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Nationalization and  
Compensation

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## PREFACE

This treatise is a continuation and enlargement of the points of view expressed in the work I published in 1957, *Nationalization, A Study in the Protection of Alien Property in International Law*, for which I was awarded the Gold Medal of the University of Copenhagen in 1956.

Since that time nationalization problems have been made the object of far-going discussions in international organizations and in literature on International Law and new nationalization measures have been taken in respect of foreign property. Therefore it has been natural to subject the points of view I expressed in my above work from 1957 to a scrutiny.

This treatise, that is largely compiled according to the same system as my earlier work, differs from the former not only quantitatively, an attempt having been made to bring the pertinent material up to date. My enquiry into the problems created by nationalizations has caused new questions to be taken up for discussion and it has been reasonable to view the problems that have been raised earlier from new angles and to subject them to a more detailed analysis than was possible in a Gold Medal treatise. This has entailed that I have had to admit that some of the views I advocated earlier cannot be upheld while other views I have expressed earlier have been confirmed by later developments.

As regards the literature quoted a full reference to any work quoted is only made on the first quotation of the work in questions. Where several works by the same author are quoted the title of the work involved or part thereof is quoted in so far as earlier quotations may give rise to doubt.

This work was published in the Danish language in 1961, and the same year the writer on the basis of this work was awarded the degree of doctor juris in the University of Copenhagen.

The difficult work of translating a legal book from the Danish language into the English language has been conducted by Mr. A. F. Colborn, London. The Rask Ørsted Foundation has contributed towards the payment of

the translation. The registers have been compiled by Mr. Henrik Stenbjerre, student of law.

The preparation of a treatise on a legal subject at the same time as the writer is teaching at the University and practicing as an advocate cannot be carried through without strong and continued encouragement. I am deeply grateful for the interest and sympathy that has been given me in that respect.

I hereby bring everybody concerned my heart-felt thanks.

*Copenhagen, September 1963.*

ISI FOIGHEL.

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## SECTION 1: BACKGROUND

### § 1

#### THE PROBLEM

A. The protection of foreign investments has played a leading role in international discussions since the Second World War. In the course of a few years there has appeared not only an enormous volume of international legal literature on the problems which arise as a result of investments abroad, but also international bodies, such as O.E.C.D., Unesco, the International Law Commission, the Economic and Social Council and other organizations within the United Nations, the Council of Europe, the Pan-American Union, as well as private legal organizations, have brought forward connected questions for discussion.

This special and widespread interest in a single problem in international society is easy to explain.

The economic consequences of the Second World War both in Europe and in the Far East created a need for capital which States were able to make good from their own resources only in extremely few cases. The emergence of new States as a result of new political tendencies, and the continuously developing impulse towards independence in the former colonial possessions of the Great Powers, brought with it political liberation, which, in some instances, was regarded by the new States as the precursor of a corresponding and necessary economic liberation from the investments which the previous colonial powers, or others, had made in their territories.

In practice, however, it has already become apparent that none of the new States has been in a position to survive without the help foreign capital can give. Such help was indeed forthcoming on a very extensive scale and thereby demonstrated the necessity of mutual economic co-operation between States. Moreover, modern techniques often demand investments which States are quite unable to undertake alone, and by reason of easier commercial intercourse the economy of States has become a very sensitive piece of apparatus which rapidly registers influences from the economic life of

other countries. The recognition of the fact that States are mutually dependent on each other economically has, even in the so-called "old" nations, reshaped economic thinking as to how the international economic process of fusion is to be brought about.

This economic integration has not been followed by a corresponding legal integration. The international community to-day shows a picture which in its political and legal aspects is very far from the comparatively homogeneous community of Christian European States which worked out a system of international law at the beginning of the 19th century. Up to the beginning of this century the legal and political ideas of members of the community of international law were broadly speaking uniform, or in any case not different in essence; but the situation to-day is quite otherwise. The leading States now represent economic-political systems which are not only different, but to a certain degree directly incompatible, and the concept of fundamental justice in the different countries is far from uniform. The disagreement on legal concepts acts as a brake on the development which should follow from the demand for progressively greater economic integration.

There is a natural connexion between this and the fact that the steadily growing need for capital in certain parts of the world can only be expected to be filled if a favourable investment-climate exists in the territories concerned. In other words conditions must be such that not only shall the investor have a reasonable return on the capital invested, but at the same time the certainty that what is invested there will not be lost. Many factors contribute in determining the climate of investment of a territory: political, cultural, commercial and, not least, legal.

Although many of these factors operate through the legal processes it must be admitted that in judging the problem as a whole the legal aspect is only a single contributory element in determining the extent of protection which in practice is given to foreign investments, though it is by no means the least important element.

The traditional rules of international law as they apply to the protection of alien property have, as a result of the developments mentioned above, been exposed to a severe test. The problem is now whether the classical rules of international law (which, as will appear later, came into being in the age of liberalism) can become common ground for a number of nations who long ago abandoned liberalism as an appropriate economic basis and who, in their municipal law, have abandoned the principle of the protection

of private property against attack and regulation by the State acting from motives of overriding public interest.

In this situation can international law continue to claim complete and full protection for alien property? The answer given by *Alf Ross*<sup>1</sup> is that international law must follow social development. International law must entrust the judgment on which forms of deprivation of property shall qualify for compensation to the municipal law of the nation involved, since the position will become clearly unreasonable on the day when international law calls for compensation for an action against private property which no nation within its own legal system would regard as qualifying for compensation. In the 19th century the doctrine of international justice could have validity, because it was in harmony with national ideas of justice. To-day it is merely a cultural relic. Ross makes the further point that no general analysis exists in international law as to what forms of deprivation of property shall be understood as qualifying for compensation by international law.

With these pronouncements as a starting point, this study will analyse the problems which arise in connexion with a single form of action against private property: nationalization.

The task here is threefold. First, an attempt will be made to establish whether the latest national practice in this field has influenced international law, or, in other words, to demonstrate the extent to which international law actually follows social developments in municipal law. This examination will seek to show how the international system of law, in spite of its static nature arising from the lack of an authoritative instrument to impose new rules to meet the demand of altered circumstances, is changed and adapted to new legal situations.

The second objective will be to carry out an analysis of how legal conflicts which have already arisen as a result of nationalization of foreign property have been solved in practice without the questions being submitted to international courts or bodies. This part of the work will serve to illuminate the rules of procedure in international law.

Finally, there is an analysis of the problems of the distribution of compensation received. Strictly speaking these are not problems of international law, but an examination of the legal questions contained in them shows that the rules of international law are not entirely without influence on

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1. *Textbook of International Law* (1946), p. 167.

the municipal rules which cover the distribution of compensation. It is from this connexion that these questions of municipal law arise naturally for discussion.

The reason for the exclusive concentration of the work on a single form of taking of property, nationalization, is first of all that both from a political and legal standpoint we are apparently facing a new phenomenon whose influence on the international community has set on foot events which have left their mark at many important points of international development in the past few years. It seems an appropriate aim of this work that it should concentrate on a concept which has only in the past few years become a common and normal element in the policy of many countries. In this way the effects on traditional international law of this taking of property can be established more clearly.

The second reason, and a special one, for narrowing the scope of the work comes from the recognition that, in international law, the problem of the limits of protection of property cannot be solved, as is attempted in municipal constitutional law, by the formulation of general principles, by reference to which a decision can be reached in every individual case as to whether or not an action against private property carries liability to compensate or can be regarded as an adjusting action without compensation. The reason is not only that the types of action against property are necessarily more various in the international legal system than within the constitutional system of any single State. It must also be supposed that the rules of international law are not so decisively affected by the nature of each single intervention, its motive, or its extent, seen in relation to the individual or the juridical person against whom the action has been taken, but are more concerned with the international effects of the action. It cannot be ruled out that actions which are dictated by motives which are the same in national law and which have the same result for the individual, namely that his property is lost, may have different international consequences and therefore be evaluated differently in international law. Verification of this hypothesis is only possible by a thorough examination of individual instances of actions against private property examined singly.

Finally, there is the purely technical advantage that an examination of a single central problem offers better opportunities to analyse the special background to these actions, so avoiding conclusions by analogy and the like from legal rules that spring from quite other circumstances.

B. In connexion with nationalization measures, problems may arise in municipal law, international private law, or international law, partly determined by the character of the nationalized property, whether foreign or national, and partly determined by the place where the nationalized property is situated.

Property is here defined as national when the property belongs<sup>2</sup> to a physical or juridical person who is attached to the nationalizing state by his nationality.

There is scarcely any doubt on the question of the territorial situation of property when immovable or movable property is in question. Where claims are concerned, it is taken that these are, in accordance with "the usual theory," territorially situated in the creditor's country<sup>3</sup>. However this doctrine cannot be accepted. The question of the territorial situation of claims takes on practical significance only at the moment when the creditor enforces his claim and the place where this takes place must then be decisive for the territorial status of the claim and thus determines the legal consequences of nationalization<sup>4</sup>. This is equally true in a situation where the claim comes from a foreign national, but is directed against, for example, a nationalized company, and in a situation where the claim is national, and for example belongs to a nationalized company. This point of view seems to have been adopted in the case referred to in *U.f.R.* 1952, page 856, concerning a claim by a nationalized company against a Danish firm. Although the claimant was a Czech company, which at the time of nationalization was situated in Czechoslovakia, it was laid down in the judgment that situs of the claim was in Denmark.

In the following study, when the territorial situs of property is an important factor, the point of time of nationalization will be decisive in the case of immovable and movable property, while the point of time at which a claim is raised will determine where claims are to be assigned territorially.

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2. For the justification of this limitation, see below page 221.

3. Thus Magne Schjødt, *Norsk Ekspropriationsrett* (1947), p. 119 and Poul Andersen, *Dansk Statsforfatningsret* (1954), p. 730.

4. cf. Lars A. E. Hjerger, "The General Approach to Foreign Confiscations." *Scandinavian Studies in Law* (1958), p. 188 and 191, and Seidl-Hohenveldern, *Internationales Konfiskations- und Enteignungsrecht* (1952), p. 88 and specially p. 91.

1. In cases where nationalized property is situated on the territory of the nationalizing state, legal problems arising from the effects of nationalization of national property only will fall outside the jurisdiction of international law, since international law does not touch the legal relationships between a State and its nationals. The legal problems here are those of municipal law.

On the other hand, if the property is alien the problems which arise between the nationalizing State and the foreign owners (and/or the home countries of these owners) will fall within the jurisdiction of international law. These problems make up the main body of the present analysis.

In the last named situation questions can also arise on how far the home country of the foreigner concerned or a third country is under an obligation to recognize the nationalization of alien property, and this problem can well arise under conditions where nationalized property is brought out of the territory of the nationalizing State after nationalization has taken place. This problem is traditionally regarded as belonging to international private law, although certain aspects of international law are of importance in deciding the question. These aspects of international law will be discussed below § 12.

2. If the nationalized property is situated outside the territory of the nationalizing State, problems can arise partly from the relationship between the nationalizing State and the State where the property is situated (the holding State), and partly in relation to the physical or juridical person who owns the nationalized goods.

Relations between the nationalizing State and the holding State can give rise to a number of questions.

The first is the problem whether and how far the judiciary of the holding State is under an obligation to co-operate in the execution of the nationalization<sup>5</sup>. This problem falls within the scope of international private law<sup>6</sup> since international law will have no claims to make in such a case<sup>7</sup>.

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5. Cf. *U.f.R.* 1955, p. 1070.

6. Cf. O. A. Borum, *Lovkonflikter* (1957), p. 138.

7. In his *Fifth Report on International Responsibility* (1960), Garcia Amador, however, proposes that international law should be changed on this point, cf. *UN.doc. A/CN. 4/125*, p. 75. This also agrees with views frequently put forward by writers from the Eastern European States, cf. Seidl-Hohenveldern,



Secondly, the question may also arise in this connexion as to whether the holding State has an obligation to recognize nationalization without an approach having been made to the judicial authorities of the holding State to co-operate in the execution of the nationalization. This problem could well arise in connexion with a decision on who is the real creditor in a claim which is raised before the court of the holding State<sup>8</sup>, or in coming to a decision on who is the real debtor in a case where the previous owner of the nationalized property which is the subject of the claim, has property in the holding State. These, too, are questions which fall within international private law.

Finally, questions may arise on the legal status of the nationalized property where nationalization is recognized as in accordance with the rules of international private law. As far as the special rules on the immunity of State property are concerned, these questions are covered by the rules of international law<sup>9</sup>.

If the position which the holding State adopts on the problems set out above results in a foreign juridical or physical person losing his property as a consequence of nationalization, the question arises as to how far the injured party has a claim against the nationalizing State. This problem falls within the scope of international law, since the facts of the case from the viewpoint of international law correspond sufficiently closely with the situation where nationalized property is situated in the territory of the nationalizing State.

The more detailed definition of what is to be understood by property and what is decisive in determining the national character of property will follow in connexion with a survey of the rules, where closer definition is important.

As a starting point for the examination it will be sufficient to designate the object affected by nationalization as "alien property."

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"Communist Theories on Confiscation and Expropriation," *A.J.C.L.* (1958), vol. 7, p. 558 and Konst. Katzarov, *Théorie de la nationalisation* (1960), p. 399-400.

8. Cf. *U.f.R.* 1952, p. 856.

9. This question will not be the subject of special examination in this book, since such a legal situation, if it is recognized, cannot be regarded as a true effect of nationalization, in that it does not result from the particular rules valid for nationalization, but is a consequence of the application to the nationalized property of the general rules of international law.

## § 2

### THE CONCEPT OF NATIONALIZATION

#### A. *Is there a difference of fact between nationalization and other forms of taking of property?*

1. *The traditional view:* In the extensive legal literature which has come into being as a result of nationalization in the past few years, the problem of definition, that is to say a clear statement of what is to be understood by nationalization in international law, has not received great attention. Gradually, as the word nationalization came to be more frequently used by States in connexion with public action against property, and as the number of cases of nationalization rose, it came to be accepted that what was regarded as nationalization in municipal law was also nationalization in international law. Without any clear explanation as to whether it was justifiable that certain public actions against property should have a new label different from the traditional one of expropriation, social restriction etc., the prevailing view is that the establishing of the definition of the term "nationalization" has no real importance <sup>1</sup>.

There is no doubt that the reason for this is that the definition of the concept of nationalization is associated by many authors with the traditional concept of expropriation.

As an illustration, Michael Brandon <sup>2</sup> states that the term nationalization is applicable to the transfer of private property to public ownership and adds that, if compensation is paid, such a transfer is expropriation without regard to other factors present.

J. E. S. Fawcett <sup>3</sup> likewise claims that nationalization with compensation

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1. Cf. e.g. Torsten Gihl who, answering a questionnaire sent out by the International Law Association in 1947, declares that it is difficult and valueless to find a difference between "expropriation" and "nationalization."
  2. Michael Brandon "Legal Deterrents and Incentives to Private Foreign Investments," *Transactions of the Grotius Society* (1958), vol. 43, p. 43, cf. also "Legal Aspects of Private Foreign Investments," *The Federal Bar Journal* (1958), vol. XVIII, p. 303.
  3. J. E. S. Fawcett, "Some Foreign Effects of Nationalization of Property," *B.Y.I.L.* (1950), vol. 27, p. 335, cf. also Robert Delson, "Nationalization of the Suez Canal Company: Issues of Public and Private International Law," *Columbia Law Review* (1957), vol. 57, p. 757, note 3.

is expropriation, while nationalization without compensation is confiscation<sup>4</sup>.

This classification of a new concept under traditional definition is apparently in agreement with normal legal methods.

However, in itself the classification gives no information of any value. Quite apart from the fact that a statement that nationalization with compensation is the same as expropriation becomes mere tautology, because of the usual definition of expropriation, the classification set out above is a poor foundation for analysing the legal effects of nationalization. This becomes doubly clear when the traditional definition of expropriation is examined.

Expropriation is defined in the theory of constitutional law as public action against rights which carries liability for full compensation, and which can only occur under certain conditions<sup>5</sup>. The term "expropriation" applied to public action thus expresses only the legal results which the action involves, but contributes no information whatever about what phenomena or courses of action accompany these legal results,<sup>6</sup> and in particular nothing of the nature of the action, whether it covers general as well as particular deprivations, restrictions on social or sanitary grounds and so on.

The definition of expropriation is, therefore, only a description for *jus* and not for *facta*<sup>7</sup>, and the assertion that nationalization is the same as

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4. Cf. also Fischer-Williams, "International Law and the Property of Aliens," *B.Y.I.L.* (1928), vol. 9, p. 25, and Garcia Amador, *Fourth Report on International Responsibility*, UN. doc. A/CN. 4/119, p. 31.

5. Cf. Ernst Andersen in Ross & Andersen, *Dansk Statsforfatningsret II* (1949), p. 212. Later in the text it appears as if "expropriation" is only another expression for "seizure." Cf. also Ross, *Dansk Statsforfatningsret II* (1960), p. 534-535.

6. It is this interpretation of the concept of expropriation which has been transferred to international law, cf. inter alia Robert Delson, *op. cit.* p. 759, note 31. The speech usage is, however, not consistent in international law, where it often appears that expropriation is used as a description for the action itself, cf. in this connexion the resolution passed by the International Law Association in 1926 where inter alia it states: "... It is generally recognised ... that private property may not be expropriated without compensation ..."  
*I.L.A. 34th Report* (1926) p. 248.

7. It is quite another matter that the legal consequences which are characteristic for the concept of expropriation in the national constitutional law of States

expropriation necessarily presupposes an obligation to compensate, the existence of which must be proved. The problem for analysis is in fact *whether* nationalization is the same as expropriation; in other words whether the facts which are described as "nationalization" are of such a kind that it is reasonable and in agreement with relevant law to ascribe to them the legal results which are inherent in the concept of expropriation. No such examination appears to have been undertaken by the authors named above.

The meaning of the word "nationalization" which will be established here must consequently be descriptive<sup>8</sup> in the sense that the definition must contain the characteristic marks which will justify and show that the phenomena which are included in the definition are distinguished from other phenomena and specially designated. It must, however, be agreed that it is not very useful to concentrate exclusively on pure description of the factual phenomena simply to make this description as complete as possible. If a definition is to have practical value as an instrument for use within a given field, it must be possible in the definition to stress those elements which may be thought to have relevance even to the possible exclusion of other elements. From the standpoint of the economic sciences nationalization may be defined with special reference to the economic results of the action; from the administrative standpoint with special reference to the administrative forms which the takeover of private industry by the State can involve<sup>9</sup>, but it may be presumed that these factors do not have decisive importance for the treatment of the subject from the standpoint of international law. A definition which is completely relevant to international law cannot, however, be laid down in advance, but requires closer examination of the international effects of nationalization. At the present stage of our analysis a definition of nationalization can therefore only be provisional and adjustable.

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are often connected with certain special types of action against property, and if the practice of constitutional law of the State is well developed, it is possible to obtain from it a very clear idea of what actions against property normally involve the consequence which can justify a description of the actions as expropriation.

8. Cf. also Edward D. Re, *Foreign Confiscations in Anglo-American Law* (1951), p. 15-16.

9. Cf. e.g. Mario Einaudi with others, *Nationalization in France and Italy* (1955), p. 5.

The starting point for a definition of the concept of nationalization must be current speech usage<sup>10</sup>. Here it is important to observe that the word nationalization was not created by the legal or economic sciences, but is a term which arose from the internal practice of States to describe certain actions against private property.

Nationalization was first heard of during the Russian revolution, when large sectors of the economy which up to then had been private property passed to the common ownership of the nation.

A survey of various laws and treaties shows that the same terminology was used later on for similar actions against private property, the typical signs being that such actions were not begun with concrete and practical objectives in sight, but had a more general character frequently coming from their association with a wider political aim, for example the reconstruction of the economic and social structure of the State in question. Finally nationalization is typically (although not exclusively) used for the takeover of industrial undertakings in the widest sense and not only for the takeover of property which exists without serving industrial interests. Since this will be examined later when the nationalization measures of various countries are surveyed, only a few typical examples will be quoted here.

In Great Britain the term nationalization was used in the Acts passed immediately after the end of the Second World War, for example, in the law of 12 July 1946<sup>11</sup> nationalizing the British coal industry. The action had as its motive the wish, long nourished by the British Labour Party, to rationalize and make efficient every part of this industry.

As a result of the action compensation was paid to the previous owners. This, then, was a case of a general taking with compensation.

In Iran on 2 May 1951 a law was passed nationalizing the whole of the oil industry. The history behind the law, however, shows that the motive was primarily nationalistic, and although the scope of the law is extremely wide, taking in the whole of the oil industry, in effect it struck at a single company only, namely the Anglo Iranian Oil Company<sup>12</sup>.

In Indonesia in 1958, a law (No. 86) was passed dealing with "the

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10. Ross, *op. cit.* § 1.

11. Cf. Tobin, "Nationalization in Great Britain – First Year," *Dep. St. Bul.* (1946), vol. 15, p. 617.

12. Cf. Alan W. Ford, *The Anglo-Iranian Oil Dispute of 1951–1952* (1954), p. 51.

Nationalization of Dutch-owned enterprises in Indonesia." In the preamble to the law it was stated that the action was part of "the struggle for the liberation of Irian Baat" (West New Guinea)<sup>13</sup>. In reality, according to Mc Nair, we are concerned here with an action against private property designed as an instrument for forcing the solution of an international political dispute, and which had as its aim objectives not directly connected with the future use of the property nationalized under this law<sup>14</sup>. A special feature of this example of nationalization is that it did not extend to similar property belonging to the local population or other aliens<sup>15</sup>.

In France, by the law of the 2 December 1945, five banks, specified by name, were nationalized as a result of the wish of the State to influence the country's economy and its financial policy<sup>16</sup>. Thus, this taking of property, though described as nationalization, is not general according to the wording and object of the law, but is directed specifically against certain concerns which are named.

Finally, there is the nationalizing action carried out in Czechoslovakia, whereby in 1945, under a number of regulations practically the whole of the economic life of the country was reconstructed by the nationalization of all but the very smallest industrial and banking activities, with no compensation to the owners<sup>17</sup>.

These examples already show that nationalization is used as a description for actions which are very different whether as to motive, extent, object, form, and/or purpose.

Against this background legal theory must attempt to establish whether there are common characteristics in these actions which will form a basis for distinguishing these measures from traditional actions against private property, and if this is so, to set out in detail what this distinction is.

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13. Mc Nair, "The Seizure of Property and Enterprises in Indonesia," *N.T.V.I.R.* (1959), p. 220.

14. *Ibid.*, p. 256.

15. Cf. *Urteil des Hanseatischen Oberlandesgerichts Bremen im Bremer Tabakstreit* (1959), p. 64 and Seidl-Hohenveldern, "Ausländische Nationalisierungs-massnahmen und ihre Beurteilung durch deutsche Gerichte," *Aussenwirtschaftsdienst* (1959), p. 274.

16. Cf. Margaret G. Myers, "The Nationalization of Banks in France," *Political Science Quarterly* (1949), p. 189.

17. Cf. inter alia Oatmann, "The Nationalization Program in Czechoslovakia," *Dep.St.Bul.* (1946), vol. 15, p. 1028.

The complex nature of the phenomena which are described as nationalization has, however, caused legal authors to lay emphasis on different elements, though no clear and reliable distinguishing marks have apparently emerged.

To quote a few examples: as a starting point and basis for discussion for the unfinished debate on the international effects of nationalization in the Institut de droit international in 1952, La Pradelle <sup>18</sup> defines nationalization as:

"... l'opération de haute politique par laquelle un Etat reformant tout ou partie de sa structure économique enlève aux personnes privées pour la remettre à la nation la disposition d'entreprises industrielles ou agricoles d'une certaine importance en les faisant passer du secteur privé au secteur public."

By this pronouncement (and this is underlined in the debate which follows) La Pradelle appears to lay decisive emphasis on the *motive* for actions against property, and he presupposes by his definition of the concept <sup>19</sup> that nationalization is distinguished from traditional action in that the last named has only local significance, while nationalization has as its motive a complete and general alteration of structure.

Because of its lack of precision in formulation and its unsuitability as a basis for distinguishing nationalization, La Pradelle's definition set on foot a protracted debate which concluded with the acceptance of the following definition by the Institute <sup>20</sup>:

"La nationalisation est le transfert à l'Etat, par mesure législative et dans un intérêt public, de biens ou droit privés d'une certaine catégorie, en vue de leur exploitation ou contrôle par l'Etat, ou d'une nouvelle destination qui leur serait donnée par celui-ci."

In this definition the juridically vague statement of motive as a relevant fact has been abandoned, and in its place the concept of nationalization has been attached to the purpose of the action, namely the transfer of the property in question to the control and use of the State.

Friedman <sup>21</sup> may be quoted as an example from the group of writers who attach decisive importance to the *extent* of the action. He does not regard it as a necessary part of the concept that the measures of nationalization should affect the economic structure of the community, since

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18. *Annuaire* (1950), vol. 43 I, p. 126.

19. *Ibid.*, p. 128.

20. *Annuaire* (1952), vol. 44 II, p. 283.

21. *Expropriation in International Law* (1953), p. 12.

nationalization does not entirely prevent the retention of private capital in industry and can even lead to co-operation between private interests and State capital. Thus he states that nationalization need only exclude foreign capital in so far as it concerns the actual holding of property in the nationalized industries. Friedman sees nationalization as general deprivation of property of a particular kind for the benefit of the common good.

Doman<sup>22</sup> describes nationalization as a more or less comprehensive, general and impersonal intervention in the economic structure with the public benefit in mind. If compensation is paid, it is a case of expropriation, if not it is a case of confiscation. By this definition nationalization is certainly not a new concept, but embraces every taking of property for the common good and is thus a generic term for all forms of public action against property.

This interpretation – and Doman's treatment in general – has, as stated above, been very clearly observable in international legal literature.

Rolin<sup>23</sup> must be quoted as an example of an author who, in his definition, emphasizes form, motive, extent and object. In the meeting of the Institut de droit international mentioned above he put forward the following definition:

“La nationalisation est la mesure législative de caractère politique par laquelle un Etat, réformant la structure de son économie, enlève aux personnes privées et confie à des organismes public la jouissance et l'administration d'entreprises industrielles ou agricoles de nature déterminée.”

Rolin, however, subsequently abandoned this interpretation and later<sup>24</sup> states that, from a legal point of view, nationalization is a “. . . variété de de l'expropriation, en tant qu'elle tend à la collectivité certains biens appartenant à des particuliers.”

Finally there are authors who attempt to solve the problem of definition radically by deliberately avoiding the use of the word nationalization and, when formulating the legal rules, use a neutral expression instead. In the paper, *Convention on the International Responsibility of States for Injuries to Aliens*, submitted on 1 May 1959 by the Harvard Law School to

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22. “Postwar Nationalization of Foreign Property in Europe”, *Columbia Law Review* (1948), vol. 48, p. 1125.

23. *Annuaire* (1950), vol. 43 I, p. 99.

24. “Avis sur validité des mesures de nationalisation décrétées par le gouvernement indonésien,” *N.T.V.I.R.* (1959), p. 266.



the International Law Commission, public action against property, in complete accordance with the latest American practice, is simply described as "taking", and thus covers both the traditional public action against property and nationalization <sup>25</sup>.

2. *Evaluation.* The establishing of a motive for an act by the State can in practice produce difficulties <sup>26</sup>; in particular the courts will find it difficult to set aside an assertion by a State that this or that motive was decisive for action it took. Nevertheless, the introduction into the definition of an action of motive for that action can have some importance, namely as a negative test, in the sense that any phenomena which clearly do not arise from the motives of the State in question, must certainly be excluded from the field of the definition. It is, however, a natural prerequisite that the statement of motive shall have some solidity and clarity if it is to be useful. Thus, if in the definition of nationalization it is stated that the action must be part of the alteration of the economic structure of the State, or must spring from social economic motives, it is possible to exclude from the field of the definition public action against property based on penal, health, defence or security grounds. However the more exact limiting of the field, for example as between nationalization and the traditional actions against private property for the common benefit, does not appear to be possible by the use of this criterion.

Nor does the *extent* of action against private property described as nationalization appear to give the necessary clarity and solidity as a criterion for a definition. Even if nationalization is almost always general, i.e. embraces all property of the same kind, for example all industrial activities of a certain size and/or with a certain production <sup>27</sup>, it appears to be quite against the current usage of the word to speak of nationalization only and exclusively in instances where the general character of the action is established. There are cases where a nationalizing action formulated in general terms is in fact aimed only at a single industrial concern <sup>28</sup>, and equally the

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25. Cf. art. 10, p. 64-72.

26. Cf. Fischer Williams, *op.cit.*, p. 26.

27. Cf. e.g. the French nationalization law of 8 April 1946, covering the electricity and gas works, where the decisive test for nationalization was the size of the average production in a specified number of years. The law is further discussed in § 9.

28. Cf. above, on the Iranian nationalization law of 2 May 1951.

term nationalization is used in nationalizing actions where the wording is quite specific<sup>29</sup>. Again, and in reverse, it may be said that many actions against private property are general actions but not described as nationalization, for example taxation, the preservation of natural beauties, and other general restrictions of private property. All this emphasizes that the criterion of extent cannot be used as part of the definition distinguishing nationalization from the traditional type of public action against property, unless it is connected with a concept of such actions based on other criteria.

Such a definition of the concept cannot be found in the current literature on the subject.

The use of the criterion *object* as decisive for the definition seems to some degree to be well-founded. As a simple fact nationalization is directed solely against property which has an economic purpose of an industrial or commercial kind. Against this, however, it can be claimed that expropriation, too, in the traditional sense can affect industrial undertakings without the action thereby being termed nationalization. The nationalization of an industrial undertaking can also include property which belongs to the undertaking without that property of itself serving an industrial purpose<sup>30</sup>. In the case of this property, however, the action in ordinary speech usage is equally nationalization. Thus the object of the action is in no sense a decisive criterion. It may indeed be possible to claim that anything which can be an object for expropriation can also be an object for nationalization and vice versa.

Whether action against private property takes place under a special *form*, for example whether it was undertaken by enactment or by an administrative act authorized by enactment or without such authority, has no relevance whatever from the point of view of international law. These questions are the sole concern of the organs of state which carry through the action. The illegality of the action according to the municipal law of the

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29. Cf. the discussion in Denmark in September 1959 on the possible nationalization of the National Bank, caused by the announcement by the bank of a higher bank rate.

30. Cf. *Sokoloff v. National City Bank* (1924), 239 N.Y. 158, 145 N.E. 917, from which it is clear that the nationalization of all private banks decreed by the Soviet Union in 1917 included both the assets of the bank and the single claims of the depositors.

State in question can, however, have some influence on the judgment of the action under international law <sup>31</sup>, but this is equally true whether the case is one of traditional taking of private property or nationalization.

Nor can it be agreed that the previous definitions which defined the concept of nationalization with the *purpose* of the action as the sole criterion can be used as a basis for a distinction.

The assertion that purpose is a decisive element in the definition can give rise to difficulties, as is illustrated, for example, by Rolin's assertion <sup>32</sup> that the Indonesian nationalizations of 1958 were not true nationalizations, since the Indonesian actions did not have the alteration of the social structure as their purpose but solely the advancement of certain aims of foreign policy. This criterion seems very vague. How comprehensive must nationalization be to alter the social structure of a country? Is Egypt's seizure of the Suez Canal sufficient? If only Dutchmen owned tobacco plantations in Indonesia, would it not be possible to regard a takeover of all the tobacco plantations as constituting an alteration in the structure of economic-social life, quite apart from the fact that some objectives of foreign policy were attained simultaneously? These examples show that purpose as a decisive criterion makes the definition unclear and unusable, and furthermore so elastic a statement of aims as that proposed by Rolin can always give rise to differing interpretations.

If, however, the statement on purpose is concrete and clear and particularly if the purpose shows clearly in the actions taken and is not merely an expression of the mental reservations of the legislators, there is nothing in principle to prevent purpose being brought in to help in defining the concept of action against private property.

The Institut de droit international is thus reasoning correctly when its definition states that the purpose of nationalization is to secure "the future use and control of the property taken over for the State or to use it for a new purpose to be determined by the State."

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31. Cf. in this connexion *Walter Fletcher Smith* case (1929) which was decided by arbitration between the United States and Cuba. The action against property discussed here was not in agreement with the municipal law, and this resulted in liability, *A.J.I.L.* (1930), vol. 24, p. 384.
32. Rolin, *op. cit.* p. 270. Seidl-Hohenveldern points out that Rolin's views spring from his position as spokesman for Iran in the Anglo-Iranian Oil dispute, where Rolin asserted the view that the nationalization by Iran was lawful, cf. Seidl-Hohenveldern "Ausländische Nationalisierungen . . .", p. 274.

This wording, however, seems too wide. It is scarcely possible to find an expropriation in the traditional sense which is not also covered by the definition of nationalization adopted by the Institut de droit international, since all expropriated property (taking expropriation in the traditional sense) is used by the State or directed to another purpose determined by the State.

Finally, after consideration of the Anglo-American practice adopted by the Harvard Law School, by which the word nationalization is excised from legal terminology and substituted by the neutral expression "taking", to include the actions described as nationalization as well as the more traditional actions against private property, it must be clear that the suggestion does not solve the problem raised here. First of all it appears from the convention proposed by the Harvard Law School that not every taking is subject to liability for compensation under international law. Thus article 10 paragraph 4 of the convention excepts actions against private property rising from legislation on taxation, general changes in the value of money, or the exercise of the policy authority of the State or in any other measure which may be necessary to enforce the laws of the State. Secondly, a distinction is made in article 10 in cases where actions against private property are part of the implementation of a programme of general economic and social reform.

Here the question may well arise whether an action, which in the speech usage of States is described as nationalization is a "general taking", a "taking which is part of a programme of reform," or whether nationalization is a "taking which is a necessary part of the enforcement of the laws of the State." The American proposal has not even attempted to give a descriptive definition of the concept of nationalization<sup>33</sup>.

Apparently then it has not yet been possible to find an appropriate solution of the problem of drawing the demarcation line between nationalization and other actions against private property of a more traditional kind. This might suggest that there is no decisive difference between nationalization and the traditional actions against private property, and that the word "nationalization" is, therefore, only a new speech formation, a result of recent political theories, since the very words of an expression such as "the transfer of property for the common benefit of the nation" make a significant political impact within certain political systems. If this view is

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33. Cf., too, the criticism expressed by Garcia Amador, *op.cit.*, p. 27.

correct, a definition of nationalization, and with it a separation of this concept from the traditional public actions against property, is neither appropriate nor possible.

This is, however, not the case.

The question of whether or not it is appropriate to make a separation will be examined in the next chapter, but the following can now be said on the possibility of shaping a definition: –

Nationalization is an action against private property of a distinctive character, and its special distinguishing marks show that the basis for the action and its purpose are other than those of traditional actions. Unlike traditional expropriation and the usual restrictions on private property, nationalization is not motivated by the desire of the State to take over or restrict the use of property to serve a special purpose of the State different from that pursued hitherto as, for example, the compulsory surrender of land for the construction of roads or railways or the restriction of building rights for the purpose of creating new roads, in each case objectives which have no connexion with the normal use of the property as practised by the owner.

The action of nationalization on the contrary seeks its justification in the very circumstance that the State will not permit private persons to exploit property for so-called private economic purposes and, therefore, wishes to take over or extend the uses of the property as previously practised.

Thus, while in the traditional actions against private property the public authorities concerned must balance various *kinds* of exploitation of the property in question against each other, i.e. between the use which has hitherto been made of the property and future different uses, the position on nationalization is quite different.

In nationalization the way the private person utilizes the property and the way the State utilizes it after the taking are the same, it is the distribution of the profit which is different. The problem which it is sought to solve by means of an action against private property, described in practice by States as nationalization, is thus primarily a problem of distribution of the profit.

This is the political and economic reality which explains the emergence of nationalization and its frequent use in nations which build on socialist theories, and because of it the difference, and thus the justification for a distinction in fact between nationalization and the traditional actions against private property, must appear well founded.

Seen against this background, nationalization may consequently be defined as *the compulsory transfer to the State of private property dictated by economic-political motives and having as its purpose the continued and essentially unaltered exploitation of the particular property.*

The emphasis in the definition that there shall be a forcible *transfer* of private property is in agreement with traditional speech usage, where property, if nationalized, retains none of the rights which normally belong to an owner. This, too, was the case in the Harvard convention draft mentioned earlier, where nationalization is described as a "taking" <sup>34</sup>.

It must, however, be asked whether a definition of nationalization which is to be used as a working foundation for the exploration of the rules of international law must be limited to the narrower interpretation of "transfer of private property," or whether, on the contrary, it can be useful in the definition of nationalization to include phenomena, which, although not labelled with the word nationalization in ordinary speech usage, are yet of a kind closely resembling nationalization. The latter course must certainly be taken, if the characteristics of the phenomena which show close resemblances to nationalization appear to be of such a kind that the facts on which the legal evaluation of the action is based, i.e. the interests behind the action, coupled with the nature of the action and its effects, correspond with those which can be shown to be present in typical cases of nationalization.

In this connexion the national administration of privately owned property for letting carried out in Czechoslovakia under Law no. 67/1956 is relevant. Under these regulations a person designated by the public authorities is appointed for each property to make all decisions on letting, repairs, etc. All profits revert to the State. The owner, however, still retains the formal occupancy of the property, and thereby under certain conditions has a special but limited right to use an unlet apartment in the property for himself against payment of a rent fixed by the authority. The owner can formally and in fact dispose of the property in his lifetime or *mortis causa*,

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34. Cf. also *A Response by the Committee on the Study of Nationalization of the American Branch of the I.L.A. to a questionnaire of the International Committee on Nationalization* (1958) (duplicated) p. 4, where it is stated "We use the word "taking" advisedly and consistently. We employ it as a substitute for the words "Nationalization" and "expropriation.""

but this right of disposal has in practice no value whatever, since no one is much interested in acquiring property on such terms.

Bearing in mind that the purpose of owning property for letting is normally dictated by the economic return the property gives, whether from occupancy or letting by the owner or by disposal, and bearing in mind that all the rights which serve to produce these returns are taken from the owner and transferred to the State, it seems reasonable to extend the concept of nationalization to include these actions too, even though the owner retains possession, because this possession is without economic value.

The agreement on compensation for nationalized property between Switzerland and Czechoslovakia, concluded on 10 January 1950, states the liability for Czechoslovakia to compensate for property which has come under national administration as a result of this law, as does a similar agreement between Belgium and Czechoslovakia of 30 September 1952.

There is the further presupposition in the proposed definition that the specification of the aims does not only include circumstances in which the State continues to utilize the assets of the property in the same way as hitherto, but also circumstances in which the State in some other way exploits potential created by the previous concern, for example by maintaining a State monopoly<sup>35</sup>.

It can be of no importance whether the property transferred is thereafter administered directly by a department of government or indirectly by a State-controlled company set up for the exploitation of the property. If, however, the property seized falls into private hands, there is no nationalization, even in common speech usage. Such was the case in the so-called Expropriation of Agriculture in Mexico in 1938, where American and other agricultural holdings were parcelled out among Mexican small-

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35. Quite otherwise Luciano Morando, *Les tendances actuelles des nationalisations* (1957), who formulates the following definition. "Une entreprise est nationalisée lorsque la propriété de celui-ci qui la gère dans l'intérêt de la nation," but adds at the same time that after the takeover by the State the nationalized undertaking has a certain autonomy and an independent set of accounts. If the undertaking is closed in order that the State can exploit, for example, the market created by the undertaking, or in general the goodwill going with the business, then according to this writer no nationalization takes place.

holders<sup>36</sup>. The Guatemalan law of 19 June 1952 dealt similarly with the expropriation of large tracts of land belonging to the American United Fruit Company<sup>37, 38</sup>.

It must be assumed that transfer of property from private hands to private hands is dictated by quite other interests than the transfer of property to the nation's common benefit, and it may thus be accepted that the international interests too, which determine how such actions are to be judged under international law, are quite other than when nationalization is in question.

However, difficult problems of limitation can arise in this connexion. It has been maintained that the nationalization of coalmines in France (following the law of 13 December 1944)<sup>39</sup> resulted in the mines passing from one private ownership to another private ownership, namely to the communist-controlled trade unions. This interpretation is, however, scarcely correct and has political overtones. The ownership passed to the State and the administration actually exercised by the trade unions was of temporary nature.

To limit the concept of nationalization only to include measures which are dictated by economic motives, leads to the exclusion from the concept of, for example, the following: actions of security nature, for example the commandeering of industries for war purposes, penal sequestration<sup>40</sup>, action for reasons of health or morality, for example the establishment of a monopoly to administer alcohol or lotteries. The application of these limitations to the present analysis is based on the assumption that very particular interests within the State dictate these actions, and it cannot be assumed that the same rules of international law will apply to these special actions against private property as to nationalization.

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36. Cf. Ross & Foighel, *Studiebog* (1954), p. 264.

37. Cf. *Dep.St.Bul.* (1953), vol. 29, p. 357 onwards.

38. Cf. also the Danish act No. 179 of 30 March 1943 on procurement of fuel in Denmark, where, too, there is no nationalization, to the extent that seizure of property takes place to the advantage of private persons.

39. Cf. Doman, *op.cit.*, p. 1141.

40. Cf. inter alia Law No. 132 of 30 March 1946 on the confiscation of German and Japanese property in Denmark, and the French law of 29 May 1945 on the transfer to State ownership of the Renault factories.



*B. Has the factual difference between nationalization and other forms of taking of property any relevance in international law?*

After the factual limitation of the concept of nationalization, the question arises whether a difference of such a kind exists between the actions which are here described as nationalization and the typical actions against private property, that a distinction in the legal sense, with particular reference to the rules of international law, is justified.

It is a part of the presents analysis as a whole to attempt to answer this question, and the problem cannot, of course, be completely expounded at this stage of the examination. The remarks on the solution which now follow must, therefore, by their very nature be provisional and subject to re-examination later.

Fitzmaurice<sup>41</sup> is of the opinion that the distinction between expropriation and nationalization is a distinction between *facta* and without legal relevance. There is possibly a difference between these concepts in degree, method or motive, but this difference is not decisive. The result in both cases is the same<sup>42</sup>. The party affected by the action loses his property<sup>43</sup>. The view presented by Fitzmaurice seems incorrect, however, even in its basic approach, which seems to rest on a mistaken interpretation of the factors which determine the content of international law.

The circumstance that the individual is equally seriously affected by expropriation or by nationalization is, from the point of view of international law, irrelevant. International law is the rules which apply to States (the self-governing communities) in their relationship with each other. The interests which the legal system of international law seeks to guard are the interests of the States, that is to say the collective interests. The treatment of the individual is, in principle, a matter of indifference in international law, since international law is concerned with individuals only in their capacity as members of a collective society (a State) or in relation to their State which has acquired special rights. This is true both in treaty rights under international law and in international law in general.

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41. *Annuaire* (1952), vol. 44 II, p. 255.

42. Cf. also Fischer-Williams, *op.cit.*, p. 25.

43. Cf. also Carl Aage Nørgaard in the notice of my *Nationalization*, *U.f.R.* 1958 B, p. 38.

The conclusion that treaties are exclusively concerned with the interests of the State follows, in that a State, when concluding a treaty, protects the interests of the whole nation, even though this may be at the expense of individual citizens. Treaties must, therefore, be interpreted in accordance with their effects on the State as a collective body, and not in accordance with the effects the treaties may have on the actual interests of a citizen. The legal rights which an individual has as a result of a treaty must be regarded as arising from the rights which have been secured for the collective body to which he belongs <sup>44</sup>.

The same point of view must govern the content and the understanding of international customary law. Only in this way is it possible, for example, to explain why traditional international law demands that a State shall pay compensation on the expropriation of alien property, while the same liability to compensate is not laid on a State which imposes severe taxation on foreigners. The interests of the individual are the same in both cases, namely the preservation of the property; the interests of the State on the contrary are different according to whether taxation or expropriation is involved. In a similar way it is only possible by appreciating the collective interests involved to explain that a person with previous extraterritorial rights can be proceeded against for acts committed while he was extraterritorial <sup>45</sup>. The interests of the individual in question are the same before and after the loss of extraterritorial status, namely to escape punishment. The interests of the home State are on the contrary different in the two situations.

In this connexion it is further to be noted that in international law the individual cannot raise complaints <sup>46</sup>, but that this is left to his home State and, since international enforcement of justice is exclusively determined by

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44. Cf. *The North Atlantic Coast Fisheries Case* (1910). "The inhabitants of the United States do not derive the liberty to take fish directly from the treaty but from the United States government as party to the treaty with Great Britain and moreover exercising the right to regulate the conditions under which its inhabitants may enjoy the granted liberty." *The Permanent Court of Arbitration*, VII, p. 131.

45. Ross, *op.cit.*, § 16 cites the law relating to foreigners as an example that the individual is automatically a legal subject (an interested subject) in international law. On the evidence quoted here this cannot be accepted.

46. *Loc.cit.*

collective interests<sup>47</sup>, it follows that the material content of the rules of international law will also be determined by these interests.

Without going more deeply into the legal theory of the individual's position in international law, it must, however, be possible to say here that it is not a necessary conclusion that the rules of international law are uniform because the circumstances which the rules govern make the individual uniform; similarly, it is not always to be taken for granted that the rules of international justice are different in situations where the individual, the single person, is treated differently. The one decisive factor is how the situation affects the interests of the State, that is to say the interests of the collective body.

The relevance of a distinction between nationalization and the traditional actions against private property must, therefore, be judged on the basis of other conclusions than those to be drawn from an individual foreign citizen losing his property.

Castberg<sup>48</sup> points out that in nationalization (as opposed to the traditional actions against private property) legal remedies which may give foreigners redress frequently do not even exist in the municipal law of the nationalizing State.

A number of authors, among them La Pradelle<sup>49</sup>, assert that nationalization will often be of such extent that payment of compensation to those affected will simply be an economic impossibility<sup>50</sup>.

Lewald<sup>51</sup> notes that nationalization can often affect assets outside the

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47. Cf. Borchard, *The Diplomatic Protection of Citizens Abroad* (1916), p. 351: "Factors which enter into consideration in determining the state's interposition are the seriousness of the offence, the indignity to the nation, and the political expediency of regarding the private injury as a public wrong to be repaired by national action—in short, the interest of the people as a whole as against those of the citizen receive first consideration before state action is initiated."

48. *Annuaire* (1952), vol. 44 II, p. 265.

49. *Annuaire* (1950), vol. 43 I, p. 118 and (1952), vol. 44 II, p. 254, cf. also Rubin, "Nationalization and Compensation," *University of Chicago Law Review* (1949-50), vol. 17, p. 460, and Scelle, *Annuaire* (1952), vol. 44 II, p. 267.

50. On the practice in international law which clearly overrules La Pradelle's argument, see the detailed discussion below in § 9, C.

51. "Das internationale Enteignungsrecht im Licht neuen Schrifttums",

boundaries of the nationalizing State, for example the nationalization of a company can extinguish the ownership of branches, patents, trade-marks and so on. The same writer also draws attention to the alterations in the economic structure of a country which cause, or are caused by, extensive nationalization.

Although a number of the characteristics which these authors adduce with a view to establishing the relevance of the concept of nationalization in international law are often only typical of a large number of cases of nationalization, they seem to emphasize the usefulness of distinguishing it as a thing in itself.

The wide and typical extent of the action when applied to industries of considerable value, raises problems both for the nationalizing State and for the home State affected. These are problems which will scarcely arise in the course of traditional actions against private property.

The nationalizing State will thus frequently be faced with exorbitant claims for compensation, which it simply will not have the resources to honour or in any case to honour promptly. Further, the home State affected will, as a result of the extent of the action, often regard the nationalization as specifically directed against the nation's foreign investments, and thus the political power, which usually accompanies investments of considerable size, will be noticeably influenced.

This is underlined in the structural alteration of the nationalizing State's economic system which Lewald noticed. Nationalization will (and this is also underlined in the definition here proposed) have as its aim the taking over by the State of nationalized industries, and with them the goodwill attached. Consequently, however large a compensation he receives, the person affected will not, as in traditional actions against private property, be in a position to acquire similar property, and thus continue the previous economic activity.

After nationalization the foreigner, and with him his home State, will be prevented from making his influence felt within the sector affected by nationalization.

The necessity for a distinction is again emphasized by some of the newer treaties of friendship, concluded by the United States, for example with Italy on 2 February 1948, Uruguay on 23 November 1949, and Ireland

on 21 November 1950<sup>52</sup>, where there is an apparent difference in the conditions and legal results between "expropriation" and "taking property into public ownership or under public control."

With this background it must be supposed that the distinction between nationalization and the traditional actions against private property is relevant in international law. The correctness of this proposition will now be examined.

### § 3

#### THE MOTIVATING INTERESTS

##### A. *What interests motivate nationalization?*

As will be shown later, the measures countries take when carrying out nationalization are of the most various kinds, not only in extent or in subject matter, but also as they concern the ideological background of the individual actions.

It would, however, be possible to make a case that the interests which motivate nationalization are relevant to a sociological or political exposition, while for a legal analysis, and especially an international legal analysis, they are without any interest whatever.

Carlston<sup>1</sup> thus claims that the content of a legal system is not determined by the interests of those subject to the law. The legal regulation of an action is solely dependent on the nature of the action and the relevant treaties and customs.

Carlston's view can scarcely be accepted in its entirety, since in the present problem a distinction must be made between the laying down of what is to be valid law and the enforcement of a legal norm. If in his statement Carlston merely means that every legal system must be authoritative, in other words binding on the individual object of the law without regard to the particular interests of that individual, he has only stated a view which is commonly agreed. On the other hand, where we are concerned with

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52. Cf. Robert R. Wilson, "Property Protection Provisions in U.S. Commercial Treaties," *A.J.I.L.* (1951), vol. 45, p. 103.

1. Notice of my *Nationalization*, *Washington University Law Quarterly* (1959), p. 100.

the fixing of valid law, it must be emphasized that knowledge of the interests which motivate a given piece of behaviour is of decisive importance. No legal system can be expected to command respect for any length of time, unless the rules laid down by the system are an expression of the predominant interests as reflected by the leading members of the society in question. This is much more clearly expressed in the system of international law, where the subjects of the law are of a special character.

Without knowledge of the interests which motivate States in their nationalization, and without knowledge of the results of these actions as they affect other States, an analysis of the legal system of international law dealing with these actions can easily lose all touch with the realities of international society.

In nationalization it must be emphasized that it is a typical feature in economic-political development that great political events, revolutions and wars, create an ideally favourable climate for economic and social reforms<sup>2</sup>, "the masses long for something new"<sup>3</sup>.

It is similarly a typical feature that these economic and social reforms bring with them a crystallization of opinion on the question of public versus private property, not only because the State must create the means to carry through its reform programme, but also because the possession of private property (and here particularly the property and control of the large industrial concerns in a country) is closely connected with the question of power in the community.

A closer analysis of the motives which have induced States to carry out nationalization shows, however, that many different factors combine.

1. *Economic interests.* It follows from the understanding of the concept of nationalization that the primary object of a State undertaking nationalization is a change in the distribution of wealth. In certain countries it is no longer a minority of the inhabitants of the country who are to possess capital goods and exploit them at the expense of others, but industrial capital, the mineral wealth of the earth and so on shall be nationalized and become the common property of the nation. These political theories, in which the extinction of private property in favour of common ownership

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2. Friedmann, *op.cit.*, p. 14, in this connexion quotes, among several other examples, the dissolution of the feudal system after the French Revolution.

3. Cf. Sharp, *Nationalization of Key Industries in Eastern Europe* (1946), p. 3.

by the nation is an objective in itself, played an essential part in the introduction of nationalization in its earlier forms, such as that observed in the Soviet Union. These ideological motives founded on Marxist theories have, however, as will appear later, retreated somewhat into the background <sup>4</sup>, and the reason for nationalization, so far as it is directed against alien property, must also be sought in the nationalistic movements of the past few years.

2. *National-political interests.* Nationalistic tendencies, which are specially marked in smaller States, most frequently find expression in the wish to practise independent policies in the widest possible measure without intervention from other States. In the economic field the consequence of this view is that States seek to free themselves by the action of nationalization from the dependence which arises from foreign capital invested in the country.

These views, with the slogan "no political sovereignty without economic sovereignty" <sup>5</sup>, have been the decisive motive power for some of the nationalizing actions of the past few years, as is clear for example from the following statement, by which the Roumanian government justified the nationalization law of 11 June 1948: "The nationalization of the principal enterprises consolidates our economic and political independence, fortifies the forces in their struggle against the attempt of interference with our internal matters and rape of our independence, carried on by the Anglo-American imperialists. It stresses our role as an active factor of the democratic and anti-imperialistic front" <sup>6</sup>.

Outside the Eastern European States, such nationalizing actions dictated by strong nationalistic motives, took place in Mexico in 1938, in connexion with the nationalization of the oil industry which was controlled by foreign interests; in Iran where the British-owned Iranian oil industry was nationalized by the law of 2 May 1961; in Egypt where the law of

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4. Doman, *op.cit.*, p. 1125, observes, inter alia, that the word socialization, at any rate in juridical speech usage, has been supplanted by nationalization, since the latter expression directs thinking to conditions which are connected more with national sovereignty than with socialism.

5. Cf. Hilary Minc, who in his capacity of Polish minister for industry presented the proposals for nationalization laws in the Polish Parliament, quoted following Sharp, *op.cit.*, p. 33.

6. Doman, *op.cit.*, p. 1128.

26 July 1956 nationalized "The Suez Maritime Canal Company," and in Indonesia where the government in its nationalization law of 1958 (No. 86) took action only against Dutch-owned concerns <sup>7</sup>.

3. *Practical economic interests.* Judged on the view that nationalization is solely dictated by the political motives set out above, it might have been expected that the nationalization of some, and indeed in some cases a great many, sections of industry in a country would only be one step in the extinction of the rights of private property and the total exclusion of foreign investment.

However, apart from the action in the Soviet Union completed immediately after the Revolution, such has not been the case.

After the Second World War no States, whether in conjunction with nationalization or in any other way, abolished private property <sup>8, 9</sup>. On the contrary there are a number of examples where, following the nationalization of principle industries, banks, insurance companies and so on, a government has officially declared that it had no intention now, or in the future, of extending the scope of nationalization. Such declarations were published <sup>10</sup> in Hungary in March 1948 and in Poland, where, in connexion with the nationalization laws, a law was also laid down "regarding the establishment of new industries and help for private initiative in industry and commerce." By the terms of this law any person, including a foreigner, who wishes to start a new business, can obtain a written declaration that the business will not be nationalized.

The fact that declarations on private investment were published simultaneously with laws on nationalization, and thus cannot have been

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7. Cf. now also Cuba, where American-owned undertakings were nationalized in the summer of 1960.

8. The Czech Prime Minister, E. Benes, also expressed similar views in an article in the *Manchester Guardian* (December 1945), where, speaking of the changes the nationalization laws had caused in economic life, he said: "It will be a régime in which private property is and will be maintained, in which private initiative will not be interfered with nor rendered ineffective. The difference from the past is that we are now creating three types of ownership, private ownership, co-operative ownership, and State ownership . . .," quoted according to Orbis, *Nationalization in Czechoslovakia* (1946), p. 10.

9. Cf. Katzarov, *op.cit.*, p. 52.

10. According to Doman, *op.cit.*, p. 1126.



due to the failure of the actions of nationalization to have the desired results, demonstrates that nationalization is also dictated by practical economic circumstances. These circumstances are (a) partly of a general character, and (b) partly a result of the special conditions brought about by the Second World War.

(a) The first and most important of these general circumstances is modern technical development, which has brought with it the necessity for a certain minimum size of industry. Machines which replace human effort or increase its efficiency may frequently require co-operation between several concerns to ensure profitable operation. Such co-operation may be difficult to bring about between a large number of private industrialists. Against this it might be maintained (in any case in communities based on the liberal interpretation of economics) that it would be in the private industrialists' own interests to rationalize production, and that free competition would force the industrialists to the most efficient form of production.

Experience in England, however, has shown that these ideas do not apply, and that in the production of goods essential to the community (public utilities: electricity, transport and so on), or to the export trade (coal, iron and steel) it is not sufficient to leave the control of these means of production to private industrialists <sup>11</sup>.

Thus it is characteristic of nationalization in Britain that, in the period between the two World Wars, the government tried to rationalize transport, electricity and the mines by the introduction of boards of control and appeals for co-operation in the introduction of new methods (particularly in the mining industry) and uniform tariffs. These appeals led to no result <sup>12</sup> and, as a result of the wish to improve the efficiency of English industry as a contributor to the British export effort, the nationalization of these industries was carried through <sup>13</sup>.

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11. Cf. Heilbroner, "Labour Unrest in the British Nationalized Sector," *Social Research* (1952), vol. 19, p. 61 onwards.

12. Cf. Brems, *op.cit.*, p. 126, who states that in 1938 the English coal industry produced 227 million tons of coal, while production in 1945 was 174 million tons. This reduction can be attributed solely to inefficiency of production.

13. The views, according to which nationalization was the only means of making production in these fields efficient were, however, not confirmed by later developments. On the contrary it has been asserted that the experiences of

There is evidence, too, that to some extent ideological points of view were also present during nationalization; British politicians, speaking at meetings while the law was in preparation, agitated for nationalization by describing the railways due for nationalization as "your railways"<sup>14</sup>, and similarly on 1 January 1947 (the day the State took over) notices were put up in the nationalized coal mines with the following inscription: "This colliery is now managed by the National Coal Board on behalf of the People"<sup>15</sup>. Compared with the economic considerations these social-political motives have, however, played a subordinate role even in the British Labour Party<sup>16</sup>.

Similar technical considerations, allied with the wish to introduce a planned economy in limited fields, were the motive for the acts of nationalization carried out in France after the Second World War<sup>17</sup>.

In addition to the circumstances mentioned above, other practical economic considerations can be the motive for the taking over of private property by the State. Thus nationalization can become necessary to bring peace to the industrial labour market (as was, for example, the case in France), to establish control of a monopoly (similarly in France), or State intervention can be motivated by the wish to bring in social reforms which cannot be carried through in any other way (for example in Mexico and Hungary).

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the past few years have decisively shown the reverse to be the case. This gave rise to violent conflicts inside the English Labour Party, which in the spring of 1960 apparently gave up the idea of nationalization, cf. for example, *Politiken* of 14 March 1960.

14. Cf. Scammel, "Nationalization in Legal Perspective," *Current Legal Problems* (1952), vol. 5, p. 41.

15. Cf. Brems, *op.cit.*

16. This Party's original attitude to nationalization was expressed at the Party conference of 30 December 1953, where the item on the agenda for the nationalization of agriculture was rejected by a large majority, since the general opinion was that such nationalization would not assist economic development. Cf. P. A. Moltesen, "Det britiske arbejderpartis jordpolitik," in *Landbrugsrådets Meddelelser* (1953), p. 873.

17. The French minister for national economy, René Pléven, thus expressed himself on 3 August 1945 in the French National Assembly during the debate on the nationalization laws:

"Nous moderniser (en nationalisant) ou mourir."

Cf. La Pradelle, *op.cit.*, p. 45.

(b) While the motives quoted above may be the grounds for nationalization at any time, the acts of nationalization in the past few years were also motivated by the special circumstances resulting from the Second World War<sup>18</sup>.

As a consequence of hostilities and the German Nazi ideology, many concerns were deprived of their owners or taken over by others, after the owners had been forced to flee from the territories occupied by Germany. After the war it was in many cases impossible to re-establish the original ownership, since in the meantime the new owners had perhaps put money into the business and reconstructed the concern, and the previous owners were either dead or had no desire to return to the countries from which they had fled.

Such "abandoned" property was in many cases nationalized by the States in which the property was situated, for one reason among others that this procedure, in the view of the States concerned, was the easiest and most expedient method of solving the problem<sup>19</sup>.

A similar process was used for property annexed by enemy forces in the occupied territories.

Furthermore, the destruction in the countries where the war had been fought had created an enormous need for capital investment in new machines and installations. The need for capital was so great that it could not be expected that private investment would be sufficient. In such cases nationalization, with the access to State investment which this seizure of property offers, seemed to be a practical possibility for reviving industries damaged by war. These views were the grounds for the nationalization of the most important undertakings in the Austrian iron and steel industry under the laws of 26 July 1946<sup>20</sup>. In connexion with this action the Austrian State invested some 3550 million Austrian schillings in the nationalized industry.

Clear confirmation of these special views as a basis for nationalization is also to be found in the reasons publicly advanced by the President of Czechoslovakia, Dr. Edward Benes, for the Czechoslovakian laws on nationalization<sup>21</sup> where it was, inter alia, emphasized that the German

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18. Cr. Friedman, *op.cit.*, p. 29 onwards.

19. Cf. also Oatman, *op.cit.*, p. 1028.

20. Cf. below p. 78.

21. Cf. Quoted following Orbis, *op.cit.*, p. 5.

administration had undermined the banks and large industrial concerns and made State support necessary. It was not, however, possible for the State to give help only to a few business but all must receive help; therefore nationalization. Benes further claimed that it was necessary to nationalize the property of the Sudeten Germans as a consequence of the treason of the owners.

4. *Conclusion.* Motives of the political, nationalistic and practical-economic kind quoted above seldom emerge separately however. This is probably only natural when one considers that many of the problems which it is the purpose of nationalization to solve, can be solved in different ways according to the political ideology by which the State's economic policy is guided. A striking example of this is to be found in the official reasons for Polish nationalization, where the necessity for nationalization is emphasized with the following arguments <sup>22</sup>: Poland was destroyed after the war, and rapid reconstruction was necessary. The desire was to avoid slumps and consequent unemployment. As a contribution to the work of reconstruction it was essential that all available funds should be used for investment and not for directors' private villas. Investments must be made as need and not profit required. The standard of living must be raised. Freedom must be secured for the workers, and so on.

Thus there appeared to be scarcely any economic problem which it did not seem possible to solve by nationalization.

These motives which are pleaded by States as a reason for extensive acts of nationalization, show that nationalization is motivated by interests which are of high importance in the economic life of the State. Apart from those instances where nationalization was dictated by circumstances which arose as a consequence of events during the Second World War, the completion of acts of nationalization will in many cases (at all events according to the belief of the nationalizing State) decide the economic and political existence of that State, and this may be taken as true both in States where the form of government is based on socialist ideology, and in States which to a greater or lesser extent acknowledge liberalism as the most expedient basis for their economy. It is, therefore, not surprising that these instances of nationalization also included alien property, when it was necessary for the State to attain the desired objective.

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22. Hilary Minc in *Zycie Warszawy* of 3 January 1946, quoted following Sharp, *op.cit.*, p. 33.

### B. *What interests oppose nationalization?*

Thus, while there are extensive and important economic interests which provide the motive for nationalization, the aversion of other States to nationalization and their protests against it are likewise dictated by economic and political interests of considerable strength. These interests can be either of national or international character.

1. *National interests.* Measures of nationalization against alien property, where compensation is not paid to those affected by this nationalization, will mean that the foreign national suffers an economic loss and that his home State, in addition to the loss of the national wealth, may well lose part of the economic power which is bound up with the invested capital.

The economic and political interests which are at stake for foreign States are often extremely wide and important. As an example, the value of property owned abroad by the United States and American citizens in 1947 was some \$ 45,500 million<sup>23</sup>, while British investments outside Britain itself totalled £ 2,000 million in 1949<sup>24</sup>,<sup>25</sup>. As regards individual countries

23. Cf. Dickens & Will Harvey Reeves, "Foreign Investments," *Political Science Quarterly* (1949), p. 211. According to the *New York Herald Tribune* of 29 August 1959 the total investments of the United States in foreign oil fields alone at the end of 1958 amounted to \$ 9,681,000,000.

24. Cf. Schwarzenberger, "British Property Abroad," *Current Legal Problems* (1952), vol. 5, p. 296.

25. The figures on the size of private foreign investments are not very precise. An examination undertaken by the secretariat of the United Nations published on 1 May 1958, *The International Flow of Private Capital 1956-58*, (UN. doc. E/3249), shows that private investments made by American citizens amount to about \$ 4 milliards a year, which is almost double the corresponding investments in 1951-52. About \$ 2,000 mill. are invested in underdeveloped countries. The remaining investments of the Western countries (chiefly Great Britain, France, German Federal Republic, Canada, Switzerland, Holland and Belgium) amount to about \$ 2 billion of which somewhat under a half are in underdeveloped countries. By far the greater part of these investments were made in oil producing countries. In addition to these private investments, considerable public investment has taken place. Cf. Richard N. Gardner, "International Measures for the Promotion and Protection of Foreign Investments," *Proceedings of the American Society of International Law* (1959), p. 257-258. Cf. also *The Promotion of the International Flow of Private Capital*, UN.doc.E/3325 (1960), p. 9.

where nationalization took place, the figures are that in 1939 foreign investments in Polish commercial and industrial companies were \$ 19.6 million, which represented 32.7 % of the total capital of Polish companies<sup>26</sup>. The nationalization of agricultural land undertaken in Czechoslovakia in the years after the First World War covered 24 % of the total area of the State<sup>27</sup>, but of this only 57½ % belonged to its own nationals, while the rest belonged to foreigners<sup>28</sup>.

Although scarcely to the same extent, there is also a good reason for protecting investments in property abroad, even against countries which pay full compensation to aliens affected by the nationalization, since, finally, the effect of nationalization is to exclude foreign nationals from activity within the economic sphere in which they have hitherto been employed. This, too, will have its effect on the economic power which is bound up with capital invested abroad.

The wish to resist the direct effects of nationalization on capital invested abroad is equally apparent, too, in those States which practise nationalization within their own frontiers, cf. the stipulation made at the instance of the Soviet Union in the Bulgarian and Roumanian nationalization laws, whereby Soviet property was excepted from the measures of nationalization.

For States which do not themselves admit nationalization as a means of solving economic problems, there will frequently be a further ground for protesting against nationalization abroad where their interests are affected.

A protest against nationalization by a foreign State will in practice be regarded as a sign that nationalization of alien property is regarded as something inadmissible and undesirable and such an announcement, especially in periods when nationalization is extending more and more, can be one of the factors whereby the protesting State seeks to preserve the confidence of other countries in its own economic system and its own capital market, a confidence which may be decisive in determining the ability of the country in question to raise foreign capital.

2. *International interests.* There are, therefore, weighty reasons why capital-exporting States resist any further advances of nationalization as a normal

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26. According to the *Yearbook of Poland* (1939), quoted following Doman, *op.cit.*, p. 1146.

27. Cf. Moodie, "Agrarian Reforms in East Central Europe," *Yearbook of World Affairs* (1954), p. 242.

28. Cf. Hobza, *Annuaire*, vol. 43 I (1950), p. 85.

means of solving economic political problems. Quite apart from these motives, whose existence is due to the desire of individual States to protect their economic position, it has become clear in the past few year that there is still great international interest, even if not in opposing nationalization directly, yet in opposing the results of nationalization on alien property.

This interest is, for example, clearly marked in the resolution adopted in the plenary session of the United Nations on 11 December 1954 on the subject of the "International Flow of Private Capital for the Economic Development of Underdeveloped Countries."

This attitude of the majority of the States has been confirmed on several occasions.

On 12 December 1958 <sup>30</sup> the General Assembly adopted a resolution entitled "The Promotion of the International Flow of Private Capital," in which the plenary session, with direct reference to risks involved when action is taken against foreign capital, commends the efforts the States have made public for counteracting so-called "non-business risks" and calls upon the Secretariat to examine measures which should be taken in capital-exporting as well as capital-importing States <sup>31</sup>,

"... for the channelling of an increasing flow of private capital investment into the development of underdeveloped countries under mutually satisfactory arrangements ..."

These announcements, which will be more closely examined later, show clearly that the interests which are opposed to nationalization not only economically, but also politically, whether seen from the point of view of the individual State or of the international community of nations, are at least as powerful as the interests which have led to the introduction of nationalization in individual States.

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29. Resolution No. 824 (IX).

30. Resolution No. 1318 (XIII).

31. This report appeared on 26 February 1960 as *UN doc. E/3325*. Cf. especially p. 63–81. Of special interests in this connexion are the lists attached to the document covering the legislation in 56 of the so-called underdeveloped countries, giving general or special facilities for foreign investment. In some cases there is a direct guarantee that no actions against property will be undertaken in the case of such invested capital.

## SECTION 2: THE TAKING OF PROPERTY

### § 4

#### THE CONCEPT OF PROPERTY IN INTERNATIONAL LAW

It is generally accepted that foreigners have no claims in international law to the ownership of property<sup>1</sup>. This principle follows from the axiom of territorial sovereignty, by which a State is justified in regulating legal affairs inside its own territory broadly speaking at its own discretion, apart from certain restrictions and exceptions contained in treaties and the customs of international law. The right of a foreigner to own property is not contained in these last. Thus, no foreign citizen or his home State can justifiably protest if the State constructs its system of society on doctrines and principles which are not founded on the recognition of private ownership. To this must be added the fact, that even though a State might admit that foreigners have a right to own property, international law contains no detailed definition of the concept of ownership. International law does not indicate precisely the real content of ownership, and thus it is not possible in international law to establish what title a foreigner has to the assets which he may be said to possess according to municipal law. International law leaves this question entirely to municipal law, as is illustrated in the pronouncement of the American Secretary of State, Mr. Gresham, on 20 December 1893<sup>2</sup>:

"It is an established principle of international law, that every State has the right to regulate the conditions upon which property within its territory, whether real or personal, shall be held and transmitted"<sup>3</sup>.

In the past few years there has been no change in the legal position here.

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1. Ross, *op.cit.*, p. 162.

2. Moore, *Digest* (1906), II, p. 33.

3. See also *The Panovezys-Saldutisiks Railway Case, P.C.I.J.*, series A/B, No. 76, p. 18: "in principle, the property rights and the contractual rights of individuals depend in every State on municipal law."



Thus when it was laid down in the Declarations of Human Rights that "Everyone has the right to own property . . .," the purpose of the wording was not to secure the rights of private ownership, as such, in such a way that the State should agree to a restriction in its unlimited right to lay down the rules on how rights of ownership shall be acquired and of what they shall consist. On the contrary, it is clear from the proceedings in the United Nations and the whole tenor of the article that its only purpose was to protect property which had already been acquired <sup>4</sup>.

The rules of international law on alien property are thus distinguished in an essential respect from the other rules which are contained in the international law applicable to foreigners. When it is laid down, for example, that foreign ambassadors are extra-territorial, or that a foreigner has a claim to normal treatment in law and commerce, the whole legal position of the foreigner is immediately and fully described in international law and derives from that legal system, with the result that the content of these rights is identical in all States which are members of the community of international law <sup>5</sup>.

The position with the ownership of property is quite different. Here the content of the laws is determined by municipal legislation which can vary from country to country. The maximum contained in international law is some protection of rights where these have been already acquired, namely protection against the State depriving the foreigner of ownership which he acquired under its municipal law. Understood thus, this rule, which is normally cited as bearing on ownership by aliens, seems only to concern the question of whether a State has an obligation to preserve a system of laws valid at an arbitrarily chosen point of time, to determine what constitutes ownership of property, or whether, on the contrary, the State has the right in accordance with international law, to alter its legal system in this field, even where questions of foreign ownership arise.

This demonstration of the special nature of the rules of international law on ownership becomes important on a more detailed examination of the content of the rules of international law. Against this background it must be clear that international law, unlike municipal law, cannot be the vehicle for ideologies of an economic political nature.

