of the Republic could cancel Hanna's mining concessions, the company was entitled to notice and an opportunity to be heard.

206. Mikesell, *supra* note 190, at 356.

207. *Id.* at 359.

208. ERNST & ERNST, ARGENTINA: A NATIONAL PROFILE 20 (1972); BUSINESS LATIN AMERICA, Sept. 26, 1973, at 305.

209. Based upon an evaluation made by the Argentine National Institute of Technology (Universidad Tecnológica Nacional), the bankruptcy referee in September of 1971 valued the assets of Swift at 556,223,360 new pesos, and the liabilities at 143,480,787 new pesos.

210. Brief on Appeal to the Federal Commercial Chamber, Compañía Swift de la Plata, Nov. 16, 1971, at 6 (abbrev. Eng. trans.).

claims entitled to vote,<sup>211</sup> the bankruptcy judge, acting on the motion of a single creditor with a claim of about \$4,000, rejected the composition.<sup>212</sup> Instead, he ordered Swift's liquidation and appointed the national government as liquidator. In addition, the court pierced a parcel of corporate veils and held all other Argentine corporations owned by Deltec contingently responsible for the debts of Swift.<sup>213</sup> This was accompanied by a prohibition *pendente lite* against Deltec's transfer of any of its other Argentine assets.

The bankruptcy court's opinion reads more like a political polemic than a reasoned judicial analysis. It begins with the assumption that Swift is part of "a unified structure of decision and interest, which makes it a single unit, with the same and common profit motive," and it is therefore "necessary to penetrate the corporate personality."<sup>214</sup> In two brief paragraphs, the court suggests that the economic difficulties of Swift are largely due to its merger with two other Deltec corporations, Armour and La Blanca, and in making loans to other corporations in the Deltec group. It therefore concludes that Swift "has been engaged in conduct incompatible with the benefits of a composition and that an analysis of its conduct reveals that it does not deserve to continue in business."<sup>215</sup>

The real basis for the court's opinion comes in a later paragraph, in which it points out:

. . . Swift is an Argentine extension of the multinational firms, a species born . . . under the impulse of new systems of production which eliminate national frontiers and generate new economic powers. Because of the concentration and flexibility of their resources, these firms are able to carry out autonomous strategies, largely independent of national authorities . . . . In the extension of their activities "these private organizations may lead to a new, abusive form of economic domination . . . ." This circumstance requires greater rigor in determining whether such a corporation should survive when it becomes insolvent.<sup>216</sup>

The court's solution was to order the "liquidation" of Swift. However, "liquidation" is not used in the usual sense of the term; in this context it means "nationalization" of the enterprise. Thus, the court's order directs the liquidator to maintain present levels of employment, and borrowing a page from the history of the first Perón-era, suggests that the employees

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211. *Id.*

212. *Compañía Swift de La Plata, S.A., conv.*, 15 J.A. 350, 350-53, 146 La Ley 597, 601-04 (Nat'l Commercial Ct., 1972) (Lozada, J.).

213. *Id.* at 368, 146 La Ley at 612 (1972).

214. *Id.* at 350, 146 La Ley at 601.

215. *Id.* at 352, 146 La Ley at 603.

216. *Id.*

might acquire the operating parts of the company.<sup>217</sup>

This decision by Judge Salvador Lozada caused *Latin America*, the highly regarded London-based newsletter, to observe:

The Argentine authorities are horrified at any suggestion that their action with regard to Swift is in any way similar to nationalizations by decision of executive or legislative branches of government in other parts of Latin America. All that is involved, they say, is a technical legal question. If the judge's decisions are reversed in a higher court, such a version may be accepted, but in the current climate of opinion in Argentina, this does not seem likely . . . . If anyone doubts the eccentricity of Lozada's historic decision (historic for the precedents he set) they should study the legal costs awarded against Swift; the lawyers who represented the small creditor . . . are to receive 1,500,000 new pesos [about \$150,000] in court-awarded legal fees. It is presumably merest coincidence that the lawyer in question was minister of justice when Lozada was appointed to the bench.<sup>218</sup>

