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THE NATIONALIZATION OF FOREIGN-OWNED PROPERTY*

EDWARD D. RE**

INTRODUCTION

A LTHOUGH the practice of governmental seizure of private property is historically ancient, legal history does not record an era when the myriad juridical problems incident to such a governmental act were of greater magnitude or more difficult of solution than those confronting jurists and statesmen today. What was formerly an isolated occurrence has now become a matter of common practice followed even by countries that accord the traditional respect to private property. Although no country outside of the Soviet Union has thus far attempted to abolish the institution of private property, the recent nationalization of industry has not been undertaken solely by those countries under the influence of the Soviet philosophy.1

In modern times, the Mexican expropriations and the Soviet nationalizations may be regarded as the forerunners of many incidents of nationalization of private property. The Iranian nationalization of the property of the Anglo-Iranian Oil Company,2 a corporation whose majority stock is owned by the British government, will not be the last governmental nationalization of private property. Furthermore, it would seem that no part of the world is immune from this rapidly growing phenomenon. A daily newspaper that discussed the Anglo-Iranian incident also contained a report from Santiago that certain deputies of the Chilean Parliament intro-

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duced a measure calling for the nationalization of Chile's copper-mining industry which is largely owned by interests in the United States.

The topic of foreign nationalization measures is of the most vital importance to any individual or corporation either presently possessing or contemplating the investment of capital abroad. The legal effects of such governmental measures have already been accorded considerable treatment by international lawyers. It is unfortunate, however, that the problems presented do not always lend themselves to a practical or easily attainable solution. This inexorable difficulty is partially explained by the fact that the legal solution is made to suffer by reason of ideological conflicts, political discord, economic necessity and other matters of international expediency. These difficulties underscore the warning that the possibility of nationalization must be added to the existing impediments and risks attending the investment of capital in foreign countries.

In the compass of a brief paper it is proposed to discuss some legal aspects of nationalization insofar as customary international law and practice may reveal an answer to two fundamental questions: Does a nation have a right to nationalize foreign-owned property? If such a right exists, what are the rights of the former owners?

A. Nationalization in Time of Peace

It must be understood at the outset that what is about to be discussed is the nationalization of private property in time of peace. The power of a State to confiscate the property of the enemy located within the national domain of the belligerent, as incident to the effort of the belligerent to weaken the enemy both militarily and economically, presents a different question of international law.


However, even in this situation, although there is authority tending to uphold the governmental power to confiscate enemy property, it is interesting to note that it is the modern enlightened policy of nations not to confiscate such foreign property, but rather to “preserve” it until the end of the war. In the United States, such is the function of the Alien Property Custodian.

B. Expropriation vs. Confiscation

The term nationalization is comparatively new, and, although it is descriptive of the act of a government taking over either particular industries or the entire economic structure of the nation, it does not indicate whether the taking is with or without compensation to the former owners of the nationalized property. If the particular nationalization decree does not provide for compensation, or if the offer of compensation is inadequate or illusory, the nationalization is in effect a confiscation of the property. However, if there is a granting or an offer of adequate compensation, the nationalization is in effect an expropriation of the property. In the words of former Secretary of State, Cordell Hull: “The taking of property without compensation is not expropriation. It is confiscation.” It, therefore, becomes apparent that the true nature and legal effect of any nationalization decree cannot be ascertained unless the decree is examined to determine whether provision has been made for the compensation or indemnification of the former owners.

Existing Rules of International Law

Since the charter of the United Nations is silent on the question of the respect that a member State is to accord foreign-owned property located within its territorial jurisdiction, a search for any applicable rule of law is unfortunately limited to the existing norms of international law. Such an examination, however, will reveal

6. See United States v. Perchenen, 7 Pet. 51 (U.S. 1833); Ware v. Hylton, 3 Dall. 199 (U.S. 1796); Brown v. United States, 8 Cranch 110 (U.S. 1814).

7. See quotation of statement by Mr. A. Mitchell Palmer, Alien Property Custodian in 3 Hyde, International Law Chiefly as Interpreted and Applied by the United States 1736 (1947). Speech of President Coolidge: “It has been the policy of America to hold that private property should not be confiscated in time of War. This principle we have scrupulously observed.” N. Y. Times, Dec. 8, 1926 p. 14.


10. See Articles 2 and 14 of the draft Declaration on Rights and Duties of States. Article 2 states: “Every State has the right to exercise jurisdiction
that both the international practice of States and the writings of theorists and publicists furnish some basic answers to the many problems raised by the nationalization of foreign-owned property.