International law does not concern itself with the question of which

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4. Cf. Kuhn, *Pathways in International Law* (1953), p. 224.

5. cf. Garcia Amador, 4. *Report*, U.N.doc.A/CN.4/119, p. 7.

economic system is most expedient, nor with the evaluation of what objectives a State is striving to reach in its internal economic policies, nor whether the objective should be a liberal or a socialist State. These are matters solely for municipal legislation.

Since the rules of international law on the rights of foreign ownership are (in comparison with the other rules on the rights of foreigners) untypical, in the sense that they are largely without material content but at the most call for the preservation of a legal system as it existed at a given time, it may well be that, when establishing the content of the rules (that is to say the extent of the protection), a good deal of care should be exercised in applying to rules of ownership the principles which normally govern the legal rights of aliens. This is particularly applicable to the doctrine of the minimum standard of civilisation.

Finally, it is essential to point out that these rules of international justice, pressed to their limit, i.e. as giving complete protection to foreign ownership, lead to the freezing of the existing economic and political systems; in any case they affect foreigners to the extent that the legislative bodies in individual countries cannot alter the rights of ownership of the foreigner without a breach of international law. Such complete protection of the rights of ownership of the foreigner against action of any kind whatever against property no more exists in international law than in municipal law, since no State will have any interest in enforcing such a rule of international law. The rights of ownership are certainly not inviolable in international law.

The claim of some writers, such as Guggenheim,<sup>6</sup> that the principle of the protection of private ownership is unquestioned today, is at best a crude formulation which requires more explanation. Within wide limits the State is able to take action against private property. It is generally agreed that the State has the right of levying taxes, also on foreigners, of confiscation in cases of criminal action, of the alteration and withdrawal of rights of ownership as measures in health, traffic or industrial and economic programmes, and, under international law, the State is justified in actions against ownership in general when special considerations of State require it. To these must be added the authority which the State has exercised in the past decades in the field of general economic policy, such as devaluation of internal currency, measures which in their extent are often far more

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6. *Lehrbuch des Völkerrechts* (1947), p. 59.

important than the other actions against property, and these currency regulations, by their very nature, are frequently and specially injurious to foreigner.

This view, that a State can alter the content of the rights of ownership, appears as the background to a large number of treaties concluded under international law. In the course of the past 100 years a number of bilateral agreements have been entered into to build up relations between States, and these lay down in detail the extent of the protection to which foreign property is entitled, under the treaties. As widely spread examples from this comprehensive treaty practice, there are the treaties of domiciliation between Switzerland and the United States on 5 November 1950, between Switzerland and Roumania on 19 July 1933 <sup>7</sup>, the treaty on friendship, trade and consular rights between the United States and Poland on 15 July 1931 <sup>8</sup>, a similar treaty between the United States and Hungary in 1926 <sup>9</sup>, and a number of commercial treaties which the Soviet Union concluded with various countries, for example Italy on 7 March 1924, Germany on 12 October 1925 <sup>10</sup> and Denmark on 17 August 1946 <sup>11</sup>.

There is very little doubt that these treaties, as far as their material subject matter is concerned, set out maximum protection which it can be expected that these countries will extend to alien property.

The importance of these treaties for understanding the general rules of international law on the question whether special conditions are involved in actions against foreign ownership will be dealt with later in our analysis; at this stage it is only to be emphasized that these treaties nowhere preclude actions against property by the holding State. On the contrary, the treaties imply that such actions can take place, although under special circumstances.

Thus, the treaty of friendship between the United States and Italy on 2 February 1948 contains the following provisions in article 5 Section 2:

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7. Cf. Bindschedler, *Verstaatlichungsmassnahmen und Entschädigungspflicht nach Völkerrecht* (1950), p. 11.

8. *Dep.St.Bul.* (1951), vol. 24, p. 821.

9. *Dep.St.Bul.* (1950), vol. 22, p. 399.

10. Cf. Bindschedler, *loc.cit.*

11. Cf. *Dansk Lovtidende C* (1946) p. 313–314. The treaty, which supersedes the earlier treaty of 23 April 1923, contains the most-favoured-nation clause in art. 13.

"The property of nationals, corporations and associations of either High Contracting Party shall not be taken within the territories of the other High Contracting Party without due process of law and without the prompt payment of just and effective compensation . . ."

Against this background the problem in international law must simply be, whether, if States exercise the authority which they hold by reason of their territorial sovereignty to restrict the rights of ownership of property and even entirely to suspend them, special conditions must be observed in dealing with alien property.

Meanwhile, as an introduction, the question is, whether the actions against property which the State can undertake against a foreigner in accordance with international law must be of a special kind, namely dictated by considerations of the common good or public interest.

## § 5

### MUST ACTIONS AGAINST PROPERTY SERVE PUBLIC AIMS?

It is often claimed that, if it is to satisfy the requirements of international law, an action against alien property must be undertaken with the common good in view, whereas an arbitrary action must be regarded as unlawful<sup>1</sup>. The basis for this view is apparently logical. When international law recognizes the right of States to raise questions on alien property, it follows from the recognition, that to protect their internal and legitimate interests, States must have the power to control persons and property situated in their territory. The importance of this is so essential that the interests of foreigners holding property in a country on whose government they have no direct influence must be sacrificed. If the holding State now undertakes actions against property which do not serve reasons of state or the common good, the grounds which justify the right of the State to act disappear, and the action is normally regarded as in breach of international law.

Georges Scelle thus claims<sup>2</sup> that, to conform to international law, actions against property directed against foreigners shall, *inter alia*, be undertaken

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1. Cf. Ross, *op.cit.*, p. 166.

2. *Précis de droit des gens* (1934), vol. II, p. 113.

"... pour cause d'utilité publique régulièrement constatée"; MacNair<sup>3</sup> states that the action "... must be motivated by some *bona fide* social or economic purpose involving the use of property nationalized". The protocol to the European convention of Human Rights also contains the provision that actions against property can only take place with public purposes in view.

These ideas are undoubtedly influenced by municipal law, in that, practically speaking, States in their municipal law always base actions against property on considerations of the purpose in view. From a number of national laws it can then be seen that the motive for action against property is often worded as "for reasons of public utility", "for the exploitation of national resources", "for purpose of land reform", "to promote the fair distribution of property" and "when property does not serve a useful purpose"<sup>4</sup>.

It is, however, questionable whether this doctrine can be maintained. International law contains no detailed definition of what is to be understood by the common good, and the formulation of such a definition will come up against insurmountable difficulties.

From the developments which have taken place inside the nations in the past few years, it must be agreed that the interference of governments in the rights of private persons has become extremely extensive and of many kinds.

Bing Cheng quotes<sup>5</sup> in this connexion that such interference has taken place in relation to the building of roads and railways, military barracks and public cemeteries, the fulfilment of an obligation under international law, mobilization of economic and industrial resources for war purposes. All these examples are to be found in cases which have reached the international courts, and there is no doubt that the list could be considerably extended.

No unequivocal interpretation of what governments understand in practice by the common good exists. The content of this concept, or of the similar one, "public aims", is determined principally by political considerations, and the establishing of limits must therefore be left to the individual State. When certain authors recommend the transfer of the expression

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3. *Op. cit.*, p. 243.

4. Quoted according to *U.N.doc.A/AC.97.5*, p. 125.

5. *General Principles of Law* (1953), p. 39.

“common good” from municipal law to international law, they disregard an essential difference between national and international communities. Even from the standpoint of municipal law, an expression such as “the common good” is vague and ill defined, but what gives the concept substance and thereby safeguards it against misuse is established by reference to the interests which best serve the political and social aims of the State. No authority exists in international society with competence to judge which economic measures in various States serve the State (or international society) best. Thus, while the concept “common good” can have material substance inside a State, because it coincides with the policy of that State, the concept “common good”, in the eyes of international law, must not only be vague and inexact, but also devoid of real substance. It can be taken as impossible that an international court or organization can form a reasonable judgment on the accuracy of a claim by a State that an action served a public purpose.

Further, even if the State itself should give no grounds for its action, no rules of international law exist to judge such a situation and distinguish it from situations where the action is based on considerations of the common good.

The practice of international courts supports this conclusion. Single decisions by international courts have certainly seemed to show that the basing of the action on considerations of the common good or a similar aim can influence the legality of the action in international law. A more detailed examination of the *ratio decidendi* of these decisions, however, shows that the reason for the decision must be sought in the incompatibility of the action in question with the State's own system of justice<sup>6</sup>. In the

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6. Cf. *Case concerning the Norwegian Shipowner v. USA* (1921) *R.I.A.A.*, vol. 1, p. 307 and especially p. 332, 335 and 336, as well as *Walter Fletcher Smith case, USA v. Cuba* (1929). In this case it is stated, inter alia, in the judgment: “From a careful examination of the testimony and of the records, the arbitrator is impressed that the attempted expropriation of the claimant's property was not in compliance with the constitution nor with the laws of the Republic, that the expropriation proceedings were not, in good faith, for the purpose of public utility . . . While the proceedings were municipal in form, the properties seized were turned over immediately to the defendant company, ostensibly for public purposes, but, in fact, to be used by the defendant for purpose of amusement and private profit, without any reference to public utility.” Cf. *R.I.A.A.*, vol. II, p. 913 and 917-918.

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judgment of this question the concept of the common good comes in as a contributory factor, and when the court or board of arbitration comes to decide whether this condition has been fulfilled, the decision is taken on the basis of the internal legal system of the State which has taken the action, and not on the basis of international law. Thus the situation is different from that discussed in this section.

## SECTION 3: COMPENSATION

### § 6

#### THE PROBLEM

A. In the mass of problems bound up with the action of the State against foreign ownership, the question of the extent to which the foreigner has a claim for compensation (and, if the answer is positive, the detailed conditions for fixing and paying the compensation) has always been predominant. Some writers are even of the opinion that the payment of compensation is the necessary and sufficient condition for the legality of an action against private property <sup>1</sup>.

Before taking decisions on the views which are available on the subject in legal literature and in practice, it will be useful to examine the problem in detail.

Later it will be shown <sup>2</sup> that the State is not justified in discriminatory treatment of foreigners if this puts them in a less favourable position than the country's own citizens. If compensation is paid to the citizens of the country by the holding State (here taken to mean the State where the property is situated and thus an object for action) the foreigner has a claim at least to the same treatment. All are agreed on this point.

The problem arises in cases where the citizens of a country only receive partial compensation, or no compensation whatever, and the question is then whether foreigners have a claim to more favourable treatment relative to compensation than that which exists for the country's own citizens under the municipal laws imposed by the State. This aspect of the problem

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1. Illustrative of this is that the Harvard Law School, in establishing the conditions for the qualification under international laws of "Taking and Deprivation of Use or Enjoyment of Property," concerns itself solely with the detailed formulation of the compensation terms. Cf. *Draft Convention* (1960) art. 10, p. 64.

2. Cf. below § 13.



goes to the heart of the matter both in municipal law and international law.

In municipal law the question is closely bound up with the sovereignty of the State, in the sense of the supreme authority of the State over persons and property situated in its territories. Recognition that foreigners have a more favourable position than the country's own citizens, will in fact imply a restriction of the powers of the national legislature to control property situated in its territories in accordance with the principles which (in any case from the conditions inside the country and in the judgment of the authorities) best serve the community in question. Thus these problems raise questions of extreme importance not only of a legal kind, but also and more especially of a political kind.

In international law the problem we are now examining has always been regarded as one of the most important. It concerns the relationship between international law and municipal law, and it is symptomatic that one of the latest examinations, the draft convention submitted by the Harvard Law School to the International Law Commission in May 1959, states as early as in art. 2:

"... A State cannot avoid international responsibility by invoking its municipal law".

One of the reasons adduced for this is that every deviation from this "beneficent principle of law" will carry with it a recognition of the principle of a national standard, with the result that international law will be left in a less developed condition than the factual incompleteness which marks it today.

Even though the arguments set out by the Harvard Law School can scarcely be described as compulsive, since the rules of international law do not exist for the sake of the legal system, the view quoted concerning the dominance of international law is often pleaded in State practice, particularly when action against alien property is in question.

In a note from the United States to the Government of Guatemala of 28 August 1953, arising from the action of Guatemala against land belonging to an American Company, the United Fruit Company, without payment of compensation, there appears the following passage:

"... Further the United States Government must point out, that international law does not authorize states to do any and every act, so long as such act is imposed on nationals and foreigners on a basis of equality or without discrimination.

What a state may do with respect to its nationals or their property is a matter largely between that state and its nationals, for the reason that nationals of a state are presumed to be able to take corrective measures looking to the protection of their rights. The Government of the United States is warranted in expecting not only that the law of Guatemala shall be applied fairly as to American nationals without discrimination, but also that both the law itself and its application shall conform at least to minimum standards required by international law"<sup>3</sup>.

The question which is raised in the American note, and which is in fact the central point of the problem of the existence of liability to pay compensation, can therefore be formulated as follows: does international law contain a minimum standard which imposes an unconditional claim on the nationalizing State for liability to pay compensation to foreigners, irrespective of its treatment of its own citizens?

B. This problem has divided the theory of international law broadly into two groups with opposing views, and it may perhaps be reasonable at this point to indicate briefly the discussion which will be evaluated in detail in the following pages and in particular compared with the latest practice.

1. The great majority of writers on international law are still of the opinion that actions against private property, including nationalization directed against foreigners, give the party affected, or his home State, a claim for compensation which is independent of the internal legislation of the nationalizing State<sup>4</sup>. One justification for this is sought in the theory of the minimum claims of civilization, containing the doctrine which is, it is claimed, recognized in practice by international courts and boards of arbitration and is moreover an expression of a necessary legal principle. That the principle is necessary means in, this connexion, that its recognition is a decisive

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3. Cf. *Dep.St.Bul.* (1953), vol. 29, p. 358.

4. See for example McNair, *op. cit.*, p. 251, Borchard, *op. cit.*, p. 104 ff, Verdross, "Zur Konfiskation Ausländischen Privateigentums nach Friedensvölkerrecht", *Zeitschrift für öffentliches Recht* (1924), p. 3221 ff, Fachiri, "International Law and the Property of Aliens", *B.Y.I.L.* (1929), p. 32 ff, Schindler, "Besitzen konfiskatorische Gesetze ausserterritoriale Wirkung?" *Schweizerisches Jahrbuch f. internationales Recht* (1946), p. 65 ff, Kunz, "The Mexican Expropriations", *Contemporary Law Pamphlets* (1940), p. 33.

prerequisite for developing international relations between the members of the international community. Furthermore, the principle of liability to pay full compensation to foreigners who are affected by actions against private property is a traditional principle of justice, which cannot be destroyed simply by the circumstance that certain States find it reasonable for political purposes to introduce actions against private property without compensation, even for their own citizens. If in every case international law recognizes that the national standard is a necessary and sufficient measurement for deciding the content of international law applying to foreigners, it means (as noted above) that the rules of international law lose all substance and all importance, and it cannot be in the interests of States to bring about such a result.

2. Against this, others hold the view that general actions against private property do not give foreigners affected by them any other legal rights than those existing under the national legislation of the State so acting.

These writers<sup>5</sup> support this view by the developments which have taken place in national communities in the past decades, when compensation to a country's own citizens for acts of nationalization in fact became a rarity. In this situation international justice cannot press a claim for compensation when this is in contradiction to the legal concept now ruling in the municipal law of many States.

Absence of liability to compensate also comes from the fact that it is generally accepted in international law that a foreigner must tolerate the subjection of his property to the restrictions which are a result of the municipal laws of the holding State; when, for example, the action is based on health, security, traffic or aesthetic considerations, in other words actions which were necessary for special reasons of the general good. Since such actions without compensation are tolerated by international law, there is no

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5. Fischer Williams, op.cit., p. 21-22, Payson Wild Jrs., "International Law and Mexico Oil", *Quarterly Journal of Inter-American Relations* (1939), *Københavns Universitet* (1956), p. 243, Frederic S. Dunn "International Law and Private Property Rights", *Columbia Law Review* (1928), vol. 28, p. 166-180, Oppenheim & Lauterpacht, *International Law* (1948), vol. 1, p. 318, Friedman, op.cit., p. 206, Olmstead, "Nationalization of Foreign Property Interests, Particularly those . . .", *New York University Law Review* (1957), vol. 32, p. 1124, and many others.

basis for the view that the foreigner or his home State has an unconditional claim for compensation when the action of the holding State springs from social motives, and these, in practice, are always the official reasons put forward for the general actions against private property which are here described as nationalization.

Other authors, again, express the view that a claim for compensation for the nationalization of alien property is incompatible with political realities in the international community<sup>6</sup>. More particularly their view is that the development of the community of international law has resulted in the formation of a body made up of a great number of States, whose economic resources are widely different and (this is the new phenomenon) where even economically weak States have taken on political roles. The disparity of interests between the capital-exporting and the capital-importing nations with regard to the question of compensation is, it is claimed, so great that the existence of a uniform rule valid in international law cannot be established<sup>7</sup>.

Finally, it can be said that the view that an action against alien property implies liability for compensation to the foreigner, must presuppose that these are situations where the payment of compensation is not only reasonable, that is in agreement with the basic principles of the law, but also lies within the bounds of possibility<sup>8</sup>. In this connexion it is worth recalling that the estimated value of the assets involved in the Iranian nationalization of the Anglo-Iranian Oil Company was some \$ 1400 mill.<sup>9</sup>, while the holdings of gold which made up the most important part of the liquid national wealth of Iran were, at the time of nationalization, \$ 239 mill.<sup>10</sup>.

A claim for compensation in such a situation will be meaningless, unless the conclusion can be drawn from it that a State, such as Iran, which has

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7. Cf. W. Friedmann, "Impacts of Social Organization on International Law" *A.J.I.L.* (1956) vol. 50, p. 504 who, inter alia, states: "... on the general principle the 'have' and 'have not' nations are bound to remain divided. At the very least it must be admitted that the assumption that nationalization without compensation generally held to be a violation of international law is no longer valid ..."

8. Cf. Bindschedler, *op.cit.*, p. 39.

9. Following Ford, *op.cit.*, p. 188-189.

10. Cf. *Review of Economic Conditions in the Middle East* (1951) p. 76, published by the United Nations Secretariat.

no economic resources to carry through such payments of compensation, must abstain from nationalization <sup>11</sup>.

This interpretation of international law can, however, scarcely be maintained, since the interests in this case which motivated the acts of nationalization were far too compelling. Such a viewpoint is clearly formulated in a note of 3 August 1938 from the Mexican Foreign Minister, General Don Eduardo Hay, to the Ambassador of the United States, in connexion with the Mexican agricultural expropriations. One of the statements made in this note is <sup>12</sup>: —

“The political, social and economic stability and the peace of Mexico depend on the land being placed anew in the hands of the country people who work it; therefore, its distribution, which implies the transformation of the country, that is to say, the future of the nation, could not be halted by the impossibility of paying immediately the value of the properties belonging to a small number of foreigners who seek only a lucrative end.

On the one hand, there are weighed the claims of justice and the improvement of a whole people, and on the other hand, the purely pecuniary interests of some individuals. The position of Mexico in this unequal dilemma could not be other than the one she has assumed, and this is not stated as an excuse for her actions but as a true justification” <sup>13</sup>.

These opinions, which reflect the extent of the action and its social-political character, are used by some authors in support of the assumption that every claim for compensation for nationalization should be abandoned, while others take a less radical position, holding that compensation for these particularly extensive actions against alien property must be restricted to an award fixed unilaterally by the State taking the action <sup>13</sup>.

C. In consideration of the central importance of the problem and bearing

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11. Cf. Hyde “Compensation for Expropriation”, *A.J.I.L.* (1939) vol. 33, p. 112, who calls for natural restitution, if the nationalizing State cannot pay; and similarly Woolsey “Expropriation of Oil Properties in Mexico”, *A.J.I.L.* (1938) vol. 32, p. 526 and Verziil, *Annuaire* (1952) vol. 44, II, p. 265, who draws attention to the fact that this solution was accepted by the Indonesian government during a parliamentary debate on nationalization. This view has, however, clearly been abandoned during the nationalization actions carried out by Indonesia in the past few years.

12. Cf. Briggs, *The Law of Nations* (1953) p. 558.

13. Cf. La Pradelle, *Annuaire* (1950) vol. 43, I, p. 128.

in mind the very extensive legal literature of the past few years on these subjects, it is perhaps surprising that something approaching agreement on a uniform solution was not reached long ago, both in the theory of international law and in international practice. This lack of agreement is to be ascribed partly to juridical-technical and partly to political-sociological circumstances.

In considering the juridical technical aspect an attempt has been made to answer the question (equality of status or an international standard) in general terms, covering all the rules contained in international law on foreigners, cf. Art. 2 A of the draft convention of the Harvard Law School quoted above, which was inserted as an introduction to the more detailed rules covering various concrete situations.

It is improbable, however, that any general answer is possible to the problem we have before us. For example, if the examination is concentrated only on the action of the holding State against alien property, the conclusion will be that not even here, within the limited field of general law relating to foreigners, will it be likely that one and the same rule will be valid for every form of action against private property. Precisely because the various kinds of actions are expressions of various interests of the States involved, whether in carrying through the action or in preventing it, the view that all actions against foreign property shall be regarded as identical in law has the balance of probability against it. That a distinction according to the kind of action is not only useful, but perhaps even necessary in solving the present problem, is again emphasised on examination of the position in national constitutional law.

In Danish law, for example, the liability to compensate for government actions against private property is positively laid down in § 73 of the Constitution, which deals directly with *afståelse* (deprivation) of property. Nevertheless, the discussion on this point of constitutional law is coloured by the question of whether this or that action is a deprivation in the sense of incurring liability to compensate. On this point, too, an attempt has been made to construct theories of a more general kind, where some emphasize the literal meaning of the words in the Constitution, while others find the decisive criteria in the previous history of the law and factual considerations behind it. It becomes clear, however, that every attempt to set up general criteria meets difficulties and in fact cannot be logically pursued because of the many-sidedness of the actions in form and content and in their

relationship to the interests which motivate and are affected by the action in question <sup>14</sup>.

In international law, where the problems are far more complex, since not only a single State's national interests are involved, but where the objective must be to extract rules which will be recognized by all States in the international community, it must, therefore, be natural to discriminate between the various kinds of action against private property and, for example, to concentrate exclusively on a single one of these.

The question of whether a foreigner must submit to equality of rights, or whether, on the other hand, an international standard is applicable, is also closely bound up with the political developments in the international community.

It was clearly observable from the debates which took place in the United Nations in the past few years (examined later) that the principle of an international standard for foreigners was regarded by those States which in recent times had been striving for, or had attained, an independent national existence, as a reminder of the days of colonialism and as an attempt by the creditor State to sustain a form of colonialism. The claim for special treatment for foreigners was compared with the system by which certain States at the beginning of this century imposed a ruling on less developed States, under which foreigners were not subject to the jurisdiction of the holding State <sup>15</sup>.

This fact, that the establishing of a legal rule is so closely bound up with the altered international conditions and with international political debate, has as its results that, on the one hand, conclusions from previous practice having its origin in political circumstances which have now changed, can only be introduced with caution; and, on the other hand, that not every declaration by a State is to be regarded as an expression of a reasoned legal opinion, since the statements in question are more probably motivated by political than by legal considerations.

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14. Cf. Ross, *Dansk Statforfatningsret II* (1960), p. 545 ff.

15. During a discussion in the International Law Commission on the responsibility of States for offences against foreigners, Martine Daffary (Iran), speaking of the legal position of the foreigners, said on 11 June 1957: "My country did not, however, wish . . . to place them above the law since that would bring back too vividly the bitter memories of the capitulationssystem . . ." *Summary Record* (1957) p. 160.

To carry out an analysis of the relevant rules of international law concerning a possible unconditional liability to pay compensation to foreigners affected by acts of nationalization, it will, therefore, be necessary to determine whether it is correct, as is claimed in the majority of theories, that there exists a rule in traditional international law which protects vested rights. The next step should be to examine whether or not such a rule is also valid for acts of nationalization, without regard to changes in the international economic and political conditions which motivate this new form of action against private property, or in any case coincide in time with the introduction of nationalization.

## § 7

### THE HISTORICAL DEVELOPMENT: THE PERIOD UP TO 1918

#### A. *International Practice.*

In the time up to 1918, action against private property belonging to foreigners was a comparatively rare occurrence. The leading States built their economic policies on clear liberal conceptions, and thus an action by a government against private property was regarded as a rare exception. Furthermore States had no interest in encouraging their citizens to invest abroad, and, even when this did take place, the home State of the investor was extremely reluctant to transform an isolated action against private property into an international conflict.

From about the middle of the 19th century, however, a decisive change took place in the attitude of governments. Diplomatic protection of investors' interests now became frequent, and demands for compensation for actions against private property were often raised and satisfied. In Great Britain, in 1873, the Corporation of Foreign Bondholders was formed, which, although an unofficial body, remained in close contact with the British government, in such a way that there could be official intervention on behalf of British subjects if their rights were violated by the actions of foreign governments<sup>1</sup>.

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1. Cf. Wortley, *Expropriation in Public International Law* (1959), p. 58.



From this period, too, come a number of treaties of domiciliation, as well as treaties on friendship, shipping, and trade, and these in connexion with the growing use of most favoured nation provisions, created a network of rules for the protection of foreign property on the foundation of the treaties<sup>2</sup>.

Also from this period are many well known international decisions. Some of them were based upon the treaties of domiciliation or friendship mentioned, others were decided on non-legal grounds with the help of diplomatic methods which were regarded at the time as suitable, or in any case not inadmissible in international relations, while others again were decided by the legislating bodies on the basis of what was at that time regarded as valid international law. Since some of these decisions are still referred to in international debate on liability to pay compensation for nationalization, this earlier practice should be the subject of a short discussion.

(a) *The Case of the Sicilian Sulphur Monopoly (1836)*. In 1836, the Sicilian government wished to grant a French company a trading monopoly, including the export trade, covering all the sulphur from the Sicilian sulphur mines. When the plans for the monopoly became known, Great Britain protested, on the grounds that the measures adopted by the Sicilian government violated the vested rights of British subjects. The British government recalled the treaty concluded between the partners in 1816, which contained both a most favoured nation clause and also, in Art. V, a provision that British subjects had the right to own and dispose of their personal property in any way whatsoever without let or hindrance. The Sicilian government asserted that, in spite of the treaty, foreigners were not entitled to greater privileges than its own nationals, and that foreigners must submit to the laws of the land. Although these viewpoints were disputed by the British government, the monopoly was set up, with the result that the British government ordered certain ships of war to be commissioned and dispatched to Naples. Thereupon the Sicilian government terminated the monopoly and assisted in the formation of a commission charged with determining the amount of compensation to be paid to British subjects as a result of the losses which the temporary setting up of the monopoly had caused.

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2. Cf. Schwarzenberger, *B.Y.I.L.*, vol. XXII (1945), p. 96.

The suitability of the case as a legal precedent is disputed by *Fischer-Williams*<sup>3</sup>, who emphasizes that the decision in the case was the result of a special treaty which had been negotiated between the parties<sup>4</sup>. *Friedman*<sup>5</sup> claims that the case has no value whatever as a result of the British action with warships.

(b) *The Finlay case (1849)*. In 1836 the Greek government took a piece of land belonging to the British subject, Finlay, for use as an extension to the garden surrounding the palace of the King of Greece. The Greek government paid no compensation for this and Great Britain protested to Greece. In 1849 the case was settled, after diplomatic intervention, by payment of compensation by the Greek government for the expropriated land. In his instruction of 7 August 1846 to the British ambassador in Athens, Lord Palmerston did not dispute the right of Greece to acquire the land, provided compensation was paid. The relevant passage reads:

"In all countries it is understood that when land belonging to a private individual is required for purpose of great public utility or of national defence, the private rights must so far yield to public interest, that the individual is compelled by law to give up his land to the public, provided always that he shall receive for it from the public its full and fair value<sup>6</sup> . . ."

(c) *The Rev. Jonas King case (1855)*<sup>7</sup>. A somewhat similar case arose in 1853 when the Greek government confiscated land belonging to an American citizen, the Rev. Jonas King, who was also arrested and sentenced for attacks on the Greek monarchy and the official religion. The protest from the United States was exclusively concerned with the confiscation of the land, and in this instance, too, the case was settled by negotiation, and the payment by Greece of compensation fixed at \$ 25,000<sup>8</sup>.

(d) *The Henry Savage Case (1865)*<sup>9</sup>. On 17 March 1852 the government

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3. *Op.cit.*, p. 2.

4. Cf. also Bindschedler, *op.cit.* p. 29.

5. *Op.cit.*, p. 75.

6. *British State Papers* (1849/50), vol. 39, p. 431-432, and Fachiri, *op.cit.*, p. 37.

7. Whiteman, *Damages in International Law* (1932), vol. II, p. 1387.

8. Cf. Sen.Doc. 9 33rd Cong. 2 sess. quoted by Wilson, *A.J.I.L.* (1951) vol. 45, p. 88, note 24. See also Moore, *op.cit.* vol. 6, p. 262-264, who classifies the case under the title "Denial of Justice".

9. Whiteman, *op.cit.*, vol. II, p. 893.

of El Salvador published a decree providing that all trade in gunpowder after 24 August 1852 would be transferred to a State monopoly and existing stocks confiscated. The government decree affected an American citizen, Henry Savage, who in 1851 had imported a shipment of gunpowder which was now worthless, since as a result of the decree its sale was, practically speaking, impossible. Savage claimed compensation equal to the value of the stocks of powder, and after varied negotiations between the government of El Salvador and the United States the case was laid before a court of arbitration, which awarded compensation to Savage.

The award of the arbitration court can only be defended when it is accepted that purely economic (as opposed to health or security) interests were the motive for the creation of the monopoly. For the rest the case is interesting in that compensation was only claimed for the property which was confiscated, but not for the injury to future trading sustained as a result of the monopoly.

(e) *The Case of the Delagoa Bay and East African Railway (1891)*<sup>10</sup>. The course negotiations took in this case can be found later<sup>11</sup> in the section on qualifications for protection. It is only necessary to say here that Great Britain and the United States protested to Portugal following the cancellation of a concession and demanded compensation. Portugal was compelled to concede this claim, and on 13 June 1891 the parties signed a protocol, providing that the case should be decided by an international court of arbitration.

According to the agreement on arbitration, the court had as its object to establish:—

“... as it shall deem most just the amount of compensation due by the Portuguese Government to the claimants of the other two countries”.

There was thus agreement on liability to pay compensation, not on the amount of compensation. The court of arbitration fixed the amount of compensation in accordance with the presumptions valid in cases of compensation for breach of contract, since Portugal's course of action was held to be in violation of the legal rights contained in the concession.

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10. *Ibid.*, vol. III, p. 1694.

11. P. 224.

*Fachiri*<sup>12</sup> regards the cases as an expression of Portugal's recognition of liability under international law to pay compensation for the confiscation of foreign property in that the rights contained in contracts are also "property" when the question of protection arises. *Guggenheim*<sup>13</sup> and *Bind-schedler*<sup>14</sup> think similarly. The last named, however, expresses some doubt on the suitability of the decision of the court of arbitration as a precedent, since the court established liability to pay compensation in a case of seizure of rights and privileges which was contrary to explicit promises.

(f) *The Conflict on the Italian Life Insurance Monopoly (1911)*<sup>15</sup>. In 1911 the Italian Legislative Assembly discussed a proposal to set up a national monopoly for life insurance to cover the whole country. The companies which already existed, of which  $\frac{2}{5}$  were foreign, were to cease to function, and no compensation was to be paid for this reason by the Italian State.

As a result of the proposal, protests were handed to the Italian government by the governments of Austria-Hungary, France, Germany, the United States and Great Britain. The protesting States claimed compensation since, as a result of the creation of the monopoly, the foreign life insurance companies would be compelled to realise their assets at a loss. However, the law on State monopoly was altered in such a way that existing companies received permission to continue their insurance activities for ten years more, and were given the opportunity of realizing their assets in an economically reasonable way, in some cases even profitably as a result of the rise in prices of property. With this action the grounds for protest by the foreign States disappeared.

The conflict roused a good deal of attention, and many distinguished jurists gave their support to the claim of the protesting States, maintaining the view of the protection of vested rights. The case is additionally interesting in that the protest against the law on monopolies was not directed against the deprivation of freedom to continue the activities of life insurance, but only against the loss in value which the law imposed on immovable and movable property of the foreign companies.

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12. *Op. cit.*, p. 166.

13. *Op. cit.*, vol. I, p. 305.

14. *Op. cit.*, p. 9.

15. Cf. *Fachiri*, *op. cit.* p. 166.

(g) *The case of religious property in Portugal (1920)*. After the revolution in Portugal in 1910, the provisional government issued a law dated 8 October 1910, under which all property belonging to religious groups was confiscated for the benefit of the State. No compensation was paid.

The French, Spanish and British governments protested to Portugal on behalf of their nationals affected by the law, and claimed compensation. On 13 July 1913 the parties signed a *compromise*, under which a board of arbitration was set up with the duty of examining and giving judgment on the complaints submitted by reference to the relevant treaties, the general principles of international law and equity (*l'équité*)<sup>16</sup>.

Under this procedure the British government declared that "it in no way regarded itself as judge as to what was legal and binding according to the internal laws of Portugal . . . But the government is of the opinion that by its conduct Portugal has acted in a way inconsistent with the principles of international law". It was further claimed from the British side that "... respect for property, respect for vested rights, these are legal principles in all civilized states".

The Portuguese government, on the other hand, did not dispute the legal principles on which the claims of the three governments were based, but claimed that the property in question did not belong to the foreign nationals, but to their religious groups.

The case was decided by a number of judgments<sup>17</sup>, under which compensation was granted in those cases where the conditions of ownership and foreign nationality were attested by the three governments.

(h) *The case of the Norwegian shipowners' claim against the United States (1922)*. As a result of the shortage of tonnage which existed in the United States at the time of the entry by that country into the First World War in 1917, the American government requisitioned a number of ships which were in course of building in American yards for the account of 15 Norwegian shipowners. At the end of the war the United States offered to pay \$ 2,600,000 as compensation to the shipowners, which was said to be the material value of the ships, while the Norwegian shipowners claimed \$ 18,000,000 as full compensation<sup>18</sup>.

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16. The arbitration agreement, art. 3, *R.I.A.A.*, vol. I, p. 9.

17. *Ibid.*, p. 11-57.

19. *Ibid.*, p. 313.

On 30 June 1921 the United States and Norway agreed on a *compromise*, by which the case should be laid before the Permanent Court of Arbitration. In the course of this agreement it was provided that:—

“... the Tribunal shall examine and decide the aforesaid claims in accordance with the principle of law and equity and determine what sum if any shall be paid in settlement of each claim”<sup>20</sup>.

The Court of Arbitration, which in essentials supported the Norwegian claim, laid down in its judgment that the owners of the requisitioned ships were entitled to compensation by American law and that:—

“... it is common ground that in this respect the public law of the parties is in complete accord with the international public law of all civilised countries”<sup>21</sup>.

In principle, with the support of this clause, the decision was regarded as meaning that vested rights have an unconditional claim on protection<sup>22</sup>.

However, the main grounds for the decision of the Court of Arbitration were that the United States had a liability to compensate for:

“... having ... made a discriminating use of the power of eminent domain towards citizens of a friendly nation”<sup>23</sup>.

With the further point, that the requisition of neutral ships under a state of emergency, according to the 5th Hague Convention of 1907, art. 19, involves liability to pay compensation<sup>24</sup>, it is difficult to see that the judgment of the Arbitration Court has any importance as support for a general theory of unconditional liability to pay compensation for the seizure of foreign property.

Furthermore, the value of the decision as a binding precedent is disputed by the United States government in its note of 26 February 1923 to the Norwegian ambassador in Washington<sup>25</sup>.

## B. Conclusion.

As already stated in the discussion of the individual cases, not all are equally well fitted to lend support to the view that a clear ruling exists in

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20. *Ibid.*, p. 310.

21. *Ibid.*, p. 332.

22. Cf. Guggenheim on this, *op.cit.*, p. 306.

23. *R.I.A.A.*, vol. I, p. 339.

24. Cf. G. and N. Cohn, *Moderne Krigsret* (1915) p. 98.

25. *R.I.A.A.*, vol. I, p. 344.

international law on unconditional liability to pay compensation for actions against the private property of foreign nationals. Nevertheless it is possible to claim that the existence of such a ruling at the points of time in question was not disputed either in theory<sup>26</sup> or in practice. In conformity with the structure of the international community at the time it was also clearly in the interests of the leading States, and these were broadly speaking identical with the capital exporting States, to claim that an unconditional liability to pay compensation existed, with its basis in international law. Minor States, which were dependent on Great Powers both economically and politically, were forced to bow to a ruling which, at the time, was in accordance with the economic and legal principles forming the basis for the municipal legal systems of by far the majority of the States. At the time there was no opportunity to test the strength of the rule of international law in cases of widespread actions against private property such as, for example, nationalization.

## § 8

### THE HISTORICAL DEVELOPMENT: THE PERIOD BETWEEN THE WARS

#### A. *International practice.*

In the course of the Russian Communist Revolution, extensive actions against private property took place in the Soviet Union. By the decree of 26 October 1917 rights of private ownership were abolished. The decrees of 14 December 1917 and of 26 January 1918 contained rulings under which the Russian banks were nationalized and replaced by a State banking monopoly, and from May 1918 and in the years thereafter large parts of industry were nationalized<sup>1</sup>. Nationalization was widely applied to the

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26. "It is probable that text-writers have given little attention to the status of the private property of aliens in time of peace because the inviolability of such property was so generally recognized." Cf. Bullington, "Problems of International Law in the Mexican Constitution of 1917", *A.J.I.L.* (1927), vol. I, p. 695. Cf. also Kunz, *op.cit.*, p. 4: "The rule . . . was taken so much for granted that there was hardly any monographic literature on this topic."

1. Cf. Vyshinski, *The Law of the Soviet State* (1948), p. 19.

property of foreign nationals but the Russian decrees did not authorize compensation for the previous owners <sup>2</sup>.

On 13 February 1918, 20 States in all (namely the 14 allied States and associated powers, as well as 6 neutral States) <sup>3</sup> protested against these actions and, led by the minister of the United States, they declared:

"In order to avoid any misunderstandings in the future, the representatives at Petrograd of all the foreign Powers declare that they view the decrees relating to the repudiation of Russian State debts, the confiscation of property and other similar measures as null and void in so far as their nationals are concerned".

This point of view was confirmed at the conference in Brussels in October 1921, where conditions in Russia were considered, and where the delegates passed a resolution which, *inter alia*, contained the following:

"The forcible expropriations and nationalizations without any compensation or remuneration of property in which foreigners are interested is totally at variance with the practice of civilised states. Where such expropriation has taken place, a claim arises for compensation against the Government of the country" <sup>4</sup>.

The view that the nationalizing State, in the same way as the State which undertakes isolated actions, was under liability to pay compensation when nationalization affected alien property, was clearly maintained against the Soviet Union, without, however, altering its legal opinions on this point <sup>5</sup>.

The problem arose anew on the occasion of the exchange of notes between the United States and Mexico in connexion with the nationalization of the oil industry by Mexico. This nationalization, which was the final result of a conflict extending over many years between the Mexican government and foreign oil interests <sup>6</sup>, was introduced by a decree of the President on 18 March 1938 <sup>7</sup>.

The Foreign Minister of the United States protested in a note of the 22 August 1938, asserting that, according to international law, nationaliza-

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2. A survey of Russian nationalization actions is to be found in Friedmann's work, *op.cit.*, p. 17.

3. Cf. Wortley, *op.cit.*, p. 61.

4. Mc Nair, *International Law Opinions* (1950) vol. I, p. 9.

5. The Soviet Union has, however, in isolated instances, concluded treaties of compensation, see later p. 111.

6. On this see later p. 90.

7. Cf. Gaither, *Expropriation in Mexico* (1940), Woolsey, *op.cit.*, p. 519 and Kunz, *op.cit.*, p. 19 ff.



tion should be accompanied by compensation which was "adequate, effective and prompt". This viewpoint, which reproduced that put forward by the United States a month earlier to Mexico, following the Mexican agricultural expropriations<sup>8</sup>, was also maintained in a corresponding Dutch note to the government of Mexico on 27 October 1938<sup>9</sup>.

In support of the legality of nationalization, Mexico claimed that there was authority for nationalization in the Mexican constitution, and that the action was further dictated by social necessity. The question was, however, solved by treaty agreement in 1946, under which Mexico undertook to pay compensation.

While the attitude of the Great Powers to the Soviet Union in 1918 was undoubtedly in agreement with the concept of the content of international law ruling at that time, it was scarcely so clear in 1938<sup>10</sup>. The practice of the courts, however, maintained its unconditional claim to protection of the rights of ownership.

A few international decisions are available from this time<sup>11</sup>, among them that of the Permanent Court of International Justice, on the question of breach of protection of vested rights in the case concerning *Certain German Interests in Polish Upper Silesia* (1926)<sup>12</sup>. The case hinged principally on the interpretation of the Geneva convention entered into by Germany and Poland on 5 March 1922 and can therefore scarcely be a decisive precedent in considering the general content of international law. However, in its interpretation of the treaty in question, the Court laid down that there exists in international law a general principle of respect for vested rights. The Court put it in this way:

"... That whereas Head II is general in scope and confirms the obligation of Germany and Poland in their respective portions of the Upper Silesian territory

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8. Cf. Briggs, *op.cit.*, p. 556 ff.

9. Cf. *Documents on International Affairs* (1938), I, p. 472.

10. On this see Erik Harremoes, *Nationaliseringens internationale virkninger* (1956) p. 86.

11. Cf. thus in *The de Sabla Claim* (1932), *Annual Digest* (1933/34), p. 241, *Hungarian Optants Case* (1927), *Recueil T.A.M.*, vol. VII, p. 138, 147, *Goldenberg Case*, *R.I.A.A.*, vol. II, p. 901 and especially 909. In this case it is stated: "The respect of private property and of the acquired rights of aliens undoubtedly forms part of the general principles accepted by the law of nations".

12. *P.C.I.J.*, *Series A*, no. 7.

to recognise and respect rights of every kind acquired before the transfer of sovereignty by private individuals, companies, or juristic persons, Head II only refers to Polish Upper Silesia and establishes in favour of Poland a right of expropriation which constitutes an exception to *the general principle of respect for vested rights*"<sup>13</sup>.

Later it adds:

"Further there can be no doubt that the expropriation allowed under Head III of the Convention is a derogation from the rules generally applied in regard to the treatment of foreigners and the *principle of respect for vested rights*"<sup>14</sup>.

Finally it is laid down in that section of the judgment covering the registration of a new owner of the Chorzów factory:

"If Poland wishes to dispute the validity of this entry, it can, in any case, only be annulled in pursuance of a decision given by the competent tribunal; this follows from the principle of respect for vested rights, a principle which as the court has already had occasion to observe, forms part of generally accepted international law, which, as regard this point, amongst others constitutes the basis of the Geneva Convention"<sup>15</sup>.

The Court took the opportunity to make a direct declaration on the question of compensation in cases of action against private property in the *Case of the Factory in Chorzów* (Claim for Compensation) 1928<sup>16</sup>. In this judgment a distinction is made between lawful and unlawful expropriation. The Court comes to the conclusion that the action of Poland is not a (lawful) expropriation "... to render which lawful only the payment of fair compensation would have been wanting ..." <sup>17</sup>.

In this case, too, the pronouncements of the Court must be regarded as *obiter dicta*, although the pronouncements quoted must be regarded as an excellent expression of the legal concepts ruling at the time.

At about the same time, however, there apparently occurred an alteration in the attitude of States towards this question. In 1929 the League of Nations summoned a conference in Paris for the discussion of the legal status of foreigners<sup>18</sup>. This conference considered a draft resolution,

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13. Ibid., p. 21. The italics mine.

14. Ibid., p. 22. The italics mine.

15. Ibid., p. 42.

16. *P.C.I.J.*, Series A., No. 17.

17. Ibid., p. 46.

18. Cf. Harremoes, *op.cit.*, p. 88.

whereby foreigners should have the right to suitable compensation in cases of expropriation, quite independently of whether the nationals of the State taking action had an equivalent right under the laws of that State.

This draft was rejected by 13 votes to 5, opposition arising chiefly from Czechoslovakia, Yugoslavia, Poland, Roumania and Salvador, and only a few States maintained that an unconditional liability to pay compensation existed under international law <sup>19</sup>. Instead a rule was accepted, by which, in matters of compensation for expropriation, States were bound to treat foreigners and their own nationals on the same footing.

There is no doubt that the proceedings of the Paris conference were a landmark in the development of the rules of international law on liability to pay compensation for actions against property. Certainly in the years immediately preceding there had been instances of State action against alien property, but to some extent efforts to obtain compensation had been successful, and, in other cases, action against property without compensation was regarded as an exception, which could not affect the content of international law.

It was now possible, for the first time, to prove conclusively that the social development in municipal law, where the liberal economic concepts of society were in retreat, had set its mark on international debate on the protection of rights of ownership. In an international conference it was no longer possible to produce a majority for the traditional rule of international law of unconditional liability to pay compensation.

Against that, however, we must certainly not exaggerate the legal significance of the conference. Thus *Harremoes* points out <sup>20</sup> that the 4 countries, which reacted most vigorously against the resolution on unconditional liability to pay compensation, were at that time in dispute with their neighbours on the right to absorb alien property and on the conditions under which this right could be exercised.

When it further appears that some of the countries which voted against the draft resolution nevertheless paid compensation for the nationalization of alien property, since such compensation was authorised by the municipal laws of the country involved, the result of the voting thus far shows nothing of legal importance. The voting seems simply to be an ex-

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19. Cf. *League of Nations Doc. C. 97, M. 23, 1930 II.*

20. *Ibid.*, p. 89.

pression of the notion that States reserve to themselves the right to reject the supreme authority of international law in a situation (and this appears extremely important) where States always give compensation to foreigners for actions against private property. Whether a rule on the absence in international law of liability to pay compensation would also have had international support in a situation where the acceptance of such a ruling would in practice mean that foreigners would receive no compensation, is difficult to say on the basis of the result of the Paris conference.

The findings of the Paris conference on this point seem at best to be of theoretical importance<sup>21</sup>, and, as will appear later, conferences on codification are not particularly well adapted for making decisions on legal theory.

### B. *Conclusion.*

The years between the wars carried the protection of the rights of ownership in international law into a new phase. In these years the world witnessed actions against private property of a scope never known before.

To some extent the example given by Soviet Russia infected States facing social and economic difficulties. Looking to the future, it was politically valuable for these States to have it established that they were bound only by their own laws as to the conditions governing their actions against private property.

In the theory of international law the new tendencies showed chiefly in the famous discussion between *John Fischer Williams* and *A. P. Fachiri*<sup>22</sup>. Other writers<sup>23</sup>, too, raise doubts on the correctness of a rule on unconditional liability to pay compensation for comprehensive acts which bring fundamental changes to the economic and social structure of a country. In spite of the authority of these writers it can, however, be asserted that at the outbreak of the Second World War no conditions yet existed which had, as their result, that the traditional rule of international law, making liability to pay compensation for actions against alien property independent of municipal legislation on the subject, had come to be regarded as

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21. Otherwise in Harremoës, *Ibid.*

22. *B.Y.I.L.* 1928 and 1929.

23. Brierly, *The Law of Nations* (1936), second edition, 9.177 and Oppenheim-Lauterpacht, *International Law* (1957) fifth edition, p. 284.

abandoned. The belief, however, in the unqualified validity of the rule had begun to weaken.

## § 9

### THE HISTORICAL DEVELOPMENT: THE POST-WAR PERIOD

#### A. *The municipal laws.*

The tendency towards continuously more extensive State action against private property, observed in the time between the wars, reached its peak during the years immediately after the close of the Second World War, when international society witnessed acts of nationalization of an extent hitherto unknown.

Where they affected alien property or property abroad, the effects of the nationalization carried out by various States have of course been reflected in international society, both before the courts and in the different organizations of the United Nations.

As has been said<sup>1</sup>, these actions against private property are dictated by strong (and sometimes, for the State, vital) interests of an economic, political, or nationalistic nature, and are marked in varying degrees by local conditions in individual States or the special circumstances which the Second World War created in devastated areas. Setting aside these local conditions, it may now be useful to examine the rules for nationalization in various countries, to determine, when considering the problem of compensation, whether municipal legal practice may perhaps be an expression of such uniformity on the principles involved that a common municipal legal attitude may emerge, which, according to the traditional view on the sources of international law, can also be decisive for the content of international law.

The following are illustrations of the measures taken by individual countries for nationalization:

(a) *Albania.* As a consequence of decree no. 1835 and edict no. 836 of the 22nd March 1954, property for letting and building land were taken over by the

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1. Cf. § 3.

Bulgarian State. It has not, however, been possible to discover to what extent the right to compensation was contained in these regulations, but certainly no compensation has been paid to nationals of the country <sup>2</sup>.

(b) *Argentina*. Under President Peron's regime, the most important industries were nationalized under law no. 224 of the 16 August 1950. Among them were the Central Bank, the telephone company and the airways company and insurance companies <sup>3</sup>.

(c) *Austria* <sup>4</sup>. Among the measures for assisting industry affected by the war, nationalization laws were passed in Austria on the 26 July 1946 <sup>5</sup> and the 26 March 1947. Under the laws the major credit institutions were nationalized, together with the most important coal mines, the leading concerns within the iron, steel and crude oil industries, and a number of engineering works, transport undertakings and electricity works.

In all, the laws covered 70 undertakings employing about 98,000 people or 22 % of the total Austrian industrial labour force. In connexion with this nationalization the Austrian State undertook extensive investments in the undertakings <sup>6</sup>.

The laws on nationalization provided that compensation should be paid in accordance with conditions to be laid down by law.

(d) *Bolivia*. On the 21 October 1952, the President of Bolivia signed a decree, under which the three most important tin mining companies, whose production covered 75 % of the total export of tin, became government property. The decree contains the provision that a sum equal to about \$ 21,000,000 should be set aside for the satisfaction of claims for compensation. Large foreign interests were connected with the companies. The compensation authorized was paid <sup>7</sup>.

(e) *Bulgaria*. Even before the close of the Second World War some acts of nationalization had taken place in Bulgaria. Thus, by the law of the 25 December 1942 the Bulgarian banks were nationalized <sup>8</sup>. One of the provisions

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2. Cf. in more detail Branko M. Peselj, "International Aspects of the Recent Yugoslav Nationalization Law", *A.J.I.L.* (1959) vol. 53, p. 428, note 1.

3. Cf. Katzarov, *op. cit.*, p. 66.

4. Cf. *Österreichs Grundindustrie verstaatlicht* (1951) p. 7, published by the Bundesministerium für Verkehr und verstaatliche Betriebe.

5. *Bundesblatt*, 16/9 1946.

6. See above § 3.

7. Cf. *Udenrigsm. Tidsskrift*, nr. 36 of 20 December 1952.

8. Doman, *op. cit.*, p. 1156.

of the law was that compensation at face value should be paid to the owners of shares in the banks. Compensation for shares in foreign ownership should, however, be decided after further negotiation with the government in question.

With its authority in the Bulgarian constitution of the 6 December 1947<sup>9</sup>, a general law on nationalization was passed on the 24 December 1947, whereby a large part of industry was transferred to the State.

With special reference to foreign property the law in art. 4 declares that nationalization does not include businesses which belong to foreign nations and which are specified in the provisions of the Peace Treaty, art. 24. However, this last clause is exclusively concerned with the acknowledgement by Bulgaria of the right of the Soviet Union to German property in Bulgaria<sup>10</sup>, and the effect of art. 4 of the law is limited to Russian property<sup>11</sup>.

Art. 13 of the law contains provisions on the obligation of the State to compensate previous owners. Collaborators and persons who were politically disqualified had no claim to compensation. Compensation was to be paid in State bonds, which should be interest-bearing<sup>12</sup>.

By the decree of the 15 April 1948 property for letting and building land were nationalized<sup>13</sup>, as well as all ships<sup>14</sup> by the law of the 3 November 1948; under the decree of the 18 February 1949<sup>15</sup> the government took over department stores and various other businesses, which provided or distributed consumer goods, as well as import and export trade.

It is safe to say that no compensation has been paid as provided in the declarations.

(f) *Burma*. In 1948 an extensive land reform programme was carried out, which was regarded as the first step in the collectivization of agriculture. Later forestry, river transport and the oil industry were nationalized, but in such a way that the previous owners of the nationalized business received compensation<sup>16</sup>.

These land reforms<sup>17</sup> immediately created considerable disquiet in foreign

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9. Chapter III, art. 6–14 deals specially with nationalization.

10. *U.N.T.S.*, vol. 41, p. 72.

11. Cf. Katzarov, *op. cit.*, p. 59.

12. Cf. Katzarov, "Les Nationalisations en Bulgarie" in Puget, *Les Nationalisations en France et à l'étranger* (1958) p. 152.

13. Cf. Branko M. Peselj, *ibid.*

14. Cf. *U.N. doc. A/AC.97/5*, p. 141.

15. *Bulgarian Journal Officiel* no. 46 of 26 February 1949.

16. Cf. *The Economist*, vol. 156, p. 62.

17. Cf. The Land Nationalization Bill 1948, the *Burma Gazette* of 18 September 1948.

circles concerned with industry and capital. The effect was that the Burmese Minister of Industry felt called upon to declare in a speech that foreigners who had made investments in Burma would not have their businesses nationalized during a period of 20 years, and that they would be permitted to transfer the profits from their investments.

The Minister added that appropriate compensation would be paid in cases where the government might undertake nationalization of foreign capital investments after the expiration of the period.

(g) *China*. After the Communists came to power widespread nationalization of private undertakings in industry and commerce was carried out. However, it became clear that the State enterprises established were not functioning particularly efficiently. In 1953, therefore, this nationalization was annulled, and private undertakings were reconstituted under their old names and under the management of the previous owner.

The amount of capital invested in the business was fixed and the interest on it guaranteed by the State. The interest, however, was set comparatively. The owners came completely under State control in such matters as fixing prices, wages and so on.

(h) *Costa Rica*. By decree no. 71 of the 21 June 1948<sup>18</sup> it was enacted that the private banks in the country should be nationalized. Payment of compensation for shares in the banks which were to be nationalized would be fixed by a later decree.

The reasons for the decree were given as the extraordinary dependence which modern commercial life has on the banks, whose activities should therefore not be in the control of private persons. It was further remarked that banks do not only employ their own capital, but national savings also, and thus any surpluses from the banks should be for the benefit of the community rather than for a limited group of shareholders.

(i) *Czechoslovakia*. On the 27 October 1945 a number of laws on nationalization<sup>19</sup> were passed in Czechoslovakia, under which a great part of Czech commercial life was taken over by the State<sup>20</sup>.

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18. Published in the *Costa Rica State Gazette* 22 June 1948.

19. As early as the 19 May 1945, the Czech President published a decree on the confiscation of "ownerless property", that is to say property which belonged to German or Hungarian citizens, or Czechs who had collaborated with the enemy. The decree, which was based on penal motives, can scarcely be characterized as nationalization for the additional reason that



The decrees issued in connexion with the law covered mining and the most important branches of industry employing a given number of workers<sup>21</sup>, certain industries connected with foodstuffs<sup>22</sup>, companies carrying on banking business<sup>23</sup>, and all private insurance companies<sup>24</sup>. By the end of 1847 these nationalization measures had taken in 1,379 businesses, employing over one million persons, or 65 % of the total industrial capacity of the country.

This nationalization affected the interest of Czech citizens as well as those of foreigners. It is known that American interests which were nationalized were estimated at between 30 and 50 million dollars<sup>25</sup>.

All the nationalization decrees contain uniform provisions for the payment of compensation to owners of nationalized property, unless these were of German or Hungarian nationality, or had collaborated with the enemy (cf. for example decree no. 100 art. 7-10). If as a result of these provisions a company was not entitled to compensation, individual shareholders could still obtain compensation, if the shareholders were not responsible for the circumstances which deprived the company of its right to compensation, cf. art. 7, par. 1, no. 3. This ruling is of special importance for foreign shareholders in the nationalized companies<sup>26</sup>.

To make the payment of compensation possible, a fund was set up whose means were to be drawn from the surpluses of the nationalized businesses. Compensation was to be paid according to the value of the nationalized property, calculated on the basis of the official price index at the time when the law came into force, after the deduction of any debts due from the property. Compensation was to be paid in bonds or, in special cases, in some other way, to be decided by the government.

By the law of 15 May 1946, however, taxes on wartime profits and on capital gains were introduced, with the result that the amounts of compensation promised would in any case be considerably reduced. Up to now no compensation has been paid to Czech nationals under the decrees.

With special reference to foreign property, the Czech government announced

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the State sold the property to private persons immediately after confiscation. Cf. *Dep. St. Bul.* (1946) vol. 15, p. 1028. Cf. also Rado, "Czechoslovak Nationalization Decrees: Some International Aspects", *A.J.I.L.* (1947) vol. 41, p. 795-805.

20. Cf. Doman, *op. cit.*, p. 1143 and Oatman, *op. cit.*, p. 1027 ff.

21. Decree no. 100/45.

22. Decree no. 101/45.

23. Decree no. 102/45.

24. Decree no. 103/45.

25. Oatman, *ibid.*

26. *Dep. St. Bul.* (1946) vol. 15, p. 1003.

in January 1946 that (i) compensation payments for nationalized property in which foreign capital was invested would be settled by direct negotiations with the government of the owners of the capital, and (ii) that such compensation would be paid in the form of 3 % Government bonds. In part agreement with this declaration, compensation was in some cases paid, following arrangements in treaties.

After President Gottwald came to power in March 1948, nationalization was continued. As a result wholesale trading, foreign trade, the building industry, travel agencies and hotel and restaurant businesses were nationalized, with retro-active effect from 1 January 1948 <sup>27</sup>. In general the principles of compensation were maintained.

By law no. 67 of 1956, which was made public on 27 December 1956, house property was placed under national management.

(j) *East Germany*. About a half of East German industry has become State property. It is, however, doubtful whether this is a case of nationalization, in so far as the German laws on nationalization were particularly directed against former members of the National Socialist party and war criminals. Consequently no compensation was paid <sup>28</sup>.

(k) *Egypt*. By law no. 385 of 26 July 1956 the Universal Suez Maritime Canal Company was nationalized. Under clause 1 of the law, nationalization covered all the property of the Company, including money, rights and obligations, both in Egypt and abroad. Simultaneously, the Company was dissolved.

On compensation, the law provided that shareholders in the Company should receive compensation equivalent to the value of the shares on the Paris Bourse on the day before nationalization came into force. It was, however, a condition for compensation that the Company's property, including property abroad, should be surrendered to the Egyptian State.

By the law of 16 January 1957 all foreign banks were nationalized, as well as foreign insurance companies and certain firms representing foreign commercial houses <sup>29</sup>. Compensation was paid to foreigners as part of a treaty settlement with France and Great Britain, and this is dealt with later.

(l) *France*. In the last year of the war nationalization of the most important industries had already begun in France. Thus, by the law of 13 December 1944 a public company was set up to exploit the coal mines of the North-East region of France <sup>30</sup>.

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27. The law was published on 2 June 1948.

28. Cf. Katzarov, *op. cit.*, p. 64.

29. Cf. Katzarov, *op. cit.*, p. 67.

30. Doman, *op. cit.*, p. 1141.

The law of 2 December 1945 nationalized the Banque de France and the four largest commercial banks<sup>31</sup>. This law was a consequence of a desire, which had long existed, for government influences on the economy of the country and especially on the management of the Banque de France. The law is also notable for restriction of its scope, in that the nationalization did not include all banks of a certain size; some large banks (Banque de Paris et des Pays-Bas and Union Parisienne) which were owned by foreign capital, were not nationalized. The reason was certainly fear of international political complications.

Such reticence by the French does not appear in other laws on nationalization.

By the law of 26 June 1945 all airways companies were absorbed by the State-owned Air France.

The law of 8 April 1946 nationalized electricity and gas works. The factor which determined whether an undertaking was covered by the law, was the size of average production over a specified number of years<sup>32</sup>. Immediately thereafter, by the law of 25 April 1946, two-thirds of the leading insurance companies were nationalized, and by the law of 17 May 1946 the State took over the coal mines still under private ownership.

For all these cases of nationalization the French government paid compensation in Government bonds, with interest at 3 % p.a.<sup>33</sup>. The value of the nationalized property was fixed in the case of companies by a given average quotation for the shares. With special reference to banking shares, the value was fixed according to the exchange quotation at a time when rumours of nationalization had depressed the market<sup>34, 35</sup>. Under these circumstances the compensation can scarcely be said to be full.

The law on the nationalization of electricity and gas works provided in art. 13, last paragraph, that "the interests of foreign shareholders will be settled by special regulations issued by the ministers of production, foreign affairs and finance".

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31. Myers, *op. cit.*, p. 189.

32. Cf. Kromann Kristensen, "Nationalisering af elektricitetsforsyningen i Frankrig", *Ingeniøren* (1948) p. 328.

33. The Communist Party urged in vain that compensation for the nationalized coal industry should be paid only to small and patriotic shareholders, cf. Einaudi, *op. cit.*, p. 40.

34. Myers, *ibid.*

35. In the case of the power and coal industries, the government decided unilaterally how much more the shares were worth than the 1938 value. The average compensation for shares in the Banque de France was fixed at 28,000 francs per share. On the basis of a conservative valuation of the break-up value of the shares, the value of each at the time of nationalization must be set at some 44,000 francs, cf. Einaudi, *ibid.*

In the course of the parliamentary debate on this law it emerged that the French government was willing to give more compensation to foreigners than to its own nationals <sup>36</sup>.

In addition to these acts of nationalization, which have a social-political tone, a number of businesses, including the Renault works, were taken over by the State immediately after the war, on the grounds that the owners of the businesses had collaborated with the enemy. This take-over by the State was not accompanied by compensation, since it was in the nature of a penalty.

No more nationalization took place after 1946.

(m) *Great Britain*. Immediately after the close of the Second World War a start was made on the nationalization of those industries chiefly responsible for export and the condition of the labour market <sup>37</sup>. The question of the take-over by the State of private undertakings was, however, not completely new. Even before the war nationalization had been a feature of British political debate <sup>38</sup>. As a result of the political discussions several Royal Commissions were set up to examine the possibility of take-over by the State, among them a Commission to examine electricity supply <sup>40</sup>. Similar Commissions were appointed on coal mining and gas supplies, and these Commissions completed their work in 1945 <sup>41</sup>.

By an Act of 12 July 1946 the British coal mining industry was nationalized, chiefly to rationalize and extend production <sup>42</sup>. By the Act of 6 August 1947 the whole of the British transport system was nationalized from 1 January 1948. This act of nationalization affected 1½ million employees, or 6½ % of the total labour force <sup>43</sup>.

From 1 April 1948 all electricity works were nationalized on accordance with the Act of 13 August 1947. This Act covered 570 companies with a total

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36. Doman, *op.cit.*, p. 1142.

37. Cf. *Udenrigsm. tidsskrift* (1948), p. 498 and (1950) p. 146.

38. Cf. Clegg & Chester, *The Future of Nationalization* (1953) p. 20 and Lewis, *British Planning and Nationalization* (1952) p. 277.

39. Cf. Cmd. 3751 (1930).

40. In May 1936, cf. Clegg & Chester, *ibid.*

41. Cf. Report of the Technical Advisory Committee on Coal Mining, Cmd. 6610 (1945) and Report of the Committee of Inquiry into the Gas Industry, Cmd. 6609 (1945).

42. In connexion with the nationalization it was decided that some £ 200 mill. should be invested by the State in this industry for modernization, new plant, etc. Cf. Tobin, *op.cit.*, p. 617.

43. Cf. G. J. Walther, "The Transport Act., 1947". *Economic Journal* (1948), vol. 58, p. 11 ff.

estimated value of about £370 million. By the Act of 30 July 1948, the State took over the gas industry on 1 May 1949.

By an Act of 24 November 1949 the British steel industry was nationalized. The Act covered 96 large undertakings and specifically excluded the American-owned Ford works in Dagenham. According to Schwarzenberger<sup>44</sup> this is to be attributed to Great Britain's recognition that, in accordance with the rules of international law, foreign property cannot be nationalized. However, this view was not supported in the parliamentary debate on the question before the Act was passed. G. R. Strauss, the Minister of Supply, stated before the Standing Committee of the House of Commons:

"We felt that it would be unwise to use the Bill for the nationalization of steel as a method of nationalization of a very important part of the car industry. One of these days a Government may want to nationalize the motor car industries but the right way will be to do it properly".

Strauss emphasised that this was the sole reason and specifically denied that it had anything to do with the American shareholders<sup>45</sup>.

All acts of nationalization in Great Britain carried compensation. This was paid in government bonds<sup>46</sup>. Interest paid on the bonds was considerably lower than the interest which owners of the nationalized capital had previously received, but considering the security offered by these bonds the compensation must be regarded as having been in full.

It is a characteristic of British nationalization that the abolition of private ownership was not regarded, even by the British Labour Party, as a desirable end in itself, but in the main was seen as a means to a better and more rational exploitation of technical resources<sup>47</sup>.

Experience with the English undertakings which have been nationalized has

44. *Op.cit.*, p. 310.

45. *The Times* of 2 February 1949, p. 5; cf. also *The Times* of 28 January 1949.

46. Drucker declares that in any event compensation in connexion with the Steel and Iron Act was considerably less than the value of the nationalized property: "The Nationalization of United Nations Property in Europe", *Transactions of the Grotius Society* (1950) p. 75.

47. This has given rise to strong Communist criticism. Thus Leonidan in an article in the Russian-English language periodical *New Times* (1948) no. 28 p. 44 declares, under the title "Shame Nationalization of the British Iron and Steel Industry", that the British "pseudo-nationalization is a swindle whose object is to secure the capitalists against worse attacks and thereby, as officials, to be in a position to exploit the workers more".

however, not fulfilled the high hopes which existed at the time of their transfer to State ownership and State management. The British Parliament has accepted the implication of this and changed some of the Acts on nationalization. Thus, the Act of 6 May 1953 introduced important alterations in the organization of the nationalized transport industry, with the special aim of making the railways more competitive<sup>48</sup>. Similarly, the nationalization of the steel industry was annulled by enactment in 1953 under the Conservative government<sup>49</sup>. Subsequently a number of concerns which had been nationalized previously, passed by sale to private ownership, although there is still government control in the businesses<sup>50</sup>.

The British Labour Party, too, seemed definitely to have abandoned the idea of nationalization in the Spring of 1960<sup>51</sup>.

(n) *Holland*. After the Second World War, by the law of 23 April 1948, the shares in the principle Dutch bank were nationalized. Compensation was paid to Dutch nationals as well as foreigners. Compensation was fixed at twice the face value of the shares and was paid in State bonds with interest at 2½ % p.a. Over the previous 15 years the original shares had yielded interest at 5 % p.a. The government bonds were negotiable and foreigners were given the right to take the bonds or proceeds from their sale out of the country. All interested parties agreed that the compensation must be regarded as adequate, having regard to the enormous losses the bank had in fact suffered as a result of the World War<sup>52</sup>.

(o) *Hungary*. Even before the nationalization laws of 1945 a large part of Hungarian industry and transport was State owned, and nationalization was consequently only an extension of the desire of the State for control of the economic life of the country<sup>53</sup>.

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48. Cf. Kelf-Cohen, *Nationalization in Britain* (1958) p. 71.

49. On the political motives for this so-called de-nationalization see Henry Puget, *op.cit.*, p. 72–78.

50. Cf. Kelf-Cohen, *op.cit.*, p. 213–141.

51. Cf. *Politiken*, 14 March 1960.

52. This information has been kindly sent to me by Mr. Josephus Jitta, The Hague, who at the same time has drawn my attention to the fact that the royal decree of 20 April 1945 on the subject of the war-damaged mining industry (discussed in my *Nationalization* p. 62) authorized only a provisional State administration which was again terminated on 1 January 1949. Before 1948 the Dutch railways had been nationalized by the laws of 17 November 1933 and of 2 July 1934. In these cases, too, full compensation was paid.

53. *Udenrigsm. Tidsskrift* (1949) p. 422.

By the decree of 20 December 1945, effective on 1 January 1946, the coal mining industry and its ancillary plant was nationalized<sup>54</sup>. This nationalization did not include some mines in foreign ownership. These exceptions were, however, more apparent than real, in that the previous owners were in fact excluded from the management of affairs and were compelled to accept the results of the enterprise achieved under their name and without their assistance<sup>55</sup>. Electricity works and certain parts of the food industry were nationalized later that year. On 30 November 1946 government control of heavy industry was introduced, but its nationalization did not take place till 25 March 1948. At this time, too, mills, breweries, dairies, oil and sugar factories and others were nationalized.

The banks and industrial activities connected with them were nationalized by the law of 24 July 1947<sup>56</sup>. Under this law an exception was made for foreign banks whose *siège-social* was abroad. The qualification for a foreign bank was that the foreign holding of shares amounted to more than 50 % of the capital. The rules were, however, not accurately followed and many foreign banks were nationalized<sup>57</sup>.

A general law on nationalization was passed on 8 May 1948. By this law all concerns were nationalized which, at a given time, had employed not less than a hundred persons, as well as concerns which, irrespective of the number of people employed, were of special importance<sup>58</sup>. The law specifically provides in par. II that this nationalization does not include property belonging to foreign subjects or juridical persons registered abroad, provided that the foreign interests had acquired the property before 20 January 1940.

One of the results of this provision was that oil production was not included in the law of nationalization, since all the oil fields in Hungary were American property. The importance of this was, however, considerably reduced, when the Hungarian government, by decree no. 9960/1948, confiscated the American oil companies, on the grounds that they had been guilty of "economic sabotage"<sup>59</sup>.

Businesses acquired in accordance with international agreements, particularly in pursuance of the Peace Treaty of 10 February 1947, were also exempted

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54. Cf. *U.N. doc. A/AC 97/5*, p. 141.

55. Cf. Charles d'Eszlary, "*Les Nationalisations en Hongrie*", Puget, *op.cit.*, p. 198.

56. Cf. *Dep.St.Bul.* (1947) vol. 17 p. 450, and Wilson "Property-protection Provisions in U.S. Commercial Treaties", *A.J.I.L.* (1951) vol. 45, p. 106.

57. Cf. *Dep.St.Bul.* (1950) vol. 22 p. 33, and Eszlary, *loc.cit.*

58. Doman, *op.cit.*, p. 1152.

59. Cf. the American note of protest of 30 November 1958, *Dep.St.Bul.* (1948) vol. 19, p. 736.

from nationalization. The laws on nationalization contained provisions for compensation, but these have not proved to be effective.

By a law of 17 February 1952<sup>60</sup>, house property and building land were nationalized, and at the same time new rules were laid down on the procedure for nationalization, especially on conditions for appeal against acts of nationalization which had already taken place<sup>61</sup>.

(p) *India*. The nationalization of India's largest banking business the "Imperial Bank of India" took place on 1 July 1955. As part of the nationalization a State Bank was set up, in which, however, the former shareholders in the Imperial Bank were permitted to continue to hold 45 % of the total share capital of the State Bank.

At the time of nationalization the Imperial Bank of India had branches in Pakistan, Burma, Ceylon and Great Britain. The problem of the transfer of these branches to State ownership has not yet been solved. Compensation was paid to the owners on nationalisation.