Sala C of the Federal Commercial Chamber sustained Lozada's decision insofar as it denied confirmation of the composition and declared Swift's bankruptcy.<sup>219</sup> However, it reversed the piercing of Deltec's corporate veils and the award of attorney's fees.<sup>220</sup> It also censured and fined the bankruptcy judge for conceding newspaper and magazine interviews about the case.<sup>221</sup> The basis of the appellate court's more tempered opinion was that the bankruptcy judge has broad discretion to reject arrangements which he finds are not in the "public interest," and that there was evidence in this case to support his determination. Such evidence was found in the limitations on Swift's freedom of action as part of the Deltec group, and particularly in its merger with two of the group's loss corporations at a time when Swift was having financial difficulties of its own.<sup>222</sup>

Shortly after the appellate court handed down its decision, Argentina's Minister of Justice, Ismael Bruno Quijano, was accused by Judge Lozada

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217. *Id.*

218. 5 *LATIN AMERICA* 378 (1971).

219. *Compañía Swift de La Plata, S.A., conv.*, 15 J.A. 353, 146 La Ley 604 (Nat'l Commercial Ct., Ct. App. 1972).

220. *Id.* at 368, 146 La Ley at 612, 616.

221. 146 La Ley at 611.

222. Swift's Brief to the Supreme Court, at 54, points out that the Federal Commercial Chamber was confused about the size of the balance sheet losses of these two companies. The Court's opinion characterized the loss of La Blanca as more than 14 million pesos and that of Armour at more than 27 million. The real amounts were apparently closer to 4 million and 9 million pesos, respectively. Moreover, the brief points out the assets were actually worth more than four times book value, and there were sound business reasons for the mergers.

of trying to influence his judgment in the Swift case. This publicity forced the resignation of the Minister of Justice.<sup>223</sup>

While Swift's appeal was pending, the entire membership of the Supreme Court resigned in the wake of the election of a Perónist regime. The new regime promptly packed the Court with Perónistas.<sup>224</sup> In September of 1973, the newly appointed Supreme Court reversed the Federal Commercial Chamber in part and reinstated Judge Lozada's original decision.<sup>225</sup> However, instead of imposing contingent liability on Deltec's Argentine subsidiaries for the debts of Swift, the Supreme Court characterized that liability as joint and several.<sup>226</sup> The Supreme Court's theory, declared a few weeks earlier in a case involving Parke, Davis & Co.,<sup>227</sup> was that a parent and its subsidiaries constitute a single "socio-economic unit" and must be treated as a single juridical entity.<sup>228</sup> The Supreme Court also reinstated the award of attorney's fees of \$150,000 to counsel for the small creditor and remanded the case to Judge Lozada to ascertain which entities should be held jointly liable for Swift's debt.

Judge Lozada immediately issued bankruptcy orders against thirteen Deltec subsidiaries and appointed intervenors to operate the companies. Thus, Deltec presently finds itself in the position of having companies with book values well over \$100 million taken over by the Argentine courts to secure the payment of \$6,504,000 worth of unpaid debts by one of its subsidiaries.<sup>229</sup> Whether these companies will be returned to Deltec or expropriated pursuant to the general expropriation law remains to be seen. At present, it is difficult to avoid the conclusion that Deltec has been the victim of a thinly-disguised confiscation by a politically motivated denial of justice in the Argentine courts.<sup>229.1</sup>

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223. 6 *LATIN AMERICA* 216 (1972). Deltec's board of directors in Argentina included Adalbert Krieger Vasena, Minister of Economy from 1967 to 1969. To what extent the company used or misused its political influence is unclear.

224. *La Prensa*, May 25, 1973, at 10, col. 1; *La Prensa*, June 9, 1973, at 1, col. 1.

225. *Compañía Swift de La Plata, S.A. Frigorífica*, 19 J.A. 576 (Sup. Ct. 1973). The Argentine Supreme Court's opinion appears in the English translation in 6 *LAW OF THE AMERICAS* 330 (1974) and is the subject of a comment by Gordon, *Argentine Jurisprudence: The Parke Davis and Deltec Cases*, 6 *LAW OF THE AMERICAS* 320 (1974); Case Note, 15 *HARV. INT'L L.J.* 528 (1974).