A. Power of State to Nationalize

Unless a State has divested itself of its power to expropriate property within its own territorial jurisdiction, by treaty or other binding international obligation, such power is generally considered an inherent attribute of sovereignty and has not been seriously questioned. In the absence of an applicable treaty stipulation, an act of the government which expropriates property is not considered an international tort for the commission of which restitution in kind must be made to the owners. On this question, the opinion of the Permanent Court of International Justice in the Chorzow Factory case is very significant because the Court distinguished between an expropriation contrary to the provisions of an existing treaty and an expropriation in the absence of such a treaty. Whereas an expropriation in violation of a treaty is a tortious act committed by a State which would require restitution (restitutio in integrum), or, if restitution be impossible, then full pecuniary indemnification for the loss including loss of future profit; in the absence of a treaty the expropriation would be an internationally lawful act conditioned solely upon the payment of "fair compensation." In the Chorzow Factory case, since the Court found that the act of Poland in seizing German properties in Polish Upper Silesia was contrary to a treaty concluded between Poland and Germany in 1922, it stated that the action of Poland was "not an expropriation—which to render lawful only the payment of fair compensation would have been wanting; it is a seizure of property, rights and interests which could not be expropriated even against compensation. . . ." Although stated by way of dictum, it is altogether clear from the opinion of the court that, even in the absence of a treaty, the expropriation, although permissible, would require the payment of compensation to the former owners for the expropriated property.

over its territory and over all persons and things therein, subject to the immunities recognized by international law." See comments to both articles in Kelsen, The Draft Declaration on Rights and Duties of States, 44 Am. J. Intl L. 259, 267-268 (1950).


B. Inviolability of Private Property

The existing international law precedents clearly establish the inviolability of private property. Fiore, one of the early writers who treated the subject, stated that "Every state is bound to recognize that the property of private persons, whether civilians or foreigners, is inviolate." In fact, it has been suggested that it is probable that the reason why textwriters have given so little attention to the question of the status of private property of aliens in time of peace is "because the inviolability of such property was so generally recognized." In an article written in 1927 by Chandler P. Anderson, it was pointed out that the accepted principle which protects foreign-owned property from confiscation in time of peace has become part of the law of nations not merely because it represents a universally recognized standard of justice, but also because it is absolutely essential for the welfare of every nation, for without its protection no commercial or financial international intercourse could safely be carried on.

These observations, of course, apply to property and property interests lawfully acquired in a foreign country. When a State has permitted an alien either to engage in business or otherwise lawfully to acquire property, it cannot thereafter arbitrarily or unreasonably curtail his rights or confiscate the property. It is agreed that such an act of State would constitute a denial of justice for which the State would become internationally responsible.

The United States has expressed its position on this question in the following terms:

“When a nation has invited intercourse with other nations, has established laws under which investments have been lawfully made, contracts entered into and property rights acquired by citizens of other jurisdictions, it is an essential condition of international intercourse that international obligations shall be

14. Fiore, International Law Codified § 1165 (Borchard’s transl. 1917).
17. See Stowell, International Law 171 (1931); 2 Hyde, International Law Chiefly as Interpreted and Applied by the United States 871-879 (1947); 6 Moore, A Digest of International Law §§ 913, 986 (1906); Fenwick, International Law 289 (1948); Quadri, Diritto Internazionale Pubblico 483, 486 (1950). See generally Freeman, International Responsibility of States for Denial of Justice (1938); Borchard, Diplomatic Protection of Citizens Abroad (1915); Eagleton, The Responsibility of States in International Law (1928); Anzilotti, Teoria Generale Della Responsabilita dello Stato Nel Diritto Internazionale (1902).
Again, it is to be observed that nationalization measures do not come within the so-called police power of a State, pursuant to which it may destroy private property for the protection of the health, morals and safety of its citizens. On the contrary, nationalization of property or industry does not imply a destruction of the property, but rather its appropriation by the State as a matter of national policy. As applied to this type of taking, the international law principle which established the inviolability of private property demands that the taking, if it is to be permitted by the family of nations, must be conditioned upon the making of “fair compensation.” This principle of inviolability of private property, which may be said to find codification in Article 17 of the Universal Declaration of Human Rights, demands that if private property be taken as an act of government the State must grant or offer a substituted res in the form of compensation.