When the law on nationalization was laid before parliament, Nehru said that parliament should have final and complete authority to fix the amount of compensation, without it being possible for the question to be submitted to the courts. Even though it might be possible to pay full compensation, such payments of compensation would be unjust and wrong. "The 'haves' would remain 'haves' and the 'have-nots' would remain 'have-nots'"<sup>62</sup>.

(q) *Indonesia*. As part of the struggle for national liberation a law dealing with the nationalization of Dutch business, including the Dutch tobacco plantations, was published on 27 December 1958. The primary objectives of the law were political. Art. 2 of the law provided that the previous owners of the nationalized businesses should have compensation to an amount fixed by one of the committees appointed by the Indonesian government. Both owner and government had the right of appeal to the Supreme Court against the decisions of the committee<sup>63</sup>.

By the decree of 23 February 1959 it was laid down in more detail what businesses were to be regarded as Dutch, in that decisions on this question were referred to a special committee. By the decree of 2 April 1959 detailed rulings were given for the formal processes of fixing compensation. The decree of

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60. Cf. Peselj, *op.cit.*, p. 428, note 1.

61. Cf. *Dep.St.Bul.* (1952) vol. 26, p. 540.

62. *The Times* of 15 March 1955 quoted according to the *Report: International Law Association* (1958) p. 236.

63. *N.T.V.I.R.* (1959), vol. VI, p. 291.



2 May 1959 provided for the nationalization of Dutch gas and electricity works.

(r) *Iran*. By the law of 2 May 1951, a measure on nationalization was enacted which, in its wording, covered the oil industry throughout the whole country, but which in fact only affected the British-owned Anglo-American Oil Company. The law contained rules that, after taking over, the Iranian government should deposit 25 % of the net income from the oil company to meet possible claims for compensation from the nationalized company. The detailed content of the law, as well as the international conflict to which nationalization gave rise, is dealt with later, page 183.

(s) *Jugoslavia*. The law on nationalization in Yugoslavia was passed on 5 December 1946<sup>64</sup>. As a result of this law private businesses of a given size in 42 branches of industry were nationalized, including mines, the oil industry, transport, electricity, foodstuffs, banks, insurance companies, textiles and the wholesale trade<sup>65</sup>.

Nationalized property was to carry compensation in the form of payment in government bonds in proportion to their net value at the time of nationalization. No compensation, however, was to be paid to Germans, or others who had collaborated with the enemy during the war. The burden of proof that such collaboration had not taken place rested with the owners of the nationalized businesses.

No compensation has been made to Yugoslav nationals in Yugoslavia. Additions to the law, extending it still further, were published on 29 April, 1948<sup>66</sup>.

On 26 December 1958 the Yugoslav National Assembly passed a law on the nationalization of property for letting and building land<sup>67</sup>. The purpose of the law was to eliminate the last trace of capitalist economy. The law covers all buildings of more than two apartments and all building land.

The law altered the actual legal position only to a very small degree, since on 26 December 1953 a law had been passed which deprived owners of house property of the practical enjoyment of ownership.

The law on nationalization contained provisions for compensation, which in fact was only a 50 % compensation spread over 50 years, without interest. It was therefore significant that art. 77 of the law authorized the government to make special provisions for the payment of compensation for nationalized property

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64. Doman, *op.cit.*, p. 1150.

65. *Dep.St.Bul.* (1946), vol. 15, p. 1150.

66. Cf. *U.N. Doc. A/AC 97/5*, p. 142.

67. Published in the *Jugoslav State Gazette* no. 52 of 31 December 1958.

belonging to foreigners. Such compensation, the law states, shall be in conformity with international agreements and the principle of reciprocity <sup>68</sup>.

(t) *Mexico* <sup>69</sup>. By a decree of the President of 18 March 1938 the Mexican oil industry, which was owned by American, British, and Dutch companies, was nationalized <sup>70</sup>.

This decree completed a process of development which had begun in 1917 when the new constitution of Mexico was adopted. Art. 27 of this constitution provided that the ownership of the land and the national wealth in it belonged to the State. Based on this authority a law was passed in 1925 aimed at restricting the existing rights of foreign companies, by replacing these with concessions of limited duration. The law, however, was disputed by the oil companies as unconstitutional, and by the judgment of the Supreme Court of 17 November 1927 the claim of the oil companies was upheld <sup>71</sup>.

In 1936 the struggle about the foreign oil companies began again <sup>72</sup>. The oil workers' trade union, probably inspired by the government, faced the companies with exorbitant demands on wages, holidays and social benefits in general, and, when the companies rejected these demands, a general strike was called. The strike came to an end after the appointment of a commission which had as its terms of reference to examine how far the companies' economic resources could meet the demands of the workers. This investigation went against the companies, but in spite of the decision of the Supreme Court of 1 March 1938 declaring that the demands of the workers must be met at essential points, the companies refused. Thereupon, the President declared himself justified in issuing the decree of nationalization quoted above <sup>73</sup>.

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68. Cf. Peselj, *op.cit.*, p. 428 and *Udenrigsm. tidsskrift* no. 22 of 15th of June 1959.

69. Since the Second World War no nationalization has taken place in Mexico. To determine the attitude of Mexico to the nationalization problem, it therefore appears reasonable in this connexion to include regulations passed immediately before the period now being examined.

70. Cf. Gaither, *loc.cit.*, Woolsey, *op.cit.*, p. 519, and Friedmann, *op.cit.* p. 25 ff.

71. Cf. Mexican Petroleum Company of California v. Secretary of Industry, Commerce and Labour (1927) *A.J.I.L.*, vol. 22, p. 421.

72. Gaither, *op.cit.*, p. 52.

73. Art. 1 of the decree read as follows: "There are hereby declared expropriated, because of their being of public utility, and in favour of the Nation, the machinery, installations, buildings, pipelines, refineries, storage tanks, ways of communication, tanks, cars, distributing stations and all other real and personal property (belonging to 15 named companies).

The foreign States whose nationals and companies were affected by the nationalization protested to Mexico and claimed compensation. This question was finally solved by treaty agreement after negotiations lasting for several years. This will be dealt with again later.

(u) *New Zealand*. From 1 April 1949, the State took over the ownership of all located and unlocated coal deposits in New Zealand <sup>74</sup>. In all cases where coal mines were being worked, compensation was paid to the previous owners. Compensation was calculated on the basis of production in the years 1941–47 and normally was equivalent to 15 times the average annual profit.

(v) *Poland*. The Polish nationalization law of 3 January 1946 <sup>75</sup> contains first, regulations of a penal nature, whereby all businesses owned by the German State or by Germans were nationalized without compensation (art. II), and secondly, rules under which other businesses, whose nature is specified, shall pass to State ownership.

The activities affected by the general nationalization all belong to one of the 17 specified branches of industry including mines, the oil industry, water works, the iron and steel industry, the sugar industry, breweries, yeast factories, the textile industry, printing works, and so on. In addition, nationalization extended to any business which employed more than 50 workers per shift.

On 30 September 1946 the Polish government published a list of 513 firms which were confiscated without compensation under art. II of the law, and of 404 nationalized firms for which it was the intention of the Polish government to pay compensation. Alien property was involved to a large extent in both groups of firms <sup>76</sup>.

Art. IV of the law provided that nationalization also covered all claims against the nationalized undertakings, apart from those belonging to Polish public juridical persons, as well as all claims, licences, patents, etc. which were the property of the businesses concerned.

According to art. VII of the nationalization law, compensation was to be paid to owners of businesses nationalized under art. III, within one year after the amount of compensation was fixed. Again, as in the Czech law, compensation was to be paid in the form of government bonds, or, under quite exceptional circumstances, in cash or in some other way. Compensation was to be fixed by a special commission with terms of reference specified in the law.

In a speech on the radio from Warsaw on 2 January 1946 Hilary Minc,

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74. *Udenrigsm. tidsskrift* (1948) p. 383.

75. Cf. *Ibid.*, p. 190, Goldberger Metzger, "The Polish Nationalization Law", *Dep.St.Bul.* (1946), vol. 15, p. 654.

76. *Dep.St.Bul.* (1946), vol. 15, p. 654.

the Polish Minister of Industry said, with reference to these very detailed provisions for compensation, that the whole nation was behind him when he said that full compensation should be paid in such amounts, in such a form and in such circumstances that it could not become a handicap to the development of Poland's economy<sup>77</sup>. Up to now no compensation has been paid to Polish nationals or companies.

By the law of 21 December 1945, with the subsequent decrees no. 343 of 1950, no. 75 of 1951 and no. 55 of 1955, Polish property was brought under national control.

(w) *Roumania*. The first, law on nationalization enacted in Roumania on 28 December 1947<sup>78</sup>, was exclusively concerned with the Roumanian national bank. After constitutional authority for further nationalization had been created in the Constitution of the Roumanian People's Republic on 13 April 1948<sup>79</sup>, the law of 11 June 1948 extended nationalization to cover great parts of industry, mines, banks, insurance and transport.

A large part of Roumanian industry was in foreign hands<sup>80</sup>, but these businesses, too, were covered by the nationalization. The law of 1948, however, contains two special provisions on alien property. Art. 1 thus provides that in businesses established by agreement between a foreign State and the Roumanian government, all the property which does not belong to one of the two States shall be nationalized. This ruling, which was inserted at the instance of the Soviet Union, is exclusively aimed at protecting Soviet property. Art. 5 contains the following ruling:

"Businesses or parts of the capital of such businesses, belonging to Member States of the United Nations, who have acquired property in accordance with the peace treaty or as part of payment of compensation as a result of the war, are not covered by the present law and are not nationalized".

Doman<sup>81</sup> believes he can see in this an example of a distinction being made in certain circumstances between private persons and States and suggests that this may be due to concern for the immunity of these States. This can, however, scarcely be accepted as the decisive reason. The explanation is much more likely to be that, by the peace treaty of 10 February 1947, art. 24<sup>82</sup>, Roumania

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77. *Ibid.*, p. 653.

78. *Ibid.* (1947), vol. 16, p. 668.

79. *Udenrigsm. tidsskrift* (1948), p. 360, Guggenheim, *Annuaire* (1950), vol. 43, p. 77, Doman, *op.cit.*, p. 1154 and *World Today* (1949), vol. 5, p. 7.

80. Friedman, *op.cit.*, p. 48 quotes 24 %.

81. *Op.cit.*, p. 1140.

82. *U.N.T.S.*, vol. 42, p. 52.

had undertaken to pay compensation or "restoration" for all measures including confiscation and control of property belonging to members of the United Nations, in cases where these measures had been taken between 1 September 1939 and 15 September 1947. It was thus politically impossible for Roumania to nationalize the same property about one year later.

The Roumanian law on nationalization also contains provisions on the payment of compensation to previous owners in government bonds, to be redeemed according to a percentage fixed by the Finance Minister with the aid of the annual profits from the nationalized businesses. The bonds were to be non-transferable, non-negotiable and non-interest bearing<sup>83</sup>. Accordingly, the value of the compensation, which in any case has not yet been paid to Roumania's own nationals, must be described as doubtful.

House property and building land were nationalized by decree no. 92 of 1950, published on 20 April 1950<sup>84</sup>. The nationalization was carried out without compensation of any kind to previous owners<sup>85</sup>. Only house property owned by workers, office staff, artisans and the like was exempted from nationalization.

(x) *Scandinavia*. At a certain time in the years between the wars some circles in Norway were inclined to the introduction of nationalization<sup>86</sup>. However, the thought was not put into effect. Since the Second World War no nationalization has been carried out, although nationalization is a point in the programme of the Government party. Ideas of nationalization seemed definitely to have been abandoned, however, in 1959. In that year the Norwegian government sent Tryve Lie to the United States to create interest in American investment in Norway. In a speech to the Norwegian-American Chamber of Commerce in New York, Trygve Lie said that the Norwegian government had no plans for the socialization of industry, and in future the government would build predominantly on private initiative for expansion. Replying to a question, Gerhardsen, the Minister of State, confirmed in the Norwegian parliament that Trygve Lie had spoken as the official representative for the government when making these statements.

In 1920 a public committee was set up in Sweden with the task of "undertaking an enquiry into the suitability of and requirements for the transfer to public ownership or public control of the natural wealth and means of produc-

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83. *Udenrigsm. Tidsskrift*, loc.cit.

84. Branko M. Peselj, *op.cit.*, p. 428, note 1.

85. *Udenrigsm. Tidsskrift* (1950), nr. 12.

86. Cf. the publication on 27 June 1942 of *Indstilling fra Socialiseringskomiteen angående socialiseringsspørgsmålet i almindelighed med bilag* (1924).

tion which are of importance to the economy of the country and the welfare of its people, or which otherwise might be thought to profit by being under the management of public bodies". The committee, which sat for several years and whose report contained interesting surveys of similar problems in other countries, accomplished nothing of practical importance however. One of the reasons for this (apart from the political situation) was that, by its financial and monetary policy, the State had acquired an increased influence on the economic life of the country<sup>87</sup>. The question of nationalization has not been raised since the Second World War.

In Finland the Popular-Democratic party raised the question of the nationalization of water power and the main industries at the end of the Second World War. At the beginning of 1947 the parliamentary group of the Popular Democratic Party brought in a Bill for nationalization. The proposals met strong opposition from the non-socialist parties, but were nevertheless referred to a committee. This was set up and issued a report on 31 March 1950 on the nationalization of power plants, the telephone system, tobacco industry, sugar industry and the drugs industry. This declaration has not been implemented.

(y) *Soviet Union*. At the very foundation of Soviet Russia in 1917 and in the years immediately afterwards, the whole of Russian industry was in effect nationalized without compensation<sup>88</sup>. Nationalization was similarly carried out in the Baltic States annexed by Soviet Russia<sup>89</sup>. There, too, no compensation was paid. Since the Second World War there has been no occasion for new nationalization.

(z) *Syria*. According to the *Iraq Times* of 31 January 1951 a law was enacted in Syria nationalizing the supply of water and electricity, as well as the public utilities dependent on electricity. The nationalization covered only businesses of a certain size.

Compensation was paid to the previous owners on the basis of the average price quoted for the nationalized shares on world stock exchanges in 1950. The compensation was paid in the form of notes, to be amortized over a 25 year period and bearing 5 % p. a. interest.

Although the electricity works and tramways were owned by French-Belgian companies, this nationalization did not give rise to international conflict.

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87. Cf. Tage Erlander, *Svensk Uppslagsbok* (1953) vol. 26, p. 881.

88. Cf. Friedman, *op.cit.*, p. 17 ff. and Vyshinskii, *loc.cit.*

89. See the Decree of 23 July 1940, discussed in *U.f.R.* 1955, p. 1972.

2. *Evaluation.* The measures of nationalization taken in various countries present a motley picture of the motives, forms and conditions which States have allowed to influence them, or which they have used to gain control of industrial concerns they have found necessary or merely expedient to take over. It is characteristic that nationalization has taken place in countries of widely different political structure and geographical situation. Nationalization demonstrates the retreat all along the line from the rules covering the protection of private ownership, as they were understood at the beginning of the century and, to some degree, in the period between the wars.

Apart from the nationalization in Soviet Russia, practically all laws and decrees on nationalization specify that compensation shall be paid to those affected by the nationalization, whether these are nationals or foreigners. However, these provisions have very largely been without real significance. Only a very few countries, (and of these mostly those countries which are based on Western democratic principles) in practice paid the compensation which the regulations on nationalization prescribed; and the compensation which was paid in these relatively few cases was not always full and adequate in the traditional legal sense.

In several countries the nationalization laws contained special provisions covering alien property, but these provisions have been effective only in a few cases.

The practice as set out above thus shows a notable tendency, at least in municipal law, to execute actions against private property of very wide scope without the payment of (full) compensation. Against this background it must, therefore, be impossible to maintain the traditional assumption that actions against private property without compensation are contrary to the general principles of law in civilized States and *for that reason* contrary to international law. It cannot, however, be concluded from this that such actions against private property as they affect foreigners are in accordance with international law.

This question cannot be answered simply by reference to municipal law. The reactions States have shown to the acts of nationalization carried out by other States are also important in the context of international law. These reactions have emerged and have been expressed at international level, namely in the discussions by international bodies, or in settlements in international agreements.

### B. *Discussions in the United Nations.*

1. *Debate.* The question of the conditions under international law governing the legality of nationalization of alien property was a main subject of a long and vigorous debate in the second committee of the General Assembly in November and December 1952, when the rights of States to exploit natural wealth were discussed <sup>90</sup>.

On 5 November 1952 Uruguay put forward a motion, whereafter the General Assembly.

"... recommends that member States should recognize the right of each country to nationalize and freely exploit its natural wealth as an essential factor of economic independence <sup>91</sup> ..."

Bolivia strongly seconded the ideas which had been expressed in the motion, but after discussions between the two States agreement was reached on an amendment which was put forward in the name of both delegations. The amendment contained no allusion to nationalization, but was only a sharp reminder to member States that they should show respect for the right inherent in the sovereignty of every country to develop its natural wealth and resources in freedom and should therefore refrain from the exercise of direct or indirect pressure, which could hinder this development <sup>92</sup>.

In spite of the omission of the word "nationalization", the purpose of the common resolution was clear. It was to manifest against the background of international developments in general, and the Anglo-Iranian

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90. Cf. Michael Brandon "Nationalization before the United Nations", *I.B.A. Report* (1954), p. 38-78; Seidl-Hohenveldern, "Eigentumschutz durch Resolutionen internationaler organizationen", *Festschrift für Herman Janssen* (1958), p. 195 ff.

91. Cf. *U.N. doc. A/C.2/L.165*.

92. *U.N. doc. A/C.2/L.165/rev.1*. The operative part of the proposal read as follows:

"*Recommends* States Members to maintain proper respect for the right of each country freely to use and exploit its natural wealth and resources as an indispensable factor in progress and economic development, and therefore to refrain from the use of any direct or indirect pressure such as might jeopardize, on the one hand, the execution of a programme of integrated economic development or the economic stability of the under-developed countries, or, on the other hand, mutual understanding and economic co-operation between the nations of the world."



conflict in particular, that creditor nations must refrain from interference if debtor States considered it necessary to take action against the exploitation by foreign capital of oil wells, mines, etc.

The United States proposed a further amendment which completely recognised the right of a country to take over and develop natural wealth and resources, but added that the country in question should refrain from taking steps which were contrary to:

"... the principles of international law and practice and to the provisions of international agreements, against the rights or interests of nationals of other Member States <sup>93</sup>".

The debate inspired by these two motions concentrated essentially on the liability to pay compensation and whether this liability arose from an international minimum standard based on international law, or whether compensation should only be paid if it was authorized by municipal law of the nationalizing State.

Certain States (Canada, China, Haiti, Honduras, and Saudi Arabia) submitted that it was superfluous to pass resolutions on this question, since the right of a State to its natural wealth and resources was a matter of course. Others (including Great Britain, Sweden and the Union of South Africa) claimed that the question of nationalization fell outside the competence of the United Nations. After an unsuccessful attempt by Holland to have the question referred to the juridical committee, and after a Danish proposal to defer the discussion had been rejected, a proposal by Saudi Arabia for the immediate termination of the debate was accepted, and the motion sponsored by Uruguay and Bolivia, as well as the American proposal, were put to the vote.

The result was that the American proposal was rejected by 27 votes to 15, with 8 countries abstaining. The motion framed by Uruguay and Bolivia was accepted, with an amendment from India, and referred to the General Assembly. Here the resolution <sup>94</sup> was adopted by 36 votes to 4, with 20 abstentions <sup>95</sup>.

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93. *U.N. doc. A/C.2/L 188*.

94. In its final form the resolution passed read as follows:

Bearing in mind the need for encouraging the underdeveloped countries in the proper use and exploitation for their natural wealth and resources.

*Considering* that the economic development of the underdeveloped countries is one of the fundamental requisites for the strengthening of universal peace.

The States voting for the proposal were: Abyssinia, Afghanistan, the Argentine, Bolivia, Brazil, Burma, Chile, Columbia, Costa Rica, Czechoslovakia, the Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, White Russia, India, Indonesia, Iran, the Yemen, Yugoslavia, the Lebanon, Liberia, Mexico, Pakistan, Panama, Paraguay, Poland, Saudi Arabia, Siam, Soviet Russia, Syria, Ukraine, Uruguay and Egypt.

Voting against were: The United States, New Zealand, Great Britain and the Union of South Africa.

The following States abstained: Australia, Belgium, Canada, Cuba, Denmark, France, Greece, Haiti, Holland, Iceland, Israel, China, Luxembourg, Nicaragua, Norway, Peru, the Philippines, Sweden, Turkey and Venezuela.

The result of the voting, taking into account and comparing the draft resolution adopted and that proposed by the United States but rejected, seems to show that the majority of States, especially the Latin-American, the Arabic and the Asiatic States and the Soviet Union and the States belonging to the Soviet bloc, rejected the traditional rule that foreigners have a claim to compensation for actions against property, irrespective of what the provisions of the municipal law may be on the liability to pay compensation.

This raises two questions of interest for the present analysis: first, what importance can be attached to voting in the General Assembly of the United Nations, and second, what conclusions can be drawn from the result of the voting.

In the matter of resolutions passed by the General Assembly, it follows from the last part of the United Nations charter, art. 10, that the General Assembly can only forward recommendations to Member States and thus

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*Remembering* that the right of peoples freely to use and exploit their natural wealth and resources is inherent in their sovereignty and is in accordance with the Purposes and Principles of the Charter of the United Nations.

*Recommends* all Member States, in the exercise of their right freely to use and exploit their natural wealth and resources wherever deemed desirable by them for their own progress and economic development to have due regard, consistently with their sovereignty, to the need for maintaining the flow of capital in conditions of security, mutual confidence and economic co-operation among nations; Recommends further all Member States to refrain from acts, direct or indirect, designed to impede the exercise of the sovereignty of any State over its natural resources. (Resolution 626 (VII))."

95. Off. Records 7th Session, General Assembly, Plenary Meetings, p. 495.

cannot take legally binding decisions, and impose obligations on members <sup>96</sup>. This ruling is not, however, unconditional. As shown by the authors quoted, there can be special cases where a resolution which has been adopted is legally binding, and it must be evident that a pronouncement on what the States consider in advance to be valid law on grounds of custom, practice or general principles of law, must be legally binding.

But quite apart from these special cases, resolutions which are passed in the General Assembly on international legal questions must carry considerable weight. Certainly a resolution which is adopted by a majority vote cannot legally bind the States which voted against it or abstained, but the manifestation, which is implicit in the adoption, will be a factor which, with other factors, will have an influence on establishing a law. In this sense the adoption of a resolution will be one of the elements which international courts can allow to influence them <sup>97</sup>.

However, it is always necessary to be on one's guard against drawing too firm conclusions, even from a clear and unequivocal resolution so far as it concerns the material content of international law.

The General Assembly of the United Nations is first and foremost a political body, and, even if legal questions are the nominal subject for

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96. Cf. Max Sørensen, *International Organisation* (1952), p. 45, Ross, *Constitution of the United Nations* (1950), p. 60, Blaine Sloan, "The Binding Force of a 'Recommendation' of the General Assembly of the United Nations", *B.Y.I.L.* (1948), vol. 25, p. 1-33, Johnsen, "The Effect of Resolution of the General Assembly of the United Nations", *B.Y.I.L.* (1955-56), vol. 32, p. 97 122 and Kelsen, *The Law of the United Nations* (1950), p. 459.

97. Cf. S. Rosenne, *The International Court of Justice* (1957) p. 405:

"The restrictions upon admissibility of evidence sometimes encountered in municipal procedure ... have no place in international adjudication, where the relevance of facts and the value of evidence tending to establish facts are left to the entire appreciation of the court". James N. Hyde, "Permanent Sovereignty over Natural Wealth and Resources", *A.J.I.L.* (1956), vol. 50, p. 864, submits, that "the resolution would be evidence of a formal act of the General Assembly and, arguable, it could also be treated as some evidence of state practice (I.C.I. Statute, Art. 38 (1) b)".

This last interpretation, as will be discussed later, is not correct, since there will often be a decided difference between the pronouncement of a State in a theoretical abstract debate and the conduct of that State in practice, when concrete situations appear.

discussion, the declarations of the States will frequently be in the nature of pronouncements on what the law ought to be, as against what is in fact accepted as the law in force at a given time. But in this relation another factor enters, to which special importance must be attached. Even if it is cautiously assumed that pronouncements and resolutions are not legally binding for the State which advances them or registers a vote on them, a State will still be in a politically difficult situation, if at a later date in its relations with a member State it takes up a position which is in conflict with the view publicly expressed by the first-named State in the General Assembly. Whether well-founded or not, this fear of being committed by a pronouncement on the subject of what is legally valid has as its result that such pronouncements can only be regarded as the minimum a State will be prepared to grant in concrete cases. Consequently, it will not always be possible to conclude from a resolution adopted on a question of international law, that in practice the content of international law will not have other results than those expressed in the resolution. This interpretation of the results of voting on resolutions on legal subjects is also emphasised by experience from international conferences on codification<sup>98</sup>. A State, which, from its interpretation of international customary law, feels obliged – in its relation to other States – to adopt a certain course, will not necessarily co-operate in affirming that such obligations exist for any other reason than the State's own free will<sup>99</sup>. The only result of such a pronouncement would be that an alteration in practice would become difficult in the future.

Not only will the affirmation of the existence of a rule in international law be of no advantage to a State, but, by disputing the existence of a rule in an abstract vote, a State, which is typically and traditionally one which is loaded with liabilities only under that rule, will incur no political or legal consequences, provided the State in question, in fact, in concrete practical cases which arise, fulfils the claims made on it under international law. Whenever the content of a rule is such that some States always have liabilities under it, while others normally have rights, this interpretation will be specially clear.

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98. Cf. Max Sørensen, *op.cit.*, p. 110–111.

99. Cf. *ibid.*: "Efforts of codification ... will therefore meet difficulties solely as a result of the slowness and caution with which governments frequently approach the ratification of treaties where the immediate advantages are not at once obvious.

These are the points of view which seem chiefly to emerge from the debate in the Second Committee of the General Assembly.

The fear of being bound in the future by an obligation under international law was clearly expressed in a speech by a delegate of Saudi Arabia, who, having described the question of compensation and arbitration in relation to nationalization as problems which States regarded with mixed feelings, said quite unequivocally:

"... If a delegation supported a resolution dealing with such questions it would be bound by certain commitments which might prejudice its Government's freedom of action in the future <sup>100</sup> ..."

This undoubtedly realistic remark is probably very true of a large number of the speeches made during the debate.

It is apparent, too, that the resolution adopted has not affected the content of the present law, in that the denial in the resolution of a rule in international law on unconditional liability to pay compensation, only has practical significance if and when governments have authority by their municipal law to nationalize alien property without compensation *and* in fact do so.

To deny the supremacy of international law at a time when international law and municipal law are in agreement with one another is legally and practically meaningless, since such a denial need not necessarily be maintained when States alter their national legislation.

An examination of the debate shows quite clearly, that not even the States which took the initiative in the discussion in the Second Committee were prepared to accept the only practical consequence which follows a shelving of the traditional rule of international law, i.e. the nationalization of alien property without compensation.

In meeting no. 231 <sup>101</sup> of the commission Uruguay emphasized that she had earlier nationalized *public utilities* such as electric power, the telegraph and telephone system, water supply, harbours, insurance activities, the distilling and cement industries, etc. Many of these were based on British capital, but nationalization had not led to international conflict since compensation had been paid in accordance with the Uruguayan constitution.

Bolivia stated that, following the nationalization of the tin mines, com-

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100. *U.N. doc. A/C.2/SR.*, par. 21.

101. 6 December 1952.

pensation up to \$ 22 million had been paid, and that this was in accordance both with municipal and international law <sup>102</sup>.

The delegate for Ecuador also drew attention to the provisions in the constitution of his country which required compensation for actions against property, although there might be difficulties if compensation should be paid before the action took place.

"... He believes however, that once a government had decided to nationalize a specific source of natural wealth it would always be possible to find means of compensating private investors. The actual machinery of the taking over of the property might be affected, but the State's ultimate right to nationalize it would not, nor would the right of private investors to prior compensation ...

If nationalization was understood as a discriminatory policy against foreign investors, his Government could not support it <sup>103</sup> ..."

Similar points of view were expressed by the remaining Latin-American delegations.

Even in the case of Iran, which by reason of the conflict with the Anglo-Iranian Oil Company occupied a special position in the debate, the Iranian representative declared that his government had always maintained its willingness to admit the principle of compensation:

"... Nor did his Government wish to discourage foreign private investors. In principle, his Government would favour foreign private investment and it was even prepared to guarantee investors the right to repatriate their revenue to a certain extent, on the basis of national law and normal commercial agreements <sup>104</sup>."

Iraq maintained:

"... Investors were already aware that countries enjoyed the right to nationalize

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102. The view of Bolivia was again emphasized in a speech in the Third Committee in the General Assembly 1955, when the Bolivian delegate, in the course of the discussion of art. 1 in the Convention on Human Rights, stated:

"... That was what Bolivia had done in nationalizing the mines, in accordance with its Constitution and the Mines Expropriation Act ... It opposed any expropriation or confiscation which was unaccompanied by compensation and had always respected foreign interests. The traditional policy found new expression in the Act of 17 October 1945 which extended to foreign capital invested in the country guarantees with respect to income and amortization as well as convertibility". *U.N. doc. A/C.3/SR.651*, par 18.

103. *U.N. doc. A/C.2/SR.234*, par. 27 and 28.

104. *U.N. doc. A/C.2/SR.238*, par. 10.

their natural wealth, subject to appropriate measures for compensation and economic adjustment <sup>105</sup>."

In the course of his speech the Syrian delegate said:

"In recent years the Syrian Government had nationalized a number of foreign companies in return for adequate compensation. The Syrian delegation thus considered that a country's right to nationalize its natural resources was one recognized in international law and that it was inalienable <sup>106</sup> ..."

The Pakistan delegate, too, based his attitude to the resolution on a reference to the constitution, which authorized full compensation for actions against property and added:

"In his country, therefore, due provision was made for both the right to nationalize and for the safeguarding of national and foreign private interests <sup>107</sup>."

This survey of the declarations of countries voting against the American draft resolution seems to show that practically speaking all States, with the exception of the Soviet bloc, took care to emphasize that in practice they could not conceive of the nationalization of foreign property without compensation. This view finally crystallized in the speeches of El Salvador in the General Assembly in connexion with the adoption of the draft resolution referred from the Second Committee. The El Salvador delegate said:

"I should like briefly to state our understanding of the resolution, which is the same as that explained so brilliantly by the Latin-American delegations. If it had been otherwise we should not have voted in favour of it or of the Indian amendment to it. We took it to mean that when expropriation takes place it should be accompanied by the payment of compensation to the national or foreign undertaking which owned the property that is nationalized ..."

"... I repeat that my delegation could not have betrayed those express provisions of our constitution and that we gave our support to the resolution on the understanding that it did not offer any loop-hole for the requirement of fair compensation payable to concerns whose property becomes public property <sup>108 109</sup>."

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105. *U.N. doc. A/C.2/SR.234*, par. 37.

106. *U.N. doc. A/C.2/SR.231*, par. 44.

107. *U.N. doc. A/C.2/SR.238*, par. 18.

108. *U.N. doc. A/PV.411*, paras. 224 and 225.

109. This interpretation was maintained by the United States in an aide-memoire of 28 August 1953, after Guatemala, in connexion with the takeover of American property, had invoked the resolution as support for the legality of Guatemala's policy. The United States declared inter alia:

The reference to municipal provisions in connexion with State action, thus seems to show that this debate contributes as little as did the debate in the Paris Conference of 1929 to any alteration in the hitherto traditional rules of international law on compensation to foreigners who lose their property by acts of nationalization. The debate can only be regarded as a political announcement by the traditional debtors to demonstrate and express the right of self-determination, particularly as to the exploitation of natural wealth, without, however, in practice taking over foreign property without compensation for that reason.

The view that foreign property could only be nationalized against payment of compensation was made no clearer in the other debates touching the question, e.g. in the proposals to the Convention on Human Rights and the recommendations on International Respect for the Right of Peoples and Nations to Self-determination, all of which were discussed both in the Commission on Human Rights, the Economic and Social Council and in the General Assembly <sup>110</sup>.

Although indirectly, nationalization was also touched on during the discussions in the Economic and Social Council on the problem of financing the economic development of undeveloped lands, and on the problem of the international supply of private capital <sup>111</sup>.

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"... attention of the Guatemalan Government is called, however, to the fact that nothing contained in the resolution referred to, authorized or purported to authorize States in the exercise of their sovereignty in developing their natural wealth and resources to violate rights of other States or their nationals under international law. The Resolution referred to clearly recommends that consideration be given by member States to the need for maintaining the flow of capital in conditions of security, mutual confidence and economic co-operation among nations." *Jfr. Dep.St.Bul.* (1953), vol. 29, p. 358.

110. Cf. Michael Brandon, *The Record In the United Nations of Member States on Nationalization 1951-1955* (1958) p. 2, and James N. Hyde, *op.cit.*, p. 854 ff.

111. The problems of the conditions under international law for the legality of nationalization have similarly been discussed in the *International Law Commission* in 1958.

For use in the continued discussions Garcia Amador prepared a report (*U.N. doc. A/CN.4/119*) which, dealing with the basic principles, referred to the ideas I set down in my *Nationalization*. The report has not been the



By resolution no. 1314 (XIII) of 12 December 1958 the General Assembly agreed to set up a committee, whose task was "to conduct a full survey of the right of peoples and nations to permanent sovereignty over their natural wealth and resources". The setting up of such a committee had been discussed in the bodies concerned since 1954. When the resolution was adopted by the Economic and Social Council, the official report on the work of the Council said <sup>112</sup>:

"The draft resolution, it was maintained, was directed against exploitation and expropriation alike. It was an attempt to allay all honest apprehensions and doubts. On the one hand, it was said, under no circumstances should a people be deprived of its own means of subsistence through the exploitation of foreign investors; on the other hand foreign investments should not be expropriated without just and fair compensation and only if warranted by public necessity. It was generally recognized that there should be collaboration between those who were in possession of surplus capital and modern techniques and those who were underdeveloped and non-selfgoverning. It was for this reason that the commission recommended that the survey commission should pay due regard "to the rights and duties of States under international law and to the importance of encouraging international co-operation in the economic development of underdeveloped countries"."

This statement is quoted not for its contrast with the resolutions passed by the General Assembly which, all other things being equal, have considerably greater authority than an annual report on the work of the Economic and Social Council, but only as an example of a realistic evaluation of the whole problem, as it must appear to a body whose composition and field of work make it likely that practical views will displace political views.

2. *Evaluation.* The last quotation is a general illustration of the reaction provoked by the debate of 1952, which to some extent was already observable in some of those taking part in the discussion in the Second Committee. It apparently quickly became clear to those States representing capital-importing countries that a rule covering the protection of foreign property was essential to attract foreign capital. Those countries which had

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subject of discussions of any importance in 1958, but a debate was planned on the topic in the 1960 session. Since those who take part in the I.L.C. do not represent governments, these discussions have no relevance to the point discussed here.

112. ECOSOC. *Official Records, Twentieth Session, Supplement no. 6*, § 129.

most sharply attacked capital-exporting states and wished to approach the nationalization of foreign property without hindrance or conditions from international law, were obviously in a dilemma, which yet, regarded in a certain way, contained interests common both to debtor and creditor States. This twist to the debate in the United Nations, occasioned to some degree by an admitted community of interest, has of course not led to a total cessation of attacks on the rule in international law on unconditional liability to pay compensation. This rule will always need defending by the traditional creditor States, though this is not so much due to the economic results expressed by the rule as to the political viewpoints which it symbolizes.

The movement there has been in the views of States away from the classical rule of international law on unconditional liability to pay compensation, thus seems to have been primarily of a political nature. As shown above, it certainly cannot be claimed on the basis of the debate in the United Nations that States are also willing to accept the legal and economic consequences of the changed political circumstances. The rules of international law are decided principally by international practice as this is expressed in the conduct of States. Only in concrete cases can it be proved whether a rule can be sustained internationally, although a majority of States in a theoretical debate may have given their support to it.

The debate in the United Nations does not contribute to the clarification of the question discussed here, nor is debate on the resolutions adopted a decisive argument against the traditional rule in international law, that alien property can only be nationalized against compensation <sup>113</sup>.

### C. *Treaty Practice.*

1. *The Treaties.* The period after the Second World War contains unlimited evidence of the nature and extent of the problems in the international community created by measures of nationalization in different countries. It is, however, also possible to find a wide range of examples of how the problems arising were attacked and of the efforts made by the governments of those States directly or indirectly affected by nationalization, to remove or modify their injurious results. In addition to the debates in the United

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113. Cf. Hartley Shawcross, "Some Problems of Nationalization in International Law" *I.B.A. Report* (1954), p. 21 note 24, and Niederer "Der völkerrechtliche Schutz des Privateigentums", *Festschrift für Hans Lewald*, p. 547.

Nations and in some other regional organizations, where the legal attitude to the effects of nationalization has been essentially theoretical, the attempts by governments to weaken the effects of nationalization are seen in a number of bilateral treaties between<sup>114</sup> the nationalizing States and States representing nationals owning property included in the local actions.

These treaties, whose number in the past 15 years is not inconsiderable by international standards, present interesting material. This interest springs principally from the fact that their existence comes not so much from abstract principles on non-present problems, but, on the contrary, arises from a mass of concrete questions at issue between the partners to the treaty, for which they attempt to find practical and immediate solutions. These solutions are in every case worked out by instruments of the international community, that is to say foreign ministers of the various countries, and thus it may be assumed that the solutions reached, also in the long term, accord with the international interests of the parties to the treaty.

It is also interesting to be able to confirm from the evidence a development both of the technical and the theoretical views behind the solutions of the problem of compensation, since this gives a picture of how both the methods and the principles of international law are capable of developing, without the direct intervention of legislating bodies, in a community of States which, particularly in the fields under discussion, show great differences one from another.

The existence of treaties<sup>115</sup> which have been concluded is not always easy to confirm. Only a few are available in the treaty collections of the

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114. Garcia Amador in his *Fifth Report on International Responsibility* (1960) to I.L.C., when referring to the treaties analysed by me (*Nationalization*, p. 88 following), properly points out that the existing treaty practice is only one of several procedural possibilities for solving the problems which arise in connexion with nationalization. Thus he quotes international commissions and arbitration with reference to special clauses containing contract agreements. There are, however, no solutions in other procedural forms which are fitted to illustrate the problem treated here. Cf. *U.N. doc. A/CN.4/125*, p. 27 following.

115. Here and afterwards the expression treaty is taken in its widest meaning, as embracing every form of written announcement between two States, irrespective of whether single documents may be described as protocol, declaration, agreement, etc.

United Nations, and some of the texts of the treaties are regarded by the parties as confidential, making access to their content impossible. The existence of some treaties mentioned here is only known from references to them in the published texts of other treaties, and the difficulty in assembling evidence makes it extremely likely that the following catalogue is not exhaustive. Against the background of the sources available, it is certain that at the moment a wide range of separate bilateral negotiations are taking place, with the object of concluding treaties of the kind now under discussion, but that (up to now) no concrete results have been reached. Even though it is not possible to draw reliable conclusions from negotiations which are in progress but not yet completed, one may justifiably assume that, broadly speaking, the tendency to negotiate compensation for nationalized alien property is more widespread than the treaties quoted below would seem to indicate <sup>116</sup>.

The existence of the following agreements for compensation is known.

*Bulgaria* has concluded treaties with <sup>117</sup>

France	28/7	1955
Norway	2/12	1955
Switzerland	26/11	1954
Great Britain	22/9	1955 <sup>118</sup>
Sweden	21/6	1946 <sup>119</sup>

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116. In addition to the treaties cited below, Iran, by its agreement, *inter alia*, with the Anglo-American Oil Company, agreed to pay this company compensation for the nationalization carried out in 1951. The compensation agreement for £ 25 million forms the second part of the consortium agreement of 1953. That the compensation did not have the form of a treaty is presumably due to the position taken up by the Iranian government at the very outset of the dispute, which was that no problem existed between Iran and Great Britain, but only between Iran and a private English firm. See also below p. 190 on the Suez Canal Company.

117. Where more than one date is quoted, one or more of the first agreements concluded between the parties was later superseded by newer agreements, often containing other principles.

118. Altered by an exchange of notes of 27 February 1959, Cf. *T.S. No. 43* (1959).

119. Exclusively for property belonging to the Swedish Match Company.

*Czechoslovakia* has concluded treaties with <sup>120</sup>

Belgium/Luxembourg	19/3 1947	30/9 1952
Denmark	6/3 1948	8/4 1960
France	6/8 1948	2/6 1950 <sup>121</sup>
Holland	4/11 1949	
Italy	29/9 1956	
Norway	13/7 1948	9/6 1954
Switzerland	18/12 1946	22/12 1949
Great Britain	28/9 1949	
Sweden	15/3 1947	22/12 1956
U.S.A.	14/11 1946 <sup>122</sup>	

*Egypt* has concluded treaties with

France	22/8 1958 <sup>123</sup>
Great Britain	28/2 1959 <sup>124</sup>

*France* has concluded treaties with <sup>125</sup>

Belgium	18/2 1949 <sup>126</sup>
Canada	26/1 1951
Switzerland	21/11 1949
Great Britain	11/4 1951

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120. According to the *Salzburger Nachrichten* of 7 March 1958, negotiations were begun between Austria and Czechoslovakia in 1957 for compensation for Austrian property which had been nationalized in Czechoslovakia. The parties were agreed on the liability of Czechoslovakia to pay compensation, but the negotiations could not be carried through to an immediate conclusion as a result of claims raised by Czechoslovakia which, in the opinion of Austria, were not relevant to the compensation problems.

121. The treaty was altered by an addendum signed on 6 June 1956, published in decree no. 59-668 of 5 May 1959, *J.O.* 28/5 1959, p. 5379.

122. At the end of 1955 negotiations were begun between the United States and Czechoslovakia. The negotiations, which had as their aim the final solution of compensation problems, seem to have brought no results.

123. Concerns only claims for the take-over of French and English property after the military intervention in the Suez Canal, see below p. 190.

124. See note 123.

125. Treaty certainly concluded with Holland.

126. With alterations of 20 March 1950.

*Hungary* has concluded treaties with <sup>127</sup>

Belgium-Luxembourg	1/2	1955		
Norway	2/10	1956		
Jugoslavia	29/5	1956		
France	12/6	1950		
Switzerland	19/7	1950		
Great Britain	27/6	1956		
Sweden	26/7	1946	31/3	1951

*Jugoslavia* has concluded treaties with <sup>128</sup>

Czechoslovakia	4/9	1947		
France	14/4	1951	2/8	1958
Holland	22/7	1958		
Italy	23/5	1949	23/12	1950
Switzerland	27/9	1948		
Great Britain	23/12	1948 <sup>129</sup>		
Sweden	12/4	1947		
Turkey	5/1	1950	?/10	1957
Hungary	29/5	1956		
U.S.A.	19/7	1948		

*Mexico* has concluded treaties with

Holland	7/2	1946
Great Britain	7/2	1946
U.S.A.	29/9	1943

*Panama* has included treaties with

U.S.A.	26/1	1950
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*Poland* has concluded treaties with

Denmark	5/12	1947	12/5	1949	26/2	1953
France	19/3	1948				
Norway	4/2	1948	23/12	1955		
Switzerland	25/6	1949				

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127. Negotiations with Denmark, cf. *Folketingstidende* (1957), col. 1011.

128. In November 1948 an agreement with Belgium/Luxembourg was certainly concluded. The agreement has not been published.

129. Cf. agreement regarding the terms and conditions of payment of the balance of such compensation, 26/12 1949 *U.N.T.S.*, vol. 87, 402; II: 1068.

Great Britain	24/1	1948	14/1	1949	11/11	1954
Sweden	28/2	1947	16/11	1949		
U.S.A.	24/4	1946	27/12	1946	16/7	1960

*Roumania* has concluded treaties with

Denmark	12/9	1960
France	9/2	1959
Greece	25/8	1956
Switzerland	3/8	1951
Sweden	28/8	1959
U.S.A.	30/3	1960

*Soviet-Russia* has concluded treaties with <sup>130</sup>

Sweden <sup>131</sup>	30/5	1941 <sup>132</sup>
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2. *What are the Motives which lead a nationalizing State to conclude treaties?* The treaties enumerated above contain more or less detailed rules on how the procedure of compensation is to be carried out. These rules will be examined later as expressing the guiding principles employed in practice by governments to settle conflicts of this kind. However, the most essential question relative to existing treaty practice, and indeed that which presents the greatest difficulties, is to what extent the treaties on compensation express a legal principle, according to which the nationalization of foreign property can only take place if compensation is paid, or whether, on the contrary, they merely reflect special concessions, or the strong negotiating position of the State claiming compensation, or other circumstances which are legally irrelevant. If the last is the case, the value of the treaty as a proof of the existence of general rules of international law is very doubtful. It might even be asked if it is warrantable *e contrario* to conclude from the said treaties that there is no such rule in general international law.

It is emphasized in this connexion that the character of the treaties as general legal source only applies to opinions on the principle of liability to pay compensation. Even though a treaty of compensation must be considered as a whole, (i.e. there is a connexion between recognition of the liability to pay compensation and the fixing of the amount of compensation) it is

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130. Negotiations begun with Denmark.

131. Concerns property in the Baltic States.

132. With alterations of 7 October 1946.

proper at this stage in the analysis to deal only with opinions on the principle of whether compensation is payable on nationalization. A number of the treaties quoted only express the idea in principle and, moreover, the fixing of the compensation is far more influenced by local and individual interests than the principle of compensation.

A more detailed examination of existing practice, and an attempt to establish the motives which may have influenced the nationalizing States to conclude treaties of compensation, gives an extremely varied picture.

(a) *Compulsion.* Conditions will often be of such a kind that the nationalizing State is under compulsion and thus has no choice between paying and refusing to pay compensation<sup>133</sup>. The background to the treaty of 19 July 1948 between the United States and Yugoslavia<sup>134</sup> was, that at a time when Yugoslavia had a pressing need for foreign currency, the United States government refused a specific request from Yugoslavia to release a gold reserve, the property of Yugoslavia, until compensation had been paid for American property nationalized in Yugoslavia. The gold, which had been deposited in the United States before the Second World War, was valued at \$ 46,800,000<sup>135</sup> and had originally been blocked to prevent Germany, or a Yugoslav puppet government set up by Germany, from exercising the right of disposal of this asset. There was, therefore, no doubt that the gold was owned by the Yugoslav government, and that the refusal of the American government to free this asset had as its exclusive motive the pressure which could be exercised on the nationalizing State.

(b) *Unblocking of credits, etc.* An analysis of available treaty practice shows that treaties covering compensation for nationalized property are often bound up with the freeing of assets owned by the nationalizing State but blocked in the State claiming compensation. Comparatively modest sums will frequently be in question and thus the possibility of regarding

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133. Cf. also the agreement concluded between the United States and Soviet Russia in 1933 covering compensation for the nationalization of American property in Russia (the Litvinoff Agreement). The agreement was an essential precondition for the diplomatic recognition of Russia, so much desired by Russia at that time.

134. *Dep.St.Bul.* (1948), vol. 19, p. 137 and 139.

135. Cf. Rubin, *op.cit.*, p. 463. As basis of comparison, the compensation amounted to \$ 17 million.



this situation as one of compulsion is excluded by the amount involved and its lack of importance to the nationalizing State. In some instances there is a doubt as to the rightful claim of the nationalizing State to these assets, and such problems have often been solved as part of an agreement on compensation.

The freeing of blocked assets took place in connexion with treaties of compensation between Great Britain and Yugoslavia on 23 December 1948, between Switzerland and Czechoslovakia on 22 December 1949, Roumania on 3 August 1951 and Bulgaria on 26 November 1954, between Norway and Czechoslovakia on 9 June 1954, Bulgaria on 2 December 1955 and Poland on 23 December 1955, between France and Roumania on 9 February 1959, where the unblocking of all Roumanian assets in France was directly specified in the text of the treaty, and between the United States and Poland on 16 July 1960.

During the negotiations on the global agreement concluded in 1956 between Sweden and Czechoslovakia on compensation for nationalized Swedish property, it was made clear from the Czechoslovak side that it would be unrealistic to reckon with a mutually satisfactory settlement of compensation problems if Sweden did not simultaneously hand over 5 million Swedish kroner to Czechoslovakia, this being the share calculated as due to Czechoslovakia from a total sum of 75 million Swedish kroner which the Swedish government, in accordance with the Washington agreement of 18 July 1946, had placed at the disposal of countries which had suffered war damage to assist their reconstruction. Sweden for its part acknowledged the Czechoslovakian claim, but maintained during the negotiations that a satisfactory agreement on compensation was a precondition of payment.

By means of an exchange of notes connected with the signing of the compensation agreement, the 5 million Swedish kroner in question were placed at the disposal of the Czech government on 22 December 1956<sup>136</sup>.

It is scarcely possible to claim any essential difference between this situation and the typical unblocking of the assets of a nationalizing State. In

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136. Cf. *Kungl.Maj:ts prop.nr. 37* (1957) p. 4 and 17 (appendix M). The amount of compensation Czechoslovakia should have paid to Sweden was, in fact, just about 5 million Swedish kroner.

both instances the position of the State claiming compensation is based on actual possession of assets of the nationalizing State. The difference depends only on the nature of the claim put forward by the nationalizing State and its origin, and these circumstances are scarcely relevant in this connexion.

A situation motivated by the same attitudes existed in the relations between the U.S.A. and Roumania. In connexion with the announcement by the American foreign ministry of the opening of negotiations on compensation problems between the U.S.A. and Roumania, it was stated that, since previous negotiations had been fruitless, the U.S.A. had blocked Roumanian assets to a value of \$ 21 million and used this sum for the partial compensation of American citizens affected by actions in Roumania. The American foreign ministry estimated the total claim at about \$ 60 million<sup>137</sup>. The American procedure is an example of compulsory contra-account. The recognition by the nationalizing State that the State claiming compensation as a matter of simple fact has the power to impose a contra-account of this kind, will often be the motive for concluding compensation treaties. In cases where the nationalizing State is in any case unable to obtain payment of its assets, it may just as well try to solve the questions at issue between the parties, and thereby restore normal relations.

(c) *Remission of Debts.* The question of compensation from Poland for the losses which Danish property and Danish interests had suffered as a result of the Polish nationalization law of 3 January 1946 was first raised by Denmark in the Danish-Polish trade negotiations in 1947. As a consequence, Denmark was accorded most-favoured-nation treatment by Poland in respect of the Danish claims for compensation. However, this brought no noticeable results, and in the period between 18 November and 16 December 1948 negotiations took place between representatives of the two governments concerning payment of compensation<sup>138</sup>. These negotiations resulted in the Danish-Polish Protocol no. 1<sup>139</sup>, signed in Warsaw on 12 May 1949. In this Protocol the Polish government declared itself willing to pay compensation for Danish interests and assets in concerns

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137. Cf. *Dep. of State Press Release*, no. 778 of 6 November 1959.

138. In co-ordination with these negotiations, commercial relations were discussed, and this led to the trade and payment agreement of 14 December 1948, cf. *Lovtidende C* (1949) p. 25.

139. Cf. *Lovtidende C* (1949) p. 567.

which had been nationalized. Art. 13 of the Protocol, on the other hand, contained a provision that Denmark should cancel the balance owing to her from a credit-in-aid, amounting to kr. 110,725, which had been granted after the First World War with the object of assisting newly formed States and those damaged during hostilities.

A similar remission of claims against the Polish government was made by Sweden in the course of the Swedish-Polish compensation treaty of 16 November 1949<sup>140</sup>. The balance of the Swedish claim in respect of the credit-in-aid amounted to 1,293,600 Swedish kroner<sup>141</sup>.

The agreement concluded between Great Britain and Poland on 11 November 1954 contained a provision in art. 8 that Poland's debt for the costs of the occupation of the plebiscite area in Upper Silesia and Poland's debts outstanding from the credit-in-aid granted for that purpose, should be extinguished on the conclusion of the compensation treaty<sup>142</sup>.

As a last example, on the conclusion of the treaty of compensation between Norway and Poland on 23 December 1955<sup>143</sup>, it was agreed by an exchange of notes that Norway should cancel Poland's debt arising from the credit-in-aid given by Norway. According to the proposal before the Storting on 22 September 1955, this debt amounted to 4,379,430 Norwegian kroner as well as £ 386-5-0. The amount was therefore very considerable indeed compared with the amounts in the compensation agreement, according to which Poland was to pay compensation for Norwegian assets up to some 3-3.5 million Norwegian kroner.

(d) *Commercial Advantages*. However, compensation agreements are most usually dictated by motives of commercial policy. The situation can be observed when, simultaneously with the conclusion of treaties of compensation, the parties conclude agreements on trade on terms which are specially favourable to the State paying compensation.

Thus, the agreement concluded between Great Britain and Czechoslovakia on 28 September 1949<sup>144</sup>, which provided that Czechoslovakia

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140. Cf. *S. Ö* (1950) p. 925.

141. Cf. the exchange of correspondence attached to the agreement on compensation, *loc. cit.*

142. Cf. *T.S.*, no. 77 (1954).

143. Nr. 103 (1955), p. 4.

144. Cf. *T.S.*, no. 60 (1949).

should pay a total of £ 8,000,000 in compensation, refers in its preamble to the trade and finance treaty<sup>145</sup> concluded between the parties on the same date, under which Great Britain undertook to permit the import of "non-essential" goods from Czechoslovakia up to an annual amount of £ 5,750,000.

Similar methods were used by Great Britain in obtaining compensation from Yugoslavia under the agreement on compensation concluded on 23 December 1948, which in art. 1, where the amount of compensation was fixed at £ 4,500,000, states that payment "... shall be agreed between the Contracting Governments during the negotiations for a long-term trade agreement which shall be entered into at an early date"<sup>146</sup>. 10 %, however, of the amount of compensation should be paid immediately from frozen Yugoslav assets, which were freed by an agreement concluded between the parties on the same day<sup>147</sup>.

On 28 February 1947 a protocol was signed between Sweden and Poland concerning the interests of Swedish physical and juridical persons in Poland, by which Poland undertook to pay compensation to those affected by nationalization<sup>148</sup>. On 18 March 1947 the same States concluded a treaty regulating mutual trade<sup>149</sup>, with a supplementary agreement concerning Sweden's part in the reconstruction of Polish industry, in exchange for deliveries of Polish coal and coke. This last agreement contains provisions for extensive credits and loans to Poland<sup>150</sup> and its general purpose was to ensure the supply of strictly necessary goods to Poland. That there is, despite the difference in dates, an intimate connexion between this trade and credit agreement and the compensation agreement, is apparent from the following communication of 18 March 1947 from the leader of the Polish delegation to the leader of the Swedish delegation:

"... With reference to the protocol signed in Warsaw on 28 February 1947 by representatives of the Swedish and Polish governments dealing with the interests of Swedish physical and juridical persons in Poland ... I have the honour to confirm that my government is prepared to bring this into force ...

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145. Cf. *T.S.*, no. 62 (1949).

146. Cf. *T.S.*, no. 2 (1949).

147. Cf. *T.S.*, no. 3 (1949).

148. Cf. *S.Ö.* (1947) p. 131.

149. Cf. *S.Ö.* (1947) p. 95.

150. Cf. art. IV., *ibid.*, p. 118.

May I add that during the discussion, which according to the protocol is to take place between the appropriate Polish authorities and the Swedish physical and juridical persons who are authorized claimants, the Polish government will be influenced by the extent to which the Swedish performance corresponds with the agreement signed this day”<sup>151</sup>.

This compensation agreement was, in fact, replaced by the treaty of 16 November 1949, under which Poland undertook to pay a total of 116 million Swedish kroner to Sweden as global compensation. At the same time agreements were reached on new credits of considerable size to Poland and, as stated above, the cancellation of the credit-in-aid.

An agreement concluded between France and Poland on 19 March 1948<sup>152</sup>, provided that Poland should pay compensation to France for nationalized property by the delivery of 3,800,000 tons of coal, of a value of \$ 15 a ton, and this was linked with an agreement that France should grant a credit for Poland equal to 50 % of the compensation.

The direct connexion illustrated in these examples between compensation agreements and trade agreements containing specially favourable terms for the State paying compensation, was successfully used by countries which, as for example Switzerland, had a specially advantageous position in international markets in the period immediately after the Second World War<sup>153</sup>.

Even in the very difficult political situation which arose between Egypt and France after the Suez crisis in 1956, it was possible as soon as August 1957 to begin negotiations for compensation for, inter alia, the French property nationalized by Egypt. The motive for this was predominantly Egypt's vital need to sell cotton to France, and this corresponded with the desire of France to buy it<sup>154</sup>.

But even where an agreement on compensation does not lead directly to a trade agreement obviously favourable to the State paying compensation, the motives for the conclusion of compensation agreements can often be traced to considerations of commercial policy.

While the agreements on the exchange of goods and on payment between

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151. *Loc. cit.*

152. *Journal Officiel* for 11 November 1951.

153. Cf. the leading article in *Neue Zürcher Zeitung* for 3 October 1948, “Die Schweiz und die Verstaatlichungen im Ausland”.

154. Cf. *Le Monde* of 27 August 1957.

Denmark and Poland neither specify nor presuppose that Denmark must import non-essential goods, or that Denmark must grant Poland special credits, the very fact that Poland has undertaken to pay a total of 5,500,000 Danish kroner in compensation over 15 years<sup>155</sup>, and that this compensation is to be paid by a fraction (0.5 %) of Poland's export to Denmark, gives Poland cause to believe that, until the compensation payments are completed, there must be exports to Denmark of not inconsiderable size, bearing in mind the amount of compensation owing.

The provision that compensation shall be paid with a part of the export surplus of the compensating State is to be found in a very large number of compensation agreements. For example, there are the agreements between Switzerland and Czechoslovakia on 22 December 1949, between France and Czechoslovakia on 2 June 1950, Bulgaria and Hungary on 31 March 1951, between Norway and Bulgaria on 2 December 1955, between Yugoslavia and Hungary on 27 June 1956, and the arrangement concluded between Turkey and Yugoslavia on 1 October 1957.

The importance of the commercial relations between the nationalizing State and the claimant home State in making it possible to obtain compensation can also become apparent in the reverse situation. It was thus explained from the Swedish side that the negotiations for compensation begun with Czechoslovakia in 1952 were:

"... broken off after some time chiefly as a result of the prejudicial effects in general on Swedish-Czechoslovakian trade and payment relations which the currency reform of 1953 involved by reason of the unilateral writing down of the Czechoslovak clearing debts to Sweden.

Now that this question has been settled after protracted negotiations there appears to be a basis for taking up negotiations on compensation ..." <sup>156</sup>

On the basis of examination of the confirmable circumstances when compensation treaties have been concluded, it can reasonably be claimed that, even though strong elements of compulsion may often be present <sup>157</sup>,

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155. Cf. Protocol nr. 2 of 25 February 1953, *Lovtidende C* (1954) p. 1.

156. Cf. *Kungl. Maj:ts prop.nr. 37* (1957) p. 5.

157. In the preamble to the agreement on compensation between France and Roumania of 9 February 1959, by which Roumanian assets blocked in France were freed, it was stated that, in making the treaty, the States, inter alia, had as their purpose "... de favoriser le développement de leurs relations économiques".

there will almost always be an incentive in the form of special commercial advantages which will persuade the interested States to come to agreement on the payment of compensation for nationalized property <sup>158</sup>.

3. *Evaluation.* This examination of the circumstances surrounding the concluding of compensation treaties does not, however, necessarily lead to the conclusion that these compensation treaties are based on political opportunism, and thus, from the point of view of international law, express no legal attitude on whether there is any liability to compensate foreigners affected by acts of nationalization.

Denials that these treaties on compensation have any importance as a general source of legal precedent come both from writers <sup>159</sup> who claim that the principle of compensation for nationalization of foreign property belongs to a liberal past, and from writers who hold the contrary view, that such a principle of compensation in fact exists in international law. The last named group reasons that the States who have, in fact, nationalized foreign property have so clearly violated the rules of international law calling for prompt, adequate and effective compensation, that the capital-exporting States have written them off as fields for investment. This is, however, not identical with writing off simultaneously claims for (partial) compensation, which governments may be in a position to force from the nationalizing States by political pressure etc. The treaties demonstrate that these attempts have to some extent been successful. This, some authors claim, has nothing to do with international law and, in particular, the fact that the claimant States found it necessary to moderate their demands as to the kind and amount of compensation in particular situations, cannot influence the rules of law.

Seen broadly, the position is comparable with that when a debtor goes bankrupt. The fact that only partial payment is made to the bankrupt's creditors cannot influence the general legal ruling that a debtor has a liability to pay his debts.

The view that the treaties are motivated by political opportunism ap-

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158. Cf. Also the finance protocol between Sweden and Roumania of 28 August 1959, discussed later, p. 188.

159. Cf. Bystricky, *Travaux de la Commission de droit international privé du VI Congrès de l'Association internationale des juristes démocrates* (Brussels, 1956) p. 22 ff.

pears, therefore, in both situations, although with opposite significance. There is, however, an obvious difference in the reasoning of the two groups. The group which denies the existence of liability to pay compensation emphasizes that the treaties contain no recognition of the legal principle of compensation, while the other group recognizes that the principle of compensation is contained in the treaties, yet does not recognize that the procedure of compensation is in agreement with, or is an expression of, existing international law. Disagreement is thus chiefly centred on the principle of compensation.

On this point the following may be said: the blocking of assets, the suspension or restriction of commercial relations and credits, the refusal of diplomatic recognition, the suspension of diplomatic relations until liability to pay compensation is admitted<sup>160</sup>, unfriendly political attitudes and so on, *can* only be a manifestation that the normal, and certainly the practical, methods of enforcement of international law are being employed to press a generally justified claim to compensation against a reluctant party.

Seidl-Hohenveldern has cited the case where a State claiming compensation blocks the assets of the nationalizing State to force the payment of compensation. If the right of the nationalizing State to seize foreign property is admitted, then certainly the nationalizing State should admit that other States have a similar right to seize, for higher purposes of state, property belonging to the citizens of the nationalizing State. The protection of the foreign property of its citizens must undoubtedly be regarded as one of these. The very fact that such a seizure of property in the claimant State can lead to an agreement on compensation, can be interpreted as meaning that the nationalizing State takes the view that no government can take over foreign property without paying compensation<sup>161</sup>.

It is also notable that it is not only the Great Powers or States whose relations with the nationalizing State are of first importance, who receive compensation. Certainly these States will be among the first to receive satisfaction, but this can scarcely be taken as showing that there is no basis for

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160. Cf. later, p. 195, on the unspecified agreement for compensation for nationalized property concluded between Greece and Roumania on 25 August 1956, art. 5.

161. Thus Seidl-Hohenveldern, "Communist Theories on Confiscation and Expropriation", *A.J.C.L.* (1958) vol. 7, p. 554.



liability to pay compensation, since this will simply be due to the circumstance that these are the States with the largest economic assets, for whom payment of compensation will presumably have the greatest importance; furthermore these are the States which possess the means of enforcing their claims.

Even the fact that liability to make economic reparation for the nationalization of alien property has up to now been established exclusively by means of bilateral agreements, can scarcely justify any contrary conclusion as far as the general rules of international law are concerned. The economic problems which accompany the carrying out of compensation payment are so complicated and individual for each State that a general unspecified declaration on liability to pay compensation would scarcely have any real significance. This is true, for example, in the case of the fixing of the amount of compensation, of the most appropriate form for this and the solution of the currency problems bound up with the compensation. It is these questions, far more than the recognition of the duty to compensate as such, which have necessitated the extensive practice of treaty making. An international court or court of arbitration would not be suitable to decide these questions in a way satisfactory for the parties concerned.

Neither is the fact that the treaties are often linked with commercial agreements, a reason for casting doubts on the value of compensation treaties as sources of legal precedent to establish the general content of international law. Following the development which has taken place in inter-State trade in the past few decades, it may be reliably supposed that commercial treaties which facilitate trade between two States most frequently bring with them advantages for both parties. Certainly the claimant State may be in an economically stronger position than the nationalizing State, but this need not necessarily be so and, in any case in the latest examples, the coupling of compensation treaties and commercial agreements, is perhaps better regarded rather as emphasizing a legal conviction that liability to pay compensation exists, than a "voluntary concession" to secure a commercial advantage. A firm conclusion on how far commercial advantages in compensation treaties have a bearing on general international law is, however, difficult.

It is moreover well known from numerous regulations in municipal law on credit that the claimant may give credit or even loans to the debtor. Creditors extend considerable financial support to an insolvent debtor to enable him to continue his business, and by maintaining business conne-

xions they cover their losses in whole or in part. It is, however, certainly not possible to conclude that, because this credit was given, the original claims by the creditors were not well founded in law.

In this connexion it must again be stressed that the practice followed shows that the starting point for negotiations leading to the conclusion of compensation treaties and negotiations between governments, have always been based on traditional law, and that legal arguments originating in international law have played an essential part. For example, the Department of State in the Press release <sup>162</sup> announcing the comming negotiations on compensation between the United States and Roumania states, *inter alia*:

"Moreover, the Roumanian Government is obligated under recognized principles of international law to pay prompt, adequate and effective compensation to American nationals, whose property interests in Roumania were nationalized, expropriated or otherwise taken."

Another example which also seems to be based on legal principles is the treaty between the United States and Panama on 26 January 1950 dealing with Panama's take-over of certain areas called El Encanto, belonging to American citizens. Thus, in art. 3 of the treaty it is stated that the government of Panama, in making the payments:

"... is prompted by reasons of strictest equity to make good the loss suffered by several nationals of the United States, who acted in good faith in the acquisition of the lands <sup>163</sup> ..."

These views are exactly identical with the actual views which form the basis of liability to pay compensation in accordance with traditional international law.

Those who deny that treaties of compensation have any legal character

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162. No. 778 of 6 November 1959. Cf. also *Kungl. Maj:ts proposition* nr. 37 (1957) p. 3-4 "The Swedish claim was based on the principle of international law concerning the liability of the nationalizing state to provide compensation to foreign citizens, who were deprived of property on the territory of that state by reason of nationalization or similar measures; from the Czechoslovakian side it was explained that Czechoslovakia was in principle liable for some of the smaller claims. On the other hand, liability for compensation to AB ... AB ... was denied. In the Czechoslovakian view a global compensation agreement would be the most expedient solution of the compensation question."

163. Cf. 1 *U.S.T.* 685.

whatever, seem moreover to overlook the circumstance that the paying State, frequently as part of a global settlement, presents and obtains recognition for counter claims whose legal character is undisputed<sup>164</sup>. Moreover, the analysis we are to undertake shows that the treaties are at many points in clear agreement with the traditional rules of international law, which in fact was not necessary if the treaties could generally be regarded as concluded *ex gratia*.

The fact that on the subject of liability to pay compensation the texts of the treaties themselves rarely contain specific references to the principles of international law, does not completely deny this interpretation, since a large number of identical treaties dealing with identical conditions may be assumed to have considerable effect in creating a norm. A State which has several times concluded treaties acknowledging the principle of compensation for the nationalization of alien property, must be justified in expecting, if only by reason of the existing co-operation which is found in practice between the foreign ministries of States, that views which have been accepted once will also be submitted against the nationalizing State by other States in similar situations. Naturally the compensation treaties also have a corresponding normative effect for the claimant State. Thus the normative effect to be attributed to a number of fairly identical treaties dealing with the same legal field may, therefore, be taken to be allowed for in the text of the treaty.

The complete rejection of the treaties as confirming law or creating law seems, therefore, to be against the normal principles for creating valid law in a community where authoritative law making and law formulation seldom occur. The objections which, even if these views are accepted, can justifiably be raised against individual arrangements for compensation, seem to have little weight in comparison with the common denominator of all the treaties, namely the liability to pay compensation<sup>165</sup>.

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164. Cf. Seidl-Hohenveldern, *op. cit.*, p. 547.

165. Cf. A.Margaresevic "The Right to Social Reform and the Restriction of Private Alien Property", *Jugoslavenska Revy za Medunarodno Pravo* (1960) vol. VII, p. 283, who adheres to the idea that treaties have a normative effect, although treaty practice is conceived as "... an evolutive process towards complete dissolution of the general validity of the traditional international law regulating the international regime of private property and the property rights of aliens ..."

## § 10

### THE THEORY

If, from this history of the development of the concept of the rules of international law on the protection of ownership, there can be found a synthesis which will answer the question whether in this field the treatment of foreigners is recognized as governed by the national standard, or whether, on the other hand, it must be acknowledged that there exists a minimum standard of international law, it seems natural that the starting point should be in traditional theory.

The traditional view presupposes that the claim of a foreigner for compensation for actions against his property is established in the doctrine of the protection of vested rights, which doctrine is an aspect of the general theory of international law that always and unconditionally, in the question of protection of rights of the foreigner, he shall be granted a status which does not fall below that required by the minimum claims of civilization. This view will now be more closely examined.

#### *A. The doctrine of the protection of vested rights.*

The theory of the protection of vested rights has <sup>1</sup> its foundation in municipal law, more precisely intertemporal law and international private law.

In intertemporal law it is accepted that, in the application of a new law, a judge does not seek to violate vested rights which have come into existence and been recognised by previous legislation. For the legislator the principle of respect for vested rights has no binding force, since a law does not lose its validity simply because a purpose of that law is the violation of vested rights. Understood in this way the theory of the protection of vested rights is only another aspect of the generally recognized principle that laws should not have a retroactive effect.

The theory of vested rights is also assumed (though this is disputed) to have a place in private international law in deciding whether a right, which has in fact been acquired under the legal system of a foreign country, must be recognized by the courts <sup>2</sup>.

From these two original spheres of application in municipal law, the

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1. Cf. Kaeckenbeeck, "The Protection of Vested Rights in International Law", *B.Y.I.L.* (1936) vol. 17, p. 2 ff.

2. Cf. Kaeckenbeeck, *op. cit.*, p. 6 and Friedman, *op. cit.*, p. 121.

theory of the protection of vested rights has been transferred to international law, and here the first obscurity appears.

The essential point in the rules of international law on the protection of ownership is, as stated above, a prohibition against the alteration of the legal position which will injure the rights of ownership acquired under the former legal conditions. The resemblances between the problems of international law on the protection of ownership and the problems which the doctrine of vested rights aims at solving in intertemporal law, are, however, not resemblances as far as the solution of the problems is concerned. In municipal law the doctrine is not regarded as setting limits, whose infringement is unlawful or carries with it invalidity or liability to pay compensation, whereas this last, as will be shown later, is the decisive factor in the doctrine of international law.

The position that a doctrine has the same name but different content in municipal law and international law, is in some respects neither unfortunate nor unique. It is only necessary to be clear wherein the difference lies, and it is not of course possible to support the existence of the principle in international law with the argument that the principle is recognized by the civilized States.

The principle of the protection of vested rights has, however, widespread though qualified support in international legal theory where it has been cited by some writers in support of the rules of international law concerning nationalization.

The treaties of friendship and domiciliation<sup>3</sup> concluded between States are often quoted in support of the existence of the doctrine. The reasoning is that these treaties are to be regarded as the product of a generally recognized rule on the protection of vested rights, and thus, therefore, that the existence of such a rule of international law must also be assumed in cases where no treaty covering the question has been concluded between the parties. Further, the doctrine is supported by the practice of international courts and boards of arbitration, as well as by a large number of diplomatic decisions dealing with the protection of ownership<sup>4</sup>.