226. *Compañía Swift de La Plata, S.A. Frigorífica*, 19 J.A. 576, 583 (Sup. Ct. 1973).

227. *Parke Davis y Cia. de Argentina S.A.*, 19 J.A. 418 (Sup. Ct. 1973).

228. *Compañía Swift de La Plata, S.A. Frigorífica*, 19 J.A. 576, 582 (Sup. Ct. 1973). The Supreme Court's opinion does not appear to rest upon factual findings that Deltec had abused its corporate entities or had specifically harmed Argentine economic interests. The Court does hint that its conclusion is necessary to prevent fraud, but the opinion fails to set out specific fraudulent acts. Whether the weakness of the opinion reflects merely the weakness of the case or the Court, or both, is unclear.

229. Deltec International Limited, 1973 Annual Report, at 5.

229.1. In refusing to give extraterritorial effect to this Argentine bankruptcy decree, a U.S. court observed:

. . . New York courts are not required to recognize foreign judgments which come in conflict with prevailing concepts of justice and fairness. The determination

## VI. CONCLUSIONS

What lessons can be drawn from the above examination of the theory and practice of expropriation law in Argentina and Brazil? And what conclusions can be drawn to guide present and prospective foreign investors in those countries?

First, the eminent domain provisions of both countries deserve only fair marks as mechanisms for promptly according the condemnee just compensation. While recent changes permitting inflation adjustments have greatly improved fairness, the "quick take" procedures (used in almost all cases), combined with the lengthy delays built into the expropriation process, often result in the payment of inadequate compensation many years after the condemnee has been deprived of his property. Moreover, the Argentine eminent domain statute is unduly restrictive in denying compensation for lost profits, good will, and, under certain circumstances, costs.

Second, many, though probably not all,<sup>220</sup> of the purposes of expropriation can be constitutionally achieved without compensation by a combination of regulation and taxation. Taxes can be raised to confiscatory levels, and artful drafting of categories of taxpayers can conceal arbitrary discrimination. Redistribution of income from business to employees can be accomplished by means of labor legislation. Rent and price controls can be used to eliminate profits, and utility rates can be set so low that they achieve a similar effect. The foreign investor can be deprived of the fruits of his investment by means of profit remittance and capital repatriation limitations, as well as exchange controls. Violations of criminal statutes may be used to trigger constitutionally valid confiscations.<sup>221</sup> Finally, as Deltec's experience demonstrates, even bankruptcy laws can be bent to disguise confiscation. While the use of such policy instruments to cloak confiscations has been relatively rare in Argentina and Brazil, past experience suggests that their municipal counts offer inconsistent and unreliable protection against such activity.

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that plaintiff is Bankrupt because it is one segment of a chain of corporations, one of which is insolvent, may under our laws amount under certain circumstances to a confiscation of property.

Deltec Banking Corp., Ltd. v. Compania Italo Argentina de Electricidad, S.A., N.Y.L.J., Apr. 3, 1974, at 18, cols. 1 & 2, *aff'd mem.*, 46 App. Div. 2d 847, 362 N.Y.S.2d 391 (1st Dep't 1974).

220. One dominant motivation of expropriation is the felt political need to claim national ownership. To the extent that even bare legal title is left with the foreign investor, such motivation is frustrated. Another motivation may be to reallocate capital, which may be more difficult to accomplish by regulation and taxation. See Axelrod & Mendlovitz, *Expropriation and Underdeveloped Nations: The Analogy of U.S. Constitutional Law*, in *ESSAYS ON EXPROPRIATION* 83, 86-87 (R. Miller & R. Stranger eds. 1967).

221. Despite constitutional language striking confiscation forever from the Argentine Penal Code, the Argentine Supreme Court upheld the confiscation of Perón's "illicitly acquired" property by special decree immediately after his ouster. Perón, Juan Domingo, [1957-III] J.A. 62 (Sup. Ct. 1957).