C. Requirement of Compensation

Regardless of the particular philosophical or theoretical views upon which the right of former owners to compensation is based,21

18. Secretary of State Hughes, Report, Mexican Claims Convention, quoted in Buell, International Relations 389 (1925).
19. See Re, Foreign Confiscations in Anglo-American Law 13, 15-16 (1951). Cf. Herz, Expropriation of Foreign Property, 35 Am. J. Int'l L. 243, 250, 251 (1941) “The right of the state to interfere with private property in the exercise of its police power has been recognized by general international law as referring to foreign property also: interference with foreign property in the exercise of police power is not considered expropriation. The state is deemed to be free to take all necessary steps in this respect without incurring any of the obligations which accompany ordinary expropriation.”
such a right is firmly established not only by the overwhelming weight of authority of publicists, but also by the sustained practice of States and an impressive array of international case law. Whether the right be considered one of natural law or a principle of international equity, the common sense of justice among men and nations demands that if a country wishes to nationalize an industry it must make payment to foreign owners of the property nationalized.\footnote{22}

This rule of international law does not require that a country must retain an institution of private property as opposed to what might be termed collectivism, but it does require that, once a foreigner has been permitted to acquire property or property interests in the country in full compliance with its municipal law, it cannot thereafter take or destroy such existing or "vested" property rights.\footnote{23} In fact, an eminent authority on international law has raised the question whether the payment of compensation is not actually a condition precedent to a State's power to expropriate.\footnote{24} Hence, a State contemplating the nationalization of immovable property of great value without means for the making of payment might find that its very power to expropriate could not be exercised. Thus, if there were no reasonable assurance of compensation, either immediate or ultimate by deferred payments, on the theory that payment be either a condition precedent or a condition concurrent with the act of expropriation, a nation would be unable to exercise its national power to expropriate. The question basically would not differ from that existing in municipal law, namely, whether the exercise of the power of eminent domain is contingent upon the country's ability to pay for the property condemned or whether the payment of "just compensation" is merely a subsequent limitation upon the original right.\footnote{25}

On the international plane, it is interesting to note that, in an

\footnote{22. For the various views concerning the requirement of compensation see excellent documentation in Wilson, \textit{Property-Protection Provisions in United States Commercial Treaties}, 45 Am. J. Int'l L. 83, 84-87 (1951).}
\footnote{23. Kaeckenbeck, \textit{The Protection of Vested Rights in International Law}, 17 Brit. Y. B. Int'l L. 14 (1936); Fachiri, Expropriation and International Law, 6 Brit. Y. B. Int'l L. 159 (1925); Sack, \textit{Les reclamations diplomatiques contre les Soviets}, 66 Revue de droit international et de legislation comparee 8, 12 (1939) ("obligation juridique de nature quasi-contractuelle"); Kunz, \textit{The Mexican Expropriations}, 17 N. Y. U. L. Q. Rev. 327, 341 (1940). "As a rule of general international law cannot be changed or abolished by the action of one or a few governments, a study of the problem reveals that the rule of international law, forbidding the expropriation without just compensation of private property of aliens continues to be positive international law."}
\footnote{25. See Sweet v. Rechel, 159 U. S. 380 (1895).}
editorial comment discussing the method of compensation urged by Secretary Hull, in the Mexican expropriations of American-owned agrarian properties, Professor Hyde wrote that it had been suggested that if "Secretary Hull's theory be duly respected, a territorial sovereign may find its very right to expropriate conditioned upon its power to pay, and that if it be sought to exercise that right when evidence of the possession of such power and the disposition to use it are not evident, there is reason to demand that there be restored to the owners what may have been taken from them."26 Actually, this problem may not be too serious if the taking involves a profitable industrial plant or an entire industry, for, in such cases, the continued operation of the enterprise may furnish the funds necessary for the payment. This, nevertheless, raises the question of the measure and nature of the compensation to be paid to the owners.

D. Measure of Compensation

Like any other situation involving the evaluation of property for which a government must make "just compensation," a hard and fast rule of compensation that will do justice in all cases has not been found. At most the rules that have been enunciated state objectives rather than establish any definite or useful measure.

The most common phraseology is that the right to nationalize is "coupled with and conditional on the obligation to make adequate, effective and prompt payment."27 [Emphasis added.] Such was the terminology used by Secretary Hull in his note to the Mexican government of August 22, 1938. He declared that the fundamental issues raised by the Mexican government were "whether or not universally-recognized principles of the law of nations require, in the exercise of the admitted right of all sovereign nations to expropriate private property, that such expropriations be accompanied by provision on the part of such government for adequate, effective, and prompt payment for the property seized."28 Of course, the answer to the question, as found in that communication, was that "... the Government of the United States cannot admit that a foreign government may take the property of American nationals in disregard of the universally recognized rule of compensation under international law or admit that the rule of compensation can

be nullified by any country through its own local legislation." The communication stated further: "The Government of the United States merely adverts to a self-evident fact when it notes that the applicable precedents and recognized authorities on international law support its declaration that, under every rule of law and equity, no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate, and effective payment therefor." [Emphasis added.]

It has been said that "international law insists upon full and prompt indemnification." One author, who indicates that the requirement that compensation be "just or fair" is not very helpful because it is "vague," asserts that the more concrete rule is the one that "only full and immediate compensation in cash fulfills the conditions of international law." In those cases where deferred payments were agreed upon, since interest has been allowed for the delay, the author concluded that this practice (of allowing interest) seemed to "corroborate" the rule calling for immediate payment.