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3. The treaties between U.S.A. and Holland 1956, U.S.A. and Korea 1956, and U.S.A. and Nicaragua 1956, thus contain the following provision: (art. 6 cl. 3) "Neither party shall take unreasonable or discriminating measures that would impair legally acquired rights ..." *U.N. doc., A/AC.97/5*, p. 780.

4. See above p. 64 ff., and the arbitration on *The Spanish Zone in Morocco* (1924) between Great Britain and Spain, *R.I.A.A.*, vol. II, p. 647.

The applicability of the doctrine to the solution of the international legal problems of nationalization can justifiably be doubted when, on the basis of existing theory and practice, an answer is sought to the question which alone can give the doctrine substance; namely, what rights are vested, against what actions are these vested rights protected, and finally in what does this protection consist.

The original meaning of the term vested-rights (*droit acquis, wohlerworbene rechte, jura quasita*) is, according to Kaeckenbeeck<sup>5</sup>, rights by birth, for example to land. Later, the concept was reserved for those rights which rested on a special basis of acquisition, as distinct from rights which followed from general legislation, and consequently belonged to all or to a given group in the population. Behind the distinction was the opinion that only the rights which were derived from legislation could be restricted, or possibly destroyed, by laws.

In French theory the basis of distinction was not the method of acquisition, but, on the contrary, the completeness of the acquisition (title), and thus the concept has become identical with the so-called subjective rights. Here it is scarcely possible to quote examples of rights which are not vested, if rights are to be understood as the legal situation derived from the circumstance that others have corresponding duties<sup>6</sup>.

This obscurity in the definition of the concept is likewise emphasized by Guggenheim<sup>7</sup>, who observes that although the Permanent Court of International Justice has stated that a rule exists in international law requiring respect for vested rights, neither that court, nor any other arbitration board, nor the practice of governments has provided a clear definition of what is to be understood by property protected under international law<sup>8</sup>.

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5. *Op. cit.*, p. 1 ff.

6. Cf. Duguit, *Traité de droit constitutionnel*, vol. II, p. 201: *Jamais personne n'a vu ce que c'était qu'un droit non acquis. Si l'on admet l'existence de droits subjectifs, ces droits existent ou n'existent pas, telle personne est titulaire d'un droit ou non. Le droit non acquis est l'absence de droit ...*

7. "Der völkerrechtliche Schutz von Investitionen im Ausland" *Schweizerisches Jahrbuch für Internationales Recht* (1956) vol. XIII, p. 57-78.

8. The unsuitability of the doctrine for defining the international laws on the protection of property seems evident when Schwarzenberger, *International Law* (1949), vol. I, p. 85, defines vested rights as "private rights of foreigners which they enjoy in accordance with minimum standards of international law."

It thus appears that even when considering the definition of the concept in principle, the actual content of the theory, and thus its significance as a defence against actions against property by States, becomes doubtful.

The traditional action, against which, according to the theory, vested rights should be protected, is expropriation in the sense of any deprivation of property for the common good, whether the expropriation actions are directed exclusively against foreigners, or against both foreigners and the State's own nationals. On this point the writers who recognize the theory as an element of international law are broadly speaking in agreement. The difficulties arise, however, with the steadily extending general restrictions on ownership in the past few years. While vested rights are not protected against taxation<sup>9</sup>, nor against actions taken on moral or hygienic grounds (for example anti-slavery laws or the prohibition of alcohol)<sup>10</sup>, the problem of general restriction on ownership is not solved in the doctrines of international law. Speaking of agrarian reforms and acts of nationalization, Guggenheim<sup>11</sup> states that the relationship between these actions and the doctrine of protection of vested rights has not been clarified, while Lauterpacht more categorically asserts that there is no protection against the "administration of public utilities" or against nationalization<sup>12</sup>.

In the matter of the content of the protection, the practice from which the doctrine draws support shows that the doctrine is always adduced as an argument for obtaining compensation. As to the amount of the compensation, it is generally taken that it shall be adequate, prompt and effective, but the more detailed connotation of these adjectives is not specified.

The categorical support which a large number of recognized writers have given to the doctrine of vested interests, among them Anzilotti<sup>13</sup>, Verdross<sup>14</sup>, Anderson<sup>15</sup>, Scelle<sup>16</sup>, Doman<sup>17</sup>, Hyde<sup>18</sup>, Woolsey<sup>19</sup> and

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9. Cf. Oppenheim & Lauterpacht, *op.cit.*, p. 318.

10. Cf. Guggenheim, *Lehrbuch* ..., p. 301 and Garcia Amador, 4. Report, p. 29.

11. *Loc. cit.*

12. Oppenheim & Lauterpacht, *loc. cit.*

13. *Cour de droit international* (1929), vol. I, p. 473.

14. *Völkerrecht* (1937), p. 220.

15. "Title to Confiscated Property", *A.J.I.L.* (1926), vol. 20, p. 528.

16. *Op. cit.*, p. 113 ff.

17. *Op. cit.* p. 1127 ff.

18. *International Law* (1947), vol. I, p. 713 ff.

19. *Op. cit.*, p. 519.

Bindschedler<sup>20</sup> thus appears to be singularly disproportionate to the practical use of the theory in international society today, namely its application to the definition of the rules of international law on nationalization. The explanation for this is evidently that international practice, which is allegedly the basis of the doctrine, springs from, or mirrors, a period when economic systems of society which have now been abandoned, predominated. Respect for private ownership in the internal legal system, and the uniformity of economic and legal principles in the leading States were simply the precondition for the acceptance of an international legal rule covering the protection of vested rights<sup>21</sup>. Furthermore, action by States against the private property of foreigners was limited to extremely few cases<sup>22</sup>.

It was also clear that the decisive economic assumptions behind the theory on the protection of vested rights had altered essentially from the answers given by States as early as 1929 to the League of Nations Committee dealing with the responsibilities of governments<sup>23</sup>, where there was open disagreement on the content and recognition of the theory.

It must accordingly be reasonable to assume that the doctrine of the protection of vested rights, as a consequence of the change in the conditions and circumstances underlying the doctrine, has no importance in defining the rules of international law on nationalization.

#### B. *The minimum claims of civilization.*

The writers on international law who most clearly hold the view that actions against the property of foreigners involve liability to pay compensation, often base their arguments on the opinion that deprivation of property without compensation is to be regarded as in general conflict with the minimum claims of civilization, and thus such actions against private

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20. *Op. cit.*, p. 8 ff.

21. Cf. thus for example the note of Lord Palmerston quoted above, p. 66, in *The Finlay case* (1849) and the British note in the case on the *Religious Property of Portugal* (1920), above p. 69.

22. Schwarzenberger, "British Property ...", p. 299, further states that the circumstance that the sums received in compensation could be converted freely to foreign currency was also important for the content of the theory of international law.

23. Cf. *League of Nat. Doc. C 75, M 69, 1929 V.*



property cannot be carried out against foreigners<sup>24</sup>. This belief cannot stand. Although we shall not here come to a conclusion on the more general question of the share which the minimum demands of civilization have in determining the international standard which shall apply solely and unconditionally to foreigners, it must be a logical conclusion from the survey we have just made of the practice in various States, that it is quite impossible to say today that a State is less civilized in the technical sense, if nationalization takes place without payment of compensation<sup>25</sup>.

Obviously the minimum claims of civilization do not presuppose agreement between all States, nor, on the other hand, is the principle a purely statistical concept which, by reason of a large number of adherents, must be taken to be binding also on the minority of States. The principles of the minimum demands of civilization must rather be regarded as a description of a system consisting of a large number of rules which the leading States (and who these are depends on the structure of international society existing at any given time), by reason of their legal principles, agree shall be observed both in municipal law and international law<sup>26</sup>. At a time when many members of the international legal community are carrying through acts of nationalization for the most diverse motives and in conditions which vary from one to another, and where the social conditions in individual national communities cast their reflection on international relations, it is not possible to talk of the existence of the principle of the minimum claims of civilization in the field under examination<sup>27</sup>. Uniformity in municipal legal principles and in the national concept of the conditions for acts of nationalization must be the decisive precondition to assert a principle in international law on the minimum standards of civilization. This precondition, as the historical examination has shown, is not present.

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24. Cf. Elihu Root, "The Basis of Protection to Citizens Residing Abroad", *Proceedings of the American Society of International Law* (1910), p. 16 and p. 20-22. Cf. also Friedmann, "Impacts ..." p. 501 ff.

25. Thus, too, Ross, *op. cit.*, p. 189.

26. Cf. Doman, *op. cit.*, p. 1136: "as long as states of the capitalistic economy are more powerful influences in international society and in the formulation of international law, the minimum standard of justice as interpreted by them will remain the dominant concept in connection with the problem of compensation for expropriated property."

27. Cf. Hertz, "Expropriation of Foreign Property", *A.J.I.L.* (1941), vol. 35, p. 243.

On the whole, the principle of the minimum claims of civilization seems, even as a description of a system, to be particularly ill suited for defining the general legal position of foreigners. Even the terminology appears unfortunate, since it introduces the idea that certain legal rights are so bound to "civilization" that the principles behind the validity of these rights must be different from those behind the other rights and duties of international law. There are undoubtedly reminiscences here of the idea of natural law which has left its mark so widely on the doctrine of international law and hindered the clarification of the problems of international law.

The effect of the terminology is also inappropriate politically, since States which have a legal system diverging from that of the leading States are thereby branded as uncivilized, although the legal system in question may perhaps adapt particularly well to the special conditions existing in the States in question. This situation is not calculated to strengthen respect for international law.

Moreover, when it appears in addition that the principle of the minimum claims of civilization seems only to have any importance at a time when the content of legal rules (and thus the conditions necessary for their existence) is stable, it is not surprising that the doctrine must be rejected as a basis for setting up international legal rules on liability to pay compensation for acts of nationalization.

## § 11

### CONCLUSION

The fact that an historical examination must lead to the rejection of a now out-dated doctrine of international law, as well as the denial of the existence of national and thus international legal standards which States have in common, does not, however, necessarily lead to the conclusion that international legal rules do not exist on international liability to pay compensation for nationalization.

It can certainly not be excluded in advance that, at the international level, States are motivated by special interests, and thus that international legal practice expresses legal standards which States have long ago

abandoned in municipal law, but which it is important that the States should maintain in their international relations <sup>1</sup>.

A disagreement of this kind between municipal and international legal standards seems to exist on the question of liability to pay compensation as a consequence of the nationalization of foreign property where the problem emerged after the end of the Second World War.

Although the laws on nationalization in most countries authorize payment of compensation, it must be admitted that only in very few cases have these provisions led to compensation being paid to those affected. It must, however, be supposed that the legal concept which led in practice to nationalization without compensation, only covers the relations between a government and its own nationals, and is not applicable to the international relations of a State, i. e. in respect of the property of foreign nationals. The reason for this must be sought in the practical considerations which lie behind the acts of nationalization and which will lead to different results on the question of liability to pay compensation according to whether the nationalization is regarded from a national or an international viewpoint.

Seen nationally, these practical considerations for the stimulation of the national economy etc. encourage governments to take over the property of their citizens to the greatest possible extent without compensation.

Seen internationally, the economic considerations, however, will prescribe a rule according to which nationalization can only take place against compensation. This will be obvious in the case of capital-exporting States, since they will be interested in enforcing a rule which protects their capital invested abroad to the greatest possible extent. The result for capital-importing States will be that careful consideration of economic realities will show that these debtor States similarly, taking the long view, must support a rule under which nationalization of foreign property carries with it unconditional liability to pay compensation <sup>2</sup>. Typical capital-

1. A similar situation is found in connexion with the rules of international law on the immunity of States. These rules come from a time when citizens were precluded from bringing actions against their own governments, which thus enjoyed "sovereignty" in municipal law. Even though the municipal concept on this point is abandoned in almost every State, the law on the immunity of foreign States is still maintained in certain fields.
2. Cf. Judge Caneiro's dissenting pronouncement in *The Anglo Iranian Oil Co. Case* (1952): "When there are so many countries in need of foreign capital for

importing States will, indirectly, improve their economy by recognizing such a rule irrespective of how their own nationals are treated, since recognition of the liability to pay compensation gives some protection to foreign capital. In the absence of protection, there is a serious risk that no foreign State or private person will invest the capital which the capital-importing States require<sup>3</sup>.

The paradoxical situation that a country is simultaneously nationalizing foreign capital and trying to persuade foreigners to invest in, for example, technical installations for the development of the natural resources of the State in question, cannot long be maintained. To undertake such projects presupposes confidence in the economic systems of these countries. To create this confidence in the capital market, the capital-importing States will have an interest in paying compensation for actions against property. The rule of international law that the nationalization of foreign property involves liability to pay compensation, independent of municipal legislation thus seems, even today, to be in the mutual interests of all States.

This common interest, in fact, marked most of the contributions to the United Nations' debate on the question of nationalization, although some States, in taking the political opportunity offered by the debate to demonstrate their political and national independence, often under-estimated the result the declarations of their delegate could have on the international capital market. The desire of States to protect foreign property independent of the voting was clearly formulated in the speech of the Abyssinian delegate:

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the development of their economy, it would not only be unjust, it would be a grave mistake to expose such capital without restriction or guarantee, to the hazard of the legislation of countries in which such capital has been invested". *Reports* (1952), p. 162.

3. This viewpoint also appears clearly in the Soviet decree of 23 November 1920 on the general economic and juridical conditions for concessions. It is stated in the introduction to the decree, which contains a guarantee against the nationalization of concessions, confiscation or requisition, that the decree (which has among its signatories, the chairman of the council of commissars, Lenin), springs from the wish that foreign capital shall be employed to the widest possible extent for the reconstruction and the strengthening of the Soviet Republic and the economy of the whole world. Cf. R. Glanz, *Deutsch-Russisches Vertragswerk vom 12. Oktober 1925* (1926), p. 231.

"If his delegation thought that the draft resolution<sup>4</sup> would discourage private foreign investors, it would not support it. He was convinced, however, that foreigners who had invested in Ethiopia were acquainted with the concepts embodied in his country's laws and the policy pursued by his Government.

A negative attitude would not attract capital<sup>5</sup>."

The fact that a large number of treaties on the payment of compensation for the nationalization of foreign property have been concluded, and that such treaties have been concluded both by capital-importing and by capital-exporting States, quite irrespective of how the State's own nationals are to be treated, all serve decisively to confirm the rule of international legal custom, that the nationalization of foreign property involves the nationalizing State in liability to pay compensation<sup>6</sup>.

In this connexion it is of special significance to point out that States, whose economic policy is based on socialist theories and who nationalize the property of their own citizens without compensation, demand and receive compensation when the property of their own citizens is nationalized abroad. Thus Czechoslovakia claimed compensation from Yugoslavia, and the question was settled by the treaty of 4 September 1947; similarly Yugoslavia, by a treaty of 29 May 1956, received compensation from Hungary. The latter treaty also settled the corresponding claim by Hungary on Yugoslavia.

*This demonstrates that, in the field we are examining, international law does not follow social development as it emerges in individual States, and the tendency which can be observed in municipal law to move away from the protection of ownership therefore does not seem to have been accompanied by the international consequence that the States concerned have ceased to raise or meet claims for compensation for nationalization which has taken place in other countries.*

The traditional principle of international law that compensation shall be paid for actions against foreign property thus seems to be recognized in practice even in the most recent cases of nationalization. With this in mind it will be valuable to undertake an analysis of existing treaty practice to

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4. The proposal put forward by Uruguay-Bolivia, cf. above.

5. *U.N. doc. A/C.2/SR 235*, par. 22.

6. Cf. also Bindschedler, *op. cit.*, p. 253 and Verdross "Die Nationalisierung Niederländischer Unternehmungen in Indonesien im Lichte des Völkerrechts", *N.T.V.I.R.* (1959), vol. VI, p. 283.

ascertain whether meeting the liability to pay compensation for nationalization is to be distinguishable from payment of compensation in the other types of action against property.

## § 12

### IS NATIONALIZATION WITHOUT COMPENSATION LEGAL?

#### A. *The Problem.*

It has now been established that the nationalization of foreign property involves liability to pay compensation to the person affected. This consequently raises the question of the nature of the liability to pay compensation, that is to say whether the payment of compensation is a condition for the legality of the nationalizing action, or whether the obligation to compensate is only a consequence of an act of nationalization which is otherwise legal.

From a theoretical point of view the reasoning can also be expressed as follows: if nationalization without compensation is contrary to international law the reason for liability is the act of nationalization itself, while in those instances where nationalization is regarded as legal, responsibility only arises in connexion with an omission to fulfil the liability to pay compensation required by international law. In the last cases compensation will thus not have the character of reparation for a breach of the law, since the action involving liability to pay compensation, the legal action against property, is not regarded by the legal system as undesirable<sup>1</sup>.

The problem has given rise to much discussion among writers on international law and it was one of the central questions in a debate of the International Law Association Conference in 1958<sup>2</sup>. The question has acquired its importance mainly in the following aspects<sup>3</sup>:

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1. This situation where a desirable act involves liability for compensation is also known in municipal law, for example the law in cases arising from a state of emergency.

2. Cf. *I.L.A. Report* (1958), p. 130–183.

3. Cf. *inter alia* Schwebel, *ibid.*, p. 150.

If nationalization without compensation is *per se* contrary to international law, it means that the customary means of enforcement of international law, particularly the claim for natural restitution, can be used against the illegal act of nationalization, and this situation can conceivably affect the amount of compensation. If, on the other hand, nationalization is regarded as a lawful act, even where it also affects foreign property, failure to pay compensation will imply that the customary means of enforcement of international law can only be used in extracting payment of compensation as such, while the transfer of property involved in the act of nationalization cannot be contested.

If the legality of an act of nationalization is only decisive for the consequences discussed here, namely the calculation of the compensation and access to natural restitution, the problem raised does not seem to be of great practical relevance <sup>4</sup>.

The fixing of the amount of compensation in cases of widespread acts of nationalization is so difficult and the evaluation of individual objects so dependent on the economic conditions created by the nationalization <sup>5</sup>, that in practice no essential financial results will emerge whether the compensation is calculated on the basis that the action was legal or illegal. Further considering the claim for natural restitution by those affected by nationalization, it must be admitted that, judging realistically, even if it were assumed that such a right existed, it would have no practical importance or any real value. The nationalizing State has in fact control over the property situated on its territory, and the practical possibility of restoring the former owner to possession of a nationalized undertaking simply does not exist. Furthermore, natural restitution as a legal remedy cannot in general be regarded as an unconditional consequence of a breach of international law, since, if natural restitution is a practical impossibility, the offending State can instead choose to disengage itself by payment of compensation.

The question of whether nationalization without compensation is unlawful and thus whether its validity can be contested under international law, has, however, taken on special importance in some recent cases, where foreign courts have given judgment on the transfer of property involved by

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4. Cf. also Guggenheim, "Der völkerrechtliche Schutz von Investitionen im Ausland" *Schweizerisches Jahrbuch für internationales Recht* (1956) vol. XIII, p. 62.

5. Cf. below p. 246 ff.

nationalization in cases where the assets nationalized were brought out of the territory of the nationalizing State after nationalization and into the territory of the State where the court was sitting. The question here is at what point of time does ownership pass to the nationalizing State. Does the State acquire ownership of the nationalized goods by the act of nationalization, at the point where a unilateral promise is given that nationalization will be accompanied by compensation, at the point of the conclusion of a bilateral agreement on compensation, or only when compensation is paid?

### B. *International Practice.*

The problems were present in the so-called "*Rose-Mary Case*", *Anglo-Iranian Oil Co. v. Jaffrate et Al* (1953)<sup>6</sup>. After Iran had nationalized the Anglo-Iranian Oil Company in 1951, the Iranian government sold 700 tons of oil to a Swiss firm which chartered the ship *Rose-Mary* to carry the oil to Italy. When passing Aden the ship was ordered into the harbour and A.I.O.C. instituted proceedings against the parties concerned for the purpose of gaining possession of the cargo, which in A.I.O.C.'s opinion, belonged to the company.

The plaintiffs maintained that the Iranian law on the nationalization of oil, which authorized nationalization without compensation, was in fact a law of confiscation. They further maintained that courts, which are bound to some extent to apply international law, should refuse to recognize actions contrary to international law.

The court accepted this view. On the international legal aspect of the nationalization, and especially on the question of compensation, the judgment states:

"In discussing what is meant by the word compensation in relation to international law it has sometimes been said that it must be adequate, effective and prompt. The question of adequacy may often be difficult for a court to decide, and no doubt this has caused and will cause considerable trouble in other cases in dealing with the extraterritorial effect of foreign nationalisation. But here I can only find to be true plaintiffs' contention that expropriation has taken place without any compensation and that this is confiscation ..."

In conformity with this principle, the judge found for the plaintiffs.

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6. Supreme Court of the Colony of Aden, 9 January 1953, cf. *A.J.I.L.* (1953) vol. 47, p. 325.



At about the same time an Italian court gave judgment in a similar case. *The Mariella, Anglo Iranian Oil Co. v. Società Unions Petralfere Orientale* (1953) <sup>7</sup>.

In this case the plaintiffs maintained that nationalization was contrary to the principle confirmed in Italian law that foreign laws shall not apply if they are in conflict with *ordre public*.

The judge did not find for the plaintiffs, since the nationalization in question and the sale of the nationalized oil had taken place on Iranian territory, and thus the legally relevant facts were to be judged only according to the Iranian legal system. The further point submitted by the plaintiffs, that the Iranian nationalization should be set aside since it was not accompanied by full compensation, was rejected by the court, and the judge specifically pointed out that the Iranian legislation authorized such compensation. On the question of compensation in general, the judge said:

"... A.I.O.C.'s argument that the law does not directly establish the measure of the compensation or the time of payment thereof is not legally relevant.

... Any question relating to the amount of compensation and the time of its payment remains outside the ambit of public policy, these are accessory elements, consideration whereof, to be made in relation, inter alia, to present historical, political, social and economic conditions and to the nature and extent of the property concerned, does not fall into the sphere of public policy, unless the relevant provisions would practically neutralise compensation so as to make it illusory ..."

The Iranian nationalization was also considered by the district court in Tokyo and later by the court of appeal in Tokyo <sup>8</sup>. The latter court laid down that it was a valid principle of international law that, if a State undertook actions against foreign property as a measure of social reform, it had an obligation to pay compensation to foreigners irrespective of the position of its own nationals. On the other hand, the court accepted that it could not question the validity of the Iranian law on nationalization.

The Indonesian nationalization law of 31 December 1958 also gave rise to legal actions concerning the products of nationalized concessions, notably tobacco from the Dutch plantations <sup>9</sup>.

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7. The Civil Court in Venice, 11 March 1953. The judgment quoted according to *I. & C.L.Q.* (1953) vol. 2, p. 628.

8. Cf. Lauterpacht, *International Law Reports*, 1953, p. 305 ff.

9. See, inter alia, Martin Domke "Indonesian Nationalization Measures before Foreign Courts", *A.J.I.L.* (1960) vol. 54, p. 305-323. Cf. also *U.N. doc. A/AC.97/5*, p. 292-294.

The Dutch Senembah Tobacco Company had given the Indonesian Bank in Holland as security for credit a quantity of tobacco from the 1957 crop<sup>10</sup>; (this was therefore from the time before nationalization, but after the Indonesian authorities had taken control of Dutch businesses in Indonesia). Part of the lot was in Amsterdam. In September 1957 it became known to the Dutch company that, on instructions from the local authorities, a branch of the Indonesian Bank in Indonesia had sold and delivered a parcel of tobacco belonging to the company and held in Sumatra. Since the bank had thereby received full cover for the sum owing to it, Senembah requested the delivery of the documents relating to the lot lying in Amsterdam<sup>11</sup>, although this lot had meanwhile been nationalized with retroactive effect.

The court of appeal in Amsterdam found for Senembah, the grounds being, *inter alia*, that the nationalization was contrary to international law and thereby invalid.

The judgment stressed that the law discriminated between Dutch and other foreign nationals, and that the Indonesian nationalization was not accompanied by compensation. Such nationalization, (and also because it would be in conflict with the *ordre public* in Holland) could not involve a transfer of the nationalized goods to the Indonesian State.

Similar problems came up for decision before the court of appeal in Bremen<sup>12</sup>, where two Dutch companies claimed a considerable quantity of raw tobacco imported by a German company in 1959 from the appellant's company, which was now nationalized. Judgment was not given for the Dutch companies, since the court found that it had not been adequately proved that the Dutch companies had retained their title to the raw tobacco irrespective of the Indonesian law on nationalization.

The judgment, however, recognized that no compensation had been paid on nationalization and that it was impossible to foresee when and to what extent compensation would be paid. This was, however, not in conflict with international law:

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10. It is thus not correct when Domke *loc. cit.* states that it was from the 1958 crop. This is shown by the documents in the case which has kindly been placed at my disposal by Senembah's counsel.

11. The lot by this time had been sold to a Danish firm, cf. note 10 end.

12. Judgment pronounced by the Hanseatisches Oberlandesgericht, Bremen, on 21 August 1959.

“Im vorliegenden Fall stellt jedoch die Enteignung der Antragstellerinnen zugleich eine Umschichtung der Besitzverhältnisse dar, die von einer selbstständig gewordenen ehemaligen Kolonie zur Veränderung des Sozialstruktur vorgenommen wurde. Für solche Globalenteignungen wird nicht ohne Grund in neuerer Zeit häufig die Ansicht vertreten, dass schon aus dem Wesen der Sache heraus nicht die gleichen Grundsätze gelten wie für Einzelenteignungen herkömmlicher Art. ... Die Entschädigungen könnten nicht also volle und sofortige aus der Substanz, sondern nur aus den Erträgen der nationalisierten Unternehmungen geleistet werden. Die Entschädigung müsse nach Zeit und Höhe mit den Verhältnissen des enteignenden Staates in Einklang gebracht werden <sup>13</sup> ...”

The judgment illustrates the difficulties with which the municipal courts are faced, if it is to be assumed that the transfer of ownership to the State only takes place when compensation is paid or it seems certain that it will be paid. This will be discussed again later.

These judgments have been strongly criticized <sup>14</sup>, principally because the Aden judgment and the principles expressed in it seemed to be at variance with the traditional principles of private international law, including the principle of territoriality.

This principle, based on the premise that the country where the court is situated cannot dispute laws which authorize actions against property which, at the time when the actions take place, was situated in the territory of the State responsible for those actions, is recognized in a number of judgments <sup>15</sup>.

On the other hand the *Mariella* case, and to some extent the judgment in Tokyo, have caused renewed discussion on the question of expediency of

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13. Cf. Urteil ..., p. 63.

14. Thus *Torsten Gihl* "Two cases concerning Confiscation of Foreign Property", *Liber Amicorum of Congratulations to Algot Bagge* (1955), p. 55-56. See also *In re Claim by Helbert Wagg & Co. Ltd.* (1956) *W.L.R.* 183, where Upjohn, J. strongly criticizes the *Rose-Mary* case, demonstrating its irreconcilability with *Luther v. Sagor* and *Princess Paley Olga v. Weisz A.J.I.L.* (1950 vol. 50 p. 683. Cf. also M. H. Bresch, commentary to the *Mariella I. & C.L.Q.* (1953) vol. 2, p. 682.

15. Cf. Adriaanse, *Confiscation in Private International Law* (1956) p. 75-76. See also as an example *Luther v. Sagor* (1921) *Ross & Foighel, op. cit.* p. 136 and *U.f.R.* (1952) p. 856 for the basic assumption. Cf. also Seidle-Hohenveldern "Recognition of Nationalization by Other Countries" *I.B.A. Report* (1954) p. 35-36.

*the Act of State Doctrine*. Some writers<sup>16</sup> are of the opinion that this doctrine, according to which a court cannot question the legality of the actions of a foreign State where the results do not extend beyond the territory of that State, leads to results which should not be accepted as reasonable, since the doctrine does not seem to recognize the supremacy of the international system of law.

The accuracy of these views will not be the subjects of detailed examination here. The discussion, however, assumes that nationalization without compensation is in itself an illegal action contrary to international law, and nationalization without compensation does not give the nationalizing State the ownership of the goods affected by the action. On this last point, and with special reference to whether the nationalizing actions which took place were accompanied by full compensation, the arguments in the judgments bear directly on the problem under consideration.

In the *Rose-Mary* case the arguments that the act of nationalization is in itself contrary to international law, with the result that the transfer of property can be ignored if the nationalization is not accompanied by (full) compensation, is scarcely in agreement with the views expressed in international practice.

The practice of the courts is not particularly instructive on this point. In the case of the *Chorzow Factory* (1928) the Permanent Court of International Justice accepted that there should be a distinction between illegal and legal expropriations<sup>17</sup>. According to the court, this distinction is important at any rate as affecting the calculation of the amount of compensation claimed by the State affected by the action. Whether it is possible to attach any importance to the distinction beyond this, especially for the problem now being discussed, does not clearly emerge from the judgment<sup>18</sup>.

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16. Cf. Hyde, *I.L.A. Report* (1958) p. 140. On the discussion in the U.S.A. cf. further the same author "The Act of State Doctrine and the Rule of Law" *A.J.I.L.* (1959) vol. 53, p. 635, and the documents discussed here. Cf. also F. Morgenstern, "Recognition and Enforcement of Foreign Legislative, Administrative and Judicial Acts which are Contrary to International Law", *I.L.Q.* (1951) vol. 4, p. 344.

17. *P.C.I.J. Series A*, no. 17, p. 46-48.

18. Robert Delson takes the contrary view: "Whether a Taking of an Alien's Property, without Compensation or in Derogation of the Terms of a Contract is in Violation of Public International Law", *Proceedings, American Branch of I.L.A.* (1959-1960) p. 38 and Hertz, *op. cit.* p. 251 and 253.

The right of States to nationalize, in the sense that other States have a corresponding duty to accept nationalizing actions as such, was also much to the fore in the debate in the General Assembly's Second Committee in 1952, when the motion put forward by Uruguay entitled "The right of each country to nationalize and freely exploit its natural wealth as an essential factor of economic independence" was discussed <sup>19</sup>.

In spite of the vigorous discussion caused by this resolution, none of the States taking part asserted that nationalization in itself was unlawful. On the contrary, the Mexican delegate declared that the resolution was unfortunate since it appeared to raise doubt on the validity of a right the practice of which was one of the clearest manifestations of national sovereignty <sup>20</sup>; while the delegate of Israel stated that the Uruguayan proposal was in fact only a confirmation of a position which was already recognized <sup>21</sup>. The same views were also put forward to the Commission on Human Rights during the debate on "the right of self-determination of people and countries" <sup>22</sup>.

The right of States to nationalize is apparently also recognized in actual disputes about nationalization. Thus, when the American government protested to the Roumanian government in the note of 7 September 1948 that Roumania had nationalized American, but not Soviet-Russian property, it was stated:

"... the United States Government has consistently recognized the right of a sovereign power to expropriate property subject to its jurisdiction and belonging to American nationals <sup>23</sup>."

Of special importance here is the common declaration of 2 August 1956 by the United States, France and Great Britain, following the Egyptian nationalization of the Suez Canal. In the declaration the three Great Powers state:

"...2. They do not question the right of Egypt to enjoy and exercise all powers of a fully sovereign and independent nation, including the generally recognized

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19. Cf. above p. 96.

20. Cf. Official Rec. 7th Session Gen.Ass. 2nd Comm., p. 254 ff.

21. *Ibid.*, p. 260.

22. Cf. Harremoes, *op. cit.*, p. 69.

23. Cf. *Dep.St.Bul.* (1948) vol. 19, p. 408. Although the note employs the expression "expropriation" the relevance of the word in this connexion cannot be disputed, since it was a result of the Roumanian nationalization law.

right, under appropriate conditions, to nationalize assets not impressed with an international interest, which are subject to its political authority<sup>24</sup>."

This declaration was issued a few days after Egypt had in fact taken over the nationalized company in accordance with a law which, though certainly authorizing compensation, made this dependent on special counter-concessions by former owners.

It must, however, be acknowledged that in practice States make very few direct statements about the problem discussed here, and for this reason categorical conclusions can only be drawn with caution from the declarations quoted above. This is connected in some measure with the fact that governments only have cause to make public announcements if the nationalizing State has nationalized without paying compensation. A declaration that such procedure is contrary to international law is normally not very precise, since it is seldom specified whether the charge is against the nationalizing action as such, or only against failure to carry out the obligation to pay compensation. The circumstance that no State in any case of nationalization of foreign property has claimed natural restitution<sup>25</sup>, does not with certainty show that nationalization *per se* is illegal. The renunciation by governments of natural restitution is due simply to the impossibility of enforcement. The reaction of States to nationalization has thus been exclusively directed to obtaining compensation, and if compensation has been obtained the nationalization has in every case been regarded as lawful. As it concerns the mutual relations of States the problem is of a theoretical kind only. Consequently the answer to the question raised here must in essence rest on theoretical constructive considerations, and here decisive regard must be paid to the question of which construction gives the greatest clarity in those connexions where the solution of the problem can be thought to have relevance.

### C. Construction.

Garcia Amador states in his report to the International Law Commission that there should be a distinction between "illegal" and "arbitrary" nationalization. Arbitrary nationalization is to be regarded as an entirely legal

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24. The Suez Canal Problem, July 26–Sept. 29 1956, Dep. of St. Publ. 639 (1956) p. 35.

25. Cf. however below § 14 on the attitude of the United States to Roumania.

action which, however, in some cases is not carried out in a legal manner, for example where due compensation is not paid. According to this writer, there is a decisive difference between the situation where a State infringes a positive prohibition, and the situation where a State exercises a right recognized by international law, but where its exercise is not in accordance with the conditions laid down by international law. The writer finds support for this terminology, *inter alia*, in the declaration on Human Rights art 17: "No-one shall be arbitrarily deprived of his property". Here the writer draws attention to the previous history of art. 17, when an amendment proposing the substitution of the expression "arbitrarily" by "contrary to the laws" was rejected <sup>26</sup>. Only by establishing his proposed distinction can the author explain why an arbitrary action does not involve the same legal consequences in law as an illegal action <sup>27</sup>. A legal nationalization thus involves the transfer of ownership <sup>28</sup>.

A similar view is among those put forward by Robert Delson <sup>29</sup>, who states that where nationalization has taken place without compensation, a distinction should be made between two different elements in the legal situation, namely (1) the action itself, whereby the property was taken over by the State, and (2) the failure to pay compensation. It is neglect of this analysis which causes many authors to accept that the illegality involved in non-payment of compensation causes an otherwise legal act, namely the acquiring by the State of the property, to become illegal and invalid. It is unlikely that failure to pay compensation would have such a result and such an unusual consequence should in any case be clearly traceable in international practice or custom, which is not the case.

In support for his view this author cites in addition to my own *Nationalization* <sup>30</sup>, Rubin <sup>31</sup>, Seidl-Hohenveldern <sup>32</sup>, Rolin <sup>33</sup> and de Visscher <sup>34</sup>. This last writer expresses himself as follows:

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26. Cf. *U.N. doc. E/CN.4/SR.61*, p. 6.

27. *U.N. doc. A/CN.4/119*, p. 18.

28. Cf. also the author's *Fifth Report on International Responsibility* (1960) *U.N. doc. A/CN.4/125*, p. 1-14.

29. "Nationalization of the Suez Canal Company: Issues of Public and Private International Law", *Columbia Law Review* (1957) vol. 57, p. 762, and *I.L.A. Report* (1958) p. 155. Cf. also this author's contribution to discussion in the American section I.L.A. in 1959, *op.cit.*, p. 33-57.

30. P. 71 and 75.

31. *Private Foreign Investment* (1956), p. 16.

"The reasons that account for nationalizations are various; but in the mind of those who enact such policies, they all come down to the higher interest of the collectivity ... whatever the reasons, the rulers alone decide. Nationalization is an internal measure often dictated by reasons that are more political than economic. In principle its legality is not to be determined by any international criterion ... Not disputing the principle of the right to nationalize, and avoiding any discussion in concreto of its motive, the States make adequate indemnification the international obligation, and make refusal to indemnify the basis of ... responsibility ... This position represents the present equation balancing the State's liberty to organize as it will and the security of international relations."

The views set down here seem to have been most clearly expressed by Torsten Gihl<sup>35</sup>, when, in the course of his criticism of the *Rose-Mary* case, he declares that the basis of the judgment is that action against property without compensation is forbidden by international law. What is forbidden by international law is clearly not the action against property as such, but only the failure to pay compensation<sup>36</sup>. In addition to the logic expressed by Gihl's views, the conclusions reached by this writer are also based on practical considerations from international trade.

Gihl's standpoint has, however, been criticized by Wortley<sup>37</sup>, among others, who expounds the view that the right to the nationalized property which the nationalizing State acquires is a right only as related to the municipal legal system of that State, so that other States may independently determine their attitude to the detailed connotation of this right by reference to international law. Certainly it must be recognized that there is a basic assumption that the State has acquired a right of ownership which will be internationally acknowledged, but this assumption can disappear. The writer admits, however, that his views have not found expression in the practice of the courts in Great Britain and the United States.

However, the most specific criticism which can be directed against the view that nationalization is *per se* legal concentrates on questions of

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32. "Communist Theories on Confiscation and Expropriation", *A.J.C.L.* (1958), p. 544-545.

33. "Avis sur la validité ...", *N.T.V.I.R.* (1959), p. 271.

34. *Theory and Reality in Public International Law* (1957), p. 193.

35. *Op. cit.*, p. 61.

36. Cf. also Katarov, "The Validity of the Act of Nationalization in International Law", *The Modern Law Review* (1959), vol. 22, p. 639 ff.

37. *Op. cit.*, p. 17.



procedure, since it is claimed that it is difficult to enforce the payment of compensation if failure to pay compensation does not involve the severest possible consequences <sup>38</sup>.

The conclusion on the views quoted must be, however, that, considered theoretically, there is scarcely any objection to regarding the act of nationalization and payment of compensation as a unit and that the non-fulfilment of the liability to pay compensation also involves the illegality of the action itself, with the result that the ownership only passes to the State when compensation is paid.

Analogous constructions are to be found in great numbers in municipal law and solidly express the content of a legal rule whereby a given action always involves liability to pay compensation. Against that, however, such a construction does not function entirely in agreement with the realities of international society.

The examination made above of the practice of States shows that nationalization is an action against private property which is carried out by almost every State. It would scarcely seem possible to establish international principles which would cause governments to be interested in the enforcement of a rule which brands nationalization as such as an illegal action and which would therefore decisively restrict their territorial sovereignty. On the contrary, time after time, States (and this is true both of capital-importing and capital-exporting States) have declared that nationalization is an assertion of the sovereign rights of the State, meaning the rights which a State can exercise on its own territory without the possibility of objection from other States.

Politically therefore, seen against the background of the realities of international society, the principle that lack of compensation will invalidate a nationalizing action seems untenable.

Nor, seen juridically, does there appear to be a natural balance between sanction and law breaking where nationalization is regarded as invalid. While there is a clear connexion between the enforcement of a claim for compensation and the failure by the nationalizing State to pay compensation to those affected, there is no such connexion between the failure to pay compensation and the sanction that nationalization itself is to be regarded as invalid.

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38. Cf. for example E. Lauterpacht, *I.L.A. Report* (1958) p. 163, on a number of writers who adhere to this view.

This sanction will in reality be a declaration that the State is denied the right of exercising its general authority to nationalize property on its own territory <sup>39</sup>.

Thus, an acceptance of the legality in international law of the act of nationalization appears to follow the social development in municipal law, and there is indeed nothing which, from an international standpoint, contradicts this view. However, as shown above, the international principles diverge from the national interests in respect of liability to pay compensation, and liability under international law ought then to involve only the payment of compensation and nothing else.

These theoretical views, whose truth it must be admitted is open to discussion, are supported and emphasized by practical considerations of considerable weight, in that the opinions which were put forward in, for example, the *Rose-Mary* case involve constructive difficulties which in practice can, at the very least, be troublesome.

If it is accepted (and this must indeed be the consequence of the view on the *Rose-Mary* case) that nationalization without compensation *becomes* legal when and to the extent that compensation is paid, questions such as the following arise: is nationalization legal if the nationalizing State promises compensation, but makes the fulfilment of the promise conditional on certain assets which belong to the nationalized concern, but are situated abroad, being placed at the disposal of the State? Is nationalization legal when negotiations on compensation are begun, but not concluded? Is nationalization legal if the nationalizing State offers reasonable compensation, but the parties affected by nationalization reject the compensation as insufficient? What is the position in law when some of those affected by nationalization (for example, some shareholders in a nationalized company) receive compensation, while other shareholders in the same company receive no compensation?

The practical difficulties in judging whether an offer of payment of compensation is in accordance with the rules of international law, emerged clearly in the judgments quoted above, especially the judgment in the *Mariella* case. The court in Venice, by accepting that the offer of payment of compensation in the Iranian laws fulfilled the claims of international law, was, in fact, forced to abandon any claim that adequate and effective

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39. Cf. Delson, *op.cit.*, p. 35.

compensation is a condition of the legality and validity in international law of an act of nationalization<sup>40</sup>.

To reach a practical solution on this point, the court felt obliged to decide the question of compensation in a way which seems incompatible with existing international law.

The uncertainty resulting from the *Rose-Mary* judgment means in practice, that it is impossible to conclude agreements with confidence with a nationalized concern, if some of its property or goods are to be brought outside the territory of the nationalizing State. It must be admitted that the principle that nationalization without compensation is illegal and thereby invalid, can, in practice, impose considerable pressure on the nationalizing State. Even apart from this pressure, however, governments, as shown above, are not entirely without means of enforcement of their rights. Moreover (and this appears of essential importance) the pressure exercised through the principle that nationalization without compensation is invalid, can only be made effective at the cost of the clarity which it is in the interest of all parties to achieve in international relations<sup>41</sup>. Irrespective of the importance the question might have in individual cases for enforcing the payment of claims for compensation, it must be accepted that the rule that nationalization as such is legal, and that the transfer to the State of

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40. Cf. likewise *Anglo-Iranian Oil Co. Ltd., v. Sociatà S.U.P.O.R.* (1954), where the Civil Court in Rome similarly rejected the view of the company that the Iranian nationalization law was in conflict with international law. On the question of compensation, the judgment laid down, inter alia, that neither Italian law nor international law demands that the amount of compensation shall correspond effectively to the value of the object nationalized. It was enough that compensation was paid (!). The judgment referred, in fact, to the resolution of the plenary session no. 626 (VII) which, since it was adopted less than a month after the Iranian nationalization law, might be regarded as international recognition of the Iranian nationalizations. Cf. *A.J.I.L.* (1955) vol. 49, p. 259.

41. To suppose that the country where the decision of the court is made incurs responsibility under international law relative to the State whose nationals are affected by an act of nationalization which must be regarded as contrary to international law, and which the courts acknowledge, thus appears to have little justification. Cf. Eagleton, *The Responsibility of States in International Law* (1928), p. 68-69, Borchard, *op.cit.* p. 197, Fitzmaurice "The Meaning of the Term Denial of Justice", *B.Y.I.L.* (1932) vol. XIII, p. 110.

nationalized property takes place at the moment of the act of nationalization, contributes best to the interests of the international community.

## § 13

### IS NATIONALIZATION WITH COMPENSATION ALWAYS LEGAL: THE THEORY OF NON DISCRIMINATION

It is generally recognized that foreigners have no claim to equality with the nationals of a country as far as *rights*<sup>1</sup> are concerned. Thus, discrimination exists in almost every State between foreigners and its own nationals in respect of political rights whose exercise can influence the form of government of the country of residence. Similarly, the rights of a foreigner to work, own real property<sup>2</sup> or conduct independent business<sup>3</sup> are often restricted. The limitations which international law contains on the admissibility of such difference in treatment by States is found in special treaties, among them the so-called treaties of trade, friendship or domiciliation. As far as concerns the restrictions of the authority of States to place foreigners in a less advantageous legal position than the countries' own nationals in the field under consideration, the treaties must be regarded as exceptions from the generally recognized rule of international law.

Against that there is the question of whether States are bound to give the foreigner the same *protection* as the country's own nationals in respect of his person or his property.

A prohibition on discrimination in these matters is often contained in the trade and friendship treaties quoted above. An example is the treaty concluded between the U.S.A. and Ireland on 21 January 1950 on friendship, trade and navigation where, among the provisions covering the protection of ownership, (art. VIII), the following occurs:

"... 3. Nationals and Companies of either Party shall in no case be accorded,

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1. Cf. Oppenheim & Lauterpacht, *International Law* (1947), vol. I, p. 628 ff.

2. Cf. *The Danish Constitution*, § 44, para. 2, and Law no. 344 of 23 December 1959.

3. Cf. Danish Commercial Law no. 138 of 28 April 1931, § 3.

within the territories of the other Party, less than national ... treatment in all matters relating to the taking of privately owned enterprises into public ownership and the placing of such enterprises under public control <sup>4</sup>."

Art IV cl. 2 in the treaty between the U.S.A. and Iran of 15 August 1955 on friendship, economic relations and consular rights contains provisions for protection against action against property as follows:

"... 2. Property of Nationals and Companies of either High Contracting Party, including interests in property, shall receive the most constant protection and security within the territories of the other High Contracting Party, in no case less than that required by international law <sup>5</sup> ..."

This provision in fact contains no prohibition against discrimination, but only an obligation to fulfil the requirements of international law. This naturally raises the question whether the two sets of wording in these treaties are different in content, or, in other words, whether a rule can be shown to exist in general international law containing a general prohibition against discrimination between foreigners and the nationals of a country in respect of protection of property.

The theoretical answer to this question is clearly confirmatory.

Thus Oppenheim-Lauterpacht states <sup>6</sup>:

"... every state is by the Law of Nations compelled to grant to aliens at least equality before the law with its citizens, as far as safety of person and property is concerned."

The same view is to be found in Michael Brandon <sup>7</sup>, Garcia Amador <sup>8</sup> and practically speaking all writers, whether they have presented general accounts of the content of international law or have been specially concerned with the rights of ownership under international law <sup>9</sup>.

In the theory, on the other hand, it is not completely clear what is the factual content of the prohibition against discrimination.

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4. Cf. *U.S.T.* 1950, 792.

5. Cf. 8 *U.S.T.* 1957, 932. The same wording is used in the Treaties of Friendship concluded by the U.S.A., Greece, Israel, Japan, Korea and Germany.

6. *Op.cit.*, p. 627.

7. "Legal Aspects of Private Foreign Investments", *The Federal Bar Journal* (1958) Vol. XVIII, p. 323.

8. 4, Report (1959), *U.N. doc. A/CN.4/119*, p. 20.

9. Thus, too, Verdross, *op.cit.*, p. 284 and the authors quoted there:—Strupp, Phillimore, Weiss, Marburg and Friedman.

There is agreement that, if the holding State takes action against the property both of foreigners and its own nationals, irrespective of whether the action springs from or is described as taxation, expropriation, nationalization or the like, and if the holding State awards its own nationals better terms, whether in regard to the extent or the results of the action, then the action is clearly contrary to international law; while discrimination to the advantage of the foreigner is completely in accordance with international law.

The problem which raises doubts is, however, to decide whether discrimination prejudicial to foreigners actually exists, since, in practice, it can be very difficult to establish equality or inequality in actions against property.

As a first point it must be taken that the verbal formulation of the action is naturally not decisive<sup>10</sup>. This was established in a reply given by the Permanent Court of International Justice on the *Case concerning the Treatment of Polish citizens and others of Polish Extraction or Language in Danzig*. The Court declared:

"The prohibition against discrimination, in order to be effective, must ensure the absence of discrimination in fact as well in law. A measure which in terms is of general application, but in fact is directed against Polish-nationals and other persons of Polish origin or speech, constitutes a violation of the prohibition ... Whether a measure is or is not in fact directed against these persons is a question to be decided on the merits of each particular case. No hard and fast rule can be laid down<sup>11</sup>."

The problems the court rightly emphasized can be more closely defined in the following two questions, which will be the subject of further examination. The first question is, how far discrimination actually exists between the citizens of a country and foreigners; and the second is, how far discrimination which does exist is illegal under international law.

The first question is difficult to answer in cases where an action, although worded in general terms, is in fact directed against objects belonging

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10. Cf. Guggenheim, *Lehrbuch* ... p. 306, Brierly, "Règles générales du droit de la Paix", *Receuil des cours* (1930), vol. 4, p. 171. Fischer-Williams, *op.cit.*, p. 29 and Bullington, "Problems of International Law in the Mexican Constitution of 1917", *A.J.I.L.* (1927) vol. 21, p. 702, note 86. Hertz, *op.cit.*, expresses it, that it is of no importance whether discrimination is open or hidden, provided evidence for it can be produced.

11. *P.C.I.J.* Series A/B, no. 44, p. 28.

only to foreigners because the nationals of the country do not own objects of the kind involved.

As examples of this there is the nationalization in Mexico of the Oil Industry in 1938, where the industry was exclusively based on foreign capital<sup>12</sup>, the nationalization law of Iran of 2 May 1951<sup>13</sup>, which, although general in its formulation, affected only the British-owned Anglo-Iranian Oil Company, and, finally, the Egyptian nationalization decree of 26 July 1956 dealing with the nationalization of the Universal Suez Maritime Canal Company.

The factual considerations which must be taken to be at the basis of the prohibition of discrimination in the treatment of foreigners in international law, seem necessarily to lead to the conclusion that the acts of nationalization quoted must be regarded as contrary to international law simply because they are solely directed against foreigners. Friedman<sup>14</sup> supports this view, on the principle that in these situations there is no longer equality between the affected foreigner and the non-affected national in the share each takes of the nation's financial burdens.

This principle can, however, hardly be accepted. In none of the cases quoted did the nationalizing State have the opportunity to carry out similar actions against its own nationals. If we assume that nationalization is a lawful part of the exercise of its territorial sovereignty by a State in cases where the action affects both foreigners and its own nationals, it is not entirely reasonable to conclude thereafter that nationalization is to be regarded as contrary to international law simply because no similar undertakings existed owned by the State's own nationals. It is scarcely good sense to talk of equality and inequality in this connexion.

The latter viewpoint seems to be in agreement with the judgment in the *Oscar Chinn Case* (1934). In this case a treaty existed which set out a general basis of equality as it affected Belgian and British citizens. Great Britain submitted that this basis of equality had been violated, because the action of the State only affected the business owned by Oscar Chinn, while another business, Unatra, which was under control of the Belgian government, was untouched. On the understanding of the general basis of equality it was said:

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12. Cf. Gaither, *op.cit.*, p. 9.

13. See above p. 89.

14. *Op.cit.*, p. 212.

"The form of discrimination which is forbidden is therefore discrimination based upon nationality and involving differential treatment by reason of their nationality as between persons belonging to different national groups. It should be recalled in this connection, that the treatment accorded to Unatra was based on the special position of that Company ... The inequality of treatment could only have amounted to a discrimination forbidden by the convention if it had applied to concerns in the same position as Unatra, and this was not the case. In these circumstances, the court is unable to attach any legal importance to the argument based ... on the fact ... that Mr. Chinn was the only private transporter who, like Unatra, confined his business to the transport of goods <sup>15</sup> ..."

These statements also bear on the problems mentioned above under the second question, and which exist specially in situations where there is discrimination between foreigners and nationals of the country but where the difference in treatment can spring from other reasons than the different nationality of the legal object.

This difference in treatment was present in the Polish nationalization law of 3 January 1946. In art. 6 of the law it was provided that Polish public juridical persons were to have a preferential position as creditors of nationalized businesses over foreign private persons or companies who were the owners of similar claims. Here the distinction is made not only between Polish and foreign claims, but between Polish public creditors and foreign private creditors. Since there existed no public claims other than Polish, it must certainly be taken that the discrimination contained in the law is also defensible on the basis of international law. It is a natural procedure in cases of this kind to distinguish between creditors' claims of various kinds, and such a distinction is generally recognized by most States in their internal law in cases of liquidation, bankruptcy and the like.

The Indonesian law on nationalization of 27 December 1958 has raised doubts, although according to its formulation it was directed solely against Dutch property, and although no businesses of a similar kind owned by its own nationals or other foreigners were included in the law. In the so-called *Bremen Tobacco Dispute* (1959) the court in Bremen declared that the Indonesian nationalization was not an example of illegal discrimination in treatment. On this point it is stated in the judgment:

"The court conceives the complaint of impermissible discrimination in this connection as alleging a breach of the principle of equality. In the formulation of the German constitutional court this means that like must be treated in a like

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15. Cf. *P.C.I.J.* Series A/B, no. 63, p. 87.



manner but that different treatment of unlike is permissible. It is sufficient to confirm objectively that the attitude of the former colonial people to its former colonial masters is naturally other than its attitude to other foreigners ..."<sup>16</sup>.

This interpretation of the general basis of equality in international law cannot be accepted<sup>17</sup>. The Indonesian law of nationalization is, by its specific wording, clearly politically tendentious, and the circumstance that, with or without good reason, there were political disagreements between Indonesia and Holland cannot legalize a difference in treatment which is otherwise illegal. If the views of the German judgment are accepted, it will imply that, practically speaking, unlawful discrimination can never exist, since differences in treatment to the prejudice of the foreigner will always be the expression of more or less justifiable political tension.

In theory, too, there is general agreement that the Indonesian nationalization is clearly contrary to international law<sup>18</sup>.

It will, however, be difficult in theory to lay down general principles on when action which is solely directed against foreign property is contrary to international law. The decisive factor must be a factual estimate of whether the specification of the objects at which the action against property is directed is of essential significance for the kind of action undertaken and its purposes. Thus, it is easier to tolerate nationalization directed only against a given industry of a certain size, than measures of taxation directed against some large fortunes which are in fact exclusively in foreign hands. The purpose of taxation is only fiscal and can reasonably be applied to fortunes of another size. It must, however, be agreed that an estimate is extremely difficult. Only if the objects of the action are openly restricted without good reason, and if the property of the State's own nationals or other foreigners is deliberately excluded from the action, does unlawful discrimination exist.

The prohibition in international law against discriminatory treatment is therefore not exclusively of a formal nature.

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16. Urteil des Hanseatischen Oberlandesgerichts Bremen vom 21 August 1959, p. 64.

17. In the case *Senembah Tobacco Company v. Bank of Indonesia*, decided by the court of appeal in Amsterdam on 4 June 1959, it was taken that the Indonesian nationalization law was in clear conflict with international law as a result of illegal discrimination.

18. Cf. McNair, Verdross and Rolin in *N.T.V.I.R.* (1959), pp. 247, 269 and 284.

## § 14

### IS NATIONALIZATION WITH COMPENSATION ALWAYS LEGAL: TREATY PROHIBITIONS

It is generally accepted that nationalization in direct conflict with a treaty is contrary to international law. This follows from the international legal principle *pacta sunt servanda*, the preservation of which is a necessary precondition for international relations. The interests of States in maintaining the principle that treaties must be upheld, must be taken to be greater than the substantial interests which might lie behind acts of nationalization<sup>1</sup>.

The problem is, however, whether and to what extent treaties contain prohibitions against nationalization.

As mentioned above<sup>2</sup>, a large number of the older treaties of friendship contain provisions on the protection of ownership. In the past few years this practice has been extended by a number of countries, led by the United States, which has concluded such treaties with several capital-importing States<sup>3</sup>.

It is, however, characteristic both of the older and the newer treaties that none of them appears to contain a direct prohibition of the nationalization of foreign property. The principal aim of the treaties is to ensure that possible actions against property involve the payment of compensation and that the compensation can be taken out of the countries in question<sup>4</sup>.

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1. Cf., inter alia, Garcia Amador, 4. Report, UN. doc. A/CN.4/119, p. 66.

2. P. 125.

3. Cf. Robert R. Wilson, *op.cit.*, and the same author "A Decade of new Commercial Treaties", *A.J.I.L.* (1956), vol. 50, p. 927. Cf. also UN. doc. A/C.9/7/5, p. 180 ff.

4. Cf., for example, treaty between U.S.A. and Ireland of 21 January 1950, art. VIII cl. 2: "Property of nationals and companies of either Party shall receive the most constant protection and security within the territories of the other Party, in no case less than that required by international law. Such property shall not be taken without the prompt payment of just and effective compensation. Nationals and companies of either Party shall be permitted to withdraw from the territories of the other Party the whole or any portion of such compensation, and to this end shall be permitted to obtain exchange in

In addition, however, the treaties frequently contain most-favoured-nation clauses<sup>5</sup> and these provisions, in conjunction with other circumstances, can bring about a situation in which nationalization of foreign property, even with compensation, may appear to be contrary to international law.

This was the case in the actions of nationalization which took place in Roumania. By the peace treaty of 10 February, art. 31c<sup>6</sup>, Roumania had accepted the following obligation:

"United Nations nationals, including juridical persons, shall be granted national and most-favoured Nation treatment in all matters pertaining to commerce, industry, shipping and other forms of business activity within Roumania ..."

The Roumanian law on nationalization of 11 June 1948 excepted, however, property belonging to the U.S.S.R.<sup>7</sup> This caused the United States, in its notes of 7 September 1948<sup>8</sup>, and 7 March 1949<sup>9</sup>, to protest to the Roumanian government against the nationalization of American property, since this was seen as a breach of the provisions of the peace treaty. In conformity therewith the United States claimed as its main point the return of the property to the owners<sup>10</sup>.

Cases where nationalization of foreign property with compensation can be regarded as contrary to international law, as a result of the breach of special provisions in treaties, are rare<sup>11</sup>. The verdict of international law on these situations is, however, unequivocal.

the currency of their own country freely at a rate of exchange that is just and reasonable". 1 *U.S.T.* 1950, p. 792.

5. Cf., for example, the treaty concluded in 1953 between the U.S.A. and Japan, art. VI, cl. 4: "Nationals and companies of either Party shall in no case be accorded within the territories of the other Party, less than ... most-favoured-nation treatment with respect to the matters set forth (above) ..." Cf. *UN.doc. A/AC.97/5*, p. 181.

6. *U.N.T.S.*, vol. 42, p. 66.

7. The same was in fact the case in Bulgaria.

8. Cf. *Dept.St.Bul.* (1948) vol. 19, p. 408.

9. Cf. *Dept.St. Bul.* (1949), vol. 20, p. 391.

10. *Ibid*, p. 392.

11. Cf. however the *Case of certain German interests in Polish Upper Silesia* (1926) *P.C.I.J. Series A*, no. 7.

## § 15

### IS NATIONALIZATION WITH COMPENSATION ALWAYS LEGAL: CONCESSIONS

#### A. *The Problem.*

In the foregoing chapters we have considered how far the payment of compensation is the necessary and sufficient condition for the nationalization of alien property to be in agreement with international law. As a result of this examination it has been shown that compensation is a necessary condition in cases of foreign property acquired in accordance with the municipal legislation of the nationalizing State and that, broadly speaking, payment of compensation is sufficient to enable nationalization to conform with the claims of international law. On the subject of provisions in treaties which secure foreign property against interference, it has been shown that acts of nationalization contrary to such treaties must be regarded as illegal, even though the nationalizing State pays the compensation considered sufficient by the claims of international law.

The reasons for this difference in treatment, namely the recognizably valuable interests which lie behind the principle *pacta sunt servanda*, have been dealt with previously and will therefore not be considered again here.

The importance of the legal basis between the nationalizing State and the owners of alien property or their home State, is emphasized by this and raises quite naturally special problems regarding the relationship between the nationalizing State and the private party in cases where there is property which was not acquired directly in accordance with municipal law, or in accordance with treaty, but in accordance with a direct agreement with the government of the country for the acquisition of property, rights, or interests in the State in question.

Such agreements have taken on immense importance in the past few years. They reflect every side of the life of the community and are an expression of the increase in the tasks of governments which the latest developments involve. In many cases a State lacks the necessary capital and experience to carry out certain projects, and it has proved practical to conclude agreements, contracts, with foreign private persons or companies for the completion of these projects. The international importance of these

transnational<sup>1</sup> agreements will be examined later, but it may be reasonable to illustrate the problem by quoting some of the types of contract which are most commonly used in this way between a government and foreign private citizens.

- Ex. 1: State A concludes a buying contract with a national of State B for a machine which can be used in one of the State undertakings. Such a contract is completed and comes to an end with its execution.
- Ex. 2: A shipyard in State A gives State B the right to manufacture ship engines in B on a licence basis. In this case, the exercise of contract rights takes place solely on B's territory, and the giver of the licence has only a financial claim against State B for royalties.
- Ex. 3: State A gives a private company the right to control a part of its territory for the exploitation of the natural wealth there at the discretion of the company against payment of an agreed royalty.
- Ex. 4: State A floats a government loan in State B, whose citizens by the terms of the loan contract have a claim on interests and instalment repayments against A.

These examples are not at all exhaustive even in the types they display. They serve only to demonstrate the diversity of contracts which States can possibly conclude as part of the exercise of State control, although not all State control necessitates the use of all the types of contract quoted. It should, moreover, be emphasized that not all types of contract are practical objects for nationalization. For this, the concession agreements, mentioned in ex. 3, seem particularly applicable. These will, therefore, be the subject of special analysis later.

The other types of contract are, however, included because the nationalization of concessions also raises a problem of central importance for other types of contract.

The question here is whether a State, as partner to a contract, by invoking its territorial sovereignty has the right to contrive a legal situation which destroys or restricts the contract rights which that State had guaranteed in the contract to the other private contracting party. In other words, this is the problem of whether one party to a contract, namely the State, is

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1. The expression is borrowed from Jessup *Transnational Law* (1950) and used here instead of the perhaps more appropriate expression international agreements. The purpose is to avoid terminology which in itself might encourage the idea that it is international rules which are the decisive basis for the settlements in these agreements.

justified, solely because it is a sovereign State, in unilaterally altering or cancelling the contract itself or (and this is the same in practice) the accepted basic norm on which the existing transnational contract was founded.

Thus, conceivable examples are that a State in an emergency situation might prohibit payments to foreign countries even for goods already delivered, or that a State might introduce a law on the special taxation of royalties, also including the royalties due from the State itself to foreign countries, or that a State would carry out the nationalization of a concession for the winning of oil.

That a State should have such powers causes strong reactions immediately. It is felt as a positive violation of the sense of justice that a State should unilaterally be able to cancel an undertaking given in the form of a contract, while a similar undertaking authorized by treaty should be respected. Such a result, based on a distinction between contract and treaty, appears particularly unreasonable in consideration of the fact that political and economic (and thus not legal) circumstances often determine whether a right is given to a foreign State or to a foreign company which, at all essential points, has the State behind it, or whether rights are given to private foreign persons. Similarly it will often depend on fortuitous internal political circumstances in the States contracting together whether the rights of private persons are contained in a contract or a treaty. Thus Guldberg<sup>2</sup> cites a number of treaties where concessions have been granted even to private persons. For example the treaty of 19 November 1930 between France and Switzerland, contains detailed provisions on the rights and duties of the concessionaire, while a complete description of the substance of the concession is laid down in the treaty itself.

The problem which is discussed here, which is often described as the problem of the "nature of the contract", is in theory solved practically everywhere by examining the legal system which governs the terms of the contract.

The reasoning is that, if a contract is governed by international law, the non-fulfilment of the contract will be judged according to the principle *pacta sunt servanda*, recognized in international law, and non-fulfilment thus becomes an international conflict which procedurally presents the opportunity of applying the rules of international law for the solution of

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2. "International Concessions, a Problem of International Economic Law", *A.S.J.G.* (1944), vol. 15, p. 48.

such conflicts, for example the rules on diplomatic protection, intervention, etc.

Thus, relative to the legal consequences, the contract or concession will be regarded as equivalent to a treaty between two States. Non-fulfilment or cancellation of treaties and contracts will be assessed legally, in the same way. The decision on whether there has in fact been a breach of contract will consequently depend on international law and on no other legal system which may be referred to in the contract or concession<sup>3</sup>.

The contrary view rests on the argument that the basis for the contract or concession is solely in municipal law. Even though the concession contains references to "general legal principles recognized by civilized nations" and perhaps even establishes a special right of arbitration, the contract or concession is to be regarded as proceeding from the municipal law of the contracting State. On this view, the private contracting party has no defence against modifications or cancellation of the contract by the State. A change in the municipal law of the country will, even if the courts are completely fair, be capable of depriving the foreigner of all the rights he should enjoy under the contract<sup>4</sup>.

It is this dilemma, here illustrated by extremes, which lies behind the problem of the "nature of the contract".

Before examining the question of the nationalization of contracts and concessions more closely, it is therefore important to clarify which interpretation of the legal position between a State and a private party to a contract is correct and reasonable.

### B. *The Traditional Interpretation.*

1. At first sight it may appear unreasonable to raise general doubts on whether the legal position between a State and a foreign citizen or a juridical person is a problem for international law. According to general international law a State has power to protect the foreign interests of its nationals and to claim that the rules of international law shall be observed by the other party. This had the effect of unrealistic sophistry when, after the nationalization of the Anglo-Iranian Oil Company in 1951<sup>5</sup>, the Iranian

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3. Cf. Harvard, *op.cit.*, p. 77.

4. *Ibid.*

5. Cf. e.g. the Iranian delegate in the Security Council of 15 October 1951. *U.N. Sec. Coun. Official Records*, 560th Meeting, p. 7 foll. According to Ford, Iran has maintained this viewpoint from May 1951 onwards.

government asserted that no conflict existed between Great Britain and Iran, but only between Iran and a private English company with whom Iran had a concession-contract. No one would have remained in doubt if Iran had nationalized the property of a British subject in Iran, since in such a case no one could justly have disputed the right of Great Britain to take up the case with the Iranian government and claim that it should be settled according to international law as applying to foreigners. When the international legal nature of a dispute between a State and a foreign citizen as a result of an action against his property acquired according to the municipal law of the State is not open to doubt, it is certainly difficult to understand that the situation by which the property was acquired by means of a contract, should cause the case to fall outside the province of international law. The fact, however, that the State taking action has not only given the foreigner the right to acquire property in accordance with municipal law, but has also concluded a specific agreement on this point, should not involve a reduction in the protection of the foreigner's rights.

That the problem was raised at all was undoubtedly due to the fear of the contracting States that a comparatively insignificant breach of a contract with a foreigner might provide a reason for political intervention by the foreigner's home State, and the conditions of the contract would then come to be regulated rather by political than by legal principles<sup>6</sup>. This fear, which is connected with the dependence of the weaker States on the

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6. In this connexion it is worth noticing that at the beginning of the 19th century, in Great Britain at any rate, the ruling principle was that a British subject who had dealings with foreign governments did so at his own risk. In general he was regarded as a doubtful person whom the government should not support. A typical reply from the Juridical Counsellor to the English Crown, Herbert Jenner, on 27 July 1931 states: "It has been the constant practice of Her Majesty's Government to decline to interfere in the transactions between British Subjects settled and carrying on trade in foreign countries and the Government of those countries. Such transactions are entered into by the individuals upon their own responsibility and without any reference or sanction of Her Majesty's Government, whose interference for the purpose of enforcing the fulfilment of such contracts on the part of foreign Governments, they have therefore no right to expect, and which might and in many cases probably would involve the two Governments in discussions of an unpleasant nature and eventually lead to serious misunderstandings between them. Cf. Mc.Nair, *International Law Opinions II* (1955), p. 201.



Great Powers with their great capital and technical resources, has naturally been specially observable in the conclusion of complicated contracts, which are often very liable to produce doubtful issues. That the problem of placing the non-fulfilment of transnational contracts outside the domain of international law arises from special considerations for the contracting State, is clear from the arbitration decision in the *International Fisheries Company Case* (1931). The Arbitration Committee stated:

"If every non-fulfilment of a contract on the part of a Government were to create at once the presumption of an arbitrary act, which should therefore be avoided, Governments would be in a worse situation than that of any private person, a party to any contract <sup>7</sup>."

2. As set out in Garcia Amador's 4th report to the International Law Commission <sup>8</sup>, the traditional interpretation has so far been that the non-fulfilment of a transnational contract was not the concern of international law, since the contracts in question should be judged according to municipal law, although it was not always clear which municipal law applied. Garcia Amador quotes in support the judgment of the Permanent Court of International Justice in the *Serbian Loans Case* (1929), and the similar judgment in the *Brazilian Loans Case* <sup>9</sup>, where the court stated:

"Any contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country."

Jessup <sup>10</sup> too, assumes that "a simple breach of contract . . . constitutes a violation of local but not of international law".

Only a situation where there are violations of other rules of international law concerning the treatment of foreigners by the State, qualifies the dispute for consideration under international law, but not the single circumstance that there has been a breach of the contract entered into.

Thus Borchard asserts <sup>11</sup> that diplomatic intervention in the event of a breach of contract "... will not be for the natural or anticipated consequen-

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7. *R.I.A.A.* vol. IV, p. 700. The American member of the arbitration court, Fred K. Nielsen, however, dissented, appearing to hold the view that a breach of contract is an automatic violation of international law.

8. *U.N. doc. A/CN.4/119*, p. 69.

9. *P.C.I.J.* Series A, No. 20/21, p. 41 and p. 121.

10. *A Modern Law of Nations* (1948), p. 109.

11. *The Diplomatic Protection of Citizens Abroad* (1915), p. 284.

ces of the contractual relation, but only for arbitrary incidents or results, such as a denial of justice or flagrant violation of local or international law".

In his dissertation "The Place of the Calvo Clause in International Law"<sup>12</sup> Lipstein states that "... the failure of States to fulfil a contractual obligation (towards an alien), unless such a failure is confiscatory or discriminatory in nature, does not automatically result in a breach of international law".

Feller<sup>13</sup>, too, holds the view that a breach of contract is not automatically a problem for international law. Thus he states: "The overwhelming weight of opinion, both of writers and tribunals, has been, however, to the effect that international responsibility for a breach of contract does not arise until there has been a 'denial of justice', i.e. until the alien has applied to the local authorities and courts and adequate redress has been denied him".

Friedman<sup>14</sup> accepts that the interference by a State in existing concessions falls outside the rules of international law on expropriation, since the position here is rather one of violation of contractual obligations, which in this author's opinion must only be judged under municipal law. When other writers have supposed that the confiscation of a contract raised problems of international law, it is only because these authors have failed to see that this can only be true in cases where no local legal remedies are available, or where there is a clear denial of justice. Only such a denial of justice can bring the conflict on the non-fulfilment of the contract on to the international plane.

The view which has been expressed by the authors quoted here seems, apart from its realistic application to States as contracting partners, to be influenced in essence by principles of dogma according to which international law is solely a legal system which governs relations between States, and thus every legal situation where one party is not a State is to be referred to municipal law. A legal situation, which according to this severe distinction comes under municipal law, can, however, come under international law if the home State of the private person involved takes up the case against the contracting State. The effect of this is that not only the

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12. *B.Y.I.L.* (1945), p. 134.

13. *The Mexican Claims Commission* (1935), p. 174.

14. *Op.cit.*, p. 151 ff.

procedural form but also the legal basis passes to international law, thus completely changing the nature of the legal situation.

Fischer-Williams<sup>15</sup> is a typical exponent of this view when he asserts, on the subjects of obligations to pay debts (State loans) under contract:

“When the debt is from State to State, we have at once a relationship within the sphere of international law ... where the contract from which the debts arises is between a State and a foreign individual, the matter becomes one of international law in the strict sense only if and when the State of the individual makes his cause its own and addresses itself diplomatically to the contracting State.”

Also relevant here is the case of the *Mavrommantis Palestine Concessions* where the Permanent Court of International Justice expressed similar views<sup>16</sup>, and the *Anglo-Iranian Oil Company Case (Jurisdiction)*<sup>17</sup>, where the court clearly rejected the view that the concession concluded between Great Britain and Iran was of the nature of a treaty.