Both countries have long traditions of relatively independent judiciaries, which have tended to take seriously their role as protectors of constitutional rights against governmental infringement. Unfortunately, the independence and vigor of the courts of both Argentina and Brazil have been seriously undermined in recent years by clashes with the constituted, duly or otherwise, political authorities. Since the end of World War II, the Argentine Supreme Court has been arbitrarily impeached *en masse* once, arbitrarily dismissed *en masse* twice, and politically motivated to resign *en masse* once.<sup>232</sup> Between 1965 and 1969, the Brazilian Supreme Federal Tribunal has been both packed and unpacked to ensure compliance with the aims of *de facto* military governments.<sup>233</sup> This is not to suggest that the Argentine and Brazilian courts have become mere rubber stamps for the Executive; they have not. But their independence has been decidedly reduced in the past decade, and the protection accorded to basic constitutional rights, such as liberty of movement and freedom of speech, has been decidedly restrained.<sup>234</sup> Nor has the return of constitutional government to Argentina resulted in increased judicial independence; present indications are that the Peronists are once again engaged in a pattern of conduct designed to undermine the independence of the Argentine judiciary.<sup>235</sup>

Third, the constitutional and statutory provisions governing expropriation have generally not been of decisive importance in resolving the major foreign investment disputes in Argentina and Brazil. Most of these have been resolved by negotiated, extra-judicial settlements. Such settlements have generally been influenced more by external and domestic, political and economic factors than by legal considerations. Despite constitutional guarantees of prior compensation, such settlements have frequently involved long-term payouts, and have sometimes required the reinvestment of a substantial portion in a less sensitive sector of the economy. Considering the magnitude of the sums involved in relation to existing foreign currency reserves, Argentina and Brazil have generally negotiated fair settlements of these disputes.

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232. A Perón-dominated Congress impeached the entire Supreme Court in 1946 for having invalidated several statutes and released numerous political prisoners. See Leonhard, *The 1946 Purge of the Argentine Supreme Court of Justice*, 17 INTER-AM. ECON. AFFAIRS, Spring 1964, at 73. In 1957, after Perón's ouster, the Lonardi provisional government summarily dismissed the entire Supreme Court. The process was repeated in 1966 after the military coup that brought General Onganía to power. See generally INSTITUTO DE CIENCIA POLÍTICA, *LA REVOLUCIÓN ARGENTINA* (1966). In the wake of a Peronist electoral victory, in May of 1973 the entire Supreme Court resigned. See note 224 *supra*.

233. Rosenn, *Judicial Review: Old and New*, 81 YALE L.J. 1411, 1419-20 (1972).

234. See Carl, *Erosion of Constitutional Rights of Political Offenders in Brazil*, 12 VA. J. INT'L L. 157 (1972); Steiner & Trubek, *Brazil—All Power to the Generals*, 49 FOR. AFF. 464 (1971); Tyson, *Economic Growth and Human Rights in Brazil: The First Nine Years of Military Tutelage*, 67 PROCEEDINGS AM. SOC. INT'L L. 208, 209-10 (1973); 35 BULL. INT'L COMM'N JURISTS, Sept. 1968, at 13. See also Bidart Campos, *La Intervención Federal al Poder Judicial de la Provincia de Santa Fe*, 131 La Ley 1287 (1968).

235. See La Prensa, March 25, 1974, at 4, cols. 1-2; *id.*, Apr. 16, 1974, at 4, cols. 1-2.

Both nations, like all other Latin American countries, have resisted pressures to subscribe to the World Bank Convention on the Settlement of Investment Disputes.<sup>236</sup> However, investment guaranty agreements permitting the U.S. Government to insure the foreign investor against certain risks have been in existence since 1959 for Argentina and since 1965 for Brazil.<sup>237</sup> Given the strength of nationalistic currents hostile to foreign investment, such insurance is advisable.