In the deferred payment cases, it would seem more realistic to explain than an expropriating State has been privileged to make payment on a deferred or installment basis provided that the deferred method of payment was taken into account in the establishment of the award. Professor Hyde has termed this method of payment or award, which has taken into consideration the consequences of the postponement, the "fiscal equivalent of prompt payment." He has explained that "The matter of time of payment is among the factors that must always be considered because if payment is to be deferred the total amount will fail to be fully or strictly compensatory if it does not make provision, among other things, for interest on the investment or for loss of benefits to the owner after the property was taken and prior to payment."

Since a nation that nationalizes industries as a policy of social reform may not be able to pay the "full, adequate and prompt"

29. Id. at 191.
30. Id. at 193.
33. Ibid.
34. Hyde, supra note 24, at 110.
35. Ibid. Professor Hyde has also termed this type of payment the "full equivalent of prompt payment." Id. at 111.
compensation that the international law rule would require as payment to foreign owners, it becomes necessary to examine the "equality of treatment" contention that has been made by some governments to ascertain its validity and applicability to present nationalizations. In the absence of a governing treaty, is the foreign-property owner entitled to a better or superior treatment than that accorded the national or the citizen of the nationalizing State? The question is vital if the municipal nationalization law either makes no provision for compensation or expressly denies compensation to the owners of the property taken.\textsuperscript{36}

E. \textit{International Standard of Justice}

It has been maintained that, in the absence of a treaty provision to the contrary, foreign nationals are not entitled to a better standard of treatment than that accorded nationals if the nationalization legislation applies equally to all property owners.\textsuperscript{37}

It may be mentioned at this juncture that a rather obvious distinction has been pointed out between an expropriation of particular property and a general or wholesale expropriation of property or industry pursuant to a national policy of social reform. The general redistribution of property in accordance with national planning calculated to achieve social welfare and the wholesale expropriation of industry has been said to be an exception to the rule which demands compensation. Writing in 1928, one author observed that "From a functional point of view, a possible solution would be to retain the rule of intervention but to except from its operation all governmental acts infringing upon vested property rights which were the result of \textit{bona fide} social or economic reform.

\textsuperscript{36} Generally the domestic law will coincide with the international standard which requires compensation. Anderson, \textit{Basis of the Law Against Confiscating Foreign-Owned Property}, 21 Am. J. Int'l L. 525 (1927). "Extracts from these fundamental laws [of 31 nations] are collected in an annex hereto, and in every instance the taking of private property in time of peace is prohibited unless for public uses and except upon payment of adequate compensation, which in most cases must be paid before the property is taken." On this question of compensation Secretary Hull wrote: "... clauses appearing in the constitutions of almost all nations today, and in particular in the constitutions of the American republics, embody the principle of just compensation. These, in themselves, are declaratory of the like principle in the law of nations. The universal acceptance of this rule of the law of nations, which, in truth, is merely a statement of common justice and fair-dealing, does not in the view of this Government admit of any divergence of opinion." Dep't of State Press Release, Aug. 25, 1938; 32 Am. J. Int'l L. Supp. 191, 193 (1938).

genuinely aimed to benefit the nation as a whole, and were not discriminatory against foreigners as such, nor liable to disturb to any substantial extent the existing methods of carrying on intercourse between nations. Such a rule, while discouraging arbitrary or dishonest governmental acts causing damage to foreigners, would at the same time provide the necessary flexibility in the present system to meet new conditions or special conditions in particular parts of the world arising from the peculiarities of different peoples. It would in effect help to perpetuate the present system by making it more adaptable to a changing world.\textsuperscript{38}

Although “these reasons may savor of layman’s ideas of equity,”\textsuperscript{39} the law would indeed be strange if compensation is required in the taking of particular property but none need be made if an entire industry is appropriated by the State.\textsuperscript{40} In the cases of fundamental social reforms involving drastic interference or taking of private property, Professor Oppenheim\textsuperscript{41} has suggested that neither the principle of equal treatment with nationals nor that of absolute respect for foreign-owned private property seems to offer a satisfactory solution. He suggests that in such cases some form of partial compensation may offer a solution that is satisfactory and consistent with legal principle.\textsuperscript{42} Even though this compromise solution may ultimately be agreed to by intervening States, it is clear that in this

\textsuperscript{38} \textit{Id.}, at 180. On the distinction between isolated or particular expropriations and general nationalizations see Rubin, \textit{Nationalisation and Private Foreign Investment: The Role of Government}, 2 World Politics 482 (1950).