Closely connected to this misinterpretation of the legal system of international law is (as Mann<sup>18</sup>, too, has shown) a misunderstanding of the concept of sovereignty, a confusion of the power to conclude contracts and the duty to fulfil them when they are concluded, and the view that a State is not bound by its own promises, which is also traceable to the influence both of municipal law in States where the State cannot be sued in the courts of the country, and of the international rules on immunity.

There are, then, many points at which the view here described can be attacked, and these have been abundantly exploited by writers who support the opposite interpretation, namely, that the legal system which must form the basis for the evaluation of national contracts is the legal system of international law.

Kelsen finds support for this view in the Drago-Porter convention of 1907 which prohibited intervention consequent on the failure of a State to fulfil contracts it had concluded with foreign nationals. According to this author the convention confirms the general rule of international law, that violation of private legal obligations between a State and a foreign national

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15. *Chapters on Current International Law and the League of Nations* (1929) p. 259.

16. Cf. *P.C.I.J.* Series A, no. 2.

17. Cf. *I.C.J. Report 1952*, p. 112.

18. “The Law Governing State Contracts”, *B.Y.I.L.* (1944), vol. 21, p. 13

constitutes a violation of the international rights of the State whose national has suffered losses <sup>19</sup>.

James N. Hyde <sup>20</sup> declares that a breach of contract is, according to international law, an illegality for which the State is answerable. This interpretation is consistent with the debate in the United Nations, since no State, according to Hyde, has at any time denied the possibility of concluding such agreements <sup>21</sup>. Similarly, Hyde supports the recognition of the international status of transnational agreements by the judgments of a number of international arbitration boards, for example in the case of *The Petroleum Development Ltd. v. The Sheik of Abu Dhabi* <sup>22</sup>, where the arbitrator, Lord Asquith, came to the conclusion that the decisive law which should form the basis of judgment were general legal principles, which he described as "this modern law of nature". This, says Hyde, is a sign that the arbitration court applied "international law by analogy".

La Pradelle <sup>23</sup> sets out similar views in the report made by him to the Institut de Droit International, but disagreement about the report was evident on this point, since a resolution on special protection under international law of contract rights was rejected <sup>24</sup>, although by a narrow majority <sup>25</sup>.

On the whole these last principles have won a great deal of support in the United States, and this is only natural, since in this field the United States, in its capacity as a creditor nation, has a special interest in claiming international protection for transnational contracts.

These views have also gained support in the American section of the

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19. Cf. "Théorie Générale du droit international public; problèmes choisis". *Recueil des Cours*, vol. 42, p. 257.

20. *Op.cit.*, p. 862.

21. This view is not very convincing, since the debate as quoted above seems to acknowledge the principle of the unilateral cancellation of these contracts, at any rate in the case of nationalization.

22. Cf. *I & C.L.Q.* (1952) p. 247 and *A.J.I.L.* (1953) vol. 47, p. 156.

23. *Annuaire* (1950), vol. 43 I, p. 67.

24. *Annuaire* (1952), vol. 44 II, p. 319.

25. It may perhaps seem extraordinary to state with what majority a scientific view was carried or rejected. It has of course nothing whatever to do with the correctness of the view, and scientific congresses are, after all, scarcely fitted to make decisions on difficult juridical questions. The voting figures are quoted only to emphasize the disagreement between those present.

International Law Association<sup>26</sup> where it is claimed, against the background of the Swiss decision in the case of *Lossinger & Co.*<sup>27</sup>, that the principle, *pacta sunt servanda*, is completely applicable to contracts between a State and the nationals of foreign States<sup>28</sup>.

In 1929 Harvard Law School propounded the following standpoint<sup>29</sup>:

"A State is responsible if an injury to an alien results from its non-performance of a contractual obligation which it owes to the alien, if local remedies have been exhausted without adequate redress."

The preparatory committee for the *Hague Codification Conference 1930* also took the view that international law normally embraced the breach of contracts discussed here, but it was considered appropriate to distinguish between direct actions against the contract and general legislation which, although having quite another main purpose in view, was in fact incompatible with the obligations of the State under the contract<sup>30</sup>. In the last named cases it depended "on circumstances" whether the State was answerable to international law. However, there was no doubt whatever that the question should be judged according to the rules of international law.

These views were also adopted in the Harvard Law School's latest convention draft of 1959<sup>31</sup>.

Similar principles have been clearly expressed by Stephen M. Schwebel<sup>32</sup> in a recently published dissertation. He examines the answer in detail to the

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26. A Response by the Committee on the Study of Nationalization of the American Branch to the Questionnaire of the International Committee on Nationalization (1958), p. 17 ff. (duplicated).

27. Cf. *P.C.I.J.* Series C, no. 78 (1936) where it states: "The principle *pacta sunt servanda* ... applies not only to agreements directly concluded between States, but also to those between a State and foreigners ..." This view was submitted by the Swiss representative during the case. The case, however, was settled by agreement, and thus the views of the court are not available.

28. Similar views were put forward by France in the case concerning *Certain Norwegian Loans* (1957) *I.C.J. Rep.* (1957) p. 9. Nor did the results of this case throw any light on the attitude of the court to the question.

29. *A.J.I.L.* (1929), vol. 23, p. 168.

30. *L.o.N.Doc.* 75.M.69, 1929, p. 33.

31. *Op. cit.*, p. 75.

32. "International Protection of Contractual Arrangements", *Proceedings of the American Society of International Law* (1959), p. 266.

question raised here, and it will be useful to go carefully through the arguments he produces.

The author clearly dissociates himself from the view that transnational contracts are equivalent to international treaties, but declares that they are, nevertheless, "instruments of an international character whose violation does give rise to a violation of international law"<sup>33</sup>. Four reasons are adduced to support this opinion.

The first is that the individual is only apparently a party in the case. In reality from the very start his home State is behind him, and this State is in fact the interested contracting party. If the transnational agreements are not recognized as being within the sphere of international law, there is a contradiction between the recognition in international law of the role imposed on the home State of the investor and the activity and importance which this State actually has in the contractual arrangement.

The second reason is that the view that an individual cannot be a subject for international law has long been abandoned in current theory. Thus, there is nothing to prevent an individual entering into agreements with another party subject to international law – a State – for the conclusion of internationally legally binding contracts.

The third reason given is that direct reference is frequently made in contracts to "such principles and rules of international law as may be relevant ..." Among these principles and rules of international law there also appears the rule of *pacta sunt servanda*.

Finally, Schwebel draws attention to the inequality involved in non-recognition that transnational agreements fall within international law. He quotes as an example that the business of investing abroad for the Soviet Union is actually carried on by the Soviet government, which concludes treaties on arrangements for loans, building enterprises and exploitation of oil with a large number of foreign States. Violations of such treaties are regarded by all as violations of international law. It would be a particularly unreasonable result if violations of completely similar agreements with, for example, American companies, where such agreements have been concluded in the form of contracts, should be presumed to fall outside the control of international law.

The evaluation of this very widespread, and to some degree well-founded, view follows below. First let us direct our attention to an author who has sought to find a very different solution to this problem.

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33. *Ibid.*, p. 267.

3. In his dissertation "The Status of Foreign Private Interests Stemming from Economic Development Agreements with Arbitration Clauses"<sup>34</sup>, A. Verdross deals only with the form of transnational contracts which are here described as concessions. The author lays decisive emphasis on the circumstance that these contracts evolve from agreements between a State and a foreign natural or juridical person *inter pares*. By an expression from Schwarzenberger<sup>35</sup> these contracts are described as quasi-international agreements. They are neither contracts which are governed by the municipal law of any State, nor are they international treaties, since they are not concluded between parties subject to international law<sup>36</sup>. The quasi-international agreements thus form a third group of agreements, which have as their characteristic that private rights which are authorized in the contract are governed by a new legal order created by the common will of the parties, that is to say the agreed *lex contractus*<sup>37</sup>. This is not incompatible with the doctrinaire opinion by which all law can be divided up into either municipal law or international law, because this interpretation has already been shown to be deficient when applied to agreements between employees in the international organizations and those organizations. These agreements are also governed by a special legal system which has been called "interne Staatengemeinschaftsrecht"<sup>38</sup>.

In his definition of these quasi-international agreements Verdross emphasizes the following points: *that* these agreements are concluded or ratified on behalf of the State which is a contracting party by the instrument which is normally authorized to conclude internationally legal treaties; *that* these agreements need not necessarily be controlled by the existing legal systems, but that on the contrary there is nothing to prevent these agreements from creating even their own legal system, since every positive legal system presupposes a prepositive basic norm, and on the other hand, a prepositive

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34. *Österreichisches Zeitschrift für öffentliches Recht* (1959), vol. IX, p. 449–462.

35. *International law as applied by International Courts and Tribunals* (1957), 3rd ed., vol. I, p. 578.

36. *Ibid.*, p. 451–52.

37. *Loc. cit.*

38. Cf. the criticism directed at this concept by Alf Ross in "Eine Österreichische Völkerrechtslehre", *Jus Gentium* (1951) vol. II, p. 224–226, and in support Poul Henning Fischer, *Det europæiske Kul- og Stålfællesskab* (1957) p. 140.

basic norm may create a new legal system, *lex contractus*; that this *lex contractus* governs the legal situation between the partners in exhaustive detail, certainly frequently with references to other existing legal systems, but this does not alter the fact that it is *lex contractus* which is applied formally; and that the quasi-international agreements, practically speaking, always contain detailed provisions on arbitration which must be applied when disputes arise between the parties. This last circumstance emphasizes the completeness of the legal system which governs the contract.

As to the law which shall form the basis of a possible arbitration action, the author establishes that this must be *lex contractus*, which can call on the municipal law of the parties, on general legal principles, on international law applied *bona fide*, on "good faith and pure belief and upon the interpretation of this agreement in a manner consistent with reason ..." <sup>39</sup>, or on a combination of these legal rules. If *lex contractus* gives no clear indications of the legal rules by which the decision is made, the arbitration board may itself decide the law to be applied, having regard that the agreements in question were concluded *inter pares*. It is, however, not necessary for all questions to be judged under the same legal system, since this is dependent only on the kind of question and its connexion with the declared wish of the parties to conclude an agreement *inter pares*.

On the basis of these principles, Verdross submits that the contracting State cannot unilaterally annul a quasi-international agreement by pleading its sovereignty. Just as a State is capable of concluding binding international treaties, so in the same way, precisely as a consequence of its sovereignty, it can conclude binding quasi-international agreements, since these, too, are concluded by the authority responsible for treaties. Only in the event of *force majeure*, or if the maintenance of the agreement would militate against the welfare of the State, may the agreement be set aside, but then only after a board of arbitration has also declared its agreement <sup>40</sup>. The principle of *pacta sunt servanda* is thus also valid for these agreements.

### C. Evaluation.

These opinions, that transnational contracts are to be regarded as in all respects subject to international law, with the result that a violation of the

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39. Cf. the agreement between the Petroleum Development (Qatar) Ltd. and the Ruler of Qatar of 17 May 1935, *ibid.*, p. 457.

40. *Ibid.*, p. 458-459.



contract is a violation of the international legal principle *pacta sunt servanda* and consequently contrary to international law, are not convincing.

The arguments for which Schwebel has made himself largely, but not exclusively, the spokesman, can be refuted without great difficulty.

Even a normal export contract between private traders received the stamp of State approval in the postwar economy, and in these cases also governments often stood close behind their citizens. This, however, either alone or connected with any other arguments, however weighty, cannot possibly lead to the position that such contracts are to be regarded as documents of international law, with all the consequences which the author attaches thereto.

When the author states that an individual can be the subject of international law, he is of course right. A distinction between subject of rights and subjects of duties would, however, have shown that this circumstance is not in itself sufficient to carry the main argument of the author. Even if one may not recognize the exposition in Danish theory of the difference between the legal subjectivity of the individual relative to rights and relative to duties, it must be unsound to conclude from the principle that an individual can be subject to international law, that the individual is in fact so subject.

The substantial references in the concessions to international law show nothing of how far the basic norm which is decisive for the concession is also that of international law. Such a reference is a clause in a contract which is not based on international law. It appears incompatible with the usual principles of logic to assume that such a clause in a contract can alter the basis of the contract itself.

The basic norm is not to be found in the concession, and what Schwebel has said on this point does not, in fact, conflict with the opposite conclusion to the one which he reaches.

It is true that a judgment of concessions with reference to municipal law will in many cases show a difference in treatment, but a difference in treatment will always exist from the fact that the contracts discussed here fall "half-way between"<sup>41</sup> rights of ownership acquired under municipal

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41. Cf. A Farmafarma "The Oil Agreement between Iran and the International Oil Consortium, the Law Controlling", *Texas Law Review* (1935) vol. 4, p. 269 thus speaks of "a jurisprudence intermediate between public international law and private international law ..."

legislation and rights acquired directly by reason of a treaty. There is nothing which leads specifically to the conclusion that the distinction, the dividing line between legal situations governed by international law and those governed by municipal law, will be found precisely at the place where Schwebel has declared it to be.

From this it appears that the view that transnational contracts have exclusively international status can hardly be maintained. It seems as unsatisfactory as the view that transnational contracts never have international status, in the sense that the rules of international law are irrelevant for judging contracts.

In putting forward his theory there is no doubt that Verdross has made a specially valuable contribution to the solution of the problem of whether and to what extent the State, as a contracting party in a transnational agreement, can abolish the basic standards on which the contract is founded.

It must also be agreed that *lex contractus* must be accepted as of decisive importance in judging the legal relations of the parties and that not all disputes between parties are necessarily to be decided by reference to the same legal system. On this last point in particular Verdross seems to have advanced significantly beyond the usual doctrine.

Nevertheless the views of Verdross are not entirely satisfactory. From the standpoint of legal theory, it is true that a prepositive basic norm can create the basis for a new legal system. But, when an attempt is made in this author's works to discover what basic norm it is which in his opinion creates the new legal system between the State and the private person as contracting parties, *lex contractus* appears. Moreover, it can be objected that *lex contractus* gives no guidance in cases where the agreement contains no information on the law by which a decision is to be made, nor does *lex contractus* offer any solution in a situation where the State wishes to abolish the whole basis of the contract by invoking its sovereignty. In the latter case the author puts forward *pacta sunt servanda* as a basic norm, in other words international law, and thus his construction of an independent legal system for quasi-international agreements in fact falls to the ground.

Generally speaking, this construction seems rather unsatisfactory and in fact quite superfluous. Not only are countless agreements concluded within every municipal legal system containing clauses on arbitration and specifications of the material norms which shall be taken as the basis for

decisions in the event of a dispute between the contracting parties, but such agreements are also well known between private persons of different nationality. Particularly in the last named situation conditions are found which closely resemble the legal situation described by Verdross. There is, of course, nothing to prevent the view that all these agreements are independent legal systems, but the relevance of such a construction is extremely doubtful, since if in every case we attempt to explore what Verdross described as the prepositive basic norm, to be applied in cases where the basic terms of the contract have been violated by one of the parties, the inevitable conclusion is that these standards are either maxims contained in most municipal systems of law that agreements shall be observed, or the basic standard of international law, *pacta sunt servanda*.

The conclusions reached by Verdross, however, make it clear that the traditional limitation of the problem found among the writers referred to previously is scarcely reasonable.

Thus it is not reasonable to expect that all legal questions which could arise between two parties to a transnational contract should be decided according to the same legal system, i. e. either according to municipal law or according to international law.

Even if it has been clearly laid down by which legal system changes in the basis of a transnational agreement shall be decided, it is not to be assumed, a priori, that all changes must be judged according to the same legal rules within the system in question.

These are the two questions which must now be the subject of a detailed analysis.

#### D. *What Legal System Governs a Transnational Agreement?*

If the question of which legal system governs a transnational agreement is to be solved by working from theoretical considerations based on realistic observations, it must be acknowledged that the views presented in the current doctrine carry considerable weight.

Thus, it is right that essential consideration must be given to the State as contracting party. If a State could always expect that every dispute on the interpretation of the contract could be regarded as an international matter, the State would undoubtedly be in a considerably weaker position than the private party. It must be in the interest of the State to avoid such a situation, since disagreement on the interpretation or fulfilment of

the contract need not necessarily be regarded as a sign of lack of good-will<sup>42</sup>.

This opinion seems in fact to be one of the specific reasons why many States have taken the step of inserting special clauses on arbitration in a number of these treaties. In cases covered by the provisions on arbitration, the private party may be precluded from calling on his home State, providing the other contracting party, the State, loyally fulfils the arbitration decisions. Nor will the private contracting party have any interest in any other course than to claim that the dispute which has arisen shall be dealt with according to the rules in the contract, whether these refer back to the municipal law of the State, the law of a third State, or general legal principles recognized by civilized nations.

The situation, however, is quite different when the contracting State acts contrary to the agreement concluded, not as a result of the interpreting by the State of the agreement in a special way, but on the sole grounds of circumstances which exist outside the agreed contract. This can happen when a State pleads its rights to control conditions in its own territory in the way which is best and most expedient for its own citizens and in the higher interests of the State. Such an occurrence can find expression in altered legislation which is not compatible with the contract concluded.

It is conceivable that in extreme cases the State as contracting party will annul the contract or its provisions on arbitration and on what legal rules shall be decisive. Both in these cases and in cases where the State has introduced other legislation which conflicts with the contract, the private party is powerless, unless it is recognized that a conflict of this kind ought to be regarded as within the domain of international law and be solved according to the material standards of international law, despite the fact that the contract contains a clause on arbitration which has now in fact become entirely worthless<sup>43</sup>.

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42. Cf., inter alia, the arbitration case discussed later between *Aramco and Saudi Arabia* (1958), where the good will and friendly relations of the parties were strongly emphasized. Cf. the judgment p. 34 "The Parties have always recognized that the present arbitration is based on their traditional relations of friendship and good will, and that they respect all the obligations they have undertaken and now undertake".

43. F. A. Mann, "State Contracts and State Responsibility", *A.J.I.L.* (1960) vol. 54, p. 572-591, is apparently of another opinion. Starting from the principles which exist in international private law, this author comes to the conclusion

The task for international legal theory must consequently be to find a method of deciding when a dispute between a State and a private contracting party is by its nature one for submission to international law and when this is not the case. This problem has, however, nothing to do with the "legal nature of the contract", as stated in the traditional doctrine. Quite apart from the objections on method which can be directed against a deduction from a concept such as "the nature of the contract", the circumstance that a contract has been concluded between the parties must only be regarded as one factor, although a very essential factor, when seeking a solution of the dispute in question. The legal system by which such agreement should be resolved, must depend on the nature of the dispute. If it is one of such a kind that (as often) the interests and expectations of the parties are met by a solution in accordance with *lex contractus*, or, possibly, the municipal legal systems of the parties, then either one or the other will provide the basis for decisions. If, however, the dispute is of a kind which makes a solution in accordance with the municipal legal system of the parties in accordance with the agreed *lex contractus* meaningless, since it would be essentially at variance with the preconditions of the contract in question, then the solution must be in accordance with international law.

The decisive criterion as to whether a dispute on the interpretation or fulfilment of an international contract falls within international law or municipal law must consequently be the character of the dispute as expressed in the submission of the contracting State. The word "submission" is, however, taken here not in its procedural meaning, but as covering the true legal position which the State is pleading. The way in which the State as contracting party formulates its submission cannot be decisive, since the wording may be incorrect, either as a result of a mistake, or as a result of the conscious desire of the State that the dispute shall be decided according to international law. When evaluating the nature of the dispute, it must therefore be reasonable to interpret the formal submission to determine whether this corresponds with the real problems behind the dispute <sup>44</sup>. If

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that alterations in the law governing the terms of the contract cannot be regarded as a problem of international law any more than as a breach of international law, since the private contracting party must be prepared for the possibility that *lex contractus* will be altered, and such an alteration is, therefore, in reality not a breach of contract (p. 581).

44. Cf. the *Aramco Case* (1958) quoted above where a similar problem was discussed.

the submission of the contracting State is based on a special legal position and invokes the content of the contract, the dispute is not one for international law but should be resolved in accordance with the procedural and material rules which the contract contains on this subject. If the contract is silent on these points, guidance may be sought in private international law. In neither case is the dispute a subject for international law.

If the contracting State pleads a special legal position on the grounds that the agreement should be altered or annulled for one or another (higher) reason, the dispute is one for international law and should be resolved according to the rules of international law. The procedural and material rules which the contract contains will rarely give any guidance in this situation where one party wishes to renounce the contract, and there is no evidence that a dispute of this kind is to be distinguished in type from the disputes which international law is designed to regulate.

These views seem compatible with the latest international practice in this field <sup>45</sup>.

An example is the judgment made on 23 August 1958 in the arbitration between *The Arabian American Oil Company (Aramco) and Saudi Arabia*. Since the arbitration judgment (although it has been printed) is not publicly available <sup>46</sup>, it will be useful to examine in detail the case and the background to it.

On 29 May 1933 a number of American oil companies, which later amalgamated to become Aramco, received a concession from the government of Saudi Arabia for the exploitation of the oil resources existing in a part of the territory of Saudi Arabia. Art. 1 of the concession contains the following provision:

"The Government hereby grants to the Company on the terms and conditions hereinafter mentioned, and with respect to the area defined below, the exclusive right, for a period of sixty years from the effective date hereof, to explore, pros-

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45. On older practice cf. the cases quoted by Carlston "Concession Agreements and Nationalization", *A.J.I.L.* (1958) vol. 52, p. 260 foll. inter alia the *Delagoa Bay Case* (1891), *The May Case* (1900), *The Shufeldt Case* (1930) etc. Working on the basis of these cases, Carlston comes to a result similar to that given above. However, I cannot agree with this author when he concludes from it that concession agreements cannot be nationalized, cf. below.

46. A copy of the 130 page judgment has kindly been placed at my disposal by the Arabian American Oil Company's agent in the case, George W. Ray Jr.

pect, drill for, extract, treat, manufacture, transport, deal with, carry away and export petroleum ... It is understood however, that such right does not include the exclusive right to sell crude or refined products within the area described below or within Saudi Arabia <sup>47</sup>."

In accordance therewith, Aramco exploited the oil wells concerned, which yielded steadily increasing amounts of oil, and Aramco arranged that the oil should be transported to buyers in ships either belonging to or chartered by the companies which were connected commercially with Aramco, or in ships provided by the buyers.

On 20 January 1954, however, an agreement was concluded between the Saudi-Arabian government and A. S. Onassis and the companies represented by him, whereby Onassis, who was Greek by birth and an Argentinian citizen resident in Monte Carlo but domiciled in Paris, received permission to establish a company, the "Saudi-Arabian Maritime Tankers Company Ltd.". The seat of the companies was to be in Saudi Arabia. As a minimum the company should control a tanker fleet of 500,000 tons to be registered in Saudi Arabia and sail under the flag of Saudi Arabia.

In accordance with art. 4 of the agreement, the company should have priority rights for the transport of oil from Saudi Arabia for a period of at least 30 years.

By various letters, including one of 23 January 1954, Aramco was informed that the agreement had been concluded, and this led to a sharp protest by that company on the grounds that the agreement with Onassis was contrary to the concession agreement of 1933. The government then proposed that the dispute be referred to an arbitration court as provided in art. 31 of the concession <sup>48</sup>.

On 23 February 1955 the parties agreed on terms of reference for arbitration, containing the questions for decision by the court.

Aramco put forward a single question, namely, how far art. 4 in the agreement of the government with Onassis was in conflict with Aramco's right under the concession. The government of Saudi Arabia formulated three questions, namely, *inter alia*, whether Aramco had any form of rights from the concession in connexion with the transport by sea of the products produced by Aramco, and, if these rights existed, whether the concession gave Aramco the right to "refuse or deny a Government requested preferential treatment to tankers flying the Saudi-Arabian flag."

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47. *Ibid.*, p. 68.

48. *Ibid.*, p. 24.

In the course of the case the government submitted that the arbitration court should pronounce on the position of the Aramco concession in relation to the right of the government, by reason of its sovereignty, to create a monopoly for the transport of oil and to impose recognition of this on the other contracting party <sup>49</sup>. The government underlined its competence to exercise control in matters affecting the State, since these competences issued from the sovereignty of the State <sup>50</sup>. The court of arbitration, however, rejected the view that the case was essentially a conflict between an agreement and the sovereignty of the contracting State. The court came to the result that both the concession and the agreement with Onassis issued from the sovereignty of Saudi Arabia, and that thus the problem was a problem of interpretation only, namely, whether the earlier agreement was incompatible with the later.

This limitation of the problem, according to which the case was solely concerned with an examination of the legal position of the parties relative to the wording and general content of the agreement concluded between them, was also decisive in determining what law should form the basis for the interpretation of the concession agreement.

Art. IV of the arbitration agreement contains the following statement on this:

"The Arbitration Tribunal shall decide this dispute

a) in accordance with the Saudi-Arabian Law ... in so far as matters within the jurisdiction of Saudi Arabia are concerned.

b) in accordance with the law deemed by the Arbitration Tribunal to be applicable in so far as matters beyond the jurisdiction of Saudi Arabia are concerned."

In fact, art. IV of the agreement did not restrict the powers of the court freely to make a decision as to what law should form the basis, since the criteria available for deciding when Saudi-Arabia law should apply were particularly obscure. The only point that emerges with certainty from art. IV of the arbitration agreement is that it was perfectly clear to the parties that different legal systems might be applied for deciding different questions connected with the exploitation of an oil concession <sup>51</sup>.

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49. *Ibid.*, p. 38.

50. "[The Government] has emphasized the regulatory power of the State, regarded as an element of its sovereignty ...", *ibid.*, p. 39.

51. *Ibid.*, p. 46.



To reach a decision on what should form the basis for its judgment the court, in agreement with traditional views, examined the “juridical nature”<sup>52</sup> of the concession agreement, and came to the conclusion that the concession “has a contractual character”, although this declaration did not appear to bring the solution of the problem any nearer. The court decided that since the concession agreement was not concluded between two States, but between a State and a private American company, it could not be judged according to international law<sup>53</sup>.

This categorical point of view was, however, not maintained.

In its conclusion, the court came to the result that the problems for decision by the arbitration court must be resolved (and this also is undoubtedly on the principles expressed above) according to municipal law, in which connexion stress must be laid on the content of the concession, the close bonds with Saudi Arabia and recognized international customs within the oil industry (which also must be regarded as being municipal law). The arbitration court, however (and this is to be specially significant in this connexion) acknowledged:

“... that Public International Law should be applied to the effects of the Concession, when *objective reasons lead it to conclude that certain matters cannot be governed by any rule of the municipal law of any State*, as is the case in all matters relating to transport by sea, to the sovereignty of the State on its territorial waters and to the responsibility of States for the violation of its international obligations<sup>54</sup>.”

Although the court gave no general guidance as to when international law governs the legal relationship between partners to a contract, and without accepting in full the examples given by the court as expressing a logical basis for discrimination, it must be said that, during its careful analysis and discussion of this problem, the court in fact deviated from the traditional principle according to which either municipal law or international law is decisive for resolving questions arising from transnational contracts.

The answer to the problem of which legal system shall be taken as the basis for decision depends on the nature of the objects in dispute. On this point the arbitration court came to a result which illustrates and emphasizes the conclusion of the analysis carried out above.

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52. *Ibid.*, p. 48–57.

53. *Ibid.*, p. 58.

54. *Ibid.*, p. 65, my italics.

*E. Is the Nationalization of a Concession Legal?*

It follows from the examination up to now that the question of the nationalization of a transnational contract, and for all practical purposes that means a concession, must be decided only according to the rules of international law. We must therefore analyse the content of these rules more closely.

It has been established above that nationalization of alien property involves the nationalizing State in liability to pay compensation. The special problem which arises when concessions are nationalized cannot concern liability to pay compensation. There are no special features among the rights granted to foreigners in concession agreements which can in any way imply that these rights are less protected than the rights which foreigners acquire in other States without special contracts simply in accordance with local legislation. All are agreed on this. The same is true of the protection which is contained in the doctrine of non-discrimination and the protection which can be derived from the treaty obligations of a nationalizing State.

The problem is only whether international law affords better protection against nationalization to rights granted in a concession than that extended to other rights of aliens. There must be a special examination of whether a special factor is present in cases where the State as a party to the concession has specifically bound itself not to nationalize the rights of the private contracting party.

Before examining the theory of this, it may be useful to examine more closely the background to these concessions,<sup>55</sup> since here we may possibly find one of the causes why the problem of concessions is so disputed. Furthermore, only an understanding of the background and social function of the rights in question can give guidance on the real content of the rules of international law.

An examination of existing concessions shows a very varied picture. Thus, concessions are found covering banking, industrial production, trans-

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55. O'Connel defines concessions as: "A contract by which one or several persons are engaged to execute certain work in consideration of being remunerated for their efforts and expenses, not by a sum of money paid directly to them by the administration after the completion of the work, but by the receipt of a return levied for a more or less lengthy period of time on the individuals who profit from the work". *Law of State Succession* (1956), p. 106.

56. Cf. *Aramco Case* p. 52 and the references quoted there.

port, mining etc. In French theory <sup>56</sup> a distinction is made between different types of concession; for example (a) concessions where the concessionnaire undertakes to establish and manage a public institution for public service, for example a railway or tramway. Compensation for the concessionnaire comes from payment by the public for its use; (b) concessions where the concessionnaire is given the rights to produce and sell certain products, for example gas or electricity. Finally a special group is distinguished (c) mining concessions, including oil concessions. It is a characteristic of these last that for the period of the concession the concessionnaire acquires a right of ownership to the minerals specified in the agreement.

Although the distinction has essential importance for French administrative law in determining the question of how far the concession is a contract, as understood in private law, or a contract of administration, the distinction has no essential importance for judging the international legal problem of whether nationalization is legal if it takes place. The distinction has been introduced here only with a view to illustrating the diversity in the form of concessions and their function, and the distinction can be useful in directing attention to the fact that the question of compensation and certain other juridical problems <sup>57</sup> may be solved differently in those cases where the concessionnaire receives a direct right of ownership of property of real value, and in those cases where he only receives a right to receive payment for certain products.

In the case of mining concessions, especially the exploitation of the natural resources of a State, there is a form of contract which has been treated in a special way even in the municipal law of those States where these resources are to be found <sup>58</sup>.

As an example, while in *English* law <sup>59</sup> the earlier position was that the owner of land also owned the minerals beneath the surface of the land (apart from gold and silver, which belonged to the crown), the Petroleum Production Act, passed in 1934, provided that any resources of oil should also pass to the crown, which thereby received "the exclusive right of

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57. Problems of this kind arose also in the *Bremer Tobacco Dispute* (1959) *Judgment from 21/8 1959*, p. 40 foll.

58. A survey of the restrictions which are to be found in the legislation of the various States is given in *U.N.doc.A/AC.97/5*, p. 106–112.

59. Quoted according to Carlston "International Role of Concession Agreements", *Northwestern University Law Review* (1957) vol. 52, p. 625.

searching and boring for and getting such petroleum". Special regulations were issued in 1946, 1954 and 1957 with respect to radio-active minerals.

A law was passed in the *United States* in 1910<sup>60</sup> providing that land which contained minerals valuable to the American nation could be excepted from the rights of private ownership. One of the provisions of the Mineral Leasing Acts 1920 was that American authorities might only dispose of the natural resources in question by leasing.

Similar practice is followed in the *South American States*, and it is everywhere laid down that access to the exploitation of natural wealth is dependent on permission from the State authorities.

In *Denmark* law no. 181 of 8 May 1950 contains special regulations on the prospecting for and getting of raw materials under the earth in Denmark. These raw materials belong to the Danish State, and similarly the getting of such raw materials is reserved to the State (§ 1).

Although this legislation has not prevented the State granting concessions with a time limit to its own or foreign nationals for the exploitation of natural resources, the examples show that the legislation of individual States has behind it, to a higher degree than for any other goods existing on the territory, the desire of the State authorities to preserve for themselves certain rights over natural resources, and, first and foremost, the right to ensure that the goods are exploited in the best way at any given time and in the interests of the whole nation. These goods can thus in their own way be conceived of as "public goods", since the right to use them is vested in the State authorities. Another way of expressing this would be that the State as such, in the common interest, must be more strongly bound to these goods than the goods which are subject to general ownership.

On the other hand, however, it must be accepted that, also from an international viewpoint, essentially important interests, interests which are in some cases vital to the international community, are bound up with the exploitation of this natural wealth and with certain transport concessions. When, from an international economic standpoint, one considers the distribution of, on the one hand, national wealth, and, on the other, national capital and with it the means of exploiting these riches, it will be clear that certain concession agreements are not only agreements which ensure the greatest possible utilization of national wealth for an individual country, but that these agreements must also, and in a special sense, be regarded as

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60. 36 Stat.847 (1910), 43 USC 141, 142 (1952).

an essential part of international economy. These concession agreements are thus of decisive significance to a very large number of States.<sup>61</sup>

It is these two viewpoints, the national, according to which the just and fullest utilization of natural wealth is of decisive importance to the State where the wealth is found, and the international viewpoint, according to which specially strong protection of the concessionnaire inside the international community is desirable, which form the background to the significance which has been assigned to conflicts arising from the nationalization of important concessions in the past few years.

In judging how much weight shall be attached to these two apparently conflicting views, the balance, at any rate in the theory of international law, has fallen overwhelmingly on the side of the international point of view. This is not only due to factual considerations, based on the principle that it must be the task of international law to establish as widely as possible a legal position which is of the greatest possible use in and for the international community, but it is also due to doctrinaire opinions.

In the last named the reasoning is that, if nationalization of a concession is a question of international law, it follows that the concession agreement shall be judged according to the principle *pacta sunt servanda*.

As stated above, Verdross, Schwebel and Hyde support this interpretation. Further, the views were put forward at the International Bar Association's Conference in Cologne in July 1958 in a motion which stated, inter alia:

"... International law recognises that the principle *pacta sunt servanda* applies to the specific engagements of States towards other States or the Nationals of other States and that in consequence a taking of private property in violation of a specific state contract is contrary to international law<sup>62</sup> ..."

A less severe view is taken in the Harvard Law School's convention of 1959<sup>63</sup>. In connexion with a declaration that compensation shall in general be paid in the case of nationalization, but that this compensation may be spread over a number of years, it is laid down that this is only true:

"(d) (provided that) the taking is not in violation of an express or implied undertaking by the State in reliance on which the property was acquired by the alien".

The grounds for this are that if undertakings were given by the State in

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61. Cf. Carlston, *loc. cit.*

62. Cf. *International Bar Association, Seventh Conference Report* (1958) p. 485.

63. *Op. cit.*, p. 64, article 10,2.

a treaty or other international agreement, in a contract with or a concession to the foreigner etc., then the State could not be justified in taking over the property of the foreigner solely against compensation paid by instalments. If it did so a foreigner would be compelled to give the nationalizing State a loan, which he had no reason to grant <sup>64</sup>.

Since the reasoning produced is in fact applicable to all cases of nationalization, it must be assumed that the grounds the authors have for stating that there is a special legal situation in cases where the nationalizing State has given a specific or assumed undertaking are to be sought in the maxim *pacta sunt servanda*.

Other writers apparently deny that the principle *pacta sunt servanda* is directly applicable to transnational concessions. Nevertheless, these writers come to the same result, namely that nationalization of these agreements is not legal. The reason for this is that a contract, in conformity with the principles which are prescribed in most municipal legal systems, creates a supposition that each contracting party will loyally fulfil undertakings given in the contract <sup>65</sup>.

Failure to fulfil this justified expectation must consequently be regarded as a breach of international law <sup>66</sup>. This interpretation differs only in form from the doctrine of the applicability of the principle *pacta sunt servanda* to transnational contracts. As will be shown later, the justified expectation of the parties in the contracts has scarcely received support from the most recent international practice in cases of nationalization.

Broadly speaking it may be said that the obscurity of the traditional doc-

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64. *Ibid.*, p. 69.

65. See, inter alia, Dunn, *The Protection of Nationals* (1932), p. 165–167 and p. 171.

66. Similar points of view appear in the *Martini Case* between Italy and Venezuela, where speaking of the right of the State by virtue of its sovereignty to destroy the legal position of the owner of a concession, an arbitration court stated: "... It is not to be supposed that [the claimants] received the contract with the idea that the Government retained the power the following or any subsequent day to change its provisions, destroying or impairing the usefulness of the points of ingress and egress to and from the railways and mines. To allow the existence of such a power in the Government as a contracting party would be to give one of the parties to the contract the right to destroy all the interest of the other party in it." Jfr. Ralston, *Venezuelan Arbitration* (1903), p. 837.

trine and its results, which clearly do not correspond with practice, are largely due to mistaken limitation of the problem. The effort has, to a large extent, been directed towards solving the problem of the binding power of transnational agreements in general terms, that is to say towards finding uniform solutions for all forms of action by the State when it was a contracting party. As was shown earlier, there is no presumption a priori that such uniformity exists, and it must therefore be reasonable to restrict the examination of practice solely to cases where nationalization has taken place.

The nationalization of the Anglo-Iranian Oil Co. and the Suez Canal Co. provide particularly useful illustrations in this respect for the evaluation of the legality of these actions.

In 1933 the Anglo-Iranian Oil Co. had received its latest concession for the exploitation of oil products which might exist on territory specified in art. 2 of the concession<sup>67</sup>. Art. 10 contained provisions on the royalty the company was to pay to the government. Art. 21 contained the following:

"The contracting parties declare that they base the performance of the present agreement on principles of mutual good will ... as well as on a reasonable interpretation of this agreement ...

The Concession shall not be annulled by the Government and the terms therein contained shall not be altered either by general or special legislation in the future, or by administrative measures or any other acts whatsoever of the executive authorities<sup>68</sup>."

Art. 22 contained an exhaustive clause on arbitration, in the course of which it was laid down that arbitration decisions should be based on the legal principles contained in art. 38 of the statute of the International Court.

With the purpose of overcoming economic difficulties which arose after the Second World War and of satisfying nationalistic movements and forces in the Iranian people, the government of Iran attempted at the end of 1949 to increase the income from the oil wells being exploited by A.I.O.C.

When the attempt to impose the payment of larger royalties on A.I.O.C. failed, the Iranian parliament, on 30 April 1951, passed a nationalization law covering the oil industry of the whole country. The law, which consisted of a single article only, was signed on 2 May 1951 by the Shah of Iran and in its entirety read as follows:

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67. Ford, *op. cit.*, p. 234.

68. *Ibid.*, p. 244.

"For the Happiness and Prosperity of the Iranian Nation and for the purpose of securing world peace, it is hereby resolved that the oil industry throughout all parts of the country, without exception, be nationalized, that is to say, all operations of exploration, extraction and exploitation shall be carried out by the Government <sup>69</sup>."

Simultaneously with this law, the Shah signed a law on the carrying out of the nationalization as it affected A.I.O.C. A board was set up to take over the future activities of the company. It was further provided that if A.I.O.C.

"should ... make its claim for compensation an excuse to forestall prompt delivery, the Government may deposit up to 25 % of the current income, less cost of production, in the Bank Melli or any Bank acceptable to both parties to secure the claim <sup>70</sup>."

Thereafter the government had authority, but no obligation, to deposit a sum to meet possible claims for compensation.

There was a sharp reaction from the British side against the Iranian procedure. Invoking art. 22 of the concession, Great Britain called for the setting up of a court of arbitration to decide the dispute. The main point made by the British side was that Iran could not unilaterally cancel the 1933 concession without compensation. After the Iranian parliament had adopted the law on the nationalization of the oil industry on 30 April 1951, but before the law was promulgated, the British Foreign Minister, Herbert Morrison, speaking in the House of Commons, said:

"We do not of course dispute the right of a Government to acquire property in their own country ..." <sup>71</sup>

This view, which originally was certainly dictated by the wish to settle the A.I.O.C. situation by negotiation, was maintained by the British government throughout the course of the whole conflict, although Great Britain could not recognize the refusal of Iran to allow the case to go before the arbitration court provided for in the concession.

This came out clearly in connexion with the application by Great Britain of 26 May 1951 to the International Court. The application contained no submission that the act of nationalization as such was unlawful, but was only an expression of the view that "the carrying out of the Iranian

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69. *Ibid.*, p. 268.

70. *Ibid.*

71. Quoted according to Ford, *op. cit.*



laws on nationalization, in so far as these were directed to a unilateral annulment of the 1933 concession, will be a violation of international law" <sup>72</sup>.

This understanding of the British attitude was moreover confirmed in the following declaration given by Herbert Morrison in the House of Commons on 29 May 1951.

"Moreover, as His Majesty's ambassador in Teheran has informed the Persian Government, while His Majesty's Government cannot accept the right of the Persian Government to repudiate contracts, they are prepared to consider a settlement, which would involve some form of nationalization, provided – a consideration to which they [the United Kingdom government] attach some importance – it were satisfactory in other respects. Their difficulty has been and still is, that the Persian Government has hitherto not seen fit to respond in any way to their repeated suggestions of negotiation <sup>73</sup>."

However, the first negotiations between Great Britain and Iran gave no results, and on 22 June 1951 Great Britain called on the International Court to issue instructions for the application of temporary measures of protection to prevent the position of the parties from being prejudiced. The Court accepted the British application in its judgment of 5 July 1951.

In a note of 9 July 1951 President Truman offered to make a mediator available, and this offer was accepted by the Prime Minister of Iran, Mossadegh, who declared he was willing to negotiate "... provided, of course, that our indisputable national rights are respected in accordance with the laws concerning the nationalization of the oil industry ..." <sup>74</sup>.

As basis for the new negotiations, the British Government declared on 29 July 1951:

"His Majesty's Government recognize on their own behalf and on that of the Company the principle of the nationalization of the oil industry in Iran <sup>75</sup>."

The International Court published its judgment on 22 July 1952, in the course of which the court declared that it had no jurisdiction to handle the dispute between Iran and Great Britain. The court thus refrained from making any decisions on the juridical aspects of the case.

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72. Cf. *Anglo-Iranian Oil Co. Case (Jurisdiction)*, *I.C.J. Reports*, 1952 p. 95.

73. Quoted according to Ford, *op. cit.*, p. 62.

74. *Dep.St.Bul.*, (1951), vol. 25, p. 129–130.

75. Ford, *op. cit.*, p. 102.

In 1953 Mossadegh, the Prime Minister, fell and the new government arranged that an international oil consortium should be formed of 8 foreign oil companies, among them A.I.O.C. which should control 40 % of the share capital.

The consortium was granted a 25 year concession on a 50–50 % basis. In conjunction with the setting up of the new oil consortium, the Iranian government and A.I.O.C. agreed that Iran should pay compensation of £ 76 million, of which £ 51 million was set off against counter claims, while £ 25 million was to be paid in 10 equal annual instalments beginning on 1 January 1957. The agreement on compensation which is contained in the document on the formation of the consortium, also included a mutual acknowledgement of payment in full between Iran and A.I.O.C. On 29 October 1954 A.I.O.C. announced that the other companies in the syndicate would pay some \$600 million for the A.I.O.C. share in the consortium <sup>76</sup>.

This case, which contains elements of nationalism, foreign policy and international finance of considerable importance, is symptomatic of the course of a contemporary conflict between, on the one side, a private concession owner, and on the other, the State granting the concession, which, invoking political or economic aims, wishes the concession to be nationalized. Apart from being an illustration of the shortsightedness of Iranian policy, since Iran was practically bankrupt when the income from A.I.O.C. ceased, and only survived the economic crisis with the aid of a subsidy of \$51 million from the USA <sup>77</sup>, it shows that the central point in the dispute between Great Britain and Iran was the question of compensation. At no time did the British government contend that nationalization as such was illegal because it conflicted with the contract, but, on the contrary, the right of a State to nationalize was recognized. There was only the desire that these problems should be solved by negotiation and, in the words of the leader of A.I.O.C.'s negotiating delegation in Teheran on 12 June 1951, to "discover whether there is somewhere we can find a useful and profitable place for ourselves under nationalization" <sup>78</sup>.

The British view becomes even more significant remembering that art. 21 of the concession contained prohibitions against the annulment of the con-

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76. Olmstead, *op. cit.*, p. 1130.

77. *Ibid.*

78. Ford, *op. cit.*, p. 64.

cession by general or particular legislation. The assumption quoted above and often cited in theory, that such a concession creates an expectation, assured under international law, that the contract will be loyally fulfilled, in the sense that the State will refrain from interference under the plea of higher purposes of State, has therefore no support in this case as far as nationalization is concerned <sup>79</sup>.

Thus the British government accepted in the Anglo-Iranian Oil Company case <sup>80</sup> that it is:

“arguable that normally a foreign national who obtains a concession from a government must realize that the vested right thus acquired is subject to the contingency of its being terminated by the exercise of the grantor State’s sovereign powers of legislation ... on payment of compensation <sup>81</sup> ...”

Here the principle *pacta sunt servanda*, applied to concessions which are nationalized, has no other importance beyond assuring the private contracting party of a claim for compensation.

Similar views appeared in connexion with the Egyptian nationalization of the Universal Company of the Suez Maritime Canal.

On 30 November 1854 the Viceroy of Egypt drafted a concession to Ferdinand de Lesseps, in accordance with which de Lesseps was to set up and manage a company whose objects were to construct the Suez Canal and control its operation <sup>82</sup>. More detailed provisions were given in the so-called definitive concession of 5 January 1856 <sup>83</sup>. On 22 February 1866 a new concession was granted to the company by the Viceroy of Egypt. This concession declared in art. XVI that, since the company was Egyptian,

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79. For details cf. later.

80. *I.C.J. pleadings*, p. 87.

81. In the course of the proceedings, Great Britain submitted that in this case, where the concession held a special provision which prohibited an annulment, some special circumstances must exist. This view was, however, as stated, not maintained outside the court room.

82. Art. 1 of the concession. This document and others of importance in the conflict on the nationalization of the Suez Canal were published in *The Suez Canal Problem July 26–September 22 1956*. Department of State Publication 6392 (October 1956) p. 1.

83. *Ibid.*, p. 4 foll. cf. in general on the historical background of the Suez dispute, Robert Delson, “Nationalization of The Suez Canal Company: Issues of Public and Private International Law”, *Columbia Law Review* (1957) vol. 57, p. 756–759.

it was subject to the laws and customs existing in that country. In matters concerning the constitution of the company as a joint stock company and the mutual relationships between the owners, it was specially provided that these relationships should be governed by the laws valid in France for joint stock companies <sup>84</sup>.

On 29 October 1888 Great Britain, Austria-Hungary, France, Germany, Italy, the Netherlands, Russia and Turkey entered into a convention on the right of free passage in the Suez Canal. According to the preamble of the convention, the States in question were

"... desirous of establishing, by a Conventional act, a definitive system intended to guarantee, at all times and to all the Powers, the free use of the Suez Maritime Canal, and thus to complete the system under which the navigation of this canal has been placed <sup>85</sup>."

In conjunction with the evacuation by Great Britain of the Suez Canal bases in 1954, a treaty was concluded between the British and Egyptian governments wherein the principle of the international importance of the canal was re-emphasized. Thus it stated in art. 8 of this treaty:

"The two Contracting Governments recognize that the Suez Maritime Canal, which is an integral part of Egypt, is a waterway economically, commercially and strategically of international importance, and express the determination to uphold the convention guaranteeing the freedom of navigation of the Canal signed at Constantinople on the 29th of October 1888 <sup>86</sup>."

As part of the effort of the Egyptian president, Gamal Abdel Nasser, to stabilize his regime and to free it from the influence of the Western powers <sup>87</sup>, the Egyptian government issued a law on 26 July 1956 nationalizing the Suez Canal Company. All the company's assets, rights and obligations were on that day transferred to Egypt.

In art. I the law contained a provision that all shareholders should

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84. *The Suez Canal Problem*, p. 15.

85. *Ibid.*, p. 16.

86. *Ibid.*, p. 22.

87. According to a speech on the radio, in which Nasser proclaimed the nationalization law, this law came into being as a result of the refusal by the U.S.A. and Great Britain to grant Egypt a loan of 70 million dollars for the building of the Aswan dam. Later, however, Nasser gave other reasons for the nationalization. *Ibid.* p. 28.

receive compensation based on the closing price of the shares on the Paris Bourse of the day before the law came into force.

The compensation should, the law stated, be paid after Egypt had taken over all the company's property and its assets in general <sup>88</sup>.

This nationalization produced energetic and widespread activity. The Foreign Secretary of the United States, Dulles, met his French and British colleagues in London on 2 August 1956. After the meeting a statement was issued by the three governments which emphasized the international character of the Suez Canal Company, but which, in general, recognized the right of every State to nationalize local installations <sup>89</sup>.

The statement concluded with an invitation to a conference in London which took place between 16 and 23 August 1956, to which were invited the 7 States (including Egypt) which, in addition to Great Britain, had been co-signatories of the Constantinople convention of 26 October 1888, as well as 15 other States (among them Denmark, Norway and Sweden) in their capacity as large users of the Canal. Egypt, however, refused to take part in the conference. It was characteristic of the debates at this conference that, on the whole, there was agreement among the delegates that nationalization, as such, of the property of the Suez Canal Company was not contrary to international law, and, similarly, the fact that the nationalization was in conflict with a concession which was expressly to continue till 1968, was not in itself a sufficiently decisive factor to cause the nationalization to be regarded as illegal <sup>90</sup>. The decisive principle was that the nationalization was illegal because the main purpose of the concession was to assure free passage as laid down in the Constantinople convention. The concession had thereby acquired international significance and its nationalization was consequently not permissible unless it was possible to assure free passage in some other way.

Apart from the view that nationalization of a concession is not to be taken as illegal in general, the remaining discussions of the London

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88. *Ibid.*, p. 31.

89. See above p. 141.

90. Great Britain, however, could not accept this view. Mr. Lloyd, the Foreign Minister, stated: "In our opinion, as I think you know, we think the Egyptian Government has been guilty of an illegal act. We think that a breach of contract is not the less so because it is a government which commits the breach. *Ibid.* p. 154.

conference are in fact without much interest, since the delegates to the conference chiefly concentrated on proposals for a practical solution ensuring right of passage.

The English-French military intervention in October-November 1956 put an end to any possibility of further negotiations with Egypt, which had, however, up to then, shown no signs of conciliation.

On 13 July 1958, however, an agreement on compensation for the nationalization which had taken place was concluded between Egypt and the Suez Canal Company, which altered its name to the Compagnie Financière de Suez, at an extraordinary general meeting of 4 July 1958. By this agreement all the Company's assets outside Egypt were transferred to C.F.S. In addition, Egypt was to pay compensation amounting to £E.28.3 million. This compensation was to be paid in instalments over 5 years<sup>91</sup>.

These two legal cases from the past few years seem to show that the problem of the nationalization of a concession, in the same way as the problem of nationalization of other rights of ownership belonging to foreigners, is the problem solely of the liability of the nationalizing State to pay compensation. The fact that the State has given foreigners certain rights by contract does not in practice impose any different restrictions on the powers of the State to nationalize than those it has in cases where it tacitly approves the acquisition by a foreigner of property on its territory<sup>92</sup>. No rule exists in international law which gives more comprehensive protection of rights created by contract than the protection existing for other rights of ownership<sup>93</sup>. This view seems to agree with older international practice.

In the case *Company General of the Orinoco* which was decided by a French-Venezuelan arbitration court, the court made a statement, inter alia, on the competence of the State to intervene in a contract:

"As the Government of Venezuela, whose duty of self preservation rose superior to any question of contract, it had the power to abrogate the contract in whole or in part. It exercised that power and cancelled the provision of unrestricted

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91. Cf. E. Lauterpacht, *The Suez Canal Settlement* (1960) p. 3 foll. where the agreement is published.

92. Cf. Robert Delson "Whether a taking ..." p. 41.

93. Cf. also the debate in *Institut de droit internationale. Annuaire* (1952) vol. 44 II, p. 305-319.

assignment. It considered the peril superior to the obligation and substituted therefore the duty of compensation<sup>94</sup>."

Similar views were advanced in the *Shufeldt Claim* (1930)<sup>95</sup>, where interference with a concession was accepted by the arbitration court against payment of compensation, and in the case of the *Delagoa Bay Railway* (1891)<sup>96</sup>, and in the case of *Robert May's* claim against Guatemala (1900)<sup>97</sup>.

There remains the question of whether a specific undertaking by the State not to alter the concession or nationalize the rights of the private contracting party, gives the foreigner a special legal position<sup>98</sup>. As mentioned, such an undertaking existed in the case of the *Anglo-Iranian Oil Co.* but this special provision did not influence the outcome of the case.

The view has been advanced that such undertakings cannot be binding in international law, simply because transnational agreements are not treaties in international law and thus the principle *pacta sunt servanda* is inapplicable<sup>99</sup>.

Mann<sup>100</sup> maintains that there are no rules to be found in international law which state that an undertaking in a contract not to alter future legislation is binding<sup>101</sup>. Such an undertaking could not in any case prevent

94. Ralston, *French-Venezuelan Claims Commission* (1906), p. 244. Quoted according to *U.N.doc. A/AC.97/5*, p. 281.

95. Between the U.S.A. and Guatemala, cf. *R.I.A.A.* vol. II, p. 1079.

96. Cf. *A/AC.97/5*, p. 280.

97. Cf. *Foreign Relations of the United States* (1900), p. 659.

98. Cf. *Annuaire* (1952), vol. 44 II, p. 305.

99. Cf. Delson, *op. cit.*, p. 44 foll. and the authors quoted. Delson supports his view, inter alia, by the fact that a direct promise not to interfere with property has obviously been set aside in the United States in a great number of cases. When a country which protects property as scrupulously as the United States fails to recognize the binding character of these promises, there is much less reason to accept the binding character of these promises in international law. The author appears to overlook that, as a result of the constitution, the United States has no authority to make promises of the kind discussed. The situation seems somewhat different when a State has this authority.

100. *Op. cit.*, p. 587.

101. An interesting opposing view is put forward by Arghyris A. Fatouros, "Legal Security for International Investment", *Legal Aspect of Foreign Investment* (1959) p. 721, where the author accepts that a promise of this

a State imposing general restrictions on ownership, and if the altered legislation is in fact an interference with the contract and falls outside the State's general powers of restriction, and if such an action furthermore takes place without payment of compensation, then responsibility to pay compensation devolves on the State, even where a direct promise has not been given.

This view must certainly be accepted. Even if it is felt to be unsatisfactory that a State can break a specific undertaking, though of course with payment of compensation, it must be recognized that no practice is to be found in international law which would support the idea that an action against property contrary to a direct undertaking given in a contract, is invalid under international law<sup>102</sup>. The right to take action against property, and in particular the right to nationalize, are so far dictated by compulsive purposes of state, that a State must be justified in setting aside a contract which stands in the way of the realization of these purposes. The contrary considerations, which in treaties are backed by the principle *pacta sunt servanda*, are scarcely present in the case of a contract. In support of this view it may be added that normally a contract does not come into existence with the same constitutional guarantees as exist for treaties.

Altered conditions may thus possibly cause an undertaking given in a contract to be annulled. However, an undertaking to refrain from nationalization is not entirely meaningless.

In the first place it should decisively influence the calculation of the amount of compensation due, since, at the time of his investment, the claimant party could justifiably have expected a clearly defined writing-off period and/or an assured income. In the second place it is far more serious

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kind will make an action against property illegal, as being in conflict with the principle of *estoppel*, which is thus described: "where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time" Although a number of writers, cf. among them Lauterpacht, *Private Law Sources and Analogies of International Law* (1927) p. 205-296, and Cheng, *op. cit.*, p. 141-149, regard this principle as a constituent part of international law also, it does not appear to be applied in practice by the courts in connexion with the problems discussed here.

102. Cf. also H. Lauterpacht, *Annuaire* (1950), vol. 43 I, p. 93-94.



for the State to nationalize a concession contrary to a specific promise, since such actions are extremely liable to arouse distrust of the State's assurances in the international capital market. These consequences of an undertaking to refrain from nationalization can, however, be easily exaggerated.

#### F. *Conclusion.*

It is apparent from the development of the subject above that nationalization of a concession must be treated as a problem of international law, without thereby laying down that all problems between the State granting the concession and the owner of the concession fall within international law. Although concessions are in many cases of extraordinarily great international importance, most recent international practice does not recognize that special rules exist in international law governing the nationalization of concessions. More especially, it cannot be assumed that the nationalization of a concession which contains an express prohibition against nationalization is contrary to international law. Nationalization of this kind involves only a claim to compensation.

It is, however, quite another thing that the nationalization of a concession can entail special legal consequences with reference to the amount of compensation or other legal obligations as the result of a breach of contract by the signatory State.

This must be the principle behind the Swedish declaration in connexion with the conclusion of the treaty of 16 November 1949 between Sweden and Poland, dealing with compensation for nationalized Swedish property, where it is stated that the claim of the Swedish Match Company, which was based on a concession granted by Poland on 17 November 1930, rested on a special legal basis as compared with Swedish claims which sprang from the nationalization of other than contract rights <sup>103</sup>.

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103. Cf. *Kunglig Maj: ts.prop.* no. 187 (1950) p. 12 foll. Cf. also the case of *Delagoa Bay and East African Railway Company* (1891) where compensation for the annulment of the concession which Portugal had granted to an American citizen was fixed in agreement with the rules of civil law for breach of contract. Cf. Whiteman, *Damages in International Law* (1932) vol. III, p. 1694 and 1697.

SECTION 4:  
THE ENFORCEMENT OF THE CLAIM  
FOR COMPENSATION

§ 16

THE FORM OF COMPENSATION

In the cases where nationalizing States do not in fact in their municipal law recognize liability to pay full compensation to foreign nationals affected by the nationalization, and where these foreign nationals consequently cannot, by application to the administrative organs of the nationalizing State, their courts etc., enforce their claims without the intervention of their home States, the following forms of bilateral compensation treaties have in practice been used up to now <sup>1</sup>:

- A. Agreements in general terms.
- B. Agreements providing for direct individual compensation.
- C. Agreements providing for indirect individual compensation.
- D. Agreements providing for global (lump-sum) compensation.

*A. Agreements in general terms.*

(1) *Practice.* An agreement in general terms on compensation for nationalized property was concluded between the United States and Czechoslovakia by an exchange of notes of 14 November 1946 <sup>2</sup>. The agreement, which was made in connexion with discussions in Washington on the commercial relations etc. of the two States, contains the following provisions in chapter 7:

“The Government of the United States and the Government of Czechoslovakia will make adequate and effective compensation to nationals of one country with respect to their rights or interests in properties which have been or may be nationalized or requisitioned by the Government of the other country. In this connection, the Government of the United States has noted with satisfaction that

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- 1. The following terminology, which I introduced in my *Nationalization*, p. 88, is used by the U.N. Secretariat in its comprehensive study *The Status of Permanent Sovereignty over Natural Wealth and Resources* (1959), A/AC.97/5, p. 183 and 194 foll.
  - 2. *Cf. Dep.St.Bul.* (1946) vol. 15, p. 1004.

negotiations concerning compensation on account of such claims will shortly begin in Praha."

A similar agreement was also concluded between the United States and Poland by an exchange of notes on 24 April 1946 in connexion with negotiations for a loan to Poland of some \$40 million<sup>3</sup>.

A further step towards a final solution of the compensation problem, although no final provisions on the amount of compensation or the claimants entitled to compensation were established at the time of the agreement, is to be found in the agreement between Sweden and Roumania of 28 August 1959. On that day a barter agreement was signed between the two States, together with a protocol on finance. Under the latter, Sweden might retain a proportion of the Roumanian income from exports. For the calendar year 1960 the proportion was fixed at 6 % and for the following years 7 % and 8 % respectively. The amount retained was to be used for the payment of compensation to Swedish nationals who had suffered losses as a result of the nationalizing actions carried out in Roumania. Previous negotiations on individual claims had had no result.

A direct recognition in treaty form of liability to pay compensation for nationalization is also to be found in the agreement concluded between Greece and Roumania on 25 August 1956 for compensation totalling \$6 million, covering losses suffered by Greek nationals during the war, and other special war damage. Art. 5 of the agreement contains provisions on compensation for lost household possessions etc. and clause 2 states:

2. "Le Gouvernement roumain accordera une indemnité equitable aux ressortissants hellènes dont les biens on été nationalisés dans la République Roumaine.

It was further laid down that a mixed commission should immediately be appointed which should begin to function as soon as the two countries had exchanged diplomatic missions. One of the tasks of the commission was to determine the amount of compensation, with a view to the renewal of direct negotiations between the two States.

Compensation for nationalized property was similarly discussed in connexion with a trade and payments agreement between Italy and Czechoslovakia signed on 29 September 1956. Simultaneously, a protocol was signed, wherein it was made a pre-condition that negotiations should begin between

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3. Cf. *Dep.St.Bul.* (1946), vol. 14, p. 761.

the two States regarding compensation for Italian owned property in Czechoslovakia <sup>4</sup>.

The agreements considered here, under which the nationalizing State pledges itself to pay compensation to foreign nationals affected by the nationalization, without establishing detailed rules on the form, kind or amount of the compensation, also occur in a few cases in the form of the so-called most-favoured-nation agreements.

As examples of this special treaty form, which is frequently used in limited spheres where it may be difficult at the time to formulate situations which may arise in the future, there are the following agreements:

In connexion with Swedish-Czech negotiations in Stockholm on the settlement of the barter arrangements between the two States, the Czech minister in Stockholm sent the following note to the Swedish Foreign Minister on 15 March 1947:

"I have the honour to bring to Your Excellency's notice that, in the matter of the application of the Czechoslovakian decrees no. 100, 101, 102, 103/1945 on nationalization and of the regulations and measures for the introduction of state administration and regarding confiscation, Swedish shareholders shall enjoy most-favoured-nation rights, most particularly with respect to procedure, the basis for the calculation of compensation and the fixing of the amount thereof."

Similar most-favoured-nation agreements were concluded between Norway and Poland <sup>6</sup>, between Sweden and Hungary <sup>7</sup>, and between Denmark and Poland in connexion with the Danish-Polish trade negotiations in 1947 <sup>8</sup>, and between Denmark and Czechoslovakia by an exchange of notes on 6 March 1948 <sup>9</sup>.

(2) *Evaluation.* The right in the last-named treaties guaranteeing to claim-

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4. Cf. *Neue Zürcher Zeitung* for 3 October 1956.

5. Cf. *S.Ö.* (1947) p. 572. According to information in *Kungl. Maj:ts. Prop. no. 37* (1957) p. 2, this agreement was accompanied by a declaration that the Czechoslovakian government was prepared to take up direct negotiations with the majority of the Swedish industrial undertakings affected by nationalization.

6. 4 February 1946, cf. *Stortingets prop.* (1955) no. 103.

7. 26 July 1946, cf. *S.Ö.* (1951) p. 145.

8. The agreement was not published, but was discussed in *Politiken* on 14 May 1949.

9. The agreement was not published.

ants most-favoured-nation treatment in procedure, the basis of calculation and the amount of the compensation, has given no result in practice.

It is perhaps possible to presume that provisions on most-favoured-nation treatment may have limited importance, especially for States which have no effective means of exercising pressure to enforce the principles of compensation. For these States it will often be sufficient that a government in a stronger negotiating position begins a process which spreads to other States with a claim to most-favoured-nation treatment.

The States with treaty obligations may, however, with some reason, maintain that the individual cases are different from the cases invoked by the claimants as the basis for most-favoured-nation treatment. The conditions surrounding compensation will be so complicated and the form, the basis of the calculation, and the amount of compensation so bound up with possible contra payments that what is most favourable for one claimant State will not be so for another<sup>10</sup>. But even where this particular form of the agreement, the most-favoured-nation treaty, is not used, the agreements quoted have proved ineffective. No American citizen has, as a result of these agreements, received compensation from Poland or Czechoslovakia,

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10. It is another matter that clauses on most-favoured-nation treatment in connexion with individual agreements on the form of compensation can have extended importance, cf. the agreement concluded between Belgium and France on 18 February 1949 on compensation to owners of shares in the nationalized French gas and electricity industry. Here the object qualifying for compensation and the method of valuing them were accurately defined in the French legislation, and the factors which influenced the decision on who was to be regarded as most-favoured were set down in cl. 2 of the agreement, which stated:

"In particular, if at any future date the French Government grants to another country, for the benefit of the nationals thereof, payment by way of compensation for similar stock or sums of a greater amount, or yielding a higher interest, or payable in a smaller number of annual instalments or enjoying certain transfer facilities, the Belgian Government shall be entitled to claim, on behalf of its nationals, the substitution of the compensation condition accorded to the nationals of such other country for the procedure laid down in the present agreement." (*U.N.T.S.* vol. 31, p. 175). Cf. also the Swedish-Polish treaty of 28 February 1947, art. 11, *S.O.* (1947), p. 131, and the Danish-Polish treaty of 12 May 1949, art. 9, *Lovtidende C* (1949) p. 571, which similarly contain clauses on most-favoured treatment.

nor have the general agreements in other cases formed a basis for the payment of compensation in a single instance.

It must therefore be recognized that the general liability to pay compensation which the nationalizing State accepts does not contribute to the solution of the problems of compensation, and this, in fact, was not the object of the agreements. The explanation for the use of the agreements in this field of law must consequently be sought in political conditions. The moment of time and the circumstances existing when they came into being, point to the explanation that the agreements must be regarded solely as expressing an accommodating attitude on the part of the nationalizing State towards claims for compensation from nationals of a State with which it wishes to establish commercial or other relations, at a time when the nationalizing State is not prepared to conclude agreements in specific terms on the payment of compensation. The general agreements quoted above seem to be a clear illustration of this.

The protocol completed on 28 August 1959 between Sweden and Roumania is, however, an interesting new phenomenon. It emphasizes the serious nature of the recognition by the nationalizing State of its liability to pay compensation, and the factual consideration that the claimant State controls assets belonging to the nationalizing State, will, to judge from experience, have a powerful influence on the negotiations for compensation which take place. It is clear that this form of agreement does not aim at a final settlement.

It is also apparent that the compensation agreements in general terms made by governments have been regarded as temporary and they were therefore superseded (or attempts were made to supersede them) by one of the other forms of compensation agreement <sup>11</sup>.

#### B. *Direct individual compensation.*

(1) *Practice.* Agreements for direct individual compensation are found when the States concerned, in addition to agreeing to or confirming the liability of the nationalizing State to pay compensation, lay down certain rules of procedure and possible facilities in connexion with the rules laid down in the nationalization laws, whereafter it is left to the individual foreign physical or juridical person to register and document his claim directly to the authorities of the State liable to pay compensation. To the extent to

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11. Cf. Appendix B "A survey of the forms of compensation".

which the claim is admitted, compensation will be paid direct to the party entitled to receive it.

This system was used in the first treaties on compensation for nationalized property concluded after the Second World War.

In the agreement of 18 December 1946 between Switzerland and Czechoslovakia, it is thus left entirely to the initiative of the individual to enforce his claim for compensation. On the facilities which the paying State should accord to the foreigner, it is stated in art. 6:

"... zu diesem zwecke geniessen die Schweizerischen Interessenten alle in den einschlägigen tschechoslowakischen Gesetzen und Verordnungen vorgesehenen Rechte und Vorteile. Tschechoslowakischer seits wird ihnen unter allen Umständen die Möglichkeit eingeräumt, die zur Einreichung ihrer Begehren und Vorschläge bei der tschechoslowakischen Behörden nötigen Mittel zu verwenden. Dies gilt insbesondere für Besichtigungen der Unternehmungen an Ort und Stelle ... für die Fühlungnahme mit dem leitenden Personal, die Überprüfung von Bilanzen, technischen und finanziellen Berichten von Geschäftsbüchern u.s.w., sowie auch für die ausfertigung von Kopien den erwähnten Schriftstücke und Dokumente <sup>12</sup> ..."

An example of an agreement providing for direct individual compensation, but where the home State of the party entitled to compensation is in somewhat closer contact with the nationalizing State, is to be found in the compensation treaty concluded by an exchange of notes between Great Britain and Poland on 24 January 1948. It is laid down in art. 12 that compensation is payable to certain British owners of and shareholders in nationalized undertakings, and that this will be paid direct to those entitled to it.

The individual must submit his claim himself, but in art. 22 Poland pledged herself to extend all necessary support and facilities to the British subjects concerned to enable them to do this. These facilities are defined in the treaty as follows:

"art. 22 b: ... the right—

- (i) to visit nationalized undertakings;
- (ii) to obtain such information regarding the condition and value of nationalized undertakings as may reasonably be required for the presentation and prosecution of claims to compensation, and
- (iii) to participate in preparing detailed inventories of the element of property of

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12. Quoted according to Bindschedler, *op.cit.*, p. 73.

nationalized undertakings and to submit comments and explanations on the relevant protocols of delivery and receipt <sup>13</sup> ..."

At the same time, however, a mixed Anglo-Polish commission was set up, not with the general task of deciding the merits of individual British claims, but to supervise the implementation of the agreement and to make recommendations to the governments concerning possible alterations, and at the express request of the governments to decide in individual cases disputes between the private claimant and the Polish State, and in other ways interpret the agreement between the two States, cf. appendix B of the treaty.

A similar arrangement was made in the Swedish-Polish agreement of 28 February 1947 <sup>14</sup>, where in art. 2 Poland undertook to pay appropriate compensation direct to Swedish nationals as a result of nationalization. Only in the event of failure of the negotiations between the Polish authorities and the Swedish shareholders should a Swedish-Polish mixed commission, set up in accordance with art. 6 of the treaty, intervene. It was also the task of the commission in this case to interpret the compensation agreement on behalf of the two governments.

By an exchange of notes on 19 March 1947, Belgium came to an arrangement with Czechoslovakia <sup>15</sup> by which Belgian shareholders in nationalized undertakings were to receive compensation when these shareholders had made good their claims in conformity with the Czech national regulations. To simplify the procedure, which was that direct individual compensation should be paid, it was, however, agreed that a Belgian authority should collect the necessary documents and forward them to the Czech Ministry of Finance, (art. 1).

Similar principles were the foundation of the arrangement agreed between Belgium and France by the treaty of 18 February 1949, with subsequent amendments <sup>16</sup> for the purpose of obtaining compensation for Belgian interests in the nationalized gas and electricity industries. Here it was laid down in art. 4 that the Belgian shareholders should apply with their share

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13. The complete text of the treaty is to be found in *The International Law Quarterly* (1948), vol. 2, p. 544.

14. Cf. *S.Ö.* 1947, p. 131. Cf. too the agreement previously quoted between Sweden and Czechoslovakia of 15 March 1947.

15. Cf. *U.N.T.S.*, vol. 23, p. 37.

16. Cf. *U.N.T.S.*, vol. 31, p. 173 and vol. 73, p. 257.



certificates to La Caisse Nationale de l'Énergie in Paris, where the shares would be exchanged for government bonds, in accordance with the conditions for compensation agreed between the two governments. In this case, too, it was left to the individual to prove that, in respect of the method of acquisition and his nationality, he fulfilled the conditions laid down in the treaty for obtaining compensation. Until 31 December 1949 a Belgian office existed, however, to which Belgian nationals could apply with the necessary documentation.

This form of compensation, described here as direct individual compensation, is also authorized in the agreements between France and Czechoslovakia of 6 August 1948<sup>17</sup>, Holland and Czechoslovakia of 4 November 1949, Switzerland and France of 21 November 1949<sup>18</sup>, and between Great Britain and France of 11 April 1951<sup>19</sup>.

(2) *Evaluation.* These agreements on direct individual compensation, where the initiative and the effort of enforcing the claim for compensation is left to the private individual who feels he has suffered losses as a result of nationalization, seem attractive. Before he raises his claim for compensation, the individual claimant must decide whether the effort and expense involved bear a reasonable proportion to the nature and amount of his claim, and this probably results in a number of doubtful or minor claims being abandoned<sup>20</sup>. At the same time it avoids the raising of individual claims for compensation to international level, where other and irrelevant considerations might exert an influence.