Lastly, nationalistic resentment of foreign investment has deep political roots in both Argentina and Brazil. Brazilian hostility towards foreign investment has been largely repressed since Goulart's ouster in 1964, though there is a sizeable group of nationalistic junior army officers favoring more state ownership of the means of production, and complaints about "de-nationalization" of Brazilian industries are widespread. A foreign investment law may also be soon introduced by the Geisel regime, which took office in March of 1974.<sup>238</sup> However, the creation of Petrobras, the state oil monopoly, before foreign oil companies were granted oil exploration concessions, has prevented oil from becoming the emotional issue that it is in Argentina. Moreover, nationalism in Brazil has tended to be more restrained and less xenophobic than in some of its Hispanic neighbors. Consequently, the Brazilian *ambiente* is far more favorable for foreign investment than that prevailing in most parts of Latin America.

Argentine nationalism, which had begun to re-emerge well before the Peronist electoral victories in 1973,<sup>239</sup> was accentuated by Perón's return to power. It is still too early to assess the implications of Perón's recent death upon Argentine nationalism. At the time of his demise, Perón seemed torn between the left and right wings of his political movement, between a desire to attract more foreign investment, albeit on his terms, and a desire to nationalize key sectors of the economy. His new foreign investment law and the Deltec affair were hardly calculated to encourage foreign investment, though the former at least has the virtue of screening

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236. See Szasz, *The Investment Disputes Convention and Latin America*, 11 VA. J. INT'L L. 256 (1971).

237. Guaranty of Private Investments Agreement with Argentina, Dec. 22, 1959, [1961] 1 U.S.T. 955, T.I.A.S. 4799 (effective May 5, 1961). The initial Agreement provides a guaranty against inconvertibility, but an amended protocol providing for expropriation, war, and civil strife guarantees was executed on June 5, 1963; though the latter has been implemented, it has never been ratified and is thus only provisionally in force. U.S. TREATIES IN FORCE 5 (1972). However, the new Argentine Foreign Investment Law subverts the entire agreement by denying entry to any foreign investor whose potential claims against the Argentine government are subrogated to foreign states or international organizations. See note 103 *supra*. Because of nationalistic opposition, the Investment Guaranty Agreement with Brazil was not signed until Sept. 17, 1965, more than a year after Goulart's ouster, and the Brazilian Senate made one important reservation. See note 6 *supra*.

238. See BUSINESS LATIN AMERICA, March 27, 1974, at 97.

239. Since June of 1970 there has been growing hostility to foreign investment manifested in legislation, the press, and the courts. See Dabinovic, *Foreign Investments: Politics and International Law*, 5 LAW. OF THE AMERICAS 10 (1973).

out undesirable foreign investments and thereby reducing potential sources of investment disputes.

There have already been a number of nationalizations of foreign investment in recent months in Argentina. The expropriation of five foreign-owned banks in September of 1973 has produced a serious dispute about the terms of compensation.<sup>240</sup> In October of 1974, Perón's widow decreed the "Argentinisation" of the foreign-owned telephone companies, including the subsidiaries of Siemens and ITT, as well as the Italo-Argentine Electric Co. (CIADE).<sup>241</sup>

Even more discouraging to foreign investment in Argentina is the government's apparent inability to prevent the kidnapping of executives, both foreign and national, by leftist guerillas. In the past fifteen months, companies doing business in Argentina have had to pay out approximately \$50,000,000 in ransom to secure return of their personnel.<sup>242</sup> The number of U.S. executives in Buenos Aires has fallen from 1000 to about 300 in the past year because of terrorist activities.<sup>243</sup> Until companies are no longer being deprived of property by threats of force, and a climate of personal security is restored, constitutional and statutory measures regulating expropriation will remain secondary considerations to the foreign investor.

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240. Law No. 20.522 (Argen.). Rather than permit compensation to be set by the courts, the Argentine government has reportedly set compensation for the former bank owners by governmental decree on a take it or take nothing basis. Chase Manhattan has denounced the compensation offered to it as "considerably below what we would consider fair value." Wall St. Journal, April 19, 1974, at 3, col. 4.

241. 8 *LATIN AMERICA* 330 (1974); *La Prensa*, Oct. 18, 1974, at 1, col. 3.

242. *NEWSWEEK*, Mar. 25, 1974, at 52.

243. *BUS. WEEK*, Mar. 9, 1974, at 40; *U.S. NEWS & WORLD REP.*, Mar. 11, 1974, at 59.