\textsuperscript{40} The issue basically involves one’s philosophy concerning the right to own private property. See Ryan and Millar, The State and the Church 278 (1930) “Property in goods which have a more remote relation to individual needs, such as, land, machinery, and the instruments of production generally, is not directly and immediately necessary for the individual; but the institution of private property in such goods is essential to human welfare, inasmuch as no other arrangement is adequate. All the foregoing natural rights belong to the individual as such, and consequently are valid against the State.” Ryan and Boland, Catholic Principles of Politics 148 (1942). Re, Foreign Confiscations in Anglo-American Law 7 (1951) “Since Magna Charta, in England and in countries whose jurisprudence is based upon the heritage of the common law, the due process of law concept is too firmly imbedded in the municipal law of those countries to tolerate any appropriation of private property without adequate compensation.”

\textsuperscript{41} Oppenheim, \textit{International Law} 318 (1948).

\textsuperscript{42} This “compromise” solution may probably appeal to some of the writers interested in this problem. See Doman, \textit{Postwar Nationalization of Foreign Property}, 48 Col. L. Rev. 1125, 1161 (1948). “A compromise in the method of compensation as recommended here is not to be interpreted as a compromise in the principles of international law.” Kuhn, \textit{Nationalization of Foreign-owned Property in its Impact on International Law}, 45 Am. J. Int’l
area lies the foreign-property owner's greatest source of danger. This warning deserves consideration because there is merit in the observation that the existing international precedents upholding the requirements of compensation to foreign-property owners can be limited to cases involving specific expropriations of private property.48

In 1938 a Subcommittee of the American Bar Association stated the main issue as follows:

"Is there a legal duty on the part of a State towards another not to take without full compensation or appropriate and immediate arrangement therefor, immovable property of nationals of that other, that has been validly acquired, when the taking is effected by general legislation impartially applied to all landowners, nationals and aliens alike?"44

The American view on this question was categorically stated by Secretary Hull in his reply to the position of Mexico in 1938. Mexico maintained that American nationals could not demand a different standard of treatment than that accorded Mexican nationals. It maintained that "there is in international law no rule universally accepted in theory nor carried out in practice, which makes obligatory the payment of immediate compensation, nor even of deferred compensation, for expropriations of a general and impersonal character like those which Mexico has carried out for the purpose of the redistribution of the land."45

Secretary Hull stated the Mexican position as follows: "Reduced to its essential terms, the contention asserted by the Mexican Government as set forth in its reply and as evidenced by its prac-

L. 709, 711-712 (1951). "If nationalization laws introduced as social reforms were to recognize full, adequate and prompt compensation, none could be carried out [citing Doman, supra]. A compromise in the method of compensation is not a compromise in the principles of international law; ..."

43. See Dunn, International Law and Private Rights, 28 Col. L. Rev. 166 (1928). "Now if we examine the cases in which the responsibility of states for injuries to aliens within their borders has been successfully invoked, we find that this minimum standard of justice is nothing more nor less than the ideas which are conceived to be essential to a continuation of the existing social and economic order of European capitalistic civilization." Id. at 175; "To extend the rule of the inviolability of the property rights of aliens to cover all cases of expropriation without concurrent indemnity, regardless of whether such act is deemed to be a necessary step in the improvement of conditions of the native population, would seem to place a powerful obstacle in the way of future social reform." Id. at 178.


tices in recent years, is plainly this: that any government may, on the ground that its municipal legislation so permits, or on the plea that its financial situation makes prompt and adequate compensation onerous or impossible, seize properties owned by foreigners within its jurisdiction, utilize them for whatever purpose it sees fit, and refrain from providing effective payment therefor, either at the time of seizure or at any assured time in the future."\(^4\) The reply to the question was clear and emphatic. Secretary Hull stated: "I do not hesitate to maintain that this is the first occasion in the history of the western hemisphere that such a theory has been seriously advanced. In the opinion of my Government, the doctrine so proposed runs counter to the basic precepts of international law and of the law of every American republic as well as to every principle of right and justice upon which the institutions of the American republics are founded."\(^5\)

The United States has consistently adhered to the position that a special agreement or treaty is unnecessary to secure to American citizens "the treatment to which they are entitled under the law of nations."\(^6\) The American view not only represents the international practice to which most nations have adhered and the position taken by international tribunals, but is in perfect harmony with the basic rule that a principle of international law cannot be unilaterally changed by a State even by the embodiment of the change in its constitution. It is indeed elementary that a nation cannot justify its refusal to perform an international obligation, imposed either by treaty or customary international law, by alleging that the obligation cannot exist or that it has been expressly vitiated by its domestic legislation.\(^7\) Hence, irrespective of the national policy underlying the expropriation, be it a general reform measure calculated to achieve social justice or an ordinary taking for the construction of a highway, for example, foreigners are entitled to compensation