However, this form of compensation agreement presupposes that the country of the national entitled to compensation is justified in its confidence that its nationals will receive fair treatment, and that the State with the obligation to pay compensation is really willing and capable of fulfilling these obligations in accordance with the agreements it has entered into.

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17. Cf. *Journal officiel* of 11 November 1951.

18. *Amtl. Samml.* (1950), p. 21.

19. *T.S.*, no. 34 and 35 (1951).

20. Bindschedler, *op.cit.*, p. 74 and Odevall, "Globalersättning för ekonomiska intressen i utlandet", *N.T.I.R.* (1954) vol. 24, p. 20 further states in identical terms that these agreements are in conformity with the Western conception of individual legal rights.

Apart from the agreements concluded with France, these presuppositions have not held good in practice. The private claimant, whether a person or a company, normally has not been able to enforce his claims, and in the few cases where compensation has been paid in accordance with these agreements, the amount of compensation has apparently been decided by the degree of interest the nationalizing State had in future cooperation with the private claimant<sup>21</sup>, possibly in other fields.

To this must be added the misgivings of an economic-political kind which the States have and which are equally valid whether individual compensation is paid directly or indirectly. This will be discussed in Chapter C.

As a result of the difficulty of applying this form of compensation settlement, most of the agreements quoted above providing for direct individual compensation have been superseded by other arrangements.

### C. *Indirect individual compensation.*

(1) *Practice.* This form of compensation occurs in those cases where the physical or juridical person affected by the nationalization presents his claim for compensation to the nationalizing State through his own government. The question of the recognition of the claim and its amount is decided in each individual case by negotiations between the governments involved, and, similarly, the compensation is paid to the claimant's government. These negotiations may either take place through ordinary diplomatic

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21. Information was thus given in *Kungl. Maj:ts proposition* of 3 March 1950, that individual large Swedish businesses connected with the agreement on new deliveries to Poland pursuant to the treaty of 28 February 1947, "have good prospects of receiving compensation for seizures of different kinds and some agreements on a similar basis are gradually being implemented." It was, however, added that a general settlement of the Swedish claims for compensation did not seem to be in sight.

*Riksdagen Protokoll* (1950), vol. 16, prp. no. 187, p. 11. There were similar results from the agreement on compensation concluded on 15 March 1947 between Sweden and Czechoslovakia, cf. *Kungl. Maj:ts proposition* (1957), no. 37, p. 3, where information was given that the majority of the claims of Swedish industrial undertakings had been settled before the end of 1948 by direct negotiation between these undertakings and the nationalizing State. There were, however, unsettled claims for about 5 millions Swedish kroner still outstanding, which were met by means of the global agreement of 22 December 1956.

channels, or a mixed commission may be set up to determine the individual claims.

After negotiations had been going on for a number of years, following the Mexican nationalization of the oil fields, between the Mexican government and the government of Great Britain acting on its own behalf and on behalf of the Dutch government, agreements were concluded on 7 December 1947 between Mexico and these two States concerning the procedure for determining the amounts of compensation Mexico was committed to pay<sup>22</sup>. Under these agreements it was decided to appoint experts who should produce a report within a given time giving an estimate of the value of the nationalized property. Art. 17 of the treaty with Holland<sup>23</sup> goes on to say:

“Within a month of the receipt of the report ... of the experts, the two Governments shall initiate diplomatic negotiations with a view to fix ... the sum to be paid ... to those Netherlands subjects who, by such methods as the two Governments may determine, prove their participation as shareholders, at the time of publication of this note in the properties referred to.”

It is noteworthy that Holland was to have the compensation paid over by Great Britain as and when Mexico paid, and it was clearly due to the influence of Britain that Holland obtained compensation.

An agreement on direct individual compensation was also concluded between Denmark and Poland by the protocol signed in Warsaw on 12 May 1949 on the subject of Danish interests and property<sup>24</sup>. The provisions of art. 7 contained regulations to the effect that the notification of rights and interests in nationalized undertakings could be made to the registry of property surrendered and taken over, which had been set up under Polish legislation. The notification might be made either direct by the interested parties or through the Danish Embassy in Warsaw. At the same time it was provided in art. 10 that a mixed Danish-Polish commission should be appointed whose task was laid down as:

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22. The agreement with Holland is to be found in *U.N.T.S.*, vol. 3, p. 13. The agreement with Great Britain is to be found in *U.N.T.S.* vol. 6, p. 55. Similar agreements were concluded between the United States and Mexico on 29 September 1943, cf. *Dep.St.Bul.* (1943), p. 230.

23. Identical provisions are to be found in the treaty concluded with Great Britain, art. 17.

24. Cf. *Lovtidende C* (1949), p. 567.

"[The commission's task is to] ... achieve a solution in each individual case, to discuss the problems which may arise in connection with the fixing of amounts of compensation due to Danish claimants, as well as any questions which in any other way affect Danish interests and property in Poland ..."

It was further provided that, should the Danish Government not find the compensation fixed adequate, the matter should be referred back for negotiation between the governments of the two countries (art. 11, cl. 3). If a solution could still not be reached by these means, the matter should go to arbitration. Finally it was agreed that negotiations on the payment of compensation and its transfer to Denmark should begin in the middle of 1950.

Similar agreements were concluded between the United States and Poland on 27 December 1946, between Czechoslovakia and Yugoslavia on 4 September 1947, between Italy and Yugoslavia on 23 May 1949, between Turkey and Yugoslavia on 5 January 1950 and between France and Egypt on 22 August 1958.

(2) *Evaluation.* The payment of compensation in the form described here as indirect individual compensation, is in close conformity with traditional diplomatic handling of the claims of private citizens or companies against foreign States. By virtue of the position and influence of the claimant State this form of agreement will often have a good chance of achieving the desired result.

Existing international treaty practice in respect of the payment of compensation for nationalization shows, however, that not even this form of individual compensation has been very effective.

In fixing the compensation for a given property, the nationalizing State will be inclined to try to keep the value as low as possible, having in mind the results which the precedent created by the decision on such a claim could have on later claims of which the State in question is still ignorant. From similar motives, the claimant State will be disinclined to accept a valuation which is perhaps reasonable in the given case. Negotiations conducted on such a basis will frequently end in deadlock.

Apart from the cases where the nature and extent of all claims for compensation are known to both parties when negotiations begin (as in art. 17, quoted above, of the treaty between Mexico and Great Britain and Holland, where the negotiations on the amount of compensation were only to begin after the experts' valuations had been received), payment of individual compensation has proved to be unworkable in practice, and States

caused these agreements for individual settlements to be superseded by treaties providing for the payment of global compensation.

#### D. *Global compensation.*

(1) *Practice.* Global compensation means that in settlement of a number of claims arising out of homogeneous circumstances, the State pledged to compensation pays a lump sum, whereupon the claimant State, on behalf of its nationals and on its own behalf declares that settlement has been made in full, whereafter no further claim deriving from the same circumstance may be raised by any of the States or with their consent.

This form of compensation payment, whose characteristic feature is to be found rather in the "receipt for payment in full" given against compensation payments for a number of known and unknown claims, than in the calculation of the amount of compensation by an estimate, has, as Whiteman<sup>25</sup> shows, frequently been used in international practice. Whiteman enumerates 36 cases in the period 1802-1934, in which States have preferred to make global arrangements. Denmark, too, formerly made global agreements, as when, by the convention with the United States of 28 March 1830 concerning "the settlement of claims by American citizens for compensation in respect of the seizure and forfeiture of ships and cargoes", Denmark undertook to pay kr. 650,000 in compensation to the United States (art. 1)<sup>26</sup>. This amount was to be paid in three instalments (art. 2), whereafter the government of the United States, on its own behalf and on behalf of American citizens, declared that all claims arising from events of war which led to the seizure and forfeiture of American ships had been fully satisfied.

Global compensation agreements have proved immensely practical in deciding claims resulting from measures of nationalization. The earliest of this group of agreements was concluded between Sweden and Soviet-Russia on 30 May 1941 and between Sweden and Yugoslavia on 12 April

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25. *Op.cit.*, vol. III, p. 2068 cf. Også Bindschedler, *op.cit.*, p. 80 and Odevall, *op.cit.*, p. 17.

26. Whiteman, *op.cit.*, p. 2068 k, no. 6; cf. Odevall, *op.cit.* p. 18, who states that the compensation was to be paid in "Spanish Ring dollars". This expression is not used in the original text of the treaty, which is to be found in *Danske Tractater efter 1800 (1872)*, First Collection, vol. 1, p. 139 foll.

1947<sup>27</sup>, and it is apparent from appendix B, "A Survey of the Forms of Compensation", that the great majority of compensation agreements have provided for global compensation, just as most of the agreements providing other forms of compensation have been superseded by treaties providing global arrangements.

(2) *Evaluation*. It is characteristic of this form of compensation that the fixing of the amount of compensation as a lump sum involves fewer complications for all parties. A number of doubtful questions, for example on conditions of ownership or nationality, where the decision based on the municipal legal systems of the contracting parties leads to different results, can be settled in a simple manner without protracted and troublesome discussions. Because of the simpler procedure, the settlement of the amount of compensation can be reached comparatively quickly, and this is nearly always an advantage to the claimants<sup>28, 29</sup>. Individual injustices which a global solution may involve can subsequently be corrected by the State receiving compensation, and such corrections have indeed taken place extensively<sup>30</sup>. Although at the time of concluding the treaties neither of the parties expects that the global sum will exactly cover the claims for compensation, the decisive factor in the efficiency and applicability of global agreements is that both the contracting States are conscious that all claims for compensation resulting from nationalization measures executed up to the time of the global agreement are now finally settled between the two governments, and that further negotiation involving expense and political irritation will be avoided.

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27. These agreements have not been published, since they are regarded as confidential by the Swedish government. However, it appears from *Kungl. Maj:ts prp.* no. 350 (1946) p. 22 and no. 187 (1950) p. 15, that in both cases these are agreements on global compensation, cf. also no. 310 (1947) p. 25.

28. The strength of this argument, which was used by the Swiss government in *Botschaft des Bundesrates vom 29. Oktober 1948* (quoted according to Bind-schedler, *op.cit.*, p. 79) is, however, relative. The starting point for negotiations on compensation can frequently be the individual claims, their basis, size and so on, and these negotiations can be fairly protracted.

29. Some authors declare that "... the lump-sum is not the sum total of verified and established individual claims, but is fixed in proportion to the financial resources of the nationalizing State ..." cf. the Dutch section of I.L.A. in *I.L.A. Report 1958* (1959) p. 229. This view, however, is not borne out by practice, cf. below § 20.

30. Cf. below section 5.

Finally it must be added that even considerations of national finance support a collective solution which makes it possible to control the effect on the economy, both of the paying State and of the claimant State, of the payment of the frequently considerable amounts of compensation, paying in a way which avoids exchange problems. This is a facility which does not exist with other forms of compensation.

Against this background it is understandable that global agreements are extremely well adapted to solve the complicated international questions which the nationalization of the whole or a part of the industrial or commercial life of a State involves. It is, however, somewhat surprising that it has taken several years for this form of compensation, which is well known in other fields, to come into general use.

## § 17

### GLOBAL AGREEMENTS AND THE CLAIMANTS

Among the elements which characterize global agreements is the circumstance that, after the conclusion of the agreement and its due fulfilment, the contracting States can regard all issues between them in connexion with nationalization as settled, and no further discussion between the parties need take place.

The formulation of this "receipt for payment in full" in the various agreements is not uniform and the difference, at least in its formal juridical aspects, rests on an essential point <sup>1</sup>.

Some agreements contain an absolute renunciation of further claims. This absolute appears in two relationships; the first as it concerns the classification of those qualified to make a claim, thus whether the renunciation applies both to the home State of the party affected by nationalization as well as the individual claimants; and the second as it concerns the nature of possible claims, in other words whether the renunciation includes claims for compensation based on international law as well as claims to be settled by reference to the municipal law of the nationalizing State.

As an example of such an absolute renunciation in both these respects we have the Danish-Polish protocol of 26 February 1953 <sup>2</sup>, which contains the following provision in art. 2: "On completion of the payment of the sum of Danish kr.

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1. Cf. Odevall, *op.cit.*, p. 16-27.

5,700,000 the Danish government will consider all the Danish claims enumerated in art. 1<sup>3</sup> as definitively settled. This settlement has the effect of discharging the Polish government from all liability in respect of Danish interested parties and their claims."

A similar provision is also found, for example, in the agreement between Holland and Yugoslavia of 22 July 1958, where in art. 3 cl. 2 is stated<sup>4</sup>:

"... Dès l'entrée en vigueur du présent accord et sous condition de son execution, suivant les modalités convenues entre les Parties, l'Etat yougoslave ainsi que toutes institutions, personnes physiques ou morales yougoslaves seront exonérées de tout recours de la part des intéressés néerlandais."

In contrast, practice also presents examples of relative renunciation, that is to say renunciation solely between the contracting parties, while the renunciation does not include possible further claims for compensation by individual interested parties, whether referred to international law or to the municipal law of the nationalizing State.

In the agreement between Sweden and Poland of 16 November 1949<sup>5</sup>, it is laid down first, that the Swedish government guarantees that after the payment of the global sum the Polish government shall pay no further claims arising from the nationalization of Swedish property; and second, that the Swedish government, from the time the agreement comes into force, undertakes not to support Swedish claims for compensation.

The agreement between Sweden and Hungary of 31 March 1951<sup>6</sup>, contains a similar provision, except that the Swedish guarantee is more closely defined, and it is laid down that if Swedish claims for compensation:

"... should nevertheless be legally enforced, the Hungarian government is entitled to deduct as against the Swedish government any losses suffered by Hungary in respect thereof ..."

In a new agreement of 16 July 1960, between the United States and Poland, the corresponding treaty provision is formulated in these words (art. 4):

2. Cf. *Lovtidende C* (1954), p. 1.

3. Art. 1 states inter alia: "... all Danish property rights and interests which are affected by the Polish legislation ... or by any other measure taken by the Polish state or its instruments."

4. Cf. *Tractatenblad* (1958), no. 136, p. 2.

5. *S.Ö.* (1950) p. 921.

6. *S.Ö.* (1951) p. 146.



"After the entry into force of this Agreement the Government of the United States will neither present to the Government of Poland nor espouse claims of nationals of the United States against the Government of Poland to which reference is made in article 1 of this Agreement. In the event that such claims are presented directly by nationals of the United States ... the Government of Poland will refer them to the Government of the United States."

These wordings, which also exist in the more recent global agreements by a number of other countries, would seem clearly to imply that unsettled claims do not lapse by reason of the conclusion and fulfilment of treaties for global compensation. However, the chances that an individual claimant will receive compensation for a claim which is settled by the treaty seem very small, whether he attempts to enforce the claim against the nationalizing State or, as in the last named example, against his home State. The renunciation by the claimant States of support of future private claims, especially when connected with the guarantees given by the governments receiving the compensation, have as a consequence, however, that the nationalizing States, even when they conclude agreements in the wordings quoted above, can reckon that their measures for nationalization will not involve any further economic obligations than those entailed in the global agreement.

Apart from the picture the clauses on relative renunciation may give of the ingenuity displayed by treaty draftsmen in solving difficult legal and constitutional problems in some countries, the renunciation clauses do not contain elements of international legal interest. The claimant State must be entitled under international law to conclude such treaties, and the question of the constitutional authority of the State over its own nationals does not arise, since the individual claimants formally and in reality are justified in reviving the case against the nationalizing State, if they find it expedient.

In the case of agreements which contain an absolute renunciation of any further claims for compensation, it must similarly be taken that the home State of the claimant is justified by international law in concluding a valid agreement on this, irrespective of whether any outstanding claims by its nationals for compensation under the municipal law of the nationalizing State must receive diplomatic protection under the constitution of the State receiving compensation <sup>7</sup>.

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7. Cf. Max Sørensen, "On the Right to Diplomatic Protection" (in Danish) *Festskrift til Poul Andersen* (1958), p. 409.

This absolute renunciation, however, raises the special question of whether the claimant State is authorized by its legal system to give such a renunciation and thus extinguish any outstanding claims by its nationals <sup>8</sup>.

In his analysis of Danish law, Max Sørensen <sup>9</sup> reaches the conclusion that the Danish government must in any case be able to renounce all intention of pursuing any further claims by diplomatic means. In principle this is not different from the typical situation where diplomatic protection is refused. But even in a case of a renunciation which also involves the claimant's demands under the municipal law of the nationalizing State, the Danish State, without incurring liability for compensation, must be authorized to give such a renunciation. In this situation it is not the renunciation by the Danish government of further claims which has caused a loss to the claimant, since the case was taken up diplomatically precisely because the satisfaction of the claim under municipal law had in practice proved impossible.

These views can largely be accepted. They are also supported by the consideration that, even if it were tentatively assumed that the Danish State had incurred some liability to pay compensation, it would in practice be impossible to establish that the action of the Danish government had been a cause of economic loss.

The problem also has another aspect, however. In practice it is not only the right of a country's nationals to diplomatic protection which is in question, but also the right of the State to exercise (and consequently the duty of the citizen to accept) diplomatic protection, with the consequences that this can entail in the form of a renunciation by the State of certain rights owned by its nationals.

In other words the question is whether, in the event of a legal dispute with a foreign State, a citizen can refuse to allow himself to be represented by his home State, even though the State might have an essential interest in doing so. If the State acts in such a situation against the will of its national, and in the course of negotiations with the foreign State renounces certain

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8. From the viewpoint of international law, this problem has no relevance to the analysis of the treaties of compensation which have been concluded, but the question must be mentioned in this context. See the detailed discussion later, on how renunciation clauses can influence the distribution of compensation, below § 21.

9. *Ibid.*

of the rights owned by that national, he will, with some justification, be able to claim that it is his home State and not the foreign State which has caused his loss.

This problem has arisen in the past few years as a result of the dissatisfaction which global compensation agreements have caused among private claimants.

This dissatisfaction is chiefly due to a supposition that the settlements reached by the government are not entirely satisfactory with reference to the amount of compensation and its payment. Whether this criticism is objectively valid is difficult to decide. The critics, however, submit the view that when presenting the group claim the government is not influenced solely by economic and legal considerations, but also, and even chiefly, concludes agreements for political reasons, for example the desire to restore full and friendly relations with the nationalizing State<sup>10</sup>. This political expediency, it is claimed, is often practised at the cost of individual claims<sup>11</sup>.

This criticism has been vigorously expressed in the United States and Great Britain<sup>12</sup>, where for example the large oil companies hold the view that, with their powerful influence and organization, they could achieve more financially satisfactory results by themselves<sup>13</sup>.

This problem differs from that explored by Max Sørensen above, in that the individual claimant does not believe that he has no hope of obtaining

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10. Cf. also Sfériades, "Le problème de l'accès des juridiction internationales, *Recueil des Cours* (1935) I, vol. 51, p. 28.

11. Criticism was strongly expressed both in the International Bar Association's and the International Law Association's conferences in the summer of 1960, during the debate on a setting up of an international arbitration court for the protection of private investments. Private persons would be able to appear before such an arbitration court as plaintiffs against foreign States, precisely to remove the problems from the field of politics. Neither of the conferences reached definitive results, and the subject is still under discussion.

12. Cf. also Vienot, *Nationalisations étrangères et intérêts français* (1953) p. 173.

13. Cf. also *Kungl. Maj:ts prop.* (1957) no. 37, where examples are given of large Swedish companies (including AB. L. M. Ericsson) which had their claims satisfied by direct negotiation with certain Eastern-European States in 1948.

compensation from the nationalizing State, and therefore to preserve his claim, which rightly or wrongly he believes valuable, he does not wish the question to be resolved by diplomatic methods.

On this point one might say that the State could merely abstain from representing the claimant in question, and thus the problem would disappear. The question, however, is not so simple. Treaty practice, which has developed in questions of nationalization is, as has been shown, specifically aimed at finding a solution by which all problems are removed together, and it is therefore more than possible that the nationalizing State would take the view that it would refuse to conclude any agreement on compensation unless all claims were definitively settled thereby. Thus a single claimant or group of claimants could make it impossible to reach a global settlement.

The situation which can arise when the essential interests of the State in conducting its foreign affairs collide with the interests in foreign countries of the individual citizen, is not obviously different from that which exists when a decision has to be made on the duty of the State to give the claimant diplomatic protection. In the latter situation it is taken that the State has no such duty, when for example predominant public interests argue against the exercise of diplomatic protection. In judging whether a citizen has a claim for compensation against the Danish State, it is an important factor in this situation that the loss arose from the acts of the foreign State, and it can never be established with certainty that diplomatic protection would have been effective <sup>14</sup>.

These principles do not seem applicable in the present situation. If a citizen wishes to preserve his property abroad, even if the property is to all appearances (for the time being) valueless, the Danish State must respect this <sup>15</sup>. Any property, whether immovable property, movable property, a debt or a doubtful claim for compensation against the nationalizing State, must be covered by the protection in art. 73 of the constitution, which is not subject to territorial limitations.

Nor does it normally seem tenable to destroy citizens' property by pleading a state of emergency or by analogy therewith. These powers ought only to be applicable in cases where a situation exists which threatens the

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14. Max Sørensen, *op.cit.*, p. 408.

15. This is also certainly the legal position in Holland, cf. the Dutch section in *I.L.A. Report* (1959) p. 232.

welfare of the Danish State and one which cannot be solved in any other way. In the field under consideration such a situation will emerge only extremely rarely.

On the other hand the State must be empowered to expropriate this property abroad against compensation, but only in cases where the common good demands it. This condition will sometimes (although not always) be fulfilled when interests connected with foreign policy or other interests are involved and the Danish State can only obtain a settlement if all claims are settled as a group.

The difficulties normally connected with expropriation abroad will only rarely be present. The expropriation will often be connected with a claim for compensation. When the interested party is domiciled or resident in Denmark, expropriation can be carried out by the Danish authorities. On the other hand if the case concerns property which, in the nationalizing State for example, is not nationalized, but which the foreign State wishes to include under a compensation settlement (for example property under national administration), expropriation will require the co-operation of the foreign State.

If the conditions for legal expropriation exist, the question still arises of the amount of compensation to be paid for the expropriated assets.

According to art. 73 of the constitution full compensation must be paid, but the problem here is whether the claimant should receive compensation equal to the value of the assets expropriated, or whether instead he should be given a proportion of the global sum equivalent to his entitlement under a normal distribution <sup>16</sup>.

In the great majority of cases, however, this problem will prove to be of predominantly theoretical interest and without essential practical importance. In practice the amount of the global sum is fixed by reference to the real value of the goods as this emerges under the changed economic and legal conditions existing in the nationalizing State. In the case of expropriation the Danish authorities could have no other basis of calculation and thus full compensation will in fact correspond with the proportion of the global sum the claimant in question would have received, if, on an equal footing with other claimants, he had requested that his claim should be raised by diplomatic means.

It might be possible to object that, if this is the solution, the problem is

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16. Cf. below § 22A.

in fact meaningless, since from a practical point of view the result will be that if paramount public interest makes it necessary, the State can include the claim even of an unwilling party in the global arrangement.

This reasoning is, however, not correct. First of all it is conceivable that the conditions for expropriation are not present, for example, because the assets which can be obtained are not reasonably comparable with the ownership the expropriation is aimed at destroying. In such a case the expropriation is not dictated by considerations of the common good. This situation can in fact come about if courts or similar bodies are set up in the international community where the individual can appear as plaintiff against foreign States. In these cases the State must refrain from concluding global agreements. The second reason is that the act of expropriation demands special authorization in law.

Finally, it is conceivable that the compensation obtained as a result of the global agreement is so disproportionate to the value of the goods in question that the claimant affected by expropriation may be able to claim compensation which is in excess of what other similar claimants might receive as their share of the global sum. The burden of proof here must rest with the claimant in question.

Against these views it might be argued that there is a danger that some claimants will raise objections to representation by the State, since by doing so they have a chance of obtaining more compensation than corresponds to their normal shares in the global sum. This danger is, however, not a real one and the chances of obtaining more compensation than nationals who do not raise objections against representation by the State are not very promising. The claimant who does not wish his claim to be pursued by diplomatic means is running a very real risk that his claim will turn out to be quite worthless.

## § 18

### FOR WHAT PROPERTY IS COMPENSATION PAYABLE

#### *A. Proprietary Rights.*

The compensation treaties which have been concluded are particularly comprehensive in their wording with reference to the kind of property to be included in the liability for compensation.

Thus the Danish-Polish agreement of 12 May 1949 speaks in general terms of "interests and property" and the agreement of 26 February 1953 enumerates "property, rights, and interests" as covered by the compensation. Similar wording was used in the British treaties, e.g. in the agreement with Yugoslavia of 23 December 1948 and that with Czechoslovakia of 28 September 1949 which uses the terms "Property, Rights and Interests". The Norwegian agreement with Bulgaria of 2 December 1955 deals with "interests", while the agreement with Poland of 23 December 1955 speaks of "assets". The Swedish agreements, too, use the comprehensive wording "rights and interests", as, for example, in the agreement with Poland of 28 February 1947 and the agreement with Czechoslovakia of 22 December 1957. The French-Polish compensation treaty of 19 March 1948 is similar. The agreement of 18 December 1946 concluded between Switzerland and Czechoslovakia is, however, more instructive and states that the payment of compensation covers the following claims:

"... propriété, participations, créances et propriété intellectuelle telle que brevets, licences, procédés de fabrication, plans, marques de fabrique et raisons sociales."

In general all the treaties provide that compensation will also be paid for shares or partnership in the aforesaid property.

From the wording of the treaties it will be natural to draw the conclusion that the goods included in the liability for compensation and enumerated in the treaties are nationalized property in the widest sense, i.e. all property of financial value affected by State action. The reasonable probability of such an assumption is strengthened by the very fact that the governments must be supposed to have exercised special care in the wording of this particular point in the text of the treaty. Indeed, the possibility cannot be excluded that individual claimants to compensation or juridical persons can be expected to support their claims against the State which receives the compensation by referring to the precise wording of the treaty<sup>1</sup>. And in such a case it is important that the treaty shall give as clear an expression as possible of the interpretation the parties attach to it.

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1. Cf. here Danish law no. 179 of 7 June 1958 on the distribution of certain sums received from abroad as compensation, where it was stated in § 4 that the compensation was to take place with guidance from the agreement between the Danish State and the nationalizing State; cf. on this below p. 284 foll.

Careful wording of what is to be understood by property seems necessary also as a consequence of the lack of any definition of the concept of property in the system of international law <sup>2</sup>.

These principles cannot, however, be entirely decisive in establishing the kind of property for which compensation is payable in accordance with global agreements of practical significance.

At the time when the global treaty is being drafted, the negotiators of the parties to the treaty have frequently examined the claims raised, and thus made their decisions on the goods for which compensation is to be paid by the nationalizing State. As stated above, a very essential aim of global arrangements is that the treaty shall contain a quit-claim for all claims arising from the act of nationalization. However, to be able to function as the final settlement of the issues between the parties, the text of the treaty should have as comprehensive a wording as is possible without the conclusion necessarily being drawn from the text that all the claims covered by the actual words used have, in fact, been compensated. The discussion of certain property can, on the contrary, conceivably be a sign that the parties to the treaty agreed that this property in particular was not compensated. The only safe conclusion to be drawn from the text of the treaties is that claims for compensation for property of the kind specified in the treaty arising as a result of nationalization of the property being completed before the signing of the treaty, cannot be raised again after the payment of the global sum.

The treaty practice discussed here thus gives no real guidance on the question of the property for which compensation can be claimed on nationalization and therefore does not contribute to the solution of this problem, which has often been discussed in general international law <sup>3</sup>.

On the other hand it may be taken that the general rules of international law concerning protection against interference with property certainly cover ownership of fixed property <sup>4</sup>, movable property <sup>5</sup> and real estate <sup>6</sup>. The protection also covers ships and shipbuilding contracts <sup>7</sup> and rights in connexion with concession agreements <sup>8</sup>. Although the practice of the courts

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2. Cf. Aleksander Magarasevic, *op.cit.*, p. 272.

3. Cf. Friedman, *op.cit.* p. 144-157, and B. A. Wortley, *op.cit.* p. 8, and Bind-schedler, *op.cit.*, p. 25 ff., also Hertz, *op.cit.*, p. 244-245.

4. Cf. for example the *Finlay Case* (1849) which concerned the seizure by the Greek government of land belonging to a British subject, for which seizure the Greek government was obliged to pay compensation; see *British State*



which forms the basis of the content of traditional international law does not date from the most recent times, and although the cases do not concern acts of nationalization but other acts against property, it may be taken that if it is recognized that nationalization involves liability to pay compensation, then that liability must include these goods too.

As far as the problem now discussed is concerned, namely the kind of claim which shall be compensated, there seems to be no basis for giving protection against nationalization any other limits than the protection existing against other interference with property.

On some problems within the concept of property, the latest treaty practice does, however, give a hint of guidance. It touches the problem of whether under international law good-will is a proprietary right for which compensation can be claimed from the State nationalizing such good-will.

The general attitude of international law on this point is not clear. The problem arose, *inter alia*, in connexion with the case of the Italian Life Assurance Monopoly (1911)<sup>9</sup>. This case attracted a good deal of attention in legal circles, particularly with reference to the question of good-will<sup>10</sup>. Some writers submitted that the good-will of a business, in the sense of the capitalized value of future income, is an asset which is protected in the same way as the stock and capital of a trader<sup>11</sup>.

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*Papers* (1849-50) vol. 39 p. 431-432, and Fachiri, *op.cit.*, p. 37. See, too, similar problems in the case of the *Rev. Jonas King* (1855).

5. Cf. the case of *Henry Savage* (1865) where an arbitration court ruled that the government of El Salvador was responsible for gunpowder belonging to Savage becoming worthless as a result of action by the government, discussed by Whitman, *ibid.* p. 893; cf. also the case of the *Sicilian Sulphur Monopoly* (1836), *British Foreign State Papers* (1839-1840), p. 1163-1242 and *ibid.* (1840-1841) p. 173-204 and *ibid.* (1841-1842), p. 111-120. It is, however, doubtful whether the last named case can be used as precedent, on account of the pressure exercised by the British fleet in connexion with the solution of the case.

6. Cf. Guggenheim, *op.cit.*, p. 304 and Schwarzenberger, *op.cit.*, p. 92.

7. Cf. *Norwegian Shipowners' Case against U.S.* (1922) *R.I.A.A.*, vol. I, p. 307 ff.

8. Cf. Whitman, *op.cit.* II, p. 1459, and above § 15.

9. See above § 7.

10. Cf. also in this connexion the *Henry Savage Case* (1865), above § 7.

11. Cf. Audinet "Le monopole des assurances sur la vie en Italie", *Revue générale de droit international public* (1913) vol. 20, p. 10 and Harremoes, *op.cit.*, p. 54 ff.

This view, however, was not sustained in the *Oscar-Chinn* case (1934)<sup>12</sup> where, following the complaint of Great Britain that the Belgian government by certain measures in the Belgian Congo had in fact abolished the right of an English company to sail cargo vessels on the Congo River, judgment was given that loss of customers by reason of changes in rates and tariffs was not a violation of vested rights. In this connexion Hertz<sup>13</sup> maintains that the situation in which the State would have an obligation under international law to guarantee such rights to foreigners would imply an obligation to guarantee such rights against every form of alteration, and so far-reaching an obligation cannot be assumed to exist. This reasoning somewhat misses the mark and in any case can have no relation to cases of nationalization. Even if one can agree with Hertz that a foreigner does not possess a right to continue to carry on his trade on the previously existing terms and that therefore the State has no corresponding unconditional obligation to guarantee this right to the foreigner, the situation is quite different where acts of nationalization are concerned. In these cases the State takes over trading activities with the deliberate intent of continuing previously existing exploitation of the property taken over. Here it seems reasonable that the State should accept responsibility for the goodwill which has been earned and, now, exploited by the State.

The latest compensation treaties do not comment directly on the question. As will appear later, however, compensation for nationalised property is established in principle on the basis of the market price of the property at the time of nationalization, and the prospect of future income is a factor which can contribute in deciding the amount payable. This appeared particularly clearly when, as in France and Egypt, compensation was also paid to foreign shareholders in nationalized companies at a rate calculated on the Stock Exchange quotation for the shares immediately before nationalization<sup>14</sup>, on the grounds that the quotation for the shares was fixed with reference to future earning prospects.

On the other hand, the latest treaty practice also shows examples where the nationalizing State has directly refused to pay for goodwill. Thus, in

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12. Cf. *P.C.I.J. Series A/B*, no. 63, p. 87-88.

13. *Op.cit.*, p. 245.

14. Cf. the French nationalization law of 8 April 1946, compared with the treaties between Belgium and France of 18 February 1949 and between Great Britain and France of 11 April 1951, see above p. 82 and p. 83.

1953, Iran undertook to pay compensation to the Anglo-Iranian Oil Company for the company's plant and distribution offices in Iran. Payment for loss of future earnings as a result of the cancellation of the concession was, however, refused <sup>15</sup>.

Thus no uniform interpretation of this problem emerges from the compensation treaties which have been concluded, but this is not remarkable. As a consequence of the wide scope of the compensation and as a consequence of the fact that the establishing of the decisive factor for the calculation of the compensation (namely the market value of the nationalized property) is attended by so many elements based on pure estimate, the question of compensation for good-will discussed here has little essential practical significance when compensation for nationalization is being decided.

#### *B. Creditors' claims.*

Nationalization of an undertaking normally includes all the assets and liabilities of the business. This raises the question of the position, relative to compensation, of creditors of nationalized undertakings.

In practice this question has been settled in various ways.

In the agreement between Denmark and Poland of 12 May 1949 it was a precondition (art. 3) that claims against nationalized undertakings should be raised against the previous owners, and account would be taken of this when the compensation due by law to those owners was determined <sup>16</sup>.

This arrangement appears to be extremely unpractical, since it presupposes that Poland will pay compensation to its own nationals, a situation in which it cannot be in Poland's interests that other States should interfere. The arrangement also involves the unreasonable (and unjustifiable) risk for the creditor that the recipient of the compensation may be unwilling to pay the debt (which may be extremely troublesome in international relations) or that the debtor becomes insolvent before the claim can be enforced.

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15. A.I.O.C., however, was paid \$ 600 million by the other partners in the oil consortium set up in 1953. The amount was paid in part cover of the claim discussed here.

16. A similar arrangement was authorized in the British-Polish agreement of 24 January 1948, art. 15, compared with art. 16 at the end.

This form of agreement has in general been abandoned by States, and global agreements now all contain provisions that creditors' claims constitute part of the global sum. In the Danish-Polish treaty of 26 February 1953 it was for example laid down that the Polish government should pay compensation to the Danish government, *inter alia*, for:

"3. Danish claims, including bonds, against debtors in Poland whose property is affected by the Polish legislation or the measures taken in pursuance thereof".<sup>17</sup>

In the agreement between Denmark and Czechoslovakia of 18 April 1960 a similar provision is worded:

"The compensation enumerated shall also cover Danish claims against debtors in Czechoslovakia whose property has been affected by any of the measures enumerated in the foregoing section, together with Danish interests in property affected by all such measures".

These provisions have, however, been given an unreasonably wide wording, and should be understood in a restricted way as only covering claims which involve nationalized property. There is also the treaty of 16 July 1960 between the United States and Poland, where the creditors' claims covered by the compensation agreement concern:

"(c) debts owed by enterprises which have been nationalized or taken by Poland and debts which were a charge upon property which has been nationalized, appropriated or otherwise taken by Poland."

Finally, it should be observed that most nationalization laws give creditors a less favourable legal position than that accorded to holders of proprietary claims. The Czech decree no. 100/45 § 5, cl. 2<sup>18</sup> thus annuls claims which are based upon "economical unjustified debts."

In Poland only certain obligations are kept alive<sup>19</sup>. By the law of 11 May 1948, art. 14, the Roumanian government annulled all claims due to bad administration, and in Hungary all claims which benefit owners and shareholders only were likewise abolished in pursuance of the nationalization law of 1948, art. 9.

In principle, however, these national provisions must be regarded as having no influence in international law on the claims for compensation.

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17. The same wording is used in the Swedish-Polish treaty of 16 January 1949.

18. Cf. Doman. *op.cit.*, p. 1158.

19. Cf. above § 9 on the nationalization law of 3 January 1946, art. 6.

From the standpoint of international law the only decisive factor is exclusively whether the creditor's claim was acquired in conformity with the national rules in force at the time of the acquisition. Whether the principle set down in the laws did in fact influence the calculation of the amount of compensation cannot, however, be established without close investigation of the individual claims brought forward during the negotiations which took place between the governments.

## § 19

### WHO CAN RAISE A CLAIM FOR COMPENSATION

#### *A. The Problem.*

In theory it is recognized that the rules of international law on compensation for nationalization cover alien property only. This is not a special rule for cases involving nationalization. International law does not control the relations between a State and its nationals and, for the nationalizing State to become subject to liability to pay compensation to another State, and for the other State to be competent to exercise protection, the property in question must have a certain national connexion with the claimant State. As will be shown below this is recognized in all compensation treaties.

The detailed analysis of the texts of the treaties, which is necessary to establish more precisely what is the national connexion which, according to the practice of States, is decisive both in establishing the obligation to pay compensation and competence to exercise protection, throws up a number of problems of essential importance, particularly as they concern juridical persons. These problems connected with companies or other juridical persons have often been solved by an unambiguous decision on the nationality of the company or the juridical persons which covers all problems. With reference to the explanation which follows, it should therefore be established from the beginning that it has not always been made clear that the problem concerning the nationality of companies or juridical persons can in fact appear in various relationships, and that the problem of national connexion which international law recognizes varies in at least some of these relationships. The following may serve as an illustration of this:

*Case 1:* A State, N, nationalizes a company (or other juridical person) which

thereby in reality ceases to exist. The company is situated on the territory of N, and it is assumed that, as a consequence of the law of N it has the nationality of N. If the shares, or a number of these, belong to nationals of a foreign State, the question arises whether this foreign State can exercise diplomatic protection relative to N, or whether N, on the other hand, can refuse claims from the foreign State on the grounds that the measure which provided the reason for the exercise of protection is affecting its "own nationals", namely the company.

The problem for solution here is the national character of the property in relation to the nationalizing State or, in other words, whether the formal connexion with the State carrying out the act of nationalization, or the real ownership, is decisive for the exercise of diplomatic protection.

This problem, which can be described as *the problem of the passive nationality of juridical persons*, will be treated below in section B.

*Case 2:* A State, N, nationalizes property in N which belongs to a company (or other juridical person) which has its situs in State B or is registered in B, or in which nationals in State B have an interest, though the company does not have the nationality of N. In this connexion the question arises whether the company in question has the nationality of B, and whether the nationality is decisive for the exercise of diplomatic protection in this relationship, since the starting point must be that a State, as a basic rule, can only represent interests which belong to one of its nationals, whether this be a physical or a juridical person.

This problem, which can be described as *the problem of the active nationality of juridical persons*, is concerned with the question of the national character of the property in relation to the protecting State. It is a question of establishing what nationality qualification is decisive for the exercise of diplomatic protection. This question will be discussed below in section C.

*Case 3:* Finally, a situation can be conceived where State N nationalizes property which belongs to a company which has the nationality of N or that of a third State, T, but where the shares, in whole or in part, are owned by persons or companies having nationality B.

This problem differs from that above under case 1 in that the company is intact after nationalization. The question which arises in this connexion is whether State B is competent to exercise diplomatic protection relative

to State N. This is the problem of what is the nature of the nationality of ownership.

This question will be dealt with below under section D in connexion with the discussion on indirect ownership.

*B. What is it that decides the national character of the property?*

1. *The property has no independent nationality.* If the property in question does not possess an independent nationality, the answer to the question will be decided by the ownership of the property.

If the owner is a Danish national, the property, as far as concerns the problems now under discussion, will be regarded as Danish, even though the property might be situated in the nationalizing State. Thus, this property, as a consequence of the ownership, will be subject to the rules of international law on nationalization.

There can be no doubt on this.

2. *The property has independent nationality.* On the other hand doubts can arise when the property which is nationalized and for which compensation is claimed, has an independent nationality under municipal legislation which is different from the nationality possessed by the person or persons to whom the goods belong.

This situation can exist when the property in question is a so-called juridical person, since it frequently happens that a company, for example, has an independent nationality.

This raises the problem described above as the problem of the passive nationality of juridical persons, where the question is whether the national character of an undertaking in, for example, the form of a company, shall be determined by the formal nationality of the juridical person, or according to the nationality of those to whom the company belongs.

The problem is not merely academic in cases of nationalization. For example, a Danish national owns shares in a company which has its situs in Poland and is registered in Poland, while the business of the whole company is carried on in Poland. According to Danish law the company cannot be regarded as Danish. According to Polish law the company will be regarded as Polish. The problem then is whether the Polish government, regardless of the Polish nationality of the company, may recognize that the nationalization affects alien property.

Since 1890 this problem has appeared several times in the practice of

international courts and arbitration<sup>1</sup>. Previously States were particularly disinclined to support claims by their nationals for compensation for losses they had sustained as shareholders in foreign companies. An example to illustrate this is the note of 27 April 1866 from the Foreign Minister of the United States to the American Ambassador in Columbia, where it states:

"It may well be that subjects of Great Britain, France and Russia are stockholders in our national banks. Such persons may own all the shares except a few necessary for the directors whom they select. Is it to be thought that each of these Powers shall intervene when their subjects consider the bank aggrieved by the operations of this Government?

If it were tolerated, suppose England were to agree to one mode of adjustment, or one measure of damages, while France should insist upon another, what end is conceivable to the complications that might ensue? It is argued that there is no policy which requires us to encourage the employment of American capital abroad by extending to it any protection beyond what is due to the strictest obligation. There is no wise policy in enlarging the capacity of our citizens domiciled abroad for purpose of mere pleasure, ease or profit, to involve this Government in controversy with foreign Powers<sup>2</sup>."

The historical character of this view is heavily emphasized by the last paragraph of the part of the note quoted, and not many years were to go by before the United States and Great Britain, which had pursued the same policy, diverged from these principles, as was evident in the case of the Delagoa Bay and East African Railway Company (1891)<sup>3</sup>.

On 14 December 1883 an American citizen, Edward MacMurdo, received a concession from the Portuguese company for the purpose of building a railway from Lourenço Marques to the frontier between Portuguese Africa and the Transvaal. To procure the necessary capital the English company was formed, and from it the case has taken its name. Work on the railway was almost complete when, in 1888, the Portuguese government announced that the railway must be 8 km. longer than originally planned, while

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1. An analysis of previous practice is to be found in J. Mervyn Jones "Claims on Behalf of Nationals who are Shareholders in Foreign Companies", *B.Y.I.L.* (1949), vol. 26, p. 225-258. However, this writer does not seem to have observed the difference in aspects of the problem on which the present survey of the nationality of juridical persons is based.

2. Quoted according to Jones, *op. cit.*, p. 228.

3. Cf. Whiteman, *op. cit.*, vol. III, p. 1694.



simultaneously a severe time-limit was imposed for the completion of the work. Since it was impossible, partly because of the rainy season, for the company to complete within the time-limit, the Portuguese government annulled the concession, invoking as grounds for its action breach of contract by the company.

England and the United States (acting on behalf of MacMurdo's widow) protested to Portugal and claimed compensation. Portugal sought to reject the intervention of these States on the grounds that the Portuguese government could only negotiate with the Portuguese company.

This company had, however, in effect ceased to function as a result of the annulment of the concession by Portugal. The British note to Portugal states *inter alia*:

"[Her Majesty's Government] ... hold the action of the Portuguese Government to have been wrongful, and to have violated the interests of the British Company which was powerless to prevent it, and which, as the Portuguese company is practically defunct, has no remedy except through the intervention of its own Government <sup>4</sup>..."

Portugal was obliged to recognize this view and the case was decided by arbitration, when the compensation for Portugal's action was fixed. The case therefore shows clearly that, although the property affected by the action was formerly Portuguese, Great Britain and the U.S.A. were in a position to protest, since the ownership was traceable to nationals of these two States.

Similar principles emerged in the *El Triunfo Case* (1902) <sup>5</sup>, where the government of Salvador had connived at certain irregularities with the result that a company registered in Salvador, partly owned by American interests, was declared bankrupt and thereafter a concession belonging to the company annulled. In this case also Salvador sought to reject the protest of the United States by referring to the *Delagoa Bay Case*.

An interesting exchange of notes on this question in fact took place between Great Britain and the United States in 1925, after Roumania had, at the instigation of Great Britain, destroyed certain installations on the Roumanian oil fields in 1916. Part of the property destroyed belonged to the Romano-Americana Company which was registered in Roumania, and the situs of this company was in Roumania. Almost the whole of the share

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4. Jones, *op.cit.*, p. 230.

5. Moore, *Digest of International Law* (1906), vol. VI, p. 649.

capital belonged to Standard Oil Company of New Jersey. Great Britain rejected the claim by the United States for compensation, because, *inter alia*, the company was not American.

The United States answered:

"Numerous precedents showing the practice of Governments to intervene on behalf of foreign corporations exist. Among them the Delagoa Bay case, El Triunfo case, the Alsop case, and the Tlahualilo case ... It would seem from the foregoing that the failure of Governments to protect their nationals in any case rests on other grounds than that their interest is represented in foreign corporations, and that it is established practice of Governments to protect the interests of their nationals in foreign corporations in appropriate cases <sup>6</sup>."

Great Britain answered:

"His Majesty's Government readily admit that many cases might be cited in which a Government has used its good offices in the interests of its own nationals, who are stockholders in a foreign corporation ...

Cases of this kind fall, generally speaking, into two classes: (1) where the action of the Government against whom the claim is made has, in law or in fact, put an end to the company's existence, or by confiscating its property, has compelled it to suspend operation; (2) where by special agreement between the two Governments a right to compensation has been accorded to the shareholders. From the second class of cases it is plain that no principle of international law can be deduced. The first class, so far from being an exception to the general rule, is in fact an example of its application, for it is not until a company has ceased to have an active existence or has gone into liquidation that the interest of its shareholders ceases to be merely the right to share in the company's profits and becomes a right to share in its actual surplus assets <sup>7</sup>."

The United States, however, abandoned its claim against Great Britain and received compensation from the Roumanian State which had been the actual agent of the damage.

The practice, as illustrated by the examples quoted above, seems to be sound also on the basis of realistic considerations, at any event as far as acts of nationalization directed against a national company are concerned: because it is precisely in these cases that the company in question will be dissolved.

The rules of international law on the diplomatic protection of alien property have as their purpose the preservation of the interests abroad of

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6. Hackworth, *Digest of International Law* (1943), vol. V, p. 841.

7. *Ibid.*, p. 843.

foreign States and their nationals and the financial interests a foreigner has in a company by owning shares in the company must, according to the general view, be regarded as conferring a right to share in the assets of the company in proportion to the number of shares held. When the right to share is made worthless by the nationalization of the company, there is the same call for the rules of international law to protect this form of property as in those cases where immovable or movable property owned by a foreigner has been nationalized.

Against this the objection cannot be levelled that these considerations are in conflict with principles of company law, whereby a juridical person is an entity and that it will be contrary to the purposes and character of a company if minority rights can be directly submitted to the third party (the nationalizing State) by some of the shareholders and not by the organs of the company.

The characteristic factor in the situation that is being considered here is, however, that action of the State involves the company itself or of all the assets of the company, in such a way that its previous existence, in fact, comes to an end. In this way the juridical person is in reality liquidated, and the right to share consequently manifests itself as a factual right to a share of the assets of the company. The fact that in single cases the nationalizing State retained the form of a company even after the undertaking had passed to State ownership, does not appear to lead to a different conclusion, since the original company which was owned wholly or in part by foreigners, ceased in reality to exist in this case also.

The fact that a company has independent nationality can be practical and reasonable from the point of view of the internal legislation of a State, but this nationality should not be decisive as to whether the juridical person should enjoy protection under the provisions covering the rights of foreigners in international law relative to the State whose nationality, for motives quite irrelevant to international law, has been given to this juridical person<sup>8</sup>.

One aspect of these principles was also stressed in a British note to the Mexican government following the nationalization of the British-owned Mexican company.

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8. Cf. also Mosler, *Wirtschaftskonzessionen bei Änderungen der Staatshoheit* (1948), p. 44, and the cases quoted there in connexion with problems of succession.

The note states *inter alia*:

"If the doctrine were admitted that a government can first make the operation of foreign interests in the territories depend upon their incorporation under local law, and then plead such incorporation as the justification for rejecting foreign diplomatic intervention, it is clear that the means would never be wanting whereby foreign governments could be prevented from exercising their undoubted right under international law to protect the commercial interests of their nationals abroad<sup>9</sup>."

The development which has taken place since 1866 in this field of international law is confirmed by the negotiations on compensation which were carried on between Switzerland and Czechoslovakia in connexion with the Czech regulations on nationalization.

In the treaty concluded between these two States on 18 December 1946, it was provided that compensation should be paid for nationalized Swiss companies, that is to say companies where Swiss capital comprised more than 50 %. In the appended protocol of 7 February 1947<sup>10</sup>, however, the following was added to this provision:

"D'une façon générale, il est bien entendu que, d'autre part, les participations minoritaires suisses bénéficient également de cette protection ..."

It is apparent also from the register published in the French *Journal Officiel* of 11 November 1951 listing the interests which had received compensation in conjunction with the agreement on compensation concluded between France and Poland on 19 March 1948, that compensation had been paid for French interests in 54 companies, of which 47 were Polish companies according to Polish law. In seven of these companies the French interests were only minority interests, since they comprised from 11 to 31 % of the share capital.

Authority for the protection of shareholders' interests, apparently without reference as to whether majority or minority interests are in question, is also to be found in the compensation agreement concluded between

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9. *Cmd.* 5758 (1938). See also Harvard, *op.cit.*, art. 20, cl. 2(c): "Injured aliens include ... an alien who holds, directly or indirectly, a share in, or other analogous evidence of ownership or interest in a juristic person which is a national of the respondent State ... and who suffers an injury to such interest through the dissolution of ... such juristic person ..." and the commentary attached to it p. 106.

10. *Recueil officiel* (1948), p. 556.

France and Roumania on 9 February 1959 and in the treaty of 16 July 1960 between U.S.A. and Poland, where American property was defined as assets etc. owned by Americans

"through ownership of capital stock or direct juridical persons organized under the laws of Poland, any part of whose property has been taken by Poland ..."

In those cases where no decisions have been recorded in the compensation treaty on this problem, it may consequently be assumed that the treaty is to be interpreted in agreement with the development shown here of the general rules of international law in this field, and thus ownership in the case of juridical persons also, is the decisive factor in determining competence to exercise protection relative to the nationalizing State, regardless of whether the property has the same nationality as that State.

### *C. To whom shall the property belong?*

1. *Physical persons.* Practically speaking the wording in the compensation treaties is identical in providing that the property for which compensation is payable as a result of nationalization shall belong to persons who are nationals of the State which presents the claim for compensation.

This principle, that nationality is decisive in international law for diplomatic protection is generally recognized in international legal theory<sup>11</sup> and practice.

The problem of which persons a State can regard as its nationals is, however, solved in international law by reference to the municipal legal systems<sup>12</sup>, which in this respect have a free hand, providing only that the person in question has some qualified connexion with the State, and the State does not abuse its powers to grant citizenship with the object of evading the rules of international law concerning the rights of aliens .

In a recent judgment the International Court of Justice pronounced as follows:

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11. Cf. for example Borchard, *op.cit.*, p. 15: "... nationality is the most important factor, for it is by virtue of the bond of nationality, that [the alien] is entitled to invoke the aid of a specific protector and that a definitive member of the international society of states has the right to interpose on his behalf to secure a guarantee for his rights and reparation for their violation."

12. Cf. Hague Convention of 12 April 1930, art. 1: "It belongs to every State through its legislation to decide who is its national ..."

"According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as the basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties ... A State cannot claim that the rules it has thus laid down ... [concerning nationality] ... are entitled to recognition by another State, unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual's genuine connection with the State which assumes the defence of its citizens by means of protection as against other States<sup>13</sup>."

As far as physical persons are concerned, the establishment of the nationality of a given person generally presents no difficulties in practice, since nationality is an identification which can be proved objectively.

In this connexion there are, however, a number of individual questions which require more detailed explanation.

In the special case where a person has dual nationality, the general rules of international law on this point must apply: that is to say, a claim for compensation for nationalized property belonging to such a person cannot be presented against a State which also lawfully claims the person in question as one of its nationals; while, similarly, the nationalizing State must be able to choose as competent to exercise protection that State with which the person with dual nationality has the strongest bond. On this question, among other factors, the behaviour of the person in question may be decisive; for example, what nationality he has invoked on previous occasions against the State in which he resides<sup>14</sup>.

It might perhaps be asked whether a person's domicile in a State should not be sufficient to make this State his competent protector in international law, at any rate in those cases where the person in question possesses no nationality. It may indeed seem unreasonable that a stateless person who,

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13. *The Nottebohm Case* (1955), *I.C.J.*, 6 April 1955, p. 23.

14. Cf. The Hague Convention of 12 April 1930 art. 4 and 5, as well as the case, *Baron Frederic de Born v. Yugoslavia* (1926), quoted in Ross and Foighel, *Studiebog*, p. 207. See also Amador's *Report on International Responsibility*, where the following provision is proposed: "art. 21, cl. 4, in cases of dual and multiple nationality, the right to bring a claim shall be exercisable only by the State with which the alien has the stronger and more genuine legal and other ties." *UN. doc., A/CN.4/111* (1948). Cf. also on this question Sinclair, "Nationality of Claims, British Practice", *B.Y.I.L.* (1950), vol. 27, p. 135.

by his activity in the country, has acquired a claim against the nationalizing State should have no possibility of having his claim raised by the authorities of the country in which, for example, he does his military service, and which through taxation and the like receives a share in the proceeds of his activity. This becomes even more unreasonable in view of the frequently very long period of time which, under national legislation, must pass before an application for naturalization can be admitted.

Existing international law<sup>15</sup>, as well as compensation treaties, is however, unanimous on this point<sup>16</sup>, and insists unconditionally on the existence of nationality to enable a person affected by nationalization to obtain compensation.

2. *Juridical persons.* Special difficulties arise in connexion with the protection which a State is competent to exercise in the case of juridical persons<sup>17</sup>. The difficulties arise in connexion with two questions unconnected with each other.

They are (a) the first question of what nationality the juridical person has, and (b) the second of whether the nationality thus proved is decisive for the exercise of diplomatic protection by the State or whether, as a result of the complexity of the problems, it must be recognized that States, in the case of juridical persons, depart from the principle of formal nationality, either in such a way that in order to raise a claim for protection the State demands more than formal nationality or, on the contrary, that the State is

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15. Cf., however, the case of *Martin Koszta* (1853), Moore, *Digest*, vol. III, § 490, where the United States considered itself competent to extend protection to a person who was domiciled in the United States, and who meanwhile was living in Turkey. The case has been strongly criticized and was based on quite special circumstances, among them that Koszta had applied for American citizenship. Borchard, *Diplomatic Protection*, p. 570-74.

16. Cf. Wehberg, who in *Annuaire* (1950), vol. 43, I, p. 110, states that a confidential agreement was concluded between Switzerland and Poland, under which Poland undertook to give compensation for property belonging to stateless persons domiciled in or owning property in Switzerland.

17. Cf. Louis-Lucas, "Remarques relatives à la détermination de la nationalité des sociétés", *La semaine juridique* (1953), p. 1104, and Mann, "Zum Problem der Staatsangehörigkeit der juristischen Person", *Festschrift für Martin Wolf* (1952), p. 271 foll.

recognized as competent to exercise protection for companies other than those having formal nationality:

(a). International law gives no direct solution in connexion with the question of the nationality of juridical persons. International law refers back to the municipal legal systems, so that the question whether a juridical person, for example a company, can be regarded from a nationality point of view as connected with State A, must be determined solely by the legislation of A <sup>18</sup>.

Just as in the case of the determination of the nationality of physical persons, the elements in municipal laws which determine nationality in the case of juridical persons differ from State to State <sup>19</sup>.

Frequently one of the following tests is applied as a basis for the definition of nationality:

The situs of the company.

The registration of the company.

The nationality of the persons controlling the company.

A more detailed examination of the application of these tests in individual States has no bearing on the present problem. In illustration, it can only be said that existing practice in national legislation is naturally reflected in the claims for compensation which have been settled.

The Danish-Polish protocol II of 26 February 1953 thus includes:

“trading undertakings which have their situs <sup>20</sup> in Denmark” (art. V).

18. In the Danish law no. 132 of 30 March 1946 on the confiscation of German and Japanese property § 2 seems to define when a company is German. This, however, is due to the special character of this law. By its terms, German nationality of a company was identical with the quality of its being enemy property, and on this question Danish legislation must have a free hand. Against that, this definition of the nationality of the company can scarcely be important in other relationships.

19. According to Mervyn Jones the investing of companies with a nationality is something comparatively new, since nationality up to recent times was closely bound up with personal allegiance to the sovereign, cf. Jones, *British Nationality Law and Practice* (1947), p. 3-11.

20. It is assumed in general that all joint stock companies that have their headquarters in Denmark are Danish and must be registered as such. It can, however, scarcely be this assumption on which the text to the protocol is based, since it seems to presuppose that the criterion of headquarters, “seat”, does



In agreement with this, the Swedish-Polish protocol of 16 November 1949 contains the following provisions in art. 5:

"As Swedish shall be considered ... juridical persons or trading undertakings with their situs in Sweden."

Switzerland also regards a company as Swiss if its situs is in Switzerland, as for example in the treaty with Yugoslavia of 27 September 1948.

The treaties concluded with Great Britain are based upon a different test. In the treaties with Yugoslavia of 23 December 1948, Czechoslovakia of 28 September 1949 and Poland of 24 January and of 11 November 1954, and with Hungary of 27 June 1956, there is identical wording, as follows:

"British Nationals' shall mean

...

- (ii) Companies, firms and associations incorporated or constituted under the laws in force in the territory of the United Kingdom of Great Britain and Northern Ireland, Canada, the Commonwealth etc. ..."

From fields outside the treaties discussed here, art. 78, cl. 9 in the Peace Treaty with Italy of 1947 contains the following:

"United Nations nationals means ... corporations or associations organised under the laws of any of the United Nations at the coming into force of the present treaty provided that the said individuals, corporations or associations also had this status on 3rd September 1943, the date of the Armistice with Italy ..."

In the Harvard draft convention of 1959 art. 21, cl. 3(d) it is stressed that the juridical person, to have the nationality of a State, shall be:

"established under the law of that State or of a political sub-division thereof <sup>21</sup>."

No uniformity therefore exists as to what test is decisive for a company's national character in international legal relations.

*De lege ferenda*, it can be said that the criterion of registration is the one which is automatically the most useful in deciding questions of nationality. First the test is objectively provable and thus extremely simple to

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not give a company nationality, but "Danish character", cf. art. V cl. 2, which states: "The physical persons shall be of Danish nationality and the juridical persons and business undertakings shall be of Danish character, both at the moment where their interests and rights were affected ... etc."

This must in fact mean that Denmark has abandoned the principle of nationality as the sole criterion for diplomatic protection, cf. below, re (b).

21. *Op.cit.*, p. 108 ff.

apply. In the second place it can be claimed that there is a true connexion between the company and the State in which it is registered, since it is the legislation of that State which governs the form and functions of the company. Finally it can be said that these principles correspond with those obtaining for physical persons whose nationality is likewise determined by the State whose legislation gives them that status <sup>22</sup>.

These principles are, however, not recognized in practice. The difficulties which arise therefrom are only a little reduced by the importance which international law attaches to nationality in connexion with the rules on competence to exercise diplomatic protection.

(b). Both the criterion "situs" and "registration" can be suitable qualifications for deciding the position of a company in municipal law, for example relative to licensing or taxation laws. However, for the same reasons that it came about that formal nationality was not decisive when judging whether the company was national property in relation to the nationalizing State, it seems clearly unreasonable in connexion with the problem of active nationality that these criteria alone should determine competence to exercise protection under international law. There can be a great number of reasons why a company is registered in another place than that in which it carries on its business, and these reasons generally have nothing to do with the motives which lie behind the rule concerning competence to exercise protection under international law.

In the problem of the active nationality of juridical persons there are, however, certain special considerations. While a State is certainly interested in protecting the property of its nationals abroad in the widest possible way regardless of how this property is made up, whether the property is of itself single articles, a single man firm, or a company, practice shows that States on the other hand are only interested in representing the property of their *own* nationals and no others.

The compensation treaties which have been concluded in connexion with nationalization show interesting features on this point. They demonstrate that only in quite few cases has the normal internal definition of nationality of the claimant State been sufficient <sup>23</sup>. It may often have been restricted, but equally often it may have been extended.

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22. Cf. Harvard, *op.cit.*, p. 112.

23. Cf. also Borchard before l'Institut de droit international at the meeting of the Institute in Cambridge 1931, *Annuaire* (1931), p. 297.

In its treaties, Switzerland has laid stress on the interests in the company being actually Swiss. For example, the Swiss-Polish compensation treaty of 25 June 1947 covers juridical persons who have their "siège social en Suisse et comportant intérêt suisse prépondérant". Similar wording is also found in the other compensation treaties concluded by Switzerland, cf. for example, the agreement with Yugoslavia of 27 September 1948 <sup>24</sup>.

An aide-memoire to this agreement explains that preponderating Swiss interests exist when the absolute majority of the company's capital is in Swiss hands, or when the Swiss capital, although in the minority, has a decisive influence on the company's policy. In addition, a company is similarly regarded as representing preponderantly Swiss interests when the persons who direct it are Swiss nationals. In this way Switzerland has reduced the importance of the formal criterion of nationality over a wide field.

The United States, too, supports the principle that nationality is not enough but that there must also exist a decisive and real American interest. Thus in art. 2 of the agreement with Yugoslavia of 19 July 1948 it was stated that the agreement covered property which belonged to:

"corporations organized in the United States, provided that at least twenty per cent of a corporate claimant's outstanding securities of any class were owned directly or indirectly by American nationals."

In the treaty with Poland of 16 July 1960, demands were more severe and the agreement included:

"juridical persons organized under the laws of the United States ... of which fifty per cent or more of the outstanding capital stock or proprietary interest was owned by nationals of the United States."

In the agreement between Belgium-Luxembourg and Czechoslovakia of 30 September 1952 it was laid down in art. 11 that compensation should be paid for property which belonged to juridical persons having their seat in Belgium or in the Duchy of Luxembourg, and having "un intérêt belge ou luxembourgeois prépondérant" <sup>25</sup>.

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24. Cf. also Guggenheim, "Der völkerrechtliche Schutz ...", *op.cit.*, p. 66, which declares that it is scarcely possible in questions of nationalization to regard a company as national when that company does not represent essential national interests.

25. This is to be understood in conjunction with the protocol accompanying the agreement, which provides that the headquarters, seat of the company shall

Sweden is among the States taking the opposite course, that is, going beyond the concept of a national company. In the treaty between Sweden and Hungary of 31 March 1951, it is provided in art. 2 that compensation includes property which belongs to:

"... juridical persons or trading companies with their seat in Sweden or with preponderantly Swedish interests."

However, this wording is not found in the most recent treaties concluded by Sweden. In the agreement with Czechoslovakia of 22 December 1956, it is stated in art. 5 that compensation should only be paid for:

"property, rights, and interests which directly or indirectly, in whole or in part, belong to ... juridical persons with Swedish nationality ..."

In protocol II of 26 February 1953 Denmark has taken the standpoint relative to Poland that Denmark is competent to exercise diplomatic protection with reference to "all juridical persons or trading activities which have their seat in Denmark". It appears from art. 5 cl. 2 that the Danish concept goes beyond the principle of nationality. In the treaty between Denmark and Czechoslovakia of 8 April 1960, it is provided in art. 3 that the rights and interests dealt with in the treaty shall belong to "... companies which were Danish ..." Here, therefore, importance is attached solely to formal nationality.

France, too, goes further than is justified by the concept of national companies, and has, for example in its agreement with Poland of 19 March 1948, obtained compensation for property belonging to French companies or companies under French control, cf. art. 4 b) and c).

From these statements it can already be seen that there is no clear and uniform line in the practice of States. Only in comparatively few cases, as for example Great Britain and now Sweden and Denmark, is the criterion of the nationality of the owners of the company accepted as the sole decisive factor in determining competence to exercise diplomatic protection. It is difficult to decide how far the narrowing of the national criterion as seen in the treaties concluded by Belgium, Switzerland and France expresses

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be in one of the two States "... dont le capital est à raison de 45 % au moins dans des mains belges ou luxembourgeoises, dont les organes sont en majorité composés de ressortissants belges ou luxembourgeois désignés par les détenteurs belges ou luxembourgeois du capital et dont la dette éventuelle envers des créanciers étrangers n'est pas disproportionnée à l'importance du dit capital ..."

current tendencies. There are, however, many reasons which suggest this is so. The taxation and exchange problems of recent years have often caused companies to be registered in another country than that in which their natural interests and fields of activity lie. The importance of the relations between States, and the strain which unsolved problems of compensation put on normal relations between States, are good reasons for narrowing the scope of diplomatic protection. It must, however, be recognized that this reasoning is not conclusive, and that the tendency, if it is possible to speak of one at all at this moment, may have other interpretations. It is only possible to understand the practice if, when considering juridical persons, the problem discussed is viewed here in conjunction with that dealt with under B. The conclusion then is that in recent times States, in their attitude to the problem both of passive and active nationality, are abandoning the formal criteria without regard to whether this involves the scope of diplomatic protection becoming particularly wide or particularly narrow, and instead are trying to discover what, from the viewpoint of international law, must and ought to be the decisive elements, namely the actual interests which lie behind the legal constructions.

This is emphasized by the wording on the characteristics for ownership, which is usually given in connexion with the criteria for determining the national ownership in the passages examined in this section.

#### D. *What are the characteristics of national ownership?*

There is an almost uniform wording<sup>26</sup> in the compensation treaties that property for which compensation is payable shall belong to national physical or juridical persons either directly or indirectly.

1. *Direct ownership.* Direct ownership hardly gives rise to doubt either in connexion with individuals or with companies.

2. *Indirect ownership.* Indirect ownership by individuals or companies can only exist when a person or a company is the owner in whole or in part of a company (hereafter described as company II) which in turn is the owner of property or interests involved in nationalization.

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26. The wording is, however, not found in the global compensation agreements concluded between Norway and Bulgaria on 2 December 1955 and between Norway and Poland on 23 December 1955.

If company II is of the same nationality as the physical or juridical persons who own this company, compensation is already authorized under the provision in the treaties to the effect that compensation is payable in respect of property directly belonging to national juridical persons.

The provision concerning indirect ownership therefore only acquires independent importance if company II has a nationality different from that of its owners.

Understood in this sense the wording of indirect ownership appears to be directed at two situations:

- (a) company II has the nationality neither of the owners nor of the nationalizing State,
- (b) company II has the nationality of the nationalizing State.

*on (a).* If indirect ownership covers the situation where company II has the nationality of a third State, this wording will lead to unreasonable results. A few examples will illustrate this:

Example 1: A Danish citizen owns a number of shares in a German company (company II) which owns property in Poland. The property is nationalized and the German company suffers loss thereby.

The rule on indirect ownership seems to lead to the result that the Danish citizen through his government shall be able to raise a claim for compensation corresponding to the proportion of his share in the total assets of the company. It seems that this result must be rejected, because Germany has not concluded a compensation treaty with Poland and consequently the owners of the balance of the share capital will receive no compensation, and because, according to company laws, a shareholder in a going concern cannot raise a claim on the grounds that the company has sustained a loss. A claim of this kind was discussed during the Danish-Polish negotiations on compensation and was in fact rejected by Poland.

Example 2: An American citizen owns shares in a Swiss company (company II) which owns property that has been nationalized in Yugoslavia.

Both Switzerland and the United States have concluded treaties with Yugoslavia providing for payment of compensation for nationalized property, but the detailed contents of the treaties are different. Compensation

to the United States is paid in cash in gold, whereas compensation to Switzerland is payable by instalments over 10 years. In this case, too, it appears unnecessarily complicated and contrary to company law if the American citizen should be able to claim his compensation from money paid out to the United States. He must receive his compensation on an equal footing with the other shareholders in the Swiss company through Switzerland, since the sum paid out in compensation to Switzerland will also include his claim.

The question therefore is whether it is in conformity with the view of the contracting States to draw such unreasonable conclusions as these from the wording of the treaties, and to interpret the provisions in the treaties we are examining in such a way that in these cases compensation is payable, and should be paid, to the State of nationality of the indirect owner.

The question must be answered in the negative.

This is the case in the Danish-Polish negotiations on compensation where the obligation to compensate for indirect ownership via foreign States was not admitted; and in the French-Polish negotiations, where the published list<sup>27</sup> of compensated French interests shows that compensation was paid only for property which belonged directly to French physical or juridical persons, or indirectly to them through Polish companies.

In reply to an inquiry<sup>28</sup> the Swedish Ministry for Foreign Affairs unofficially stated that compensation for property which belonged to Swedish nationals indirectly, i.e. through foreign companies, had not been obtained by Sweden either. The British Foreign Office stated that the Foreign Compensation Commission (a British commission charged with the distribution of compensation received) had in isolated cases paid out compensation for property nationalized in Yugoslavia and Czechoslovakia, belonging to companies with their seat, in Switzerland, but controlled by British shareholders. It was expressly emphasized that these claims for compensation were not covered by the Swiss agreements (by reason of the British capital), and it should not be expected that such claims would be met in the future<sup>29</sup>.

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27. *Journal officiel* of 11 November 1951.

28. Transmitted at my request.

29. This notice from the British Foreign Office does not, however, show that Great Britain had had the claims here discussed met by Yugoslavia and Czechoslovakia, since the commission undertakes the distribution of the

As a final example, the provision on indirect ownership in the agreement between Switzerland and Czechoslovakia, by the supplementary protocol of 7 February 1947<sup>30</sup> art. 1, cl. 4, makes it clear that Czechoslovakia is to be expressly exempted from payment of compensation for Swiss interests in German firms, since it was expected that such claims would be settled at the coming peace conference with Germany. In this case, too, recognition of indirect ownership as a basis for compensation claims was rejected.

*on (b)* In connexion with the analysis of the rules on the problem of the passive nationality of juridical persons dealt with above, it is assumed that in the case of juridical persons also it is the real ownership which is decisive, even though the nationalized company possesses the nationality of the nationalizing State. The principles of company law do not decisively contradict this assumption, since in this situation it must be presupposed that the nationalization was directed against the company itself whereby the company was in reality dissolved, and in this situation, the right of the individual shareholder will then be manifested as an actual sharing right.

However, the situation is different where the case concerns nationalized property belonging to a company which continues in being in the nationalizing State even after nationalization, and which according to the law of the State possesses the nationality of that State. Here there is in fact the same pressure for foreign States to protect the shareholdings of their nationals in these companies, if only because it is immensely difficult in practice to decide how large a part of the assets must be nationalized to terminate the existence of the company in reality. On the other hand, in this situation the principles of company law, according to which individual shareholders should not be able to take action except through the appointed channels of the company, cannot be entirely rejected a priori.

The problem arose in connexion with the nationalization by Mexico in

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monies received solely on the basis of English municipal law, as laid down in the Foreign Compensation Act of 12 July 1950. Even though Yugoslavia and Czechoslovakia might have paid compensation for the claims under discussion, it is questionable whether, in these cases, we are dealing with indirect ownership. According to Swiss law these companies do not have Swiss nationality, and the British control over the companies points to their being in reality British, regardless of the fact that they are not registered in Great Britain, cf. above the cases quoted under C.

30. Cf. *Receuil officiel* (1948), p. 547.



1938 of property belonging to the Mexican Eagle Company, which was registered in Mexico where the company had its seat, and 70 % of the share capital was in British and Dutch hands. Great Britain protested to Mexico, which rejected the protest partly on the grounds of the company's nationality. Great Britain was unable to recognize these views and the case was finally solved by the conclusion of a treaty between Great Britain and Mexico (and a corresponding treaty between Holland and Mexico) of 7 February 1946, where details of the principles for the payment of compensation were laid down. Mexico was thus obliged to yield to the British views<sup>31</sup>.

Also in connexion with payments of compensation after the First and Second World Wars, treaties were concluded which extend diplomatic protection to indirect ownership in this type of situation. As an example, the Peace Treaty with Italy of 1947 in art. 78, cl. 4 (b) contains the following provision:

"United Nations nationals who hold, directly or indirectly, ownership interests in corporations or associations which are not United Nations nationals within the meaning of paragraph (a) of this article, but which have suffered a loss by reason of injury or damage to property in Italy, shall receive compensation in accordance with subparagraph (a) above. This compensation shall be calculated on the basis of the total loss or damage suffered by the corporation or association, and shall bear the same proportion to such loss or damage as the beneficial interests of such nationals in the corporation bear to the total capital thereof<sup>32</sup>."

This provision also appears to cover the situation where the companies concerned are still functioning.

Thus, in the case of the Mexican Eagle Company and the peace treaties quoted, the decisions reached went beyond the company law principles which involved the non-recognition of indirect ownership in the situation described above under (a) where company II had the nationality of a third State. This appears to be reasonable. Where company II has the nationality of the nationalizing State, it means that the possibilities that the company will receive the necessary diplomatic protection are very limited. These possibilities can indeed be as strictly limited as in the situation in which the company is dissolved. The choice here is between recognizing some protec-

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31. Cf. Jones, *op.cit.*, p. 24.

32. Similar provisions are found in the peace treaties with Bulgaria, art. 23, cl. 4(b), Roumania, art. 24, cl. 4(b) and with Hungary, art. 26, cl. 4(b).

tion from international law or discounting it completely. In deciding this choice, company law considerations must give way. This must be the meaning, and the only meaning, of the wording used in the compensation treaties on the subject of indirect ownership.

Understood in this way, and connected with the points made above under B and C, it may be said that in their most recent treaty practice States attempt to preserve the real interests of their nationals to the widest possible extent, irrespective of how these interests may emerge.

*E. At what point of time shall the national ownership exist?*

It is generally accepted in international law that for a State to raise a claim against another State on behalf of one of its nationals, national ownership must exist both at the time of the breach of rights and at the time when the demand for compensation is presented.

The basis for discussion prepared for the codification conference at the Hague in 1930 contains the following provision on this point:

"A State may not claim a pecuniary indemnity in respect of damage suffered by a private person in the territory of a foreign State unless the injured person was its national at the moment when the damage was caused and retains its nationality until the claim is decided ..."

Although the problem was not discussed at the conference, the above statement was regarded as an expression of the international practice and of the view prevailing among the majority of the States which had replied to the questionnaire of the League of Nations on the subject<sup>33</sup>.

The theoretical basis which has been sought for this problem, namely the discussion on how far the claim is "owned" by the private person affected by the State itself, will not be examined in detail here. The work of *Alf Ross*<sup>34</sup> on showing the unrealistic and speculative character of this discussion can in general be accepted. The problem is solely a practical problem, for whose solution only exclusively practical considerations, applied to situations where the raising of international claims will be of importance, are decisive. This also appears to be recognized in the basis for discussion quoted above.

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33. Cf. Briggs, *The Law of Nations* (1953), p. 733, and the quotations and references given there.

34. *Op.cit.*, p. 263 ff.

In international treaty practice, however, examples can be produced where States have diverged from the general rule of international law.

In an exchange of notes<sup>35</sup> between the United States and Belgium of 5 December 1949 concerning compensation for war damage suffered by American citizens, it is provided that, to take advantage of the legal benefits mentioned in the treaty, they shall as a general rule be American citizens both at the point of time when the war damage occurred and at that time when the agreement on compensation came into force. It adds:

"This benefit is likewise granted to persons who had the status of "American nationals" on only one of the two aforesaid dates and that of nationals of either Belgium or another country with which Belgium concluded a reciprocity agreement regarding war damages on the other date."

This ruling is quite accomodating in its wording, in that it at least eliminates the inadequacy which the traditional rule involves, in cases where a change of nationality takes place between the emergence of the claim and its enforcement between two States, each of which on its own account has made comparatively uniform arrangements for compensation with the paying State. However, the rule does not appear to have been applied in other cases than those covered by the exchange of notes. In particular it may be noted that United States has regarded the rule applied in the exchange of notes as a specific exception. In February 1959 the State Department, on the occasion of an approach to Congress<sup>36</sup> seeking to amend the demand that nationality must exist at the time when the claim came into being, made the following declaration:

"In view of the above-mentioned impressive array of pronouncements by Secretaries of State, of learned professors and authors of recognized competence in the field of international law and practice, and of tribunals, including the Permanent Court of International Justice<sup>37</sup>, it is difficult to understand how the

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35. 2. *U.S.T.*, p. 945-946.

36. The application was, inter alia, submitted by the Conference of Americans of Central and Eastern European Descent, and concerned the payment of compensation money for nationalization in Bulgaria, Hungary and Roumania. The application sought to alter the American legislation and conditions for payment, on the argument that no such rule as that given in the text was to be found in international law.

37. H. Lauterpacht, *The Development of International Law by the International Court* (1958), p. 350-352, however, supported by the practice of the court,

proponents of the theories advanced in the petition could expect to succeed in their efforts to convince the Government of the United States that there is no doctrine in international law which requires that, in order to be legally valid, an international claim be national in origin, that is, that the claimant be a national of the claimant state at the time his claim arose. Of course, two nations could as between themselves, as in the case of Belgium and Czechoslovakia<sup>38</sup> ... agree to depart from the doctrine, but that fact cannot, as stated above, create a principle of international law binding on states which are not parties to such an agreement<sup>39</sup>."

In the treaties which have been concluded for compensation for nationalized property, the ruling principle has overwhelmingly been that the general rule of international law should be followed, and that the foreigner affected should possess the nationality of the claimant State both at the time of the action and at the time of the enforcement of the compensation claim. The precise definition of these points is, however, not uniform.

In considering the earliest moment at which the nationality of the claimant State shall be in existence, most treaties provide that it shall be the day on which the measures for nationalization were carried out. This was the wording in the agreement between Great Britain and Yugoslavia of 23 December 1948, Great Britain and Czechoslovakia of 28 September 1949, France and Bulgaria of 28 July 1955, Great Britain and Hungary of 27 June 1956, between Holland and Yugoslavia of 17 March 1958 and between Denmark and Czechoslovakia of 8 April 1960.

The uniformity in the wording of the treaties according to which general rules of international law are in fact to be observed, is, however, only apparent.

In an "Interpretative Minute" to the agreement between Great Britain and Czechoslovakia of 28 September 1949, it is stated that "the date of the relevant measure" means "in all cases in which the measure concerned was effected by or as a direct consequence of law, the date of Promulgation of the law and, in any other case, the date of Signature of the compensation

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considers that the International Court recognizes exceptions to the traditional rule, cf. *Panevezys-Saldutiskis Case*, *Series A/B*, no. 76 (1949), p. 16 and p. 35, and *Reparation for Injuries Case*, *I.C.J. Reports* 1949, p. 181.

38. Reference here is to the agreement of 30 September 1952, cf. immediately below.

39. Quoted according to *A.J.I.L.* (1959), vol. 53, p. 909.

Agreement”<sup>40</sup>. The conclusion from this is that it is not necessary in all cases to produce evidence of nationality at the time when the action in fact took place.

In the agreement between Great Britain and Poland of 24 January 1948, the rule appears that British nationality was to exist on 3 January 1946, the day when the Polish nationalization law came into force. This seems to agree better with the practice of international law.

A special rule is found in the agreement between Belgium/Luxembourg and Czechoslovakia of 30 September 1952 which provided that property acquired later than the day of the Czechoslovakian measures should not be included in the compensation agreement unless the property in question was already directly or indirectly Belgian or Luxembourgian property at the date of those measures.

This provision, which must be regarded as a special exception from customary practice, is interesting in its acknowledgment of the national character of a claim, although the owner of the nationalized property at the time of the signature of the agreement need not necessarily have been a national of the claimant State at the time the claim came into being.

Some States, reversing this process, have demanded that ownership shall have the nationality of the claimant State before nationalization took place. In the Danish-Polish protocol of 12 May 1949, the rule was laid down that, to qualify for compensation, property should have been acquired by a Danish national before the outbreak of war on 1 September 1939. This special rule, which was dictated by a wish to avoid compensation for property which had been acquired with enemy help, or as a speculation under war conditions, cannot affect the general rules of international law.

The conclusion must be that the compensation treaties follow the general rules of international law, according to which the bond of nationality with the claimant State shall exist at the time the claim comes into existence, which means the time when the foreigner loses his property, cf. the Danish-Polish protocol II of 26 February 1953, where it was quite clearly laid down that nationality shall be in existence at the moment when the property was “affected by Polish measures”. The fact that in some cases there is more general formulation of the time, such as the moment at which “the law came into force” is probably to be traced to a legal technical limitation

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40. Quoted according to I. M. Sinclair, *op. cit.*, p. 143.

made necessary by the large number of claims for settlement in the agreements.

In determining the latest time for the national qualification, most of the treaties quoted provide that this moment shall be that of the signing of the treaty. However, the treaties between Switzerland and Yugoslavia of 27 September 1948, between Denmark and Poland of 26 February 1953 and between Sweden and Czechoslovakia of 22 December 1956 specify this as the time at which the compensation treaty comes into force.

In cases where treaties do not come into force immediately after signature, the wording used by Switzerland, Denmark and Sweden appears somewhat inappropriate. It can very easily happen that alterations in ownership, due to change of nationality or inheritance, can take place after signing. The result of this will be that, if the provision in the treaty is to be followed literally, the amount of compensation must be settled afresh. This result is quite impractical.

## § 20

### THE AMOUNT OF COMPENSATION

In international legal theory it is generally accepted that the compensation payable by a State for property taken from a foreigner shall be adequate or complete, shall be paid promptly and, having regard to existing circumstances, shall be effective<sup>1</sup>.

This view is undoubtedly supported by the practice of international arbitration boards and courts, and by cases where compensation for deprivation of property has been settled by diplomatic negotiation. None of the cases which have come up for decision has, however, been concerned with nationalization<sup>2</sup> as this concept was defined in chapter 2, but they have been

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1. Cf. inter alia Friedmann, *op. cit.*, p. 215, Hyde, "Compensation for Expropriation" *A.J.I.L.* (1939), vol. 33, p. 112, and Whiteman, *op. cit.*, vol. II, p. 386.
  2. The question was, however, raised in the *Hungarian Optants Case*, but the court did not give an opinion on the problem, cf. *Emeric Kulin père v. Etat roumain* (1927), *Recueil T.A.M.* vol. VII, p. 147 and 150.

concerned only with isolated actions against property where the property was taken over by the State to be utilized for a purpose different from that being carried on before State action.

Against the background of the distinction, which has been made the principle of the present exposition, between nationalization on the one hand and other actions against property by the State on the other, it is obviously inappropriate to analyse the problem of the amount of compensation from the starting point of practice which is the result of actions of quite another kind, and with quite another background.

If nevertheless this procedure has been adopted, it is mainly due to two circumstances.

First, the distinction between nationalization and other actions against property, as it is put forward in chapter 2 above, might be of a temporary and hypothetical nature only. The verification of the legal relevance of this distinction will appear only after an examination of whether nationalization involves different legal consequences from the other actions against property. To carry out this verification, it is necessary to take the traditional concept of compensation as a starting point.

But there comes the further point that a number of treaties on the protection of property concluded in recent years contain rulings that property can only be taken from a foreigner by the holding State against compensation which is adequate, prompt and effective. This is the wording found in the treaty between the United States and Italy of 2 February 1948 covering friendship, trade and shipping; in the treaty between the United States and Greece of 3 August 1951 similarly covering friendship, trade and shipping, where art. VIII. provides that the taking of property from nationals of the other contracting party involves liability for "the prompt payment of just compensation ... in an effectively realizable form"; and in the other treaties of friendship and residence concluded after the Second World War.

As will be shown below, some of the compensation treaties also contain references to the traditional terms. This makes it necessary to examine in detail the content of the traditional concept of compensation against the background of the developments of the past few years, to determine whether traditional terminology has the same connotation in nationalization as in other actions against property.

A. *The calculation of the amount of compensation.*

1. *The starting point: Compensation shall be adequate.* Beyond declaring that compensation shall be adequate, traditional international law gives no special guidance, and thus does not indicate which factors shall be taken into account for the calculation of compensation to enable this to fulfil the demands of international law. The following illustrates the method of estimation.

In the case of the *Reverend Jonas King* (1855) between the United States and Greece, the American foreign secretary recommended to the ambassador in Athens that the value of the land for which Greece should pay compensation should be determined:

“by taking the opinion of intelligent and impartial foreigners by recent sales of land in the vicinity, by a private arbitration of disinterested persons or by any other sources of information ...”

and thereby to make an estimate of:

“... not speculative and consequential losses, but such as would probably be adjudged by candid and practical men <sup>3</sup>.”

The difficulties in fixing compensation which arise when general expressions such as “adequate”, “complete”, “fair” etc. are used as standards, and which are not solved simply by recommendations of the kind put forward in the case just quoted, were evident in the case of the *Claim of the Norwegian Shipowners against the United States* (1922) <sup>4</sup>. The board of arbitration set up in this case was to determine the amount of compensation the United States should pay the plaintiffs.

Compensation was fixed as “the fair market value”. The American government nevertheless strongly contested the justice of the decision, submitting, inter alia, that the board of arbitration had not accurately defined the real value, but a market value distorted by speculative interests <sup>5</sup>.

In the case concerning *The Factory of Chorzow* (Claim for Indemnity) (1928) <sup>6</sup>, it is laid down that compensation in cases of lawful expropriation

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3. Cf. Moore, *Digest*, vol. VI, p. 263.

4. Cf. *R.I.A.A.*, vol. I, p. 307 and specially p. 334 and 338.

5. Cf. the communication of the American government to the Norwegian ambassador of 26 February 1923, *ibid.*, p. 344.

6. *P.C.I.J. Series A*, no. 17.



was "the value of the undertaking at the moment of dispossession, plus interest to the day of payment" <sup>7</sup>.

Equally vague and undefined statements on the calculation of the amount of compensation are also to be found in individual treaties. For example, the treaty of friendship between the U.S.A. and Greece of 3 August 1951 quoted above defines "just compensation" as "the full equivalent of the property taken".

Thus the guidance given in older practice and in the treaties where statements are made on these points, has no real bearing on concrete cases where the amount of compensation is to be calculated, and thus gives no clear expression of what is to be understood by the terms "adequate" or "complete" compensation in existing international law. That this situation, however, has not brought insoluble problems in its train, is probably influenced by the circumstance that, broadly speaking, all the leading States make provision for payment of compensation for deprivation of property in their municipal law. "Full" or "adequate" compensation in international law means, therefore, compensation established on the same principles as in municipal law. As an illustration of the elements which weigh heavily in these cases, there is the case *Olson v. the United States*, where it is stated in the judgment pronounced by the Supreme Court of the United States <sup>8</sup>.

"Just compensation includes all elements of value that inhere in the property, but it does not exceed market value fairly determined. The sum required to be paid the owner does not depend upon the uses to which he has devoted his land but is to be arrived at upon just consideration of all uses for which it is suitable. The highest and most profitable use for which the property is adoptable and needed or likely to be needed in the reasonable near future is to be considered, not necessarily as the measure of value, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held."

A special question which has been much to the fore in the past few years, is whether, when fixing compensation, consideration must be given to the general economic conditions existing in the State where the property is situated and which that State is in a position to alter by legislation or other intervention.

There is probably no general answer to this question. As a guiding principle, however, it must be taken that the most a claimant can expect from

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7. Cf. Ross & Foighel, *Studiebog*, p. 391.

8. 292, U.S.A. 246,255, Quoted according to Hyde, *op. cit.*, p. 110.

compensation is that he shall be restored to the same position as if the action leading to his claim had not taken place. Thus the claimant must suffer any fall in values resulting from the general political and economic conditions in the State in question<sup>9</sup>. Against this it cannot be accepted that a State which by legislation etc. deliberately seeks to reduce the value of the assets for which it must pay compensation with the main purpose in view of escaping with reduced compensation, should be able to invoke these actions when the amount of compensation is determined<sup>10</sup>.

There are, however, considerable difficulties in individual cases in deciding whether the measures taken by the State were for other purposes than to reduce the compensation. If the last was the case, the reduction in value by reason of these measures must be taken into account<sup>11</sup>.

In particular the situation discussed here will arise from devaluation of the local currency, or from taxation.

2. *Practice.* Examination of existing practice in the compensation treaties will show that the traditional terminology is repeated in a number of the treaties which authorize compensation in the form described above as individual compensation, and which contain no expressly specified methods of calculation.

By art. 1 in protocol no. 1 of 18 December 1946 between Switzerland and Czechoslovakia, Czechoslovakia recognized its liability to pay compensation for "die auf dem Spiele stehenden schweizerischen Interessen und wird den schweizerischen Berechtigten eine adequate und effektive Entschädigung ausrichten."

9. Cf. Joseph, "International Aspects of Nationalization, *I.B.A. Report* (1954), p. 4.

10. Cf. here also Harvard, *op. cit.*, art. 10: "...Just compensation in terms of the fair market value of the property unaffected by this or other taking ..."

11. Cf. in this connexion the Egyptian nationalization law of 26 July 1955, where it was provided that the value of the shares in the Suez Canal Company should be fixed according to the price of the shares quoted on the Paris Bourse on the day before the nationalization law came into force. According to Olmstead, *op. cit.*, p. 1133, this is, however, not complete compensation, since it is doubtful whether the price of the shares was as high as it would have been there been no disturbance in the territory. Olmstead's point of view cannot be accepted. He seems to overstress the concept "complete compensation". Cf. also Wortley, *op. cit.*, p. 129 foll. on British compensation laws.

The British-Polish agreement of 3 January 1946 contains provisions in art. 3 that "compensation shall be so assessed as to be adequate ..." The Swedish-Polish treaty of 28 February 1947 lays down in art. 1 that Poland shall give "skälig ersättning" (just compensation).

On this point the Polish delegation made a reservation in the final clause of the protocol that after the words quoted above there should be added "according to the relevant Polish legislation". In the Danish-Polish protocol I of 12 May 1949 art. 11 states "that compensation shall be fixed in such a way as to be adequate".

On the other hand there are no statements on the principles for fixing the amount of compensation in those treaties which authorize global compensation. Such statements are properly regarded as superfluous, since the exact sum is established in the treaties. Nevertheless, the amount of the global compensation gives some general guidance, in so far as the fixing of the global sum has often been carried out by reference to the principles which were laid down in the agreements on individual compensation which the global treaties on compensation superseded.

Thus, on the basis of the text of the treaties only, no answer is to be found to the question whether the compensation actually paid in cases of nationalization was adequate or complete in the sense in which these expressions are traditionally understood in existing international law. An answer requires closer analysis of the application of these treaties in practice.

No certain answer to the question is, however, possible without access to the valuation of the assets on which compensation was fixed. From the evidence which exists it is possible to say that, with reference to the agreement between the United States and Yugoslavia concluded on 19 July 1948, according to which \$17 million was paid as compensation for nationalized property, it was stated in the House Committee on Foreign Affairs that<sup>12</sup> the result reached represented about 42.5 % of the original amount claimed, and the American government's advisers declared that the \$17 million would cover "the fair value of the claims".

According to the statements cited by Schwarzenberger<sup>13</sup> the compensa-

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12. HR 4406, 81st Cog.Ist.Sess. (1949), p. 7 and 18. Quoted according to Rubin, *op. cit.*, p. 465.

13. "British Property ..." *op. cit.*, p. 307.

tion which Poland was to pay to Great Britain amounted to about one third of the value of the British investments in Poland. The Czech compensation, under the treaty of 28 September 1949 is similarly stated to amount to one third <sup>14</sup>, while the compensation fixed at \$4,500,000 in the British-Yugoslav agreement of 23 December 1948 was said to amount to half the value of the British investments. British interests in the French nationalized gas and electricity industry obtained compensation by the agreement of 11 April 1951 up to 70 % of the amount of the private investments.

The compensation received by Norway as a result of the compensation agreement with Poland of 23 December 1955 amounted to about 3.5 million Norwegian kroner, while the value of the nationalized property was estimated at 4.5 million Norwegian kroner <sup>15</sup>.

In view of these figures and statements, which might suggest that the compensation paid in pursuance of the compensation treaties was not adequate or complete, the reservation must be made that the figures with which the compensation is compared often represent the valuation of their claims made by the persons affected by the nationalization, and it is well known from municipal law that a claimant seldom underestimates his claim to compensation.

Any guidance which is to be found in existing treaty practice on the calculation of compensation must therefore be sought not so much in the figures given but in the principles which underlie valuation during negotiations by States, and it is against this background that we must explore whether the claimant is in a less favourable position than he would have been if nationalization had not taken place.

The principles which Poland invoked, at any rate in its negotiations with Sweden <sup>16</sup> and Denmark <sup>17</sup>, are contained in art. 7 of the Polish nationalization law. It is stated there that, in arriving at the amount of compensation, regard must be paid to:

- (a) the general reduction in the Polish national wealth as a result of the war (estimated at 40 %)

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14. Cf. *Hansard*, 5th Series, vol. 475, col. 64.

15. Cf. *Stortingets prp.* no. 103 (1955) p. 3.

16. Cf. the Treaty of 28 February 1947. Polish reservation, point 1.

17. Cf. the Treaty of 12 May 1949, art. 7.

- (b) the net value of the assets of the nationalized undertaking on the day the State took it over<sup>18</sup>;
- (c) the reduction in the value of the undertaking as a result of war damage or other losses connected with war or occupation in the period between 1 September 1939 and the day of the take-over by the State;
- (d) investments made after 1 September 1939 and
- (e) special circumstances reducing the value of the undertaking (time limits on concessions and licenses etc.).

These principles, though in a somewhat different form, have by and large been invoked by all nationalizing States during negotiations with foreign States on compensation.

3. *Evaluation.* It is scarcely possible to make legal objections to the above principles for determining adequate compensation<sup>19</sup>. Even though nationalization had not taken place, the assets of foreign nationals would have been affected both by the general reduction in the national wealth of the country where the investments were made and by the effects of war damage on those assets. These are risks which a person who invests capital abroad should, and can, take into account when judging the expediency and economic safety of such an investment.

The practical application of the above rules to the calculation of compensation, however, will not always lead to adequate compensation.

It will, for example, be impossible in practice for the representatives of the claimant government to determine the net value of the property affected

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18. The Italian Peace Treaty of 10 February 1947, art. 78, cl. 4 (*U.N.T.S.*, vol. 49, p. 161) expressed the principle that compensation for action against property should be fixed according to the value of the property at the time of payment. This principle appears to be in agreement with the purpose of the compensation. However, the principle was not consistently carried out, since it further appears in the Peace Treaty that compensation was only to be paid at the rate of two-thirds of the so-called replacement value. Thus the difference between this principle and that set out in the Polish nationalization law has been practically eliminated.

19. Cf. however, the official Swedish interpretation, as expressed in the Swedish-Polish treaty of 28 February 1947, where it is incorporated in the text of the treaty itself that the Swedish delegation regards the principles set out there as in conflict with international law.

by nationalization for the simple reason that it will prove impossible to gain access to the property to inspect it <sup>20</sup>.

Moreover, at the time when the value of the property is to be assessed there will almost certainly no longer be a free market for the nationalized assets, and similarly the exploitation of and return from the assets will, as a result of official action in fixing wages, prices for raw materials, and finished goods be dependent on the decisions of the government that is to pay the compensation. Normally, therefore, no objective test of market value will exist to guide the valuation <sup>21</sup>. Even in those cases where the nationalized asset is a claim for money in the currency of the country, comprehensive monetary changes and exchange regulations introduced in connexion with the nationalization will frequently mean that these claims are practically speaking worthless at the time of valuation or, in any case, their value is much depreciated so far as foreign nationals are concerned.

The determination of fair market value or the net value of property at the time of nationalization, which is the very foundation for the calculation of compensation, is thus at all essential points left to the discretion of the government committed to pay compensation, and the elements of complete or adequate compensation easily become blurred. Consequently it is not possible entirely to reject the view that the compensation received was not sufficient <sup>22</sup>. There is perhaps also support for this in the fact that all treaties of compensation contain the quitclaim mentioned above, in accordance with which the State receiving compensation renounces the right to raise further claims for compensation. Such a declaration of renunciation would seem to be superfluous if all claims had been settled in full <sup>23</sup>.

Nevertheless, with the background described here, it is scarcely possible to say that most recent treaty practice shows any change in the traditional principles of international law on the calculation of compensation. If the compensation paid under the terms of the treaty is obviously less than full, it is probably due to the general economic circumstances accompanying the

20. Cf. *Det norske Stortings prp.* no. 103 (1955) p. 3.

21. Cf. also *Kungl. Maj:ts prp.* no. 187 of 3 March 1950 on the practical difficulties of the Swedish negotiators in fixing compensation.

22. Cf. in this connexion *Kungl. Maj:ts prp.* no. 37 (1957) p. 6, which, in connexion with the compensation agreements between Sweden and Czechoslovakia of 22 December 1956, states: "... that payment of the global sum ... does not give 100 % compensation to the Swedish owners ..."

23. *Ibid.*

nationalization; similarly the element of discretion in the valuation of individual assets, (and this is present in most calculations of compensation outside contract agreements) plays a predominantly large part by reason of the nature and extent of the nationalized property.

*B. The terms of payment.*

*1. The starting point: Compensation shall be paid promptly.*

In close connexion with the calculation of the amount of compensation is the question of the terms of payment, that is to say whether the compensation shall be paid in immediate cash or by instalments<sup>24</sup>. The traditional view in international legal theory in connexion with expropriation of foreign property is that payment of compensation shall take place beforehand if possible, and in any case promptly.

This rule, which aims at restricting expropriation to cases where the interests of the State in taking over the property are so great that advance or immediate compensation is not by comparison considered to be a heavy commitment on the economy, cannot be applied to compensation payable for the nationalization of alien property.

If the nationalization is of any size, it will be impossible for any State to meet a claim for full compensation, even with the above qualification, if this compensation must be paid in immediate cash.

*2. Practice.*

These circumstances have had as their practical result that States paying compensation for nationalization have abandoned the traditional principle and arranged that the amount shall be paid in instalments. This instalment principle is also used in the municipal law of countries where compensation for the nationalization of the property of their own nationals is in fact paid, and the method used is payment of the compensation in government bonds or the like, spread over a number of years. This is the case, inter alia, in Great Britain and France.

The instalment principle is similarly applied in all effective compensation

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24. "The global sum and the period of payment stand in direct relationship to each other. As the time of payment is increased, so must the Swedish claimant demand a higher global sum and in reverse he should be prepared to accept a less sum if the period of payment is shorter. These terms are connected with the absence of any stipulation on interest in the agreement ..." *Kungl. Maj:ts prp.* no. 187 (1950) p. 17.

agreements, both in cases where compensation is paid to individuals in the form of government bonds<sup>25</sup>, and in cases where it is paid in the form of global compensation.

The United States government has, however, protested against the instalment principle in a single instance. In a note of 28 August 1953 to Guatemala, on the occasion of the expropriation of certain land belonging to the American owned United Fruit Company it is stated:

“Payment in bonds maturing in 25 years, with interest at 3 per cent per annum, and of uncertain market value is scarcely to be regarded as either prompt or effective payment. Many of the holders will realize little on the bonds in the course of their lives. The offer of payment in bonds under all the circumstances is not of a nature to offer “the full guarantee and protection” of either the law of Guatemala or of the law of nations<sup>26</sup> ...”

There seem, however, to be special reasons for the protest in the particularly onerous conditions, low interest, long redemption time, fluctuations in exchange etc., which were inseparable from the offer made by Guatemala. Later the United States, too, concluded compensation treaties based on the instalment principle, for example the agreement with Poland of 16 July 1960.

As to the number of instalments and the length of the period of payment, it is scarcely possible to formulate a general rule from existing treaty practice, since the period of payment in the treaties ranges from 3 to 20 years. The time involved will depend on the individual circumstances, including the extent of the nationalization, the amount of the compensation, the expectations of future commercial relations etc.

In some of the treaties it has been agreed that compensation shall be paid with an immediate payment in cash and the balance spread over a number of years. This is the case in the treaties between Great Britain and Yugoslavia of 23 December 1948, Switzerland and Czechoslovakia of 22 December 1949, Switzerland and Roumania of 3 August 1951, Switzerland and Bulgaria of 26 November 1954, between Norway and Czechoslovakia of 9 July 1954 and between Norway and Bulgaria of 2 December 1955.

In these cases, as well as those where the whole amount of compensation

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25. Cf. the agreements between Belgium and France of 18 February 1949 and Switzerland and France of 21 November 1949.

26. Cf. *Dep.St.Bul.* (1953) vol. 29, p. 359.



was paid out in cash, as in the agreements between the United States and Yugoslavia of 19 July 1948, between Poland and Norway of 23 December 1955, and between Sweden and Czechoslovakia of 22 December 1956, the special circumstance existed that the cash payment or a very large part of it could be set off against assets available in the countries receiving the compensation.

### 3. *Evaluation.*

The practice examined above shows that States in general regard payment by instalments as satisfactory in settling claims arising from nationalization. This form of payment meets the interests of both States involved. The nationalizing State can thus carry out the necessary nationalization without fearing that exorbitant demands will be presented for immediate settlement and without the risk of commercial relations being broken off with other States because the nationalizing State has not the large sums required to meet the claims of these other States.

Furthermore, by paying in instalments, due regard can be paid to the economic and commercial situation of the States involved. Quota systems and other forms of restriction of international trading have been widespread in the period after the war. An immediate payment of compensation either in goods or in currency would have a decisive influence on the economic relations of the country, and a sudden release of goods could influence the internal price structure of these goods in a damaging way, thus involving internal political consequences which extend far beyond the simple payment of compensation. It is in the interest of all States to avoid such a situation.

On the other hand, the disadvantages for the claimant State which payment by instalment involves can be considerably reduced by increasing the amount of compensation in proportion to the length of the period of payment.

The postponements and extensions of the time of payment which have come into existence through the principle of payment by instalment are, therefore, (contrary to the opinion of *La Pradelle* and others) the result reached in State practice<sup>27</sup> as a consequence of the generally extremely high value of the nationalized property.

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27. This is *now* generally acknowledged, cf. Harvard *op. cit.*, art. 10, cl. 4: "If property is taken by a state in furtherance of a general programme of economic and social reform, the just compensation required by this article

*C. The nature of the compensation.*

*1. Starting point: Compensation shall be effective.*

The widespread shortage of convertible currency after the Second World War, together with the currency restrictions and general inflation in practically all the nationalizing countries, have caused a number of currency problems in connexion with the payment of compensation to foreigners for nationalization. The solution of these problems, in the same way as the determination of the basis of calculation and the terms of payment, is a decisive factor in determining the amount of the compensation.

The problems arise in making a choice between the following possibilities:

- (a) payment in the currency of the nationalizing State;
- (b) payment in the currency of the claimant State;
- (c) payment in convertible currency of a third State.

The theoretical solution of the currency problems<sup>28</sup>, i. e. ensuring compensation shall be effective, must take its starting point in the purpose of compensation, i. e. to ensure to the claimant a financial indemnity such that his position remains unaffected by the nationalization.

The conclusion from this seems to be that payment ought to be made in the currency of the State in which the nationalized property was situated at the time of nationalization.

This theoretical solution is supported by the fact that the investor voluntarily placed his capital in the nationalizing State, and must therefore have been able to foresee the possibility of the losses which inflation and currency restrictions in the country of investment might cause him. The value of the property depends entirely on the economic opportunities in

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may be paid over a reasonable period of years ..." It must, however, be added that the Association of the Bar of the City of New York in a duplicated report (July 1960) has strongly expressed itself against this view that "represents the most striking departure ... from what the United States Government, and the preponderance of international lawyers in this country have regarded as established international law". Cf. also 40. *Dep.St.Bul.* (1959) p. 791, where the instalment principle of the State Department's juridical advisers is branded as an indirect attack on the principle of complete compensation. Cf., however, above on the treaties concluded by the U.S.A.

28. Cf. Bindschedler, *op. cit.*, p. 56.

the country where the property is situated, and it therefore seems reasonable that the amount of compensation computed on the basis of the value of the property should suffer the same fate. Compensation in convertible currency, whether that of the claimant State or of a third State, or merely compensation in the non-convertible currency of the claimant State, can mean a very considerable financial advantage for the persons affected by nationalization compared with foreign owners of, or shareholders in undertakings which have not been nationalized. The last-named have probably had no opportunity for getting their capital out of the country of investment. There is the further argument, and this is important in practice, that the State liable to pay compensation will only rarely have at its disposal other currency than its own for the payment of compensation <sup>29</sup>.

The view that compensation payments for foreign property shall be made in the currency of the country where the property is situated was recognized indeed in the Peace Treaty with Italy of 10 February 1947 in art. 78, cl. 4 <sup>30</sup>, where it was laid down that compensation for property which had belonged to nationals of countries of the United Nations shall be paid

"... in lire to the extent of two-thirds of the sum necessary, at the day of payment, to purchase similar property or to make good the loss received."

Similar provisions are included in the peace treaties with Bulgaria of the same date in art. 23, cl. 4 (payment in levas) <sup>31</sup>, with Hungary in art. 26, cl. 4 ("in Hungarian money") <sup>32</sup> and with Roumania in art. 24, cl. 4 (in lei) <sup>33</sup>.

In spite of these examples, the solution of payment in the currency of the nationalizing State must be rejected <sup>34</sup>, since the background which gives these arguments validity does not exist in the case of nationalization.

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29. Cf. here the Polish government's note of 30 April 1946 to the United States Government, in which it is stated: "In order to achieve ... that compensation to citizens of the United States be effected in a manner which would permit an exchange of the amounts paid for dollars in the shortest possible time, the dollar reserves of Poland must first be substantially increased ..."  
*Dep.St.Bul.* (1946), vol. 15, p. 653.

30. *U.N.T.S.*, vol. 49, p. 161.

31. *U.N.T.S.*, vol. 41, p. 68.

32. *U.N.T.S.*, vol. 41, p. 192.

33. *U.N.T.S.*, vol. 42, p. 52.

34. In the opposite sense Friedman, *op. cit.*, p. 218-219.

The investments were in many cases made at the time when the currency of the country of investment was convertible, and when the currency restrictions in force today were unknown phenomena. The advantage which might possibly exist from the payment of the compensation in the currency of the claimant State or in free convertible currency will in practice probably not be regarded as any enrichment, considering the amounts paid and the time taken to pay them, compared with the advantages foreigners have whose property is not affected by nationalization.

Furthermore, however, and this is decisive, payment in the currency of the nationalizing State will seldom constitute any redress to the person entitled to compensation, since he will normally be precluded from reinvestment in the same or similar kinds of business. His possibilities of using the compensation in the nationalized country will generally, but not always, be limited to the purchase of government bonds. This has as a consequence that payment in the currency of the nationalizing State, even in cases where the currency is to be regarded as "hard", will not be satisfactory unless the amounts paid in compensation can be taken out of the country<sup>35</sup>.

Thus, the practice adopted in the peace treaties quoted, cannot be of any guidance in the solution of this problem, since the provisions seem to contain the preassumption that the person entitled to compensation can use the money received as compensation for the purchase of property corresponding to the property lost.

The conclusion from these views must be that to be effective compensation must be paid in currency other than that of the nationalizing State if the nationalizing State is opposed to new investments from abroad, and has excluded the possibility of foreign re-investment or reduced it to such limited fields that it has no practical significance. This must at any rate hold good where investments in the nationalized property were originally made in foreign currency.

## 2. *Practice.*

This conclusion, indeed appears to be recognized in treaty practice.

The treaty concluded between Sweden and Poland on 28 February 1947 thus provides in art. 5 that the following principles shall be the basis of the calculation of compensation:

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35. Cf. also the discussion in 1947 at the Preparatory Committee of the U.N. Conference on Trade and Employment, and the commentaries to art. 12 *Cmd. 7212* contained in the report.

- (a) Where Swedish currency is directly invested in Poland by Swedish physical and juridical persons compensation shall be paid in Swedish kroner as a proportion of the total compensation equal to the proportion which the amount of directly invested Swedish currency forms to the total amount invested. The following shall be regarded as directly invested Swedish kroner:
- (1) investments or credits originating through the transfer direct to Poland of Swedish currency or Swedish goods.
  - (2) investments or credits originating through the transfer direct to Poland of other currencies at a time when the Polish zloty could be freely converted into Swedish kroner.
  - (3) re-investments in Polish zlotys at a time when Polish zlotys were freely convertible into Swedish kroner”.

Art. 13 of the treaty concluded between Great Britain and Poland on 24 January 1948 contains a provision that the “compensation securities” which are to be paid to British claimants shall be “sterling securities” in those cases where investment had been made in the following ways:

- (i) Investment made by transferring sterling to Poland.
- (ii) Investment made by transferring other currency to Poland at a time when such currency was convertible into sterling.
- (iii) Accumulation or re-investment in Poland of undistributed profits in zlotys at a time, when the zloty was convertible into sterling.
- (iv) Introduction into the undertaking of any items of property which may be agreed to constitute an investment of capital.
- (v) Rendering, in pursuance of a contractual obligation of any substantial technical or economic assistance or other services which, after discussion by the Mixed Commission, may be agreed to constitute an investment of capital.”

In other cases, for example, where investments had been made in Polish currency, compensation was to be paid in “zloty securities”.

No such differentiated provisions appear in the Danish-Polish protocol of 12 May 1949, where art. 11 simply states that adequate payments “shall be made effectively and that negotiations on the transfer of the amounts of compensation to Denmark shall take place between the two governments”. The problem of payment was in fact solved in conjunction with the global compensation agreement which will be discussed later.

By the compensation treaties with Belgium of 18 February 1949 and Switzerland of 21 November 1949, France carried through an arrangement that compensation was to be paid in the form of government bonds

payable in French francs, but linked to the dollar clause stating that the French government guaranteed the value of the franc against a dollar exchange rate specified in the treaty. Interest paid on the bonds and the principal on redemption can be used by the recipients for re-investment in France.

The other agreements on individual compensation do not contain any regulations on the currency in which payment shall be made <sup>36</sup>.

It appears, however, as if the currency problem in connexion with the payment of compensation has solved itself. The treaty practice of the past few years, which has abandoned the principle of individual compensation in favour of the principle of global compensation, contains no indication of the difficulties which the drafters of the treaties quoted were obviously facing. The payment of the global sum is effected as a rule in merchandise or by the release of the capital which has been frozen in the claimant State. The private physical or juridical persons who are entitled to compensation will, therefore, receive their compensation in their national currency. This solution is in fact in agreement with the views stated above based on the facts of the situation.

In a single case the global sum was paid in part in the currency of the nationalizing State. By the treaty between Switzerland and Hungary of 19 July 1950 Hungary undertook to pay 3,740,029 forints as part of the global sum. It was, however, expressly agreed that this sum should be convertible. This satisfies the requirements of international law that payment of compensation shall be effective.

#### D. Conclusion.

The conclusion from the above analysis of the latest compensation treaties is that the compensation which has been paid fulfils in principle the requirements that it shall be full and effective as laid down in traditional international law in individual cases of deprivation of property directed against foreigners.

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36. Schwarzenberger, however, states in *British Property, op. cit.*, p. 306, that Mexico fulfilled its compensation liability with reference to the treaties of 7 February 1956 by paying the amount of compensation to Great Britain and Holland in U.S. dollars.

Certainly, in respect of both these requirements, special conditions hold good and thus the picture of the compensation paid as a result of nationalization is quite different from that from the traditional actions. But this is, at the most, a difference of fact which cannot justify a distinction between nationalization and other actions against property as far as the legal effects of these two types of action are concerned. It is interesting to confirm how the principles of compensation adopted in the international legal tradition have retained their effectiveness even in the case of a concept so relatively new and politically coloured as nationalization.

On the other hand there has been a decisive change concerning the traditional requirement that compensation shall be paid promptly. It is arguable whether the change to the principle of payment by instalments is rather a result of change in currency and trading conditions than a result of nationalization as such; but this discussion is not very useful. The vital point is that acts of nationalization, in conjunction with the given economic circumstances, have caused a different rule to come into being for this kind of action than for the traditional actions. Thereby the juridical relevance of the definition, and with it of the distinction, is established.

SECTION 5:  
THE DISTRIBUTION OF COMPENSATION

§ 21

THE INFLUENCE OF INTERNATIONAL LAW  
AND THE DISTRIBUTION OF COMPENSATION

*A. The Problem.*

Under the compensation practice which has been described above as direct or indirect individual compensation, the payment of compensation to the claimant is a final definitive solution of the problems which led to the emergence and enforcement of the claim for compensation.

This is not at all the position in the most recent and most commonly applied form of payment of compensation in international practice, global compensation.

In this case the home country of the claimant receives a sum for distribution to the individual claimants. Irrespective of whether the amount of global compensation is paid as a round sum based approximately on a summary of the individual claims and discussed in this form by the two States which conclude the agreements, or whether it is paid as a sum established on a freer basis of valuation, difficult problems arise in the distribution of the compensation, which the States receiving the compensation have attempted to solve by various procedures which will be examined in detail in this section.

In forming a judgment on the problems involved in the distribution of the compensation which has been received, the starting point must be the provision in the compensation treaties that the distribution of compensation is normally entrusted to the State which receives it.

In the treaty concluded between Sweden and Poland on 16 November 1949<sup>1</sup> it was laid down:

“The distribution of the ... total amount shall take place in a way to be determined by the Swedish government”.

In the agreement between France and Roumania on 9 February 1959 the corresponding rule is worded:

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1. Corresponding to the other treaties concluded by Sweden.



“La repartition entre les différents ayants droit relève de la compétence exclusive du Gouvernement français et n'engage en aucune façon la responsabilité du Gouvernement roumain <sup>2</sup>.”

In the agreement between the United States and Yugoslavia on 19 June 1948, there is also an express provision that the distribution of the compensation to the claimants is a matter which is the sole concern of the United States (art. 8). Similarly in art. 3 of the agreement of 16 July 1960 between the United States and Poland it is stated:

“The amount paid to the Government of the United States ... shall be distributed in such manner and in accordance with such methods of distribution as may be adopted by the Government of the United States.”

No corresponding provisions are to be found in British agreements, but it follows from the regulations in the treaties covering the duty of the nationalizing State to supply information and, when requested by the British, to produce evidence of the claims presented, that Great Britain follows the same procedure <sup>3, 4</sup>.

In the agreement between Denmark and Czechoslovakia of 8 April 1960 it is provided in art. 5 that:

“The distribution of the amount of compensation cited in art. 1 is solely the concern of the Danish government”.

These provisions, however, do not necessarily mean that the State receiving the compensation is free to decide how the compensation shall be distributed. The provisions quoted must in the main be an expression of a course of proceeding, so that any troubles and complications in the distribution of the compensation are assigned to one of the contracting parties. There is, however, no necessity for such an arrangement and there are no legal principles to prevent the distribution being carried out by, for example, a commission on which both States are represented. Arrangements of this kind are also known from older international practice in similar fields.

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2. Art. II. Corresponding to the other treaties concluded by France.

3. Cf. for example the agreement with Hungary of 27 June 1956, *TS*. (1956) no. 29, art. 8 and 9.

4. Cf. also art. 6 in the agreement between Switzerland and Yugoslavia of the 27 September 1948, and art. 8 in the agreement Switzerland concluded with Poland on 25 June 1949 and Czechoslovakia on 22 December 1949. Cf. Bindschedler, *op. cit.*, p. 87.

Furthermore, the circumstance that the State receiving the compensation shall make the distribution, must mean that it must formally take place according to the municipal law of that State<sup>5</sup>. This also is recognized without exception, as will appear later. The problem is, however, to what extent the general rules of international law, the compensation treaty and its preconditions are to be taken into account during the shaping of the municipal regulations on distribution. A closer examination of the compensation treaties and the regulations established for distribution shows that various procedures have been adopted.

*B. The rules of international law applied to avoid claims for repayment by the State which has paid compensation.*

In individual cases the distribution of compensation in another country is of direct financial importance to the State paying compensation.

In the compensation agreement between the United States and Yugoslavia of 19 July 1948 (previously quoted) it was provided that Yugoslavia should pay total compensation of \$17 million to the United States. In accordance with the express provisions of the treaty the United States was to set up an agency for the management of the distribution, whose decisions should be final (art. 8).

It was, however, laid down in art. 1 of the compensation treaty that, if there should be a balance remaining after all claims had been met and expenses connected with the distribution of the compensation had been deducted, such remaining balances should be repaid to Yugoslavia.

Thus, in this instance, Yugoslavia had a direct financial interest in ensuring that the American distribution of compensation took place in close agreement with the wording and preconditions of the agreement for global compensation. The treaty of 1948 also contained a provision that the United States was bound to make available to Yugoslavia confirmed copies of decisions by the distribution agency. At the same time, in connexion with decisions on the individual cases, Yugoslavia was empowered to make submissions as *animus curiae* (art. 9).

If, in this situation, the United States pays compensation outside the terms authorized by the compensation treaty and international law, and if this has as its result that a claim for the repayment of surpluses fails,

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5. Cf. Max Sørensen, *Festschrift, op. cit.*, p. 410.

Jugoslavia must be entitled to receive compensation from the United States. A distribution of the global sum received in conformity with the terms of the treaty is in this case a legal necessity.

*C. The rules of international law applied in the incidental interests of the State paying compensation.*

Instances can occur where the State paying compensation has directly stipulated in the compensation treaty that the distribution shall follow a course set out in detail.

The State paying compensation may have a particular interest in this. It is, for example, conceivable that the nationalizing State, even after the nationalization, is in some degree dependent on a group of claimants or individuals in it. Consequently it may be important for the State paying compensation that, with its future economic policy in mind, it can point to the sums of compensation which have actually been paid to the claimants in question.

Although it is not possible to pronounce with certainty on the motives behind the global agreement concluded between France and Roumania on 9 February 1959, it can be said that just such a distribution is laid down in this agreement.

Art. 11 states that the amount of global compensation shall be distributed in accordance with the following guiding rules:

“a) Trésor public français au titre de ses participations dans d'anciennes sociétés roumaines et pour la propriété des bons de pétrole: 3, p. 100.

b) Personnes physiques ou morales françaises atteintes par des mesures de nationalisation, expropriation, réquisition ou autres mesures restrictives similaires et ayant droit à des dommages de guerre ou restitution: 37, p. 100.

c) Porteur français des emprunts visés à l'article ....: 60, p. 100.”

Similar detailed provisions on distribution of compensation are to be found, *inter alia*, in the agreement between Great Britain and Hungary of 27 June 1956 (art. 1(2)), between Sweden and Poland of 16 November 1949 (art. 1, cl. 4) and in the Danish-Polish protocol no. 2 of 26 February 1953 (art. 1) in which it is similarly laid down that certain claimants, expressly named in the treaty, shall receive definite sums.

There is no doubt that, in these cases, the State paying compensation must be able to demand that the rules in the treaty concerning the distribu-

tion of compensation shall be accurately observed. This demand was also met in the national regulations for distribution.

*D. The rules of international law applied in the general interests of the State paying compensation.*

In addition to the cases where the distribution of compensation directly affects the relations between the two contracting States and where this has been expressed in detail in the text of the treaty, it is conceivable that the distribution of the global sum by the State receiving the compensation can be of essential importance to the State paying the compensation, both as it affects other States and as it affects the nationals of the State receiving compensation.

Since the signing of an agreement for global compensation is often the final step in protracted negotiations, in the course of which the parties to the treaty have discussed individual claims with a view to determining the approximate size of the global sum, it will obviously be unreasonable if the State paying compensation is not released from all material liability to the claimants, in respect of the claims which have been recognized and which consequently have influenced the amount of the global sum.

If the State paying compensation is not released, it may run the risk that claims already recognized and paid to the receiving State may be raised afresh, for example by a third State which may perhaps assert that the claimants are also (or only) nationals of that State, or that some of its nationals are shareholders in companies which have the nationality of the State receiving compensation. As pointed out in § 19, doubt can arise both from questions of nationality of the claimant and from questions of the indirect ownership of the nationalized goods.

With these cases before it, the State paying compensation is vitally interested that the receiving State shall distribute the global sum in conformity with the treaty and with the rules of international law in general. Even though the renunciation clauses in the treaties on global compensation will scarcely have much influence in the case of the third State, it will of course be an extraordinarily weighty argument in any negotiations with that State concerning compensation, that in respect of the goods for which the third State desires compensation, this has in fact been paid to (natural or juridical) persons entitled to it under international law.

This interest in the distribution of compensation is clearly stated in the

compensation treaty between the United States and Poland of 16 July 1960 where, in the appendix to the treaty, it is expressly specified "... for the purpose of the distribution of the sum to be paid by the Government of Poland ..." what claims in respect of nationality and ownership are covered in the treaty. Further, art. 5 of the treaty states:

"With a view to protecting the Government of Poland from the possible assertion through third countries, or otherwise, of claims settled by this Agreement, the Government of the United States will furnish to the Government of Poland copies of such formal statements of claims as may be made by claimants and copies of decisions with respect to the validity and amounts of claims."

According to art. 7 of the treaty, this appendix is a constituent part of the treaty. Although art. 3 entrusts the distribution of compensation to the government of the United States, the provision quoted appears to imply that during the distribution the United States should pay due regard to the interests of Poland in being released from all material obligations to individual claimants. Whether the United States would incur legal responsibility if, during the distribution, the United States ignored Poland's alleged interests, must, however, be regarded as doubtful.

The material release of the State paying compensation is also important in another way in direct relation to the individual claimant. While the State paying compensation discharges its obligations to the receiving State with the conclusion and implementation of the treaty of global compensation, this is not always the case relative to individual claimants. The reference here is to the relative renunciation clauses discussed in § 17.

The effect of a relative renunciation of this kind is simply that the State receiving compensation expressly binds itself to refrain from supporting claimants in their demands<sup>6</sup> against the State paying compensation. The

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6. Cf. the clauses quoted in § 17, as well as, for example, the treaty between Great Britain and Hungary of 27 June 1956, art. 4(3) "The United Kingdom Government and the Hungarian Government shall not present to the other on its behalf or on behalf of any person, whether included in the definition of British nationals or Hungarian nationals or not, any claim relating to a matter for the settlement of which paragraph 1, art. 1 of the present Agreement provides, nor will either Government support such claims". Cf. also the treaty between Belgium and France of 18 February 1949, "The Belgian Government undertakes, subject to compliance by the French Government with the obligations assumed in the regulation annexed hereto, not to put forward, or to submit to international tribunals, or to support by diplomatic

private person who is affected by the action of the foreign State is not thereby excluded from raising the claim for compensation with the foreign State if he finds it opportune. The presupposition for this is, however, that he has not received full payment of his claim for compensation in the distribution of the compensation made by his home State.

Consequently the State paying compensation will in these cases, too, be directly interested that the distribution takes place in agreement with the treaty and its preconditions, since the distribution of the global amount decisively affects the degree to which the State paying compensation is released from financial obligations to the foreigner whose property has been affected by nationalization. It would, therefore, be natural if in such a case the State receiving compensation followed the rules of international law when making its distribution, and this to a considerable extent takes place in practice, though no legal obligations exist for doing so in these cases.

It must, however, be recognized that the arguments produced on the interests of the State paying compensation in being released materially from any obligation to the claimants is predominantly hypothetical and not of great practical importance for the arrangements for distribution by States. First of all the views quoted depend on the assumption that there will be a decisive change in the State paying compensation, in its attitude to the treatment of individual claims for compensation. This in most cases presupposes a change of regime, a factor which States scarcely include in their deliberations when concluding compensation treaties. But it must also be observed that the situation described here, where the State receiving compensation gives only a relative renunciation, occurs extremely rarely, since the relative renunciation is often accompanied by a guarantee from the State receiving compensation to the paying State. Thereby interest in maintaining the rules of international law in the distribution of the compensation passes from the State paying compensation to the State receiving it.

*E. The rules of international law applied for the purpose of the guarantee of the State receiving compensation.*

The agreement between Sweden and Czechoslovakia of 22 December 1956 declares in art. 4:

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action, any claims which may be advanced by Belgian natural or juridical persons", *U.N.T.S.*, vol. 31, p. 173.

"The Swedish Government guarantees that the Czechoslovak Republic together with Czechoslovak physical and juridical persons, following the payment in full of the sum of 5 million Swedish kroner, shall not be called upon to make any further payments for the Swedish claims and demands made in art. 1."

Similar provisions are to be found in the other agreements for global compensation concluded by Sweden and in the treaties concluded by some other States. A guarantee against further claims is often a condition from the State paying compensation for accepting only a relative renunciation from the claimant State.

The effect of such a guarantee is that in a case where a person affected by nationalization in some way obtains (additional) compensation from the nationalizing State, the other party to the treaty with the State paying compensation shall pay the same amount. There are thus no financial reasons why the State paying compensation should be interested in the distribution of compensation, and the distributing State need not consider the paying State during the distribution.

The State receiving compensation has itself, however, a vital interest in ensuring that the distribution of the global sum takes place in the closest possible conformity with the compensation treaty and with the rules of international law in general, since it can be concluded with certainty that, when the treaty was concluded and implemented, a settlement took place at any rate of the claims where the evidence of losses and the basis for compensation under international law was satisfactory.

To the extent that distribution takes place in conformity with the compensation treaty and the rules of international law in general, so, to the same extent, the risk is reduced that unsatisfied but justified claims against the State paying compensation exist, and again to the same extent, risk is reduced for the State receiving compensation that the guarantee contained in the compensation treaty will be invoked.

#### *F. The rules of international law applied out of other considerations.*

In the cases described above, the compensation treaty and the assumptions behind it, which to a large extent means the rules of international law on the working out of liability to pay compensation (which were examined in the previous section), are thus important for the distribution of the compensation. Clear disregard of the rules of international law will, in various

ways, have as its result that the State receiving the compensation incurs legal or financial responsibility relative to the State paying compensation.

There are, however, examples where the payment by the nationalizing State of the global sum under the terms of the treaty finally put an end to all problems of compensation between the two contracting States.

If the State paying compensation pays a global sum in full and definitive settlement of its liability, irrespective of whether the compensation paid in individual cases is of the same size as the claim which arose from the nationalization, if the State paying compensation completely, i.e. also in material affairs, hands over the distribution of compensation to the receiving State, and if, finally, the receiving State can give, and has given on behalf of its nationals, an absolute renunciation of further claims, then it must be taken that the distribution of compensation is the sole concern of the State receiving compensation and its nationals, and that no obligation exists to apply the rules of international law to the distribution of the compensation.

These preconditions are fulfilled in some of the older British global agreements for compensation; thus, in the treaty with Yugoslavia of 23 December 1948<sup>7</sup>, with Poland of 14 January 1949 and of 11 November 1954, with Bulgaria of 22 September 1955 and with Hungary of 27 June 1956<sup>8</sup>, similar absolute renunciations<sup>9</sup> are to be found, for example, in the agree-

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7. Article II contains the following provision". "(a) The Government of the United Kingdom shall accept payment of the said sum of four and one half million pounds (£ 4,500,000) in full satisfaction and discharge of all claims of British nationals arising, on or before the date of signature of the present agreement, out of various Yugoslav measures affecting British property. (b) In consideration of the payment by the Government of Yugoslavia of the said sum ... the Government of the United Kingdom on their own behalf and on behalf of British nationals shall release the Government of Yugoslavia from all liability, including liability for payment to British nationals, in respect of the claims mentioned in paragraph (a) of this article. (c) The provision of this article shall apply to all such claims whether they are made or presented before or after the date of signature of the present agreement."

8. In the later British compensation treaties absolute renunciation is confined to the claims which are directly included in the treaty, whereas for other claims only a relative renunciation is given. Thus in the agreement with Hungary the following wording is used: "Art. 5 (1): The United Kingdom Government hereby declare on their own behalf and on behalf of British nationals that payment by the Hungarian Government of the sum of £ 4,050,000 mentioned in paragraph (1) of article 1 of the present



ment between Belgium and Czechoslovakia of 30 September 1952 and between Denmark and Poland of 26 February 1953 <sup>10</sup>.

In this situation the rules of international law, as they may appear by the treaty and its preconditions, are without importance. The State receiving compensation can, without fear of legal or financial consequences relative to the paying State, distribute at its discretion the compensation it has received.

Nevertheless, the practice shows that even in these cases rules of international law bear on the settlement of many of the legal questions arising from the distribution of compensation. The causes can be various. Some of them can possibly be found in the constitution of the State receiving compensation, and this will be illustrated later. Other causes lie in the fact that the application of rules of international law will be appropriate, if only for the reason that individual States frequently lack traditional rules on the distribution of compensation. It is a natural development to apply to the distribution of the compensation the rules which formed the basis for the payment of the compensation.

However, no legal necessity for this ever existed.

#### G. Conclusion.

It is clear from the foregoing that there is the utmost variation in the influence which the rules of international law, as expressed in treaties and their preconditions, have on the arrangements for the distribution of compensation in individual countries.

The answer to the question of the importance of international law in individual cases seems primarily to be dependent on the extent to which the distribution of the global sum influences the relations between the contracting States. To the extent that the question is not directly mentioned in the compensation treaties, there seems to be a connexion between the application of international law in the national arrangements for distribution and

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Agreement fully and finally discharges the Hungarian Government and Hungarian nationals in respect of all the debts, claims and obligations mentioned in the said paragraph (1) of article 1 of the present Agreement." (On the subject of the relative renunciation connected with this, see above p. 269, note 6).

9. Cf. Bindschedler, *op. cit.*, p. 98.

10. Art. 2, see above p. 207.

the wording in the treaties of the renunciation clause necessary when global arrangements are made. If States abandon the use of the declaration of absolute renunciation, and it is possible that this tendency can be observed in the compensation treaties concluded in the past few years, international law will, to a corresponding degree mainly relative to the State receiving the compensation, become a necessary part of the material basis of the distribution of compensation inside a country.

Understood in this way, and with the reservation that the use of international law in the existing arrangements for distribution is not always a legal necessity, it may be of interest, on the basis of comparative law, to examine more closely how the distribution of compensation has taken place.

It must be assumed that such an examination will illustrate the views of States on certain international legal problems which are not clearly dealt with in the compensation treaties, and, in reverse, it is perhaps to be expected that the internal practice of States in this field will appear so practical in achieving its purpose as gradually to influence some of the rules of international law. In other words this may be a manifestation of the influence on each other of international law and municipal law, a two-way effect which comes from the extension of the activity of the international community in many fields in recent years.

## § 22

### THE ADMINISTRATION OF THE DISTRIBUTION OF COMPENSATION

#### *A. The United States.*

The problems which arise in connexion with the administration of sums received as compensation are not new in the United States.

On 27 February 1896, the American Congress passed a law containing the following clause:

“Hereafter all moneys received by the Secretary of State from foreign governments and other sources, in trust for citizens of the United States or others, shall be deposited and covered into the Treasury. The Secretary of State shall determine the amounts due claimants, respectively, from each of such trust funds,

and certify the same to the Secretary of the Treasury, who shall, upon the presentation of the certificates of the Secretary of State, pay the amounts so found to be due.

Each of the trust funds covered into the Treasury as aforesaid is hereby appropriated for the payment to the ascertained beneficiaries thereof of the certificates herein provided for <sup>1</sup>."

The law thus lays down the rule usually to be found in constitutional States, by which compensation received from foreign governments is distributed by the administration. The sole necessity for the law seems to be that the money passes into the treasury as a fund and the law gives authority for its paying out on production of the evidence specified in the law. The wording of the law has in fact given rise to some doubt on the ownership of the fund in question (see below in § 23).

The distribution of compensation directly through the ordinary channels of administration has, however, been abandoned in the case of compensation for nationalization.

In conjunction with the conclusion of the treaty for global compensation with Yugoslavia on 19 July 1949, and presumably as a direct result of the provision in the treaty for the establishment of an "agency", Congress in 1949 considered a bill to establish an "International Claims Commission". The commission would have as its task the distribution of global compensation received from foreign States in settlement of claims by the United States or United States citizens. The law was passed on 10 March 1950 <sup>2</sup> under the title "International Claims Settlement Act of 1949". In accordance with an addendum of 1 July 1954, the commission was re-organized and its powers under the law were, with a few unimportant alterations, transferred to a "Foreign Claims Commission" <sup>3</sup>.

The law on the distribution of compensation followed accurately the guiding principles laid down in the text of the treaty. During the discussions in Congress a number of proposals which diverged from the treaty were put forward and rejected <sup>4</sup>.

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1. 29th Stat. 32, 31 U.S.C., § 547, quoted according to Hackworth, *op.cit.*, vol. V, p. 763.

2. Published in *A.J.I.L. Supp.* (1951), vol. 45, p. 58-65.

3. Cf. 19 Fed Reg. 3985, 22 U.S.C.A., § 1622, note.

4. Cf. Milo G. Coerper, "The Foreign Claims Settlement Commission and Judicial Review, *A.J.I.L.* (1956), vol. 50, p. 869. Cf. also Clay, *Georgetown Law Journal* (1954/55), vol. 43, p. 582-614).

The background of the law was set out by a member of Congress as follows:

"... the actions under review in this procedure are not actions of the United States Government. They are actions of the Yugoslav Government. They are being subjected to review by an executive agency of the United States. This is appropriate in that this whole procedure stems from the general power of the Executive in the field of foreign relations ... The actions under review will be inherently the actions of another government, made susceptible of review by any agency of our Government through the agreements of Yugoslavia or other governments which may make subsequent agreements <sup>5</sup> ..."

This interpretation, that the distribution is an element in the authority of the American government concerning matters of foreign policy, has as a result that American courts are held not to be competent to pronounce on decisions of the commission. This was established in the case *De Vegvar v. Gelliland* <sup>6</sup>.

The law provides that the commission shall consist of three members appointed by the President. The commission is provided with powers to hear witnesses, impose fines, and the law states that individual claimants can appear through lawyers whose fee is fixed by the commission. Decisions of the commission are final, also relative to the administrative authorities <sup>7</sup>.

Of special interest is the definition of the competence of the commission and the material legal basis on which the distribution of the compensation shall take place.

On this, subject section 4(a) of the law has the following provisions:

"... The commission shall have jurisdiction to receive, examine, adjudicate and render final decisions with respect to claims of the Government of the United States and of nationals of the United States included within the terms of the Yugoslav Claims Agreement of 1948, or included within the terms of any 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 and of nationals of the United States against a foreign government, arising

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5. 95th Cong.Rec.8840, quoted according to Coerper, *loc. cit.*

6. 97th U.S. App.D.C. – 288 F. 2d.640 (1955), see also Coerper, *op. cit.* p. 870 coll. and below, p. 304.

7. Cf. also Rode, "The International Claims Commission of the United States", *A.J.I.L.*, (1953), vol. 47, p. 615–637.

out of the nationalization or other taking of property, by the agreement of the Government of the United States to accept from that government a sum in en bloc settlement thereof.

In the discussion of claims under this act, the Commission shall apply the following in the following order:

- (1) the provision of the applicable claims agreement, as provided in this subsection, and
- (2) the applicable principles of international law, justice and equity."

These provisions seem to have been closely observed. Thus the decisions of the commission provide a good basis from which to evaluate the American interpretation of the rules of international law.

### B. *Great Britain.*

As a result of the agreements on global compensation with Yugoslavia of 23 December 1948 and 26 December 1949 and with Czechoslovakia of 28 September 1949, the British Parliament, on 12 July 1950, passed "The Foreign Compensation Act, 1950"<sup>8</sup>.

The basis for the application of the law is to be found in the memorandum issued by the Foreign Office which accompanied the bill, wherein the following appears:

"It has in the past been the practice, when His Majesty's Government have received such lump sum payment from foreign governments, for the Secretary of State for Foreign Affairs to arrange for the distribution after making such investigation of the claims and taking such advice thereon as seemed appropriate in the particular case, for instance after setting up some committee, perhaps with a legal chairman, to investigate and advise on distribution. Though this method has been satisfactory and in fact the distribution has been effected in accordance with the advice of impartial and independent persons, it is, nevertheless, the case that the responsibility for the exercise in detail of what is in essence a quasi-judicial function has rested on the executive. It seems preferable that such quasi-judicial functions should be fulfilled by an independent statutory commission and the magnitude of the sums involved in current claims and their complexity has led His Majesty's Government to the conclusion that such a Foreign Compensation Commission should be created without delay."

The law provided that a commission should be set up, the "Foreign

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8. 14th Geo.C.Ch.12. Cf. the debate in Parliament in connexion with the passage of the law, *Hansard*, vol. 475, no. 42, cols. 39-67 (8 May 1950) and vol. 475, no. 55, sp. 2271-2283 (25 May 1950).

Compensation Commission". The commission, whose chairman was appointed by the Lord Chancellor, had the task of distributing compensation received from Yugoslavia and Czechoslovakia. The law, however, was framed to leave the position open for the commission to undertake other work in connexion with future or past negotiations on compensation. A large number of such tasks have been laid on the commission, as will be seen below. The law gave the commission powers to hear witnesses and take evidence under the same rules as the courts. Penalties for perjury and the like must, however, be imposed by the High Court. The commission was charged with presenting an annual account to Parliament as well as an annual report on the distribution of compensation. In general the law provided that the decisions of the commission with reference to applications for compensation could not be brought before the courts (art. 4(4)).

The law in question was, however, only a draft regulation which presupposed more detailed rules on the material legal basis to which the commission should refer for its decisions. These rules were to be established by "Orders in Council" laid before Parliament.

The rules of procedure for the commission<sup>9</sup> were laid before Parliament on 18 December 1950 and contained, inter alia, special rules on evidence (including the presentation of oral explanation and pleading), provisions on the commission's powers to alter earlier decisions *ex officio* in cases where the commission came into possession of new information, special rules for decisions on questions of general importance for all claims etc.

Of special interest is the provision in the rules of procedure § 9 where the secretary of the commission was charged with setting up a register of all applications. This register was to be freely available to all petitioners included in the same Order in Council.

The first Orders in Council were laid before Parliament on 22 July 1950 and covered compensation from Czechoslovakia and Yugoslavia<sup>10</sup>.

These orders contain a virtually complete set of material rules for decisions on the applications which had been received. For example there appear in the Czechoslovakian order:

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9. "Foreign Compensation Rules, 1950", *S.I. 1950*, no. 2042. These rules were altered on 29 June 1956 by *S.I. 1956* no. 962.

10. "The Foreign Compensation (Czechoslovakia) Order in Council, 1950", *S.I. 1950* no. 1191, and "The Foreign Compensation (Yugoslavia) Order in Council, 1950" *S.I. 1950*, no. 1192.

- (a) The definition of the persons who can make an application (art. 7).
- (b) The definition of what claims can be considered (art. 10).
- (c) The definition of the factors which give the property British nationality (art. 11).
- (d) The definition of what is understood by property (art. 13).
- (e) The definition of what is understood by "Interest in property" or to use our terminology, indirect ownership (art. 14).
- (f) The definition of the "relevant date" (art. 15).
- (g) The definition of what measures give a claim to compensation (art. 16).

With these detailed rules as a basis, the commission was to estimate the loss suffered. On this point art. 19(b) stated:

"The amount of loss so assessed shall be such amount as seems just and equitable to the Commission having regard to all circumstances".

These Orders contain no reference whatever to international law<sup>11</sup>. On this point the British basis of distribution differs essentially from, for example, the procedure in the United States<sup>12</sup>. The commission should have consideration only for the existing Orders in Council and matters of doubt were to be interpreted in accordance with the customary principles.

However, the difference is more apparent than real. The British rules follow the rules in the compensation treaty and its preconditions at very many points, and thereby incorporate the international law directly into English law.

The fact that the Yugoslavian order in Council differs from the Czech order on certain points (for example art. 15 concerning the relevant date) although the two Orders were laid before Parliament on the same day, also emphasizes that the wording reflects the differences in the two treaties of global compensation.

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11. Against this it is expressly provided in § 20(a) that, when valuing the individual claims for compensation, the commission shall pay no regard to the rules for valuation contained in the relevant Czechoslovakian regulations. This is a clear deviation from the English rules of international private law, according to which acts by foreign States shall be judged according to the legal system of the State which performed them.

12. In general see Drucker, "Compensation for Nationalized Property: the British Practice", *A.J.I.L.* (1953) vol. 47, p. 477-486.

In practice the British procedure may, however, mean a lightening of the work of the commission.

In conjunction with the law on the establishing of the commission, Orders in Council were also issued dealing with the treaties of compensation concluded with Poland<sup>13</sup> and Bulgaria<sup>14</sup>.

With reference to the authority contained in the law for extending the work of the commission beyond the distribution of compensation, it may be observed that this authority was used in three Orders giving the commission powers to register claims for compensation, before compensation treaties were concluded. This happened before the signing of the compensation treaties with Hungary<sup>15</sup>, Bulgaria<sup>16</sup> and Roumania<sup>17</sup>.

### C. Switzerland.

By a resolution of 13 July 1948<sup>18</sup>, the Swiss Federal Council set up a "Special Commission for Compensation for Nationalization" to distribute the global compensation received from abroad. The task of the commission was to determine whether the conditions for the settlement of the claim in accordance with the compensation treaty had been carried out. Further, the commission was to conduct negotiations with individual claimants and fix the proportionate amount of compensation payable to each. If agreement could be reached, the amount should be fixed unilaterally by the commission. A detailed formulation of the material law on which the commission could base its findings did not exist in Swiss law. The commission could take decisions only on the basis of the compensation agreement or general international law<sup>19</sup>. If a claimant was dissatisfied with a

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13. "The Foreign Compensation (Poland) (Debts) Order in Council", *S.I.* 1956, no. 617, with alteration of 30 January 1957, *S.I.* 1957, no. 100, and "The Foreign Compensation (Poland) (Nationalizations) Order in Council", *S.I.* 1956, no. 618, with alteration of 30 January 1957, *S.I.* 1957 no. 101 and no. 1366.

14. "The Foreign Compensation (Bulgaria) Order in Council", *S.I.* 1958, no. 261.

15. "The Foreign Compensation (Hungary) (Registration) Order in Council", *S.I.* 1954, no. 219.

16. *S.I.* 1954, no. 220.

17. *S.I.* 1954, no. 221.

18. Cf. Bindschedler, *op.cit.*, p. 70 foll. The commission's competence was later extended by a resolution of the federal council of 10 December 1948.

19. *Ibid.*, p. 91.



decision of the commission, the case could be brought before the political department and thereafter before the Federal Council, whose decision was final. The commission had no powers to exercise sanctions against witnesses or in any other way to exercise the functions of a court in connexion with the settlement of cases.