\(^4\) Ibid.
\(^5\) Ibid.
\(^6\) Such was the position expressed by Secretary of State Hughes in 1924. (Roumanian expropriation of American-owned property in Bessarabia). See I Hackworth, Digest of International Law 21 (1940).
\(^7\) Publications of the Permanent Court of International Justice, Series A, No. 24, 12 (Order 1930) ("... it is certain that France cannot rely on her own legislation to limit the scope of her international obligations ...") ; Anderson, Basis of the Law Against Confiscating Foreign-owned Property, 21 Am. J. Int'l L. 525 (1927) "Inasmuch as international law, unlike municipal law, is not subject to repeal by domestic legislation, no member of the family of nations may justify its repudiation of a principle of international law by applying a different principle of its domestic legislation." 2 Hyde, International Law Chiefly as Interpreted and Applied by the United States 875 (1947).
pursuant to the requirement of international law regardless of the treatment accorded the citizens of the expropriating State.

The compensation, of course, must be real and useful.50 Even those authors that feel that there should be a compromise with the traditional standard of compensation agree that the "nationalization should not be permitted or recognized if the compensation provided for is so inadequate as to constitute merely a disguise for the spoliation of foreign-owned property."51

F. Illustrative International Precedents

The most relevant international precedents that can be mentioned at this point firmly establish the right of a nation to intercede on behalf of its citizens in order to attain for its citizens those rights to which they are entitled by international law.52 It has been stated that the above principle of intercession flows from the fact that the confiscating State by appropriating the property of the foreign owners thereby unfairly enriches itself at the expense of another nation.53

An important recorded precedent is found in the Sicilian Sulphur Monopoly case of 1838.54 In 1836 a contract was made between the Sicilian government and a French company whereby the French company was granted the exclusive right of purchasing and exporting all sulphur produced in the country. Subsequently, the Sicilian government, by general legislation, established a state

50. Rubin, Nationalisation and Compensation: A Comparative Approach, 17 U. of Chi. L. Rev. 458, 461 (1950). "Between the concessions that the compensation, even if local currency, must be something more than merely formal compensation and the contention that lack of foreign exchange resources does not limit the power to nationalize or expropriate lies an area almost wholly undefined." Id. at 462. Domke, Some Aspects of the Protection of American Property Interests Abroad, 4 The Record 268 (1949) "The primary issue in questions of expropriation of American claims abroad is whether deferred payments, unrealistic values of exchange or domestic investments may be considered as full compensation of the former owners."


52. Fachiri, Expropriation and International Law, 6 Brit. Y. B. Int'l L. 160 (1925). "A state is entitled to protect its subjects in another state from gross injustice at the hands of such other state, even if the measure complained of is applied equally to the subjects of such other state." See Resolution of International Law Association to the effect that a nation has a right to intercede to protect its nationals from discrimination and also from a denial of justice even in the absence of discrimination. 34th Conference Report 248 (1926).


54. 28 British and Foreign State Papers 1163 (1838).
monopoly of the sulphur industry with resulting damage to a large number of British subjects. Notwithstanding British protests, Sicily, nevertheless, put the monopoly into effect. Unfortunately, the authority of the incident as a precedent is weakened by the fact that, before an agreement was reached, British gunboats were dispatched to the vicinity, whereupon the monopoly was abolished and a claims commission was established for the reimbursement of the British subjects who suffered a loss during the short life of the monopoly. Sicily defended against the claims on the ground that the law establishing the monopoly was a general law that applied to citizens and aliens alike. The incident, therefore, raised the issue concerning the "equality of treatment" principle as opposed to the existence of an international standard of justice requiring compensation for foreigners. Although Sicily submitted to the British view in favor of the international standard of justice, as indicated, it is unfortunate that the decision doubtlessly resulted from the intimidation by the British naval demonstration.55

A typical precedent, which involves the expropriation by a State of property of a particular foreigner or a specific group, is the Finlay incident.56 In the Finlay case the Greek government appropriated a parcel of land owned by Mr. Finlay, a British subject, which land was desired by King Otho for his garden. The British government, on behalf of Mr. Finlay, successfully demanded compensation from the Greek government for the property taken.57 In 1853 the United States obtained compensation from the same government for a similar act of government against Mr. King, an American.58

In this type of a case there is abundant international case law and practice to sustain the principle requiring compensation.59

55. Another precedent, also weakened by the intervention by force, is the expropriation by the Turkish government of certain wharves owned by a French company. Although the expropriation was made upon grounds of public necessity, compensation was made by the Turkish government. Archives Diplomatiques 74 (1901-1902).

56. 39 British and Foreign State Papers 410 (1849-1850).