This commission was criticized for its dependence on the ordinary apparatus of administration, since it was asserted that the essential guarantees for the safeguarding of the rights of the citizen were not present<sup>20</sup>.

As a result a new commission was set up by a federal resolution on 21 December 1950 and with it an appeal commission for compensation paid for nationalization<sup>21</sup>.

Art. 3 of the resolution defines the material legal basis for the commission's work as follows:

“Die Kommission verteilt die Entschädigungszahlungen gemäss den einschlägigen zwischenstaatlichen Vereinbarungen und andern anwendbaren Vorschriften des Bundesrechts sowie auch den allgemeinen Grundsätzen des Völkerrechts.

Im Rahmen dieser Rechssätze entscheidet sie nach freiem Ermessen.”

Detailed rules for the commission's work are given in “Verordnung betreffend die Kommission für Nationalisierungsentschädigungen vom 17. April 1951” where the scope of the commission's work was worded as follows in art. 1:

“Der Kommission für Nationalisierungsentschädigungen obliegt die Durchführung der zwischenstaatlichen Vereinbarungen welche die Bezahlung von Globalentschädigungen an den Bund zur abgeltung der durch Verstaatlichungsmassnahmen entstandenen Ansprüche schweizerischer Personen zum Gegenstand haben. Sie besorgt insbesondere die Verteilung der auf Grund dieser Vereinbarungen bezahlte Beträge. Zu diesem Zwecke prüft sie die Legitimation der Ansprecher und setzt nach Bewertung des Anspruches die Auszurichtende Entschädigung sowie nötigenfalls die Zahlungsmodalitäten fest.”

The commission consisted of at least five members appointed by the Federal Council (art. 3). In the treatment of individual cases the official principle was laid down that the commission was not bound by the individual claims. The applicant had the right to appear personally before the commission (art. 12). The right to publish official notices was given in art.

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20. *Ibid.*, p. 93 and p. 124.

21. Cf. Bundesbeschluss über die Bestellung einer Kommission und einer Rekurskommission für Nationalisierungsentschädigungen vom 21. December 1950.

15. The commission was to work out a plan of distribution, in such a way that individual claims should be settled in due proportion unless the relevant agreement on compensation had laid down a different distribution<sup>22</sup>.

If a balance remained after a distribution on these principles, it should be shared proportionately between the individual claimants. (art. 18)

Claimants receiving compensation were, in general, pledged to deliver all relevant documents to the commission.

On the same day the "Verordnung betreffend die Rekurskommission für Nationalisierungsschädigungen" was adopted. By the terms of this regulation the appeal commission consisted of 3 members who were not bound in their decision by the grounds which might have been put forward in the application for appeal. If the earlier decision was annulled, the appeal commission might either make a new judgment or refer the matter back to the commission (art. 6). The decision of the appeal commission was final.

#### D. France.

By laws no. 51-671, 51-673 and 51-674 of 25 May 1951<sup>23</sup> regulations were laid down for the appointment of a board for the distribution of the global compensation received from Czechoslovakia, Poland and Hungary respectively. In art. 1, the law contains identical provisions that the boards were to consist of 5 members, of whom 2 were appointed by the president of the Court of Appeal (Cour de Cassation), who likewise nominated the chairman who should be the judge<sup>24</sup>.

The law provided that claimants, as they were defined in the treaty, should notify their claim within 3 months, failing which the claim lapsed. Notification of claims could also be made by French physical or juridical persons representing minority rights in companies, which are not French or under French control<sup>25</sup>.

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22. Art. 18: "... vorausgesetzt, dass sie nicht in den in Betracht fallenden Entschädigungsabkommen bereits ziffermässig festgesetzt sind."

23. J.O. of 1 June 1951.

24. Cf. also Vienot, *Nationalisations étrangères et intérêts français* (1953).

25. Law no. 51-671, art. 3(a). Law no. 51-673 and 51-674, art. 2(a). This rule seems to correspond closely with the compensation treaties concluded by France, cf. above § 19.

The commission was to work out a plan of distribution where the proportion of each claim in the global sum was established. There was thus no opportunity for further testing of the claim by an administrative appeal or by submitting the case to the courts.

The law contained no material rules.

On 13 May 1952 a regulation on procedure was issued to law no. 51-673<sup>26</sup> in respect of the compensation from Poland, containing provisions that the commission itself determined its rules of procedure, and that the commission was bound to submit regular reports on its activity to the Foreign Minister and the Finance Minister. The order also contained special provisions relative to the circumstance that Polish compensation was paid in coal in accordance with the treaty on global compensation of 19 March 1948.

Similar procedural orders were issued in connexion with the laws no. 51-671 (Czechoslovakia) and no. 51-674 (Hungary) of 4 August 1952<sup>27</sup>.

By law no. 52-861 of 21 July 1952<sup>28</sup> the French president was empowered to ratify the agreement on global compensation with Yugoslavia, and at the same time to set up a board whose object was to undertake "la repartition de l'indemnité globale forfaitaire versée par le gouvernement yougoslave en application dudit accordé". The order on procedure of 29 October 1952 is an addendum to this law<sup>29</sup>.

The rules which apply to the Yugoslavian board do not therefore differ essentially from the orders established in connexion with the earlier treaties of compensation<sup>30</sup>.

#### E. Sweden.

On 13 June 1941 a board of 3 persons was set up to distribute the compensation Sweden had obtained from the Soviet Union under the treaty

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26. *J.O.* of 14 May 1952.

27. *J.O.* of 24 August 1952.

28. *J.O.* of 21 & 22 July 1952.

29. *J.O.* of 3 December 1952.

30. For some of the individual problems on which the French distribution board has pronounced, see *Affaires Etrangères* (1955), vol. 6, p. 21 and (1958) vol. 9, p. 32 & 33.

of 30 May 1941 dealing with the settlement of claims for nationalization in the Baltic States <sup>31</sup>.

A similar procedure was proposed in Kungl.Maj:ts prop.nr. 187 of 3 March 1950 in connexion with the ratification by Sweden of the agreement for global compensation with Poland of 16 November 1949. Both juridical experts and the claimants were to be represented on the proposed board <sup>32</sup>.

By the royal resolution of 16 June 1950, that is to say by an administrative act, the board for the distribution of Polish funds was set up, consisting of a judge from the Swedish High Court (chairman), a lawyer and a representative for the Foreign Ministry.

In Sweden no law was passed nor material legal rules established regarding the setting up of the board as guidance for the distribution of compensation by the board.

Thus the board was unable to consider any other claims than those contained in the compensation agreement <sup>33</sup>.

No powers were given to issue official notices. Appeals against the decisions of the board could be submitted to the King.

In connexion with the compensation treaty concluded with Czechoslovakia on 22 December 1956, a similar board was set up.

Another procedure was used in connexion with the compensation treaty with Yugoslavia of 12 April 1947. The number of claimants was relatively small, and it was therefore possible before the signing of the treaty to secure advance approval for the proposed settlement, and couple it with a declaration of renunciation of further claims against Yugoslavia. After this a distribution board was superfluous. Similar procedures were used in connexion with the distribution of the global amounts paid under the agreement concluded with Hungary on 31 March 1951.

#### *F. Denmark.*

It was possible to distribute the compensation received by the Danish government from Poland, in accordance with the compensation treaty of 26 February 1953, under the administration of the Ministry of Commerce

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31. As a result of the confidential nature of the agreement no further information is available.

32. P. 21.

33. Cf. the board's unpublished report to the King of 19 April 1951.

and without any serious difficulties. All the claims were known in advance and the number of claimants was so comparatively small that these could be kept informed of progress and thus have an opportunity to approve the results which could be attained during the negotiations with Poland before the signing of the treaty. The amount of global compensation which Poland undertook to pay was thus fixed on the basis of a list of the Danish claims submitted. It was then possible to use this list also as a basis for the distribution of the money received.

On 27 January 1957, however, the Ministry of Commerce put before Parliament a bill concerning the distribution of certain compensation received from abroad<sup>34</sup>. In this bill it was suggested that a board be set up to organize the distribution. The bill, according to the notes accompanying it, had as a reason, *inter alia*, that other countries had created similar boards and that the distribution of the global sum had given rise to a number of difficult legal questions demanding thorough knowledge of the law of probate, of the procedure for negotiations with the foreign State, etc. "... During the distribution there will, therefore, be a call for expert legal knowledge of different kinds, and this objective can best be attained by entrusting the distribution to a board set up for that purpose, in which the various branches of legal expert knowledge can be represented"<sup>35</sup>.

As a further reason it was claimed that the setting up of a board would result in the establishment of uniform practice in the distribution of the global compensation received from various countries. It is probable that certain problems of procedure and evidence were being thought of here, since the law, as far as material legal questions are concerned, for example the persons included in the distribution and the kind of claim that can be met, makes the individual treaty the decisive factor.

With a few alterations the bill was adopted and became law no. 179 of 7 June 1958<sup>36</sup>. In accordance with § 2 of the law, a board was to be set up consisting of a chairman nominated by the Minister of Commerce in consultation with the Minister of Justice, who must possess the qualifications for appointment as judge and 3 other members representing the Foreign Ministry, Finance Ministry and the Ministry of Commerce.

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34. *Folketingstidende* (1957), col. 1010.

35. *Folketingstidende, Tillæg A* (1957-58), col. 704.

36. *Lovtidende* (1958), no. XVI, p. 485.

Thus, in the Danish board the procedure known from some other countries, where representatives for the claimants or experts from industry and commerce are represented on the board, was not followed.

The board was to undertake the distribution of global compensation received by the Danish State in accordance with treaties for losses sustained as a result of measures taken by the State paying compensation, "among them that the property has been nationalized, seized or in some similar way abstracted from the owners ... (§ 1 cl. 1)." It may also be taken that this also covers, for example, losses sustained as a result of property being placed under national control, although the rights of ownership still rest with the original owners, cf. the alteration in the text of the bill carried out in committee. The amendment was directed to § 1 cl. 1 in such a way that there could be no doubt that any and every financial loss was covered by the law<sup>37</sup>.

§ 3 authorised the issue of official notices. In § 5 it was further provided that if the claim submitted was rejected in whole or in part, the decision was to be accompanied by reasons for the rejection. The decision of the board could be brought before the courts by the applicant.

Expenses in connexion with the work of the committee were to be met from the global compensation, unless other arrangements were authorized by the parliamentary finance committee. (§ 8)

With reference to the work of the board in distributing the global compensation and the material basis for doing so, § 4 provided that the board should undertake an examination of the claims submitted and determine, inter alia, whether the documentary evidence provided was satisfactory. Thereafter, on the basis of the claims received and the information available to the board, coupled with the guidance in the agreement and its preconditions, the board was to fix the sum of money which should form the basis of the distribution of the global compensation. All persons sharing in the distribution should have the same proportional cover, unless other provisions existed from the agreement, from the negotiations, or from the preconditions for the agreement. (§ 6)

No guidance was given in the law on the question of the persons included in the distribution, but the notes on the bill contained an express provision that "this question must be decided separately for each agree-

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37. Cf. the spokesman of the parliamentary committee during the 2nd reading of the bill. *Folketingstidende* (1957-58) sp. 4342.

ment”<sup>38</sup>. This must mean that the board was not empowered to waive the provisions which were laid down on this point in the treaty.

Similar reference to the compensation treaty is only to be found in the notes to § 4 of the bill, where the legal inquiries by the board were to include the question of whether the documented claim was included in the agreement<sup>39</sup>.

It thus appears that the comparatively few material legal rules which are given in the law as guidance for the board all refer back to the basic treaty and its preconditions<sup>40</sup>. On this point the Danish legislation corresponds entirely with the practice in other countries.

### G. Conclusion.

It is clear from the foregoing that where the circumstances accompanying the distribution of compensation are not entirely simple, for example as a result of the number of claims or their nature, special commissions or boards have everywhere been set up to administer the distribution. A feature common to all of them is that the functioning of these boards is only a part of the normal administration, and for this reason the composition of the boards, their powers and the final nature of their decisions reflect the tradition of legal administration in each country, though this is of course to some degree influenced by the circumstance that the distribution of compensation is an act which particularly requires expert judicial knowledge.

Apart from the British regulations, regulations in the other countries give extremely meagre information on the material legal basis for the decisions of the commission. Formally decisions are reached everywhere on the basis of municipal law, which either, as in Great Britain, changes the form of the constituents of the treaty in detail, or in the other cases simply refers to principles in the basic treaties. It is not possible to find rules in the national regulations for distribution which deliberately depart from the rules agreed in the compensation treaties. It is, however, difficult, without

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38. *Folketingstidende, Tillæg A* (1957-58), col. 705.

39. *Ibid.*

40. In clause 6, dealing with deviation from distribution according to the principle of equality, reference is further made to the agreements concluded and their preconditions, as well as to the negotiations with the foreign State. This seems superfluous.

access to the individual decisions, to state with certainty how widely deviations from international law have actually taken place in States where the material legal rules are meagre.

## § 23

### WHO OWNS THE GLOBAL COMPENSATION?

#### A. *The Problem.*

The circumstances just discussed, in which the distribution of the global compensation received is entrusted to the State which received it and then formally carried out in conformity with the municipal law of that State, naturally gives rise to the question of who is to be regarded as the owner of the sum of global compensation paid to the State.

#### 1. *The relation between the party paying compensation and the party receiving it.*

It might be thought that the problem would arise in the relations between the State paying compensation and the State receiving it. From this point of view, however, it must be clear that the paying State cannot as a general principle intervene in any apportionment of the compensation money which the receiving State may find reasonable. In particular the State receiving compensation must, without disturbance to its relations with the paying State, be entitled to meet claims which the paying State has refused to recognize during the negotiations. The interpretation placed on international law by the paying State thus need not be respected in the distribution of the sum received by the home State of a claimant, any more than the legislation of the paying State or other principles bearing on the calculation of the compensation, irrespective of their conformity with international law, are binding on the State receiving the money.

It follows from the principle that the State receiving the compensation may, under international law, freely and legitimately act on behalf of its nationals and make any agreement whatever with the paying State which it, the receiving State, may find expedient. As far as the paying State is concerned, the receiving State has a free hand and the relationship of



the receiving State to its own nationals is a matter in which the State paying compensation is normally neither able, nor wishes, to intervene.

The case, however, is different when the State receiving the compensation may by the terms of the treaty, or as a result of the general legal relationship between the contracting parties (cf. the discussion above) have undertaken to distribute the money in an agreed way. A breach of an agreement of this kind can involve it in liability to the paying State. This, however, does not alter the situation that the apportionments of the compensation made by the receiving State, whether or not these are in conflict with international law, are fully valid as they affect those receiving payment.

Whether the legal position of the receiving State with reference to the sums received is to be regarded as ownership in relation to the paying State, is less important. The decisive point is that the legal position between the two contracting parties is clear and undisputed. And the problem of the ownership of the sums of compensation received has not given rise to doubt in this respect.

## *2. The relation between the State receiving compensation and its nationals.*

The case is altered, however, when the question of the ownership of the sum of global compensation is examined in the relationship between the individual claimants and their home State which has received the compensation.

The problem of who can be said to own the compensation money is a problem of municipal law, the solution of which is solely dependent on the system of municipal law in each individual country, including the national constitutions.

These have an important bearing on the question. If, for example, the constitution of a country contains stipulations on the protection of ownership, the question of the possible rights of ownership of the claimant is clearly of interest. If such ownership of the compensation sum exists, the State cannot be justified in denying, in whole or in part, payment of the compensation to the claimant. If the reverse is assumed, that the State is the owner of the compensation money, then this may be freely used for purposes unconnected with the claims for compensation which themselves were the basis for the calculation of the global amount and its payment by the nationalizing State.

If the State, as far as the claimants are concerned, is the owner of the global sum in the sense that it can legally dispose of the compensation at its discretion, this may equally imply that the claim of the individual for compensation for nationalization has ceased to exist, at any rate to the same extent as the home State of the individual claimant has received satisfaction. Legal apportionments of the claim, either *inter vivos* or *mortis causa* will consequently be precluded, since the claimant in question, on this assumption, is not the owner either of a claim for compensation against his home State or against the nationalizing State, nor is he the owner of any compensation money.

*B. Other legal interpretations.*

In the *United States* the question of who owns the compensation money after it has been paid to the home country of the claimant, has been concentrated in the law of 27 February 1896 quoted above. In connexion with the distribution of compensation received in the *Alsop* case, the legal advisers of the government published a statement which, dealing with the interpretation of the law of 1896, says, *inter alia*:

"... It follows naturally that the award when received after the determination of its validity and amount belongs to the nation and constitutes a national fund ... That the fund received in such cases is a national fund is further shown by the fact that the Government has always exercised the right to reopen awards for the purpose of determining if they were improper or unjust and of refunding sums it seemed inequitable to retain ...

Moreover, in distributing awards Congress has invoked and acted upon the same principle, giving the fund to whom it chose and cutting off from participation those whom it wished <sup>1</sup> ..."

This interpretation, which is difficult to reconcile with the text of the law, is supported by a number of judgments, but appears to have been abandoned in recent times. The question came up again in connexion with the claims received by the United States at the end of the First World War.

Administrative Decision V, delivered by the referee in the mixed arbitration commission on the treaty of 10 August 1922 (The United States – Germany), states *inter alia* <sup>2</sup>:

"... But where a demand is made on behalf of a designated national, and an

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1. Hackworth, *op.cit.*, p. 765.

2. *Ibid.*, p. 76.

award and payment is made on that specific demand, the fund so paid is not a national fund in the sense that the title vests in the nation receiving it entirely free from any obligation to account to the private claimant, on whose behalf the claim was asserted and paid and who is the real owner thereof. Broad and misleading statements susceptible of this construction are found in cases where lump-sum awards and payments have been made to the demanding nation covering numerous claims put forward by it and where the tribunal making the award did not undertake to adjudicate each claim or to allocate any specified amount to any designated claim ... It is not believed that any case can be cited in which an award has been made by an international tribunal in favor of the demanding nation on behalf of its designated national in which the nation receiving payment of such award has ... hesitated to account to the national designated ... for the full amount of the award received. So far as the United States is concerned it would seem that the Congress has treated funds paid the nation in satisfaction of specific claims as held 'in trust for citizens of the United States or others'."

The views of the arbitration commission seem perfectly reasonable and must be taken to be valid even beyond the situation which is dealt with directly in the judgment.

The question was not raised in connexion with the International Claims Settlement Act of 1949. The relevant law contains no expression of opinion corresponding to that quoted in the extract above, but it can safely be assumed that it was not the purpose of the law to change the legal interpretation of this point. The question of whether the State or the claimant owns the amount of global compensation does not, however, appear to have raised special problems. The distribution of compensation, in conformity with the law relating to it, took place in close agreement with the text of the compensation treaty and in this situation the question of who is the owner loses its importance.

In *Great Britain* the question came before the courts in the case *Civilian War Claimants Association Ltd. v. Rex (The King)*<sup>3</sup> (1932). It was laid down in the judgment that the sums paid in compensation by the German government to cover claims by British subjects against Germany under the Versailles Treaty of 1919, had been received by the British government in its quality as "sovereign" and not as "trustees" or agent for the claimants.

According to Eli Lauterpacht<sup>4</sup>, this view forms the basis for the English

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3. (1932), A.C. 14.

4. "The Foreign Compensation Act, 1950", *The International Law Quarterly* (1951), vol. 4, p. 362.

Foreign Compensation Act, 1950. As to the sums received as compensation from Czechoslovakia and Yugoslavia as a result of the global agreements reached, this author says:

"Such monies are not received by the Crown as an agent or trustee for the former owners of the expropriated property and, consequently, the decision to distribute and the methods of distribution of these sums is a matter entirely within the discretion of the Crown ... There is still no obligation upon the Crown to make these funds available for distribution and, if it does not, no action can lie against it <sup>5</sup> ..."

On the legal interpretation in *Switzerland*, Bindschedler states that the distribution commission is authorized to exclude a claimant from the distribution of compensation if he does not carry out the requirements of the commission, for example in producing evidence, or if in any other way he does not conduct his case according to the instructions of the commission: "Dies ist durchaus möglich nach dem ja der Bund Eigentümer der Globalsumme ist, und die einzelnen Interessenten ... keinen Rechtsanspruch auf einen Anteil wie überhaupt auf Gewährung des diplomatischen Schutzes haben können <sup>6</sup>."

This author states that this interpretation has clear support in Swiss constitutional law.

The correctness of these principles, with special reference to British and Swiss law, will not be made the subject of detailed discussion here. Assuming their correctness, it must be supposed that the principle that the State is the real owner of the compensation is so influenced by internal constitutional law, that the examples cannot be taken to have general validity. It may, however, be taken that some of the observations made below on the problem in general and Danish law in particular can conceivably have some weight even in relation to the views of Lauterpacht and Bindschedler. However, as in the case of the American legal interpretation, the correctness of this will be difficult to prove, since the question of the distribution of compensation cannot be brought before the courts in these countries.

### C. *Danish Law.*

#### 1. *Can the State refuse to pay out the sum received in compensation?*

The first question to be asked is whether art. 73 of the Constitution may be

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5. *Ibid.*

6. Bindschedler, *op.cit.*, p. 91-92.

taken to protect the contingent ownership of the compensation monies of a claimant.

Art. 73 of the Constitution deals with property which according to present opinions is interpreted as in any case covering all goods having capital value, thus money also. According to the Constitution there is nothing to prevent the expropriation of property taking place abroad. Such expropriation is covered by art. 73 and gives a consequent claim for compensation.

Compensation which is paid by the foreign State to those affected by the nationalization must, if the compensation is the property of the private person, undoubtedly be covered by the protection of the constitution, whether the amount of compensation is to be regarded as a capital asset situated in Denmark or as a replacement for property abroad. The problem is only whether the compensation can be said to belong to the claimants as their property.

To understand the problem it must be stressed that the individual claimant, by the act of the nationalization of his property, acquires a claim for compensation directly against the nationalizing State, for which authority is either in its municipal legislation or in international law. The individual can press this claim against the State in question and, in the earliest treaties of compensation, facilities were also given to support the efforts of the individual affected by nationalization by means of the compensation treaties which authorize compensation under the forms previously described as direct or indirect individual compensation. It is clear from the texts of the treaties quoted earlier that such compensation is paid out to or belongs to the individual claimant and it is therefore scarcely possible to talk of the State having ownership, even if a successful enforcement of the claim for compensation is essentially to be ascribed to the intervention of the State. There is no doubt that the claimant preserves his claim to compensation throughout the whole course of events, right up to the payment of the compensation money, and that the person concerned can apportion his claim whether *inter vivos* or *mortis causa*.

Against this background it is difficult to see that the situation is legally different when compensation is paid in form of a global sum. Global compensation is a special *form of compensation* which has proved to be practical for reasons set out above. The special elements attaching to global compensation agreements, namely the relative or absolute renunciation by the State of further compensation, and the circumstance that the compensation is a total sum, a lump sum, do not seem to be sufficient reasons for

supposing that the State, by means of global compensation agreements (as opposed to the position under agreements on individual compensation), should acquire ownership of the monies paid, in the sense that the individual claimant is precluded from the legal disposition of the claim in the period between the receipt of the monies and till their further payment, and that the State can thus arbitrarily decide the apportionment of the sums received in compensation.

When Bindschedler, speaking of Swiss law, declares that the compensation monies belong to the Swiss State, he apparently supports his view with the fact that the individual citizen has no claim to diplomatic protection. This reasoning cannot be accepted. Even if it is assumed that a State can refuse to safeguard the interests of its nationals against foreign States, and even if it is further assumed that by its relationship with its nationals the State can make decisions on the claims of its nationals, for example give an absolute or relative renunciation of the validity of the claim if essential interests of foreign policy require it<sup>7</sup>, it does not necessarily follow that compensation which has actually been received does not belong to the claimants who suffered losses abroad which are covered by the compensation. The principles which support the recognition of authority of the State to abstain from protecting the claims of its nationals against foreign States, or even to renounce them altogether, are primarily dictated by considerations of the general political interests of the State in its relations with the foreign States in question. Here it is reasonable that the claims of single individuals should, in given circumstances, be sacrificed to the common good. But the principles carry no weight in the situation where the compensation monies have been paid.

With the act of payment the possibilities of compensation for other claims and other interests than those included in the compensation are, practically speaking exhausted. There no longer exist any considerations concerned with the general interests of the State in its foreign relations which can be made the reason for the destruction by the State of individual claims.

Thus the situation is quite different.

The claims which the individual claimant had against the nationalizing State have, by virtue of the intervention of his home State, been fulfilled in whole or in part by payment of a sum of money by the nationalizing State

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7. Thus Max Sørensen, *Festschrift*, p. 409-10.

to the receiving State. The situation that other claimants have had similar claims satisfied simultaneously can cause distribution difficulties, but this does not seem capable of influencing the legal situation in respect of ownership itself<sup>8</sup>.

It does not, therefore, seem possible to adduce principles which support the opinion that global compensation paid by a foreign State as a result of losses sustained by Danish nationals is to be regarded in any other way than as compensation paid in its traditional forms: namely as belonging to the claimants. Understood in this way, the global compensation must be covered by the rules of the constitution on the protection of ownership, and a complete refusal to pay the claimants will be covered by art. 73 of the Constitution and provide a claim for compensation, at any rate if the global sum received is used for entirely inappropriate purposes, e.g. as a subsidy for the expenses of the foreign service in general or for distribution among sports clubs.

*2. Is the State free to distribute the compensation?* If it is accepted that according to Danish law the State is pledged to pay the money it has received as global compensation to the persons whose claims form the basis for the compensation, the question still arises as to whether the State is constitutionally bound by the words of the treaty and preconditions, or whether the State can in fact, at its own discretion, distribute the sum of compensation within the specified group of persons.

Even if it is accepted that the global compensation does not belong in its entirety to the State which receives it but on the contrary to the individual claimants, it is in practice impossible to specify how large a proportion of the compensation belongs to each single claimant, and the question here is whether the single claimant must allow the State to make the decisions on distribution. The function of the State (and in this case this will mean the function of the legislature) in determining the guiding principles for the distribution of the compensation received, is not different from the function the legislative power has assumed in establishing rules for probate and

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8. The principle put forward here, according to which the State (as far as the claimants are concerned) cannot be said to have ownership of the amount of global compensation, is perhaps also emphasized by the fact that the paying in of compensation from the foreign State and its paying out to claimants is not, in Danish law, controlled by the finance law, which would have been natural if ownership by the State had been established.

bankruptcy, where guiding principles also exist for the distribution of assets which do not belong to the State. The question is only whether the State is completely free in this respect.

(a) *Can the State reject claims which are not included in the treaty and its preconditions?* If the distribution takes place in close conformity with the treaty and its preconditions, this distribution must be completely constitutional. Even though the treaty might contain evidence of principles held by the paying State which in the view of the Danish government were in conflict with international law, no Danish national could call upon the Danish government to pay compensation for claims which it had proved quite impossible to induce the other contracting State to recognize. No obligation exists for the State to exceed the claims authorized in the treaty and its preconditions.

(b) *Can the State reject claims which are covered by the treaty and its preconditions?* Where no special considerations (for example in deference to the paying State) demand that international law shall be maintained as the basis for the distribution of the compensation, the situation is conceivable in which the State chooses to allow the distribution simply to take place according to the general rules of its municipal law. Special problems can arise here in cases where international law and municipal law do not agree with each other. This is true for instance in connexion with the rules on limitation of claims. It is possible to imagine a situation in which the Danish State submits a claim against the nationalizing State, which claim has not lapsed according to international law but may have become obsolete under Danish law.

If this claim is included in the global sum, the problem arises as to whether the State can reject the claimant's demand as lapsed under its municipal law.

This question must certainly be answered in the negative. As support for this view the same considerations can be brought forward as above under 1, in that the situation being considered here is only distinguished quantitatively from that set out under 1. Even though the individual's claim was not regarded as covered by the protective clauses of the Constitution § 73, the fact that the State had accepted compensation from a foreign State using as its argument that a claim for compensation existed and thereafter refused to pay compensation to the person entitled to it, would be so offensive to the sense of justice that such an action, if only for political reasons, could scarcely be carried through.



(c) *Can the State pay claims which are not included in the treaty and its preconditions, but are otherwise authorized by international law?* The difficult question, however, is whether the receiving State is entitled to extend payment to other persons for other claims than those covered by the treaty. This can become a practical problem in cases where the receiving State is of the opinion that other persons or other claims should, according to the interpretation of the rules of international law by the receiving State, be covered by the treaty, but where this was not recognized by the paying State. The recognition of such a right to extend payments is opposed by the principle that the absolute share in the compensation money for the other groups of persons and their claims directly covered by the compensation treaty is thereby reduced, cf. law n. 179 of 7 June 1958, § 6.

Nevertheless such a distribution of compensation may be constitutionally permissible.

Such an extension of the persons entitled to compensation by the treaty seems to spring from good motives. In the first place it can be against the long term interests of the receiving State to make a distribution in such a way that it gives recognition to international legal principles which are incompatible with the views on international law which it, the receiving State, holds. To this, however, must be added the second point (and this carries decisive weight) that the payment of compensation in the form of a global sum has as one of its purposes the exclusion during the treaty negotiations of discussions of legal opinions on which the parties to the treaty do not agree.

Instead the compensation is paid as a "lump sum", with the presumption that doubtful legal questions also have thereby found their financial solution. Consequently the claimants who were directly covered by the treaty cannot state with certainty that the global amount paid covers only the claims which were specifically recognized by the paying State. These claimants will scarcely be in a position to show the probability, let alone prove, that their proportion of the compensation was smaller than it would have been if their home State had submitted only their claims to the nationalizing State <sup>9</sup>.

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9. The situation is somewhat altered, if the calculation of the global sum is made automatically on the basis of a register of notified claims, but in these cases the State, when distributing, will generally only allow these claims and no others to come into consideration, cf. the Danish practice in connexion with the compensation agreement with Poland.

(d) *Can the State pay claims which are neither covered by the treaty and its preconditions nor authorized by international law in general?* This situation can conceivably arise in connexion with the limitation of persons recognized as entitled to compensation. General international law, as stated above, contains the rule that the connexion of nationality must exist both at the time of nationalization and at the time when the States came to agreement on settlement of the claims for compensation. This rule can produce unsatisfactory results in cases of change of nationality between the time of the action and the time of the enforcement of the claim for compensation. It thus does not appear entirely unreasonable if the receiving State should attempt to alleviate the severe effects of the rules of international law by paying compensation, for example, to persons who were naturalized by the receiving State after nationalization but before the conclusion of the agreement.

Apart from cases where decisions have been taken on these situations in the treaty or documents attaching to it<sup>10</sup>, it must, however, be concluded that the State is not justified in distributing compensation in these cases. The other claimants will justifiably be in a position to assert that their compensation was reduced by the action, and it is not likely that evidence will be found for supposing that such claims were taken into general consideration at the time of the fixing of the global sum. On the contrary, the compensation treaties appear to show that, in those cases where States were conscious of the problem, it was possible to conclude direct agreements with the paying State on this point, and that it must be supposed that the global sum in these cases was fixed by agreement.

#### D. *Conclusion.*

On the basis of what has been said the State, as far as the claimants covered by the treaty are concerned, does not own the global compensation.

Individual claimants must be in a position to raise objections against payment being made from the compensation sum to meet other claims than those covered by the treaty, its preconditions and/or general international law as this is interpreted by the receiving State. Power to dispose freely of the sum of compensation does not belong to the State. It can establish conditions on the submission of evidence and other measures bearing on the

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10. Cf. above p. 244 on "The interpretative minute" to the agreement between Great Britain and Czechoslovakia of 28 September 1949.

distribution of the money, and just as in legislation on bankruptcy and probate, it can publish provisions on notification of claims, exclusion of claims not notified, form of payment etc. Under all circumstances, however, the Danish State is bound by the limits laid down in § 73 of the Constitution.

Proprietary rights to the sum of global compensation must belong to the claimants in partnership as common owners, and in such a way that the individual claimant owns a share in a global sum proportionate to his claim for compensation. The individual claimant can exercise his powers over this share at the owner, and the claim for compensation must be subject to inheritance. The legal work of the board of distribution can most properly be compared with the work of the Probate Court when a distribution of capital is to be made between a number of common owners.

## § 24

### SPECIAL CONSEQUENCES OF COMMON OWNERSHIP BY CLAIMANTS TO COMPENSATION

Whether one recognizes the common ownership of claimants in the compensation sum as drawing its authority from the nature of the compensation, or from the Constitution of the receiving State, or one recognizes that common ownership is established solely as a result of the regulations on distribution of the compensation issued by the State, this common ownership raises certain problems.

#### *A. The claim for equality.*

From the provisions in the regulations of individual countries' distribution quoted above, it is clear that, apart from special agreements with the State paying compensation, all claimants must take their share from the global sum on a basis of equality. Such a provision is also found in Danish law no. 179 of 7 June 1958.

The distribution, however, took place according to a list drawn up by the Distribution Board where individual claims were set down with the amount which was to form the basis for a just distribution. The determination of the size of this amount, which in fact is decisive as to whether the formal equal distribution was also a true equal distribution, was entrusted to the

discretion of the Board, and the question here is whether restrictions on this discretion exist on the grounds that the size of the payment for individual claims would influence the amount of compensation for every claimant. This question will be examined in detail as it refers to Danish law.

In the notes to the Danish Bill (to § 4) the following appears on the powers of the Board to fix the basic sum:

"... It will thus possibly become necessary to make an estimated calculation, since it will not always be reasonable to give consideration to the various groups of claimants proportionate to the sums with which they will in fact be credited after examination. In carrying out this estimate the board must base its decisions on the agreement and the negotiations on it, but in addition also on an estimate of the nature of the claim or the nature of the claim of the group in question compared with other claims or other groups of claims".

This last sentence is not very clear. It is presumably directed to situations where some claims can be supported by pleas of loss of livelihood, whereas other losses only concern money invested in foreign businesses with the object of obtaining a better return. The reasoning, as expressed during the debate in the Folketinget in connexion with the presentation of the Bill, would then be that in the course of distribution, consideration could be given to the financial situation of the claimant, in such a way that the first type of claim would have priority and carry greater weight than claims which sprang from losses arising from "pure" capital investment<sup>1</sup>.

It should be observed in this connexion that similar principles were submitted to Parliament in England, where, however, the government rejected the idea that social considerations should enter into the distribution, since a distribution based on such principles would bring insurmountable difficulties in its train and be contrary to the principle of equality of distribution<sup>2</sup>.

It also appears unreasonable that claimants who have quite legally invested money abroad with the completely lawful purpose of obtaining a return thereby, should, in conflict with the principle of equality of distribution of global sums laid down in § 6, be forced to pay for a social measure which ought to be spread over a far wider circle than the fortuitous owners of capital affected by measures of nationalization in the country in question.

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1. Cf. the negotiations in Parliament, especially Frode Jakobsen and Axel Larsen's contributions, *Folketingstidende* (1957-58) cols. 1392 and 1398.

2. Cf. *Hansard*, vol. 475, no. 55 (25 May 1950) col. 2271 ff. and specially 2275.

On the other hand it should be recognized that the Board can, for example, fix special exchange rates for money debts and even different exchange rates for different kinds of money debts, which were affected by exchange control regulations in connexion with acts of nationalization. Such exchange control measures can have as a result that compensation at the new exchange rate means in effect that the claim of such a person will be extinguished. It will frequently be impossible to specify anything in the compensation agreement on this problem, since most States reserve the right, which is not restricted by international law, to regulate their own internal exchange, and therefore will refuse to recognise any obligation to pay compensation in respect of losses which arise in this way. An "exchange adjustment" of this kind will not be felt totally unreasonable in its effect upon other claimants who have lost real property, since it will in fact mean that all those affected by the action receive a share of compensation which is proportionate relative to the wealth which was invested in the foreign State and lost by the action of that State. The amount of stress the Board will lay on such principles must, according to the law, rest on the free discretion of the Board. On the other hand it cannot be left to the free discretion of the Board to decide whether a claim is to be covered by an "unequal distribution" or an exchange adjustment. This last question must be open for testing before the courts, cf. § 5 of the law<sup>3</sup>.

*B. Information on claims of fellow applicants.*

The question can be raised whether, before a decision is reached in his case or after it has been published, the individual claimant can demand to be informed of the claims submitted by fellow applicants. His interests here are clear. The more claims recognized from fellow applicants, the more will his share of the global sum be reduced.

In Great Britain access to information on the claims of fellow applicants was directly authorized in the rules of the distribution commission of 18 December 1950<sup>4</sup>.

It is stated in § 9 that, for each global sum, the Secretary of the Commission shall draw up a register containing a resumé of each application. Every applicant shall have the right of access to consult this register and

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3. Cf. also Max Sørensen, *Festskrift, op.cit.*, p. 410.

4. The Foreign Compensation Commission Rules, Approval Instrument, 1950, *S.I.* 1950, no. 2046.

every applicant has the right to inform the commission of objections he may have relative to the claim of a fellow applicant.

Similar rules do not exist for the Danish distribution Board and the question then is whether, in Danish administrative practice, applicants must be granted the right to inspect records which also include applications from fellow claimants.

The situation that a decision in the case of a fellow applicant by a Board or other authority affects the first applicant's position is not unknown. In all cases where the authorities have only limited possibilities of satisfying applicants, similar situations arise, for example in making appointments, granting licenses etc. In these cases it is generally held that the one applicant has no claim, and certainly in practice is not given the opportunity, to see the documents of fellow applicants<sup>5</sup>. Furthermore, even in cases where the right to inspect records is admitted, this cannot cover circumstances which may be regarded as confidential where they touch the interests of the community or a third party.

In the price agreement law, § 13 cl. 2 (cf. the rules of procedure of the price appeal board § 4), it is laid down that a complainant has no claim to confidential information concerning the situation of other undertakings which cannot be given without prejudice to the general interests of the community. It is to be taken that this rule expresses a general basic principle which, to protect the interests of the third party, denies all the claims of a private party to have access to documents used by the other side, since it must be regarded as "natural that the third party should under all circumstances be protected against access to his secrets by other private parties"<sup>6</sup>.

These legal-administrative principles have no decisive weight in the cases now discussed. Even if it is accepted that there shall not be access to information on the applications of fellow claimants which are under consideration by an application board, the position is quite different as regards the distribution of the sum of global compensation. While the person who is seeking a position, or a license or the like, cannot claim that his application must be met, the position in connexion with distribution of compensation is the special one that the individual applicant specifically possesses a legal claim that his demands shall be covered in due proportion. An unequal distribution favouring his fellow applicants will, in this case,

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5. Cf. Bent Christensen, *Nævn og Råd* (1958), p. 404.

6. *Ibid.*, p. 411-412.

have as its result that the rights created for the claimant by the payment of the compensation money by the foreign State are diminished.

As to the principle adopted in the provision in the price agreement law, art. 13 cl.2, this in fact can be acknowledged only as a general rule. In this law particularly there are good reasons for establishing provisions for safeguarding the interests of the third party and of the community.

The cases which come before the price appeal board and similar bodies are often concerned with contemporary circumstances where unwarranted knowledge of price calculations, production methods and so on could be abused by a third party.

Applications for compensation for nationalization etc. cannot be supposed to contain such contemporary secrets. They are most frequently concerned with investments made in the nationalizing State many years before, whose contemporary importance, partly as a result of the nationalization and partly as a result of the relatively long period of time which usually elapses between the moment of nationalization and the act of distributing compensation, must be said to be minimal. The information contained in applications will frequently appear in public registers (the ownership of real property, companies etc.), but even where this is not the case the interest which both the administrative power and the applicant have in a correct distribution must outweigh the interests of the individual who demands, sometimes from obscure motives, that the size, for example, of a seized bank account or a nationalized undertaking shall be kept secret.

In this connexion it may be observed that it is usual in cases of bankruptcy, liquidation and the like that those having a legal interest in the distribution of the assets are normally kept informed of the claims of the other creditors and any distribution which follows the bankruptcy and the liquidation. This does not seem to have caused difficulties in practice.

### *C. Injunctions against the distribution board.*

In cases where an applicant, by reason of a general right to be informed of the commission's decisions, or by chance, has learnt that the commission is paying an amount to a fellow applicant which, in the opinion of the first applicant is unjustified, the problem arises whether the first applicant can obtain an injunction against the commission. In this way it would be possible to prevent a payment which might cause a reduction in the amount available to meet the claim of the first applicant.

An applicant whose claim has been rejected can have a similar interest in obtaining an injunction.

It is in this form that the problem appeared in the United States in the case of *De Vegvar v. Gelliland*<sup>7</sup>. The distribution commission had rejected a claim for compensation on the grounds that the applicant's property had been nationalized at a time when the applicant had not yet become a naturalized American citizen. The applicant submitted the case to the U.S. District Court (Columbia), which pronounced that the court had no competence to decide the case. In July 1955 all claimants received notice that payment of compensation was about to take place. On 20 July 1955 the court of appeal ruled that the commission must not pay a sum of \$ 5,885,848.04, the equivalent of the applicant's claim. This prohibition was, however, sustained only until 31 March 1956, since the Supreme Court had meanwhile rejected the applicant's submission, when it was clear that, in accordance with the American distribution law, the courts had no competence to try the decisions of the commission.

In Danish law the power to impose an injunction on the distribution board does not exist, since the provision in the law on procedure, § 646, cannot be applied in the circumstances being considered here<sup>8</sup>. In fact the question of the imposition of such an injunction is not very practical.

It is laid down in the distribution law, § 6, that the distribution list prepared by the board shall, inter alia, contain a register of:

"... those amounts payable to any of the applicants taking part in the distribution, which have been calculated by the board having full regard for claims brought before the court."

Since at the time it is laid down in § 7 (with immense caution) that payment shall only take place when all connected legal actions have been settled, and after the board has made any necessary corrections to the distribution list, it is scarcely likely that the situation which led to the American injunction will arise.

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7. 97 U.S.App.D.C. – 228 F.2d 640 (1955) and Coerper, *op. cit.*, p. 872 ff.

8. Cf. Gomard, *Fogedret* (1960) p. 202.



## APPENDIX A

### Survey of the Compensation Treaties Referred to (Chronological)

<i>Treaty</i>	<i>Form<sup>1)</sup></i>	<i>Amount and Currency</i>	<i>Terms of payment</i>	<i>Sources</i>
Sweden – Soviet Russia 30.5.1941 and 7.10.1946	G	19.580.000 Sw. Kr.	Instalments	Not published. Cf. Kungl. maj:ts prp. nr. 187 (1950), p. 15
U.S.A. – Mexico 29.9.1943	II	\$ 29.137.700	Instalments over 4 years	Dep. St. Bul. (1943) p. 230
Holland – Mexico 7.2.1946	II		Instalments	U.N.T.S., vol. 3, p. 13
Great Britain – Mexico 7.2.1946	II		Instalments	U.N.T.S., vol. 6, p. 55
U.S.A. – Poland 24.4.1946	U			Dep. St. Bul. (1946) vol. 14, p. 761
Sweden – Bulgaria 21.6.1946	DI	Concerns only property of certain compa- nies		Not published
Sweden – Hungary 26.7.1946	U			S. Ö. 1951, p. 145
U.S.A. – Czechoslovakia 14.11.1946	U			Dep. St. Bul. (1946) vol. 15, p. 1004

1. U = Unspecified agreement on compensation  
 DI = Direct individual compensation  
 II = Indirect individual compensation  
 G = Global compensation

<i>Treaty</i>	<i>Form<sup>1)</sup></i>	<i>Amount and Currency</i>	<i>Terms of payment</i>	<i>Sources</i>
Switzerland – Czechoslovakia 18.12.1946	DI			Recueil off. (1948) p. 547
U.S.A. – Poland 27.12.1946	II			Bindschedler, op. cit., p. 116
Sweden – Poland 28.2.1947	DI			S. Ö. 1947, p. 131
Sweden – Czechoslovakia 15.3.1947	U			S. Ö. 1947, p. 572
Belgium/ Luxembourg – Czechoslovakia 19.3.1947	DI			U.N.T.S., vol. 23, p. 37
Sweden – Yugoslavia 12.4.1947	G			Kungl. maj:st prp. nr. 187 (1950), p. 15
Czechoslovakia – Yugoslavia 4.9.1947	II			U.N.T.S., vol. 112, p. 96
Denmark – Poland 5.12.1947	U			Not published
Great Britain – Poland 24.1.1948	DI			T.S. (1948) no. 23, Cmd. 7403
Norway – Poland 4.2.1948	U			Stortingets prp. (1955), nr. 103
Denmark – Czechoslovakia 16.3.1948	U			Not published

<i>Treaty</i>	<i>Form<sup>1)</sup></i>	<i>Amount and Currency</i>	<i>Terms of payment</i>	<i>Sources</i>
France – Poland 19.3.1948	G	Value of 3,8 mill. tons of coal	2 mill. tons in 15 years. The remainder to be arranged	Journal off. 11.11.1951
Norway – Czechoslovakia 13.7.1948	U			Not published
U.S.A. – Yugoslavia 19.7.1948	G	\$ 17.000.000	Cash set off against gold account	Dep. St. Bul. (1948) vol. 19, p. 137
France – Czechoslovakia 6.8.1948	DI			Not published
Switzerland – Yugoslavia 27.9.1948	G	75.000.00 Sw. Frcs.	Instalments over 10 years	Amt. Samml. (1948), p. 1007
Great Britain – Yugoslavia 23.12.1948		4.500.000 £	10 % set off against cash. Remainder over 7½ years	T.S. (1949), no. 2
Great Britain – Poland 14.1.1949	G	Final sum not fixed		T.S. (1949), no. 15
Belgium – France 18.2.1949	DI			U.N.T.S., vol. 31, p. 173
Denmark – Poland 12.5.1949	II			Lovtidende C (1949), p. 567
Italy – Yugoslavia 23.5.1949	II			Bindschedler, op. cit., p. 117

<i>Treaty</i>	<i>Form<sup>1)</sup></i>	<i>Amount and Currency</i>	<i>Terms of payment</i>	<i>Sources</i>
Switzerland – Poland 25.6.1949	G	53.500.000 Sw. Frs.	Instalments over 13 years	Amtl. Samml. (1949), vol. I, p. 817
Great Britain – Czechoslovakia 28.9.1949	G	8.000.000 £	Instalments over 9 years	T.S. (1949), no. 60
Holland – Czechoslovakia 4.11.1949	DI			Not published
Sweden – Poland 16.11.1949	G	116.000.000 Sw. Kr.	Instalments over 17 years	S.Ö. 1950, p. 921
Switzerland – France 21.11.1949	DI			Amtl. Samml. (1949), vol. II, p. 1841
Switzerland – Czechoslovakia 22.12.1949	G	71.000.000 Sw. Frs.	28 mill. set off against cash. Remainder over 10 years	Amtl. Samml. (1950), p. 21
Turkey – Yugoslavia 5.1.1950	II			Bindschedler, op. cit., p. 117
U.S.A. – Panama 26.1.1950	G	\$ 400.000	Two instal- ments, 6 and 18 months after ratification	1. UST. 685
France – Czechoslovakia 2.6.1950	G	4.200 mill. Fr. Frs.	Instalments over 10 years (Later changed)	Journal off 11.11.1951
France – Hungary 12.6.1950	G		Instalments	Not published

<i>Treaty</i>	<i>Form<sup>1)</sup></i>	<i>Amount and Currency</i>	<i>Terms of payment</i>	<i>Sources</i>
Switzerland – Hungary 19.7.1950	G	29.981.000 Sw. Frs. + 3.740.029 forint (con- vertible)	Instalments over 10 years	Bindschedler, op. cit., p. 115
Italy – Yugoslavia 23.12.1950	G	\$ 16.000.000	Instalments (?)	Not published
Canada – France 26.1.1951	DI			U.N.T.S., vol. 233, p. 65
Sweden – Hungary 31.3.1951	G	33.170.000 Sw. Kr.	Instalments over 3–13 years depend- ing upon the nature of the claim	S.Ö. 1951, p. 145 and Kungl. maj:ts prp. (1951), no. 208, p. 15
Great Britain – France 11.4.1951	DI			T.S. (1951), no. 34 and no. 35
France – Yugoslavia 14.4.1951	G	Value of \$ 15.000.000 paid in Fr. Frs.	Instalments over 10 years	Journal off. 31.7.1951
Switzerland – Roumania 3.8.1951	G	42.500.000 sw. frs.	25.5 mill. set off cash. Remainder over 8 years	Botschaft nr. 6128 30.10.1951
Belgium/ Luxembourg – Czechoslovakia 30.9.1952	G	425.000.000 Belg. Frs.	Instalments over 10 years	Not published
Denmark – Poland 26.2.1953	G	5.700.000 Danish Kr.	Instalments over 15 years	Lovtidende C (1954), p. 1

<i>Treaty</i>	<i>Form<sup>1)</sup></i>	<i>Amount and Currency</i>	<i>Terms of payment</i>	<i>Sources</i>
Norway – Czechoslovakia 9.6.1954	G	2.600.000 N. Kr.	Partly in cash, and partly set off	Innstilling til Stortinget nr. 108 (1955)
Great Britain – Poland 11.11.1954	G	5.465.000 £	Instalments over 12 years period possibly to be extended	T.S. (1954), nr. 77
Switzerland – Bulgaria 26.11.1954	G	7.500.000 Sw. Frcs.	2,5 mill. set off against cash. Remainder over 10 years	Botschaft nr. 6749 8.2.1955
Belgium/ Luxembourg – Hungary 1.2.1955	G	95.000.000 Belg. Frcs.	Instalments over 10 years	Moniteur Belge, nr. 280, 7.10.1955
France – Bulgaria 28.7.1955	G	1,5 milliard fr. frcs. Dollar- value	Payment by export of goods	Revue generale de droit international public (1959), vol. 63, p. 392
Great Britain – Bulgaria 22.9.1955	G	400.000 £	Payment by export of goods, cf. agreement of 27.2.1959	T.S. (1955), no. 79 and T.S. (1959), no. 43
Norway – Bulgaria 2.12.1955	G	175.000 N. Kr.	34.562 set off cash. Remainder by export of goods	Innstilling til Stor- tinget nr. 162 (1957)
Norway – Poland 23.12.1955	G	about 3–3,5 mill. N. Kr.	Set off against cash	Stortingets prp. (1955), no. 103

<i>Treaty</i>	<i>Form<sup>1)</sup></i>	<i>Amount and Currency</i>	<i>Terms of payment</i>	<i>Sources</i>
Jugoslavia – Hungary 29.5.1956	G	Value of \$ 85.000.000	Instalments over 5 years	
Great Britain – Hungary 27.6.1956	G	4.050.000 £	Instalments in connexion with export of goods	T.S. (1956), no. 30, Cmd. 9870
Greece – Roumania 25.8.1956	U			Not published. Cf. Neuer Zürcker Zeitung. 3.10.1956
Italy – Czechoslovakia 29.9.1956	U			Not published. Cf. Neuer Zürcker Zeitung 3.10.1956
Norway – Hungary 22.2.1956	G	225.000 N. Kr.	Set off against cash	Stortingets prp. (1957), nr. 64
Sweden – Czechoslovakia 22.12.1956	G	5.000.000 Sw. Kr.	Set off against claims ac- cording to the Washington- treaty of 18.7.1946	Kungl. maj:ts prp. (1957), nr. 37
Turkey – Jugoslavia ... 10.1957	G	\$ 3.750.000	Eight instal- ments	Not published
Holland – Jugoslavia 22.7.1958	G	Value of \$ 655.000 in Holl. Fl	Instalments over 5 years	Tractatenblad (1958), nr. 136
France – Jugoslavia 2.8.1958	G	Add. to agree- ment of 14.4.1951		Journal off. 23.5.1959

<i>Treaty</i>	<i>Form<sup>1)</sup></i>	<i>Amount and Currency</i>	<i>Terms of payment</i>	<i>Sources</i>
France <sup>2</sup> – Egypt 22.8.1958	II			La Documentation Française, Tectes diplomatiques CLXXXI, no. 2.473, 18.10.1958
France – Roumania 9.2.1959	G	Value of 21 mill. \$ in Fr. Frcs.	Set off against blocked ac- count and by export of goods	Journal off. 19.3.1959
Great Britain – Egypt <sup>2</sup> 28.2.1959	G	27.500.000 £	£ 3.500.000 set off cash Remainder on the 29.2.1960	Cmd. 639
Sweden – Roumania 28.2.1959	U			Not published Dagens Nyheter 1.9.1959
Denmark – Bulgaria 26.11.1959	G	\$ 3.000	Cash	Lovtidende C (1960), p. 94
Denmark – Jugoslavia 19.12.1959	G	\$ 26.500	Cash	Lovtidende C (1960), p. 114
U.S.A. – Roumania 30.3.1960	G			Not published
Denmark – Czechoslovakia 8.4.1960	G	1.222.865 Danish Kr.	Set off against blocked ac- count	Lovtidende C (1960), p. 308
U.S.A. – Poland 16.7.1960	G	\$ 40.000.000	Instalments over 20 years	Not published

2. Only property confiscated after the military intervention of France and Great Britain in 1956.



<i>Treaty</i>	<i>Form<sup>1)</sup></i>	<i>Amount and Currency</i>	<i>Terms of payment</i>	<i>Sources</i>
Denmark – Roumania 12.9.1960	G	473.166 Danish Kr.	cash	Lovtidende C (1960), p. 406

## APPENDIX B

### Survey of the Forms of Compensation<sup>1</sup>

#### A. Unspecified agreements concerning compensation

<i>(U.S.A.-Poland</i>	24/4 1946)
<i>(Sweden-Hungary</i>	26/7 1946)
<i>(U.S.A.-Czechoslovakia</i>	14/11 1946)
<i>(Sweden-Czechoslovakia</i>	15/3 1947)
<i>(Denmark-Poland</i>	5/12 1947)
<i>(Norway-Poland</i>	4/2 1948)
<i>(Denmark-Czechoslovakia</i>	16/3 1948)
<i>(Norway-Czechoslovakia</i>	13/7 1948)
<i>(Greece-Roumania</i>	25/8 1956)
<i>(Italy-Czechoslovakia</i>	29/9 1956)
<i>(Sweden-Roumania</i>	28/8 1959)

#### B. Agreements concerning direct individual compensation

Sweden-Bulgaria	21/6 1946
<i>(Switzerland-Czechoslovakia</i>	18/12 1946)
<i>(Sweden-Poland</i>	28/2 1947)
<i>(Belgium/Luxembourg-Czechoslovakia</i>	19/3 1947)
<i>(Great Britain-Poland</i>	21/1 1948)
<i>(France-Czechoslovakia</i>	6/8 1948)
<i>(Belgium-France</i>	18/2 1949)
<i>(Holland-Czechoslovakia</i>	4/11 1949)
Switzerland-France	21/11 1949
Canada-France	26/1 1951
Great Britain-France	11/4 1951

1. The treaties in italics are those where no compensation has been paid in pursuance of them, either because when they were concluded they were already intended to be provisional, or because the system of compensation laid down in the treaty has proved in practice to be unworkable.

**C. Agreements concerning indirect individual compensation**

U.S.A.-Mexico	29/9	1943
Great Britain-Mexico	7/2	1946
Holland-Mexico	7/2	1946
(U.S.A.-Poland	27/12	1946)
Czechoslovakia-Yugoslavia	4/9	1947
(Denmark-Poland	12/5	1949)
(Italy-Yugoslavia	23/5	1949)
(Turkey-Yugoslavia	5/1	1950)
France-Egypt	22/8	1958

**D. Agreements concerning global compensation**

Sweden-Soviet Russia	30/5	1941
Sweden-Yugoslavia	12/4	1947
France-Poland	19/3	1948
U.S.A.-Yugoslavia	19/7	1948
Switzerland-Yugoslavia	27/9	1948
Great Britain-Yugoslavia	23/12	1948
(Great Britain-Poland	14/1	1949)
Switzerland-Poland	25/6	1949
Great Britain-Czechoslovakia	28/9	1949
Sweden-Poland	16/11	1949
Switzerland-Czechoslovakia	22/12	1949
U.S.A.-Panama	26/1	1950
France-Czechoslovakia	2/6	1950
France-Hungary	12/6	1950
Switzerland-Hungary	19/7	1950
Italy-Yugoslavia	23/12	1950
Sweden-Hungary	31/3	1951
France-Yugoslavia	14/4	1951
Switzerland-Roumania	3/8	1951
Belgium/Luxembourg-Czechoslovakia	30/9	1952
Denmark-Poland	26/2	1953
Norway-Czechoslovakia	9/6	1954
Great Britain-Poland	11/11	1954

Switzerland-Bulgaria	26/11	1954
Belgium/Luxembourg-Hungary	1/2	1955
France-Bulgaria	28/7	1955
Great Britain-Bulgaria	22/9	1955
Norway-Bulgaria	2/12	1955
Norway-Poland	23/12	1955
Jugoslavia-Hungary	29/5	1956
Great Britain-Hungary	27/6	1956
Sweden-Czechoslovakia	22/12	1956
Norway-Hungary	22/2	1957
Turkey-Jugoslavia	/10	1957
Holland-Jugoslavia	22/7	1958
France-Jugoslavia	2/8	1958
France-Roumania	9/2	1959
Great Britain-Egypt	28/2	1959
Denmark-Bulgaria	26/11	1959
Denmark-Jugoslavia	19/12	1959
U.S.A.-Roumania	30/3	1960
Denmark-Czechoslovakia	8/4	1960
U.S.A.-Poland	16/7	1960
Denmark-Roumania	12/9	1960

## APPENDIX C

### Treaties Cited

#### BELGIUM

##### Compensation for nationalization:

Czechoslovakia	19/3	1947	109, 200
–	30/9	1952	31, 109, 235, 245, 273
France	18/2	1949	109, 197, n. 10, 200, 256, n. 25, 261, 269 n. 6
Hungary	1/2	1955	110

##### Compensation for war damage:

U.S.A.	5/12	1949	243
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#### BULGARIA

Peace Treaty			241 n. 32, 259
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##### Compensation for nationalization:

France	28/7	1955	108, 244
Great Britain	22/9	1955	108, 272, 280
Hungary	31/3	1951	118
Norway	2/12	1955	108, 113, 118, 215, 237 n. 26, 256
Sweden	21/6	1946	108
Switzerland	26/11	1954	108, 113, 256

#### CANADA

##### Compensation for nationalization:

France	26/1	1951	109
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#### CZECHOSLOVAKIA

##### Compensation for nationalization:

Belgium	19/3	1947	109, 200
–	30/9	1952	31, 109, 235, 245, 273
Denmark	6/3	1948	109, 196
–	8/4	1960	109, 220, 236, 244, 265
France	6/8	1948	109, 201
–	2/6	1950	109, 118, 282

Great Britain	28/9	1949	109, 115, 116, 215, 233, 244, 252, 277, 298 n. 10
Holland	4/11	1949	109, 201
Italy	29/9	1956	109, 195
Jugoslavia	4/9	1947	110, 133, 204
Norway	13/7	1948	109
–	9/6	1954	109, 113, 256
Sweden	15/3	1947	109, 196
–	22/12	1956	109, 113, 118, 215, 236, 246, 254 n. 22, 257, 270, 284
Switzerland	18/12	1946	109, 199, 215, 228, 250
–	7/2	1947	240
–	22/12	1949	109, 113, 118, 256, 265 n. 4
–	10/1	1950	31
U.S.A.	14/11	1946	109, 194

## DENMARK

## Commerce:

Soviet Union	17/8	1946	51
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## Compensation for nationalization:

Czechoslovakia	6/3	1948	109, 196
–	8/4	1960	109, 220, 236, 244, 265
Poland	5/12	1947	110
–	12/5	1949	110, 114, 118, 196, 197 n. 10, 203, 215, 219, 220, 245, 252, 251, 261
–	26/2	1953	110, 207, 232, 236, 245, 246, 267, 273, 284
Roumania	12/9	1960	111

## EGYPT

## Compensation for nationalization:

France	22/8	1958	109, 117, 204
Great Britain	28/2	1959	109

## Treaty of the Suez Canal:

Great Britain	1954	188
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## FRANCE

## Compensation for nationalization:

Belgium	18/2	1949	109, 197 n. 10, 200, 256 n. 25, 261, 269 n. 6
Bulgaria	28/7	1955	108, 244
Canada	26/1	1951	109
Czechoslovakia	6/8	1948	109, 201
—	2/6	1950	109, 118, 282
Egypt	22/8	1958	109, 117, 204
Great Britain	11/4	1951	109, 201, 252
Hungary	12/6	1950	110, 283
Jugoslavia	14/4	1951	110, 283
—	2/8	1958	110, 283
Poland	19/3	1948	110, 117, 215, 228, 236, 282
Roumania	9/2	1959	111, 113, 229, 264, 267
Switzerland	21/11	1949	109, 201, 256 n. 25, 261

## Concessions:

Switzerland	19/11	1930	158
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## GERMANY

## Commerce:

Soviet Union	12/10	1925	51
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## GREAT BRITAIN

## Compensation for nationalization:

Bulgaria	22/9	1955	108, 272, 280
Czechoslovakia	28/9	1949	109, 115, 116, 215, 233, 244, 252, 277, 298 n. 10
Egypt	28/2	1959	109
France	11/4	1951	109, 201, 252
Hungary	27/6	1956	110, 233, 244, 265 n. 3, 267, 269 n. 6, 272, 280

Jugoslavia	23/12	1948	110, 113, 116, 215, 233, 244, 252, 256, 272, 277
–	26/12	1949	277
Mexico	7/2	1946	110, 241
–	7/12	1947	203
Poland	3/1	1946	251
–	24/1	1948	111, 199, 219 n. 16, 233, 245. 261
–	14/1	1949	111, 272
–	11/11	1954	111, 115, 233, 272, 280
Treaty of the Suez Canal:			
Egypt		1954	188

## GREECE

## Friendship, trade and shipping:

U.S.A.	3/8	1951	247, 249
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## Compensation for war damage:

Roumania	25/8	1956	111, 195
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## HOLLAND:

## Compensation for nationalization:

Czechoslovakia	4/11	1949	109, 201
Jugoslavia	17/3	1958	244
–	22/7	1958	110, 208
Mexico	7/2	1946	110, 241
–	7/12	1947	203

## Friendship and domiciliation:

U.S.A.		1956	125 n. 3
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## HUNGARY

Peace Treaty			241, 259
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## Compensation for nationalization:

Belgium/Luxembourg	1/2	1955	110
Bulgaria	31/3	1951	118



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France	12/6	1950	110, 283
Great Britain	27/6	1956	110, 233, 244, 265 n. 3, 267, 269 n. 6, 272, 280
Jugoslavia	29/5	1956	110, 133
Jugoslavia	27/6	1956	118
Norway	2/10	1956	110
Sweden	26/7	1946	110, 196
–	31/3	1951	110, 208, 236, 284
Switzerland	19/7	1950	110, 262

## Friendship, trade, and consular rights:

U.S.A.	1926	51
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## IRAN

### Friendship, economic relation, and consular rights:

U.S.A.	15/8	1955	149
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## IRELAND

### Friendship, trade, and navigation:

U.S.A.	21/1	1950	36, 148, 154 n. 4
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## ITALY

Peace treaty	233, 241, 253 n. 18, 259
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### Commerce:

Soviet Union	7/3	1924	51
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### Compensation for nationalization:

Czechoslovakia	29/9	1956	109, 195
Jugoslavia	23/5	1949	110, 204
–	23/12	1950	110

### Friendship, trade and shipping:

U.S.A.	2/2	1948	36, 51, 247
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## JAPAN

### Friendship:

U.S.A.	1953	155 n. 5
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## JUGOSLAVIA

## Compensation for nationalization:

Czechoslovakia	4/9	1947	110, 133, 204
France	14/4	1951	110, 283
–	2/8	1958	110, 283
Great Britain	23/12	1948	110, 113, 116, 215, 233, 244, 252, 256, 272, 277
–	26/12	1949	277
Holland	17/3	1958	244
–	22/7	1958	110, 208
Hungary	29/5	1956	110, 133
–	27/6	1956	118
Italy	23/5	1949	110, 204
–	23/12	1950	110
Sweden	12/4	1947	110, 205, 284
Switzerland	27/9	1948	110, 233, 235, 246, 265 n. 4
Turkey	5/1	1950	110, 204
–	1/10	1957	110, 118
U.S.A.	19/7	1948	110, 112, 235, 251, 257, 265, 266, 275

## KOREA

## Friendship and domiciliation:

U.S.A.	1956	125 n. 3
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## LUXEMBOURG

## Compensation for nationalization:

Czechoslovakia	19/3	1947	109
–	30/9	1952	109, 235, 245
Hungary	1/2	1955	110

## MEXICO

## Compensation for nationalization:

Great Britain	7/2	1946	110, 241
–	7/12	1947	203
Holland	7/2	1946	110, 241

–	7/12 1947	203
U.S.A.	29/9 1943	110

## NICARAGUA

## Friendship and domiciliation:

U.S.A.	1956	125 n. 3
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## NORWAY

## Compensation for nationalization:

Bulgaria	2/12 1955	108, 113, 118, 215, 237 n. 26, 256
Czechoslovakia	13/7 1948	109
–	9/6 1954	109, 113, 256
Hungary	2/10 1956	110
Poland	4/2 1948	110
–	23/12 1955	110, 113, 115, 215, 237 n. 26, 252, 257

## PANAMA

## Compensation for nationalization:

U.S.A.	26/1 1950	110, 122
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## POLAND

## Compensation for nationalization:

Denmark	5/12 1947	110
–	12/5 1949	110, 114, 118, 196, 197 n. 10, 203, 215, 219, 220, 245, 251, 252, 261
–	26/2 1953	110, 207, 232, 236, 245, 246, 267, 273, 284
France	19/3 1948	110, 117, 215, 228, 236, 282
Great Britain	3/1 1946	251
–	24/1 1948	111, 199, 219 n. 16, 233, 245, 261
–	14/1 1949	111, 272
–	11/11 1954	111, 115, 233, 272, 280

Norway	4/2	1948	110, 196
–	23/12	1955	110, 113, 115, 215, 237 n. 26, 252, 257
Sweden	28/2	1947	111, 116, 197 n. 10, 200, 215, 251, 252, 253 n. 19, 260
–	16/11	1949	111, 115, 193, 208, 233, 264, 267, 284
Switzerland	25/6	1949	110, 235, 265 n. 4
U.S.A.	24/4	1946	111, 195
–	27/12	1946	111, 204
–	16/7	1960	111, 208, 220, 229, 235, 256, 265, 269

Friendship, trade, and consular rights:

U.S.A.	15/7	1931	51
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ROUMANIA

Peace treaty			241, 259
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Compensation for nationalization:

Denmark	12/9	1960	111
France	9/2	1959	111, 113, 229, 264, 267
Sweden	28/8	1959	111, 195, 198
Switzerland	3/8	1951	111, 113, 256
U.S.A.	30/3	1960	111

Compensation for war damage:

Greece	25/8	1956	111, 195
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Domiciliation:

Switzerland	19/7	1933	51
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SOVIET UNION

Commerce:

Denmark	17/8	1946	51
Germany	12/10	1925	51
Italy	7/3	1924	51

Compensation for nationalization:

Sweden	30/5	1941	111, 205, 283
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**SWEDEN****Compensation for nationalization:**

Bulgaria	21/6	1946	108
Czechoslovakia	15/3	1947	109, 196
–	22/12	1956	109, 113, 118, 215, 236, 246, 254 n. 22, 257, 270, 284
Hungary	27/6	1946	110, 196
–	31/3	1951	110, 208, 236, 284,
Jugoslavia	12/4	1947	110, 205, 284
Poland	28/2	1947	111, 116, 197 n. 10, 200, 215, 251, 252, 253 n. 19, 260
–	16/11	1949	111, 115, 193, 208, 233, 264, 267, 284
Roumania	28/2	1959	111, 195, 198
Soviet Union	30/5	1941	111, 205, 283

**SWITZERLAND****Compensation for nationalization:**

Bulgaria	26/11	1954	108, 113, 256
Czechoslovakia	18/12	1946	109, 199, 215, 228, 250
–	7/2	1947	240
–	22/12	1949	109, 113, 118, 256, 265 n. 4
–	10/1	1950	31
France	21/11	1949	109, 201, 256 n. 25, 261
Hungary	19/7	1950	110, 262
Jugoslavia	27/9	1948	110, 233, 235, 246, 265 n. 4
Poland	25/6	1949	110, 235, 265 n. 4
Roumania	3/8	1951	111, 113, 256

**Concessions:**

France	19/11	1930	158
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**Domiciliation:**

Roumania	19/7	1933	51
U.S.A.	5/11	1950	51

## TURKEY

## Compensation for nationalization:

Jugoslavia	1/10	1957	118
–	5/1	1950	204

## URUGUAY

## Friendship:

U.S.A.	23/11	1949	36
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## U.S.A.

## Compensation for nationalization:

Czechoslovakia	14/11	1946	109, 194
Jugoslavia	19/7	1948	110, 112, 235, 251, 257, 265, 266, 275
Mexico	29/9	1943	110
Panama	26/1	1950	110, 122
Poland	24/4	1946	111, 195
–	27/12	1946	111, 204
–	16/7	1960	111, 208, 220, 229, 235, 256, 265, 269
Roumania	30/3	1960	111

## Compensation for war damage:

Belgium	5/12	1949	243
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## Domiciliation:

Switzerland	5/11	1950	51
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## Friendship:

Japan	1953	155 n. 5
Uruguay	23/11	1949 36

## Friendship and domiciliation:

Holland	1956	125 n. 3
Korea	1956	125 n. 3
Nicaragua	1956	125 n. 3

**Friendship, trade, and consular rights:**

Hungary	1926	51
Poland	15/7 1931	51

**Friendship, economic relations, and consular rights:**

Iran	15/8 1955	149
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**Friendship, trade, and navigation:**

Ireland	21/1 1950	36, 148, 154 n. 4
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**Friendship, trade and shipping:**

Greece	3/8 1951	247, 249
Italy	2/2 1948	36, 51, 247

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## Abbreviations

A.J.C.L.	American Journal of Comparative Law.
A.J.I.L.	American Journal of International Law.
Annuaire	Annuaire de l'Institut de droit international.
A.S.J.G.	Acta Scandinavia Juris Gentium.
B.Y.I.L.	British Yearbook of International Law.
Dep. St. Bul.	Departement of State Bulletin.
Folketingst.	Report of Danish Parliament.
I.B.A.	International Bar Association.
I.C.J.	International Court of Justice.
I. & C.L.Q.	The International and Comparative Law Quarterly.
I.L.A.	International Law Association.
I.L.C.	International Law Commission.
I.L.Q.	International Law Quaterly.
J.O.	Journal Officiel.
Leag. of Nat. Doc.	League of Nations document.
N.T.I.R.	Nordisk Tidsskrift for International Ret. .. (Acta Scandinavia Juris Gentium).
N.T.V.I.R.	Nederlands Tijdschrift voor International Recht.
P.C.I.J.	Permanent Court of International Justice.
R.I.A.A.	Report of International Arbitral Awards.
S.Ö.	Sveriges överenskommelser med främmande makter. (Swedish Treaty Series).
T.S.	British Treaty Series.
Udenrigsm. Tidsskr.	Report of Danish Foreign Service.
U.f.R.	Ugeskrift for Retsvæsen. (Danish Court Report).
U.N. doc.	United Nations document.
U.N.T.S.	United Nations Treaty Series.
U.S.T.	United States Treaty Series.



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