57. For a criticism of the Finlay case see Baty, International Law 85 (1909).

58. On the King incident see 6 Moore, International Law Digest 262 (1906).

59. For other precedents see 6 Moore, International Law Digest (1906) § 913 (Denial of Justice), § 997 (Confiscatory Breaches of Contract); Bulington, Problems of International Law in the Mexican Constitution of 1917, 21 Am. J. Int'l L. 685 (1927); Herz, Expropriation of Foreign Property, 35 Am. J. Int'l L. 243 (1941).
However, as was indicated previously under the discussion of the International Standard of Justice,\textsuperscript{60} excepting the clear-cut American position on this question, equally authoritative international precedents cannot be found to extend the rule of compensation to all cases of expropriation including the nationalization of entire industries and the redistribution of lands.

A well-known precedent that involved the governments of the United States and Great Britain against Portugal is the Delagoa Bay Railway case.\textsuperscript{61} In this case the Portuguese government confiscated a railway concession originally owned by an American citizen who later disposed of his rights to a British corporation. Although this involved the taking of physical properties in addition to the concession, the Portuguese government denied liability on the ground that the revocation of the concession and the taking were acts of State for which the State was not responsible. The matter was submitted to arbitration and Portugal was ordered to pay fifteen and a half million francs to the former owners.\textsuperscript{62}

Many other precedents could be mentioned;\textsuperscript{63} however, the principles for which they stand are made clear by the few previously mentioned examples. If the municipal law of a country provides that private property cannot be taken for a public use except upon the payment of just compensation, the national and international rules will coincide and no problem will be presented concerning the requirements of compensation.\textsuperscript{64} If the domestic law, however, makes no such provision, the foreigner may rely upon the international standard even though he thereby reaps a benefit not available to the citizen of the nationalizing State.

The International Code of Fair Treatment for Foreign Investments restates the standard of treatment that should be accorded to foreign investments. Article 11 (a) of the Code provides that the property of foreign investors "shall in no circumstances be liable to measures of expropriation or dispossession except in accordance with the appropriate legal procedure and with fair compensation

\textsuperscript{60} See \textit{supra} II, E and notes 38-43.
\textsuperscript{61} 2 Moore, History and Digest of the International Arbitration 1865 (1898).
\textsuperscript{62} See Sentence Final du Tribunal Arbitral du Delagoa, Berne (1900).
\textsuperscript{63} See note 59 \textit{supra}.
\textsuperscript{64} For the specific provisions of law of many countries see annex to Anderson, \textit{Basis of the Law Against Confiscating Foreign-owned Property}, 21 Am. J. Int'l L. 525. 527-533 (1927); see note 36 \textit{supra}. 
FOREIGN-OWNED PROPERTY

according to international law.”

If countries contemplating the nationalization of industry were to respect and appreciate the inherent justice and the reciprocal benefits that would flow from adherence to the requirements of international law a solution to the problem could be found and compliance would seem less burdensome.

PRESENT UNITED STATES POLICY CONCERNING CLAIMS

The present policy of the United States as expressed in the 1948 agreement with Yugoslavia and in the International Claims Settlement Act of 1949 indicates a definite appreciation of the fact that the actual attainment of compensation for United States nationals in cases of the nationalization of their property is dependent upon a variety of factors, among which the political instability and the ability to pay of the debtor country are of primary importance. This policy neither weakens nor compromises the principle which requires compensation, but makes the best adjustment possible between the equities of the former owners and the interests of the nationalizing State.

Under the 1948 agreement with Yugoslavia the United States accepted a lump sum payment of seventeen million dollars in settlement of claims of American property owners whose property in Yugoslavia had been nationalized. Although this agreement was expedited, if not made possible, by the fact that the United States had actual possession of approximately forty-seven million dollars of blocked Yugoslav gold, the method of settlement evidences a new method of settlement whereby one settlement is made on

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66. 19 Dep't of State Bull, 137 (1948).


68. See Kuhn, Nationalization of Foreign-owned Property in its Impact on International Law, 45 Am. J. Int'l L. 709, 710 (1951); Doman, Postwar Nationalization of Foreign Property, 48 Col. L. Rev. 1125, 1161 (1948).

69. “There is little doubt, as of the summer of 1948, the United States would not have been able to obtain a compensation agreement with Yugoslavia had it not been for the presence in the United States of some $46,800,000 of Yugoslav gold, blocked by United States law.” Rubin, Nationalization and Compensation; A Comparative Approach, U. of Chi. L. Rev. 458, 463 (1950).
behalf of all interested nationals instead of an individual protection afforded to each property owner resulting in individual awards.

Several important changes result from this type of an over-all compensation agreement. First, the property owner now looks to his own government for compensation. Second, although provision is made for part-payment of an award, complete payment cannot be made until all claims have been filed and adjudicated, since until that time the amount of ademption to which all claimants must submit will be unknown. This, of course, results from the fact that the en bloc settlement is likely to be less than the full market value of the property. Such is the case in the specific example of the settlement with Yugoslavia.

The International Claims Settlement Act of 1949, in order to distribute the fund acquired under the agreement with Yugoslavia or any other "claims agreement hereafter concluded between the Government of the United States and a foreign government . . . similarly providing for the settlement and discharge of claims of the Government of the United States and of nationals of the United States against a foreign government, arising out of the nationalization or other taking of property," established in the Department of State an International Claims Commission. The Commission, consisting of three members to be appointed by the President, shall have jurisdiction to "receive, examine, adjudicate and render final decisions" with respect to all claims coming within the Yugoslav or any future claims agreement. The Act expressly provides that in the decision of claims, in addition to the provisions of the particular agreement, the Commission is to apply "the applicable principles of international law, justice and equity."

As evidenced by the experience with Czechoslovakia and Poland, the United States may not in most cases be in so favorable a position as it was in relation to Yugoslavia. However, the American position in all cases is clear and emphatic. Its refusal to accept the national treatment standard was conclusively demonstrated as recently as 1948 by its position at the International Conference of American States at Bogota. At that Conference, the United States success-

72. Ibid.
fully opposed the Mexican proposal that there would have to be effective compensation for expropriation "except when the constitution of any country provided otherwise." Mexico's inability to add the quoted limitation to Article 25 of the Economic Agreement leaves the standard of compensation precisely as stated in that article, i.e., "Any expropriation shall be accompanied by payment of fair compensation in a prompt, adequate and effective manner."

The United States' protest to Hungary over the Hungarian Nationalization Law of December 28, 1949 can leave no doubt that the United States will tolerate neither discriminatory treatment of its citizens as compared with other aliens, nor the outright confiscation of American-owned property. Nevertheless, as a practical matter, the closeness of the vote by which the Mexican proposal was defeated in Bogota may serve as a definite warning to the American investor. This does not imply that there is any doubt concerning the position of the United States. It does, however, indicate that other countries do not necessarily agree with the American conception of international law on these questions. This uncertainty offers at least a partial explanation for the fact that although the United States is the leading capital-supplying country in the world "the flow of private investment abroad has dwindled to a negligible factor."

CONCLUSION

Since the over-all en bloc settlement is a post factum device, it seems that the treaty remains the only assurance that can be offered the American who is asked to invest capital abroad. The tech-

75. 22 Dep't of State Bull. 399 (1950). The note of protest to Hungary referred to the Treaty of Friendship, Commerce and Consular Rights of 1926 and stated that the United States would hold the Hungarian government "wholly responsible for the payment of adequate and effective compensation for the property rights of American nationals affected by the present edict as well as by previous laws and decrees." The note pointed out the discriminatory nature of the nationalization law insofar as it exempted interests of the Soviet Union.
76. The United States defeated the proposal backed by Mexico, Cuba, Argentina and other countries by a vote of ten to nine. See Domke, Some Aspects of the Protection of American Property Interests Abroad, 4 The Record of the Association of the Bar of the City of New York 268 (1949).
78. See Wilson, Property-Protection Provisions in United States Commercial Treaties, 45 Am. J. Int'l L. 83 (1951). Cf. "Negotiations with other countries for similar lump-sum settlements are being pressed, and as such settlements are made the funds will come under the jurisdiction of the Com-
The technique used by Great Britain in bringing about an agreement with Czechoslovakia deserves to be studied by the United States. The same can be said for the provisions for arbitration recently included in agreements by Great Britain with Czechoslovakia, Poland and Yugoslavia. Bi-lateral financial and trade agreements such as have been initiated by Switzerland may offer a solution that may prove to be useful and adequate in certain cases. Perhaps it is unduly optimistic to say that "such agreements might not only give adequate compensation to foreign investors but are destined to revitalize international trade." Nevertheless, the possibility for their utilization should not be overlooked with those countries interested in American trade or American loans. The American investor is entitled to such preventive efforts on the part of his government.

Just as international law recognizes the right of a nation to nationalize property and industry to effect social and economic changes, it also recognizes the inviolability of private property, the rights of foreign property-owners, and the right of States to intercede on behalf of their citizens to secure these rights. Such is the obligation of government and it cannot be said that a reasonable effort to obtain these rights in practice has been made until all available means known to diplomacy and statesmanship have been employed.


"The committee recommends that vigorous steps be taken to negotiate similar agreements with all other nations which have 'nationalized' or confiscated American property." Id. at 108.


80. See Domke, On the Extraterritorial Effect of Foreign Expropriation Decrees, 4 Western Pol. Q. 12, 16 (1951).