

**SYMPOSIUM**

**MULTINATIONAL CORPORATIONS AND  
THE ENERGY CRISIS**

*Foreign Governmental Control of  
Multinational Corporations Marketing  
in the United States*

*American Tax Credits and Foreign  
Taxes and Royalties*

*Expropriation, Threats of Expropriation  
and Developmental Policy*

## SOME DILEMMAS OF AN INTERNATIONALIST IN A WORLD OF STATE EGOISM

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The opening words of Bacon's essay *Of Truth* are: "What is truth? said jesting Pilate; and would not stay for an answer."

The validity of any statement about international law turns on the meaning one is prepared to give the term. To say that the obligation to pay prompt, adequate and effective compensation for the expropriation of alien property derives from the body of traditional customary international law pertaining to the responsibility of states, or that the obligation derives from domestic (constitutional), and not international law at all, is to speak without clear referent. Clarity of both intent and ideology are absolute necessities.

### I. THE TRADITIONAL CUSTOMARY DOCTRINE

In the *Factory at Chorzow*<sup>1</sup> case the Permanent Court of International Justice, the inter-war predecessor of the present International Court of Justice, concluded that international law required states which expropriated property to pay compensation, not only for the assets taken, but also for the owner's loss of profits—but not, presumably, for speculative profits, *sed quaere*.<sup>2</sup> In that case the Court laid down in detail the principles of compensation. It called for:

Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it . . .<sup>3</sup>

The Court's thesis in the above case was reinforced, in a number of ways, by its decisions in both the *Panevezys-Saldutiskis Railway*<sup>4</sup> and the *Certain German Interests in Polish Upper Silesia (Merits)*<sup>5</sup> cases.

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1. [1928] P.C.I.J., ser. A, No. 13.

2. On the point of the Permanent Court of International Justice's measure of damages holding in the *Factory at Chorzow* decision and speculative damages, see H. LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* 315-16 (1958).

3. [1928] P.C.I.J., ser. A, No. 13, at 47.

4. [1939] P.C.I.J., ser. A/B, No. 76.

5. [1926] P.C.I.J., ser. A, No. 7.

## II. PROBLEMS OF RELEVANCE—CONTEMPORARY CONFRONTATIONS AND CONTRADICTIONS

All these cases, however, were decided in the period between World War I and World War II. Many contemporary commentators argue that we cannot accept the authority of decisions from that period since it belongs to an age that is culturally and politically antediluvian. But does disagreement with the past necessarily abolish its contemporary relevance? The relevance and meaning of many inter-war concepts of international law are in a state of flux. But such a factual observation, while reporting negatively, perhaps, on rights which may have been cast into that observed flux, cannot, of itself, validate new rights, in particular validate or justify the expropriation of alien property without imposing any corresponding or complementary duty to pay prompt, adequate and effective compensation to the owner of the confiscated investments. Even after we have said, with Justice Harlan in *Banco Nacional de Cuba v. Sabbatino*,<sup>6</sup> that:

There are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens. There is, of course, authority, in international judicial and arbitral decisions, in the expressions of national governments, and among commentators for the view that a taking is improper under international law if it is not for a public purpose, is discriminatory, or is without provision for prompt, adequate, and effective compensation . . . .

The disagreement as to relevant international law standards reflects an even more basic divergence between the national interests of capital importing and capital exporting nations and between the social ideologies of those countries that favor state control of a considerable portion of the means of production and those that adhere to a free enterprise system.<sup>7</sup>

We can still disagree with his conclusion. The jump from alleging or reporting the fact of the dissolution of old rights to asserting new and contrary rights is not justified of itself. For the new rights to be established, their new underpinnings must be demonstrated. Merely to report the dissolution (even if, in fact, it has taken place) is not enough to establish the new. There are many possible options.

Secondly, disagreement with Justice Harlan's statement of the consequences of the play of international legal ideologies can most effectively be reinforced by pointing up the weakness of his assumption that the lack of agreement he notes is singularly the quality of states' international legal obligations respecting the expropriation of alien property,

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6. 376 U.S. 398 (1964).

7. *Id.* at 428-30 (footnotes omitted).

This is far from being a unique case. In fact, it is sadly reflective of many areas of international law, none of which is more significant than the law of the sea.

These contemporary trends are also reflected in the resolutions of the United Nations General Assembly on permanent sovereignty over natural resources. Accordingly, a brief adumbration of the trends reflected in these resolutions and an appraisal of their significance as illustrating both legal and political trends can provide us with insights as to beliefs in the state of governing international or municipal law, the possible directions of future legal change, the dilemmas facing capital exporting countries and the prerogatives upon which many capital importing countries are coming to insist.

### III. THE UNITED NATIONS GENERAL ASSEMBLY RESOLUTIONS ON PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES

#### A. A Brief History

The benchmark of contemporary declarations on states' rights to appropriate foreign-owned property is the United Nations General Assembly's Declaration on Permanent Sovereignty Over Natural Resources.<sup>8</sup> This resolution, after asserting the right of states to nationalize foreign-owned assets, required that such conduct should be for "reasons of public utility, security or national interest which are recognized as overriding purely individual or private interests, both domestic and foreign."<sup>9</sup> The same paragraph then provided that:

In such cases the owner shall be paid appropriate compensation in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law.<sup>10</sup>

The Declaration does not spell out what the rules of international law are. It may be argued that such silence leaves the definition of the requisite standards to the states concerned. Such an argument, however, is a denial of any meaningful connotation of the phrase "and in

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8. G.A. Res. 1803, 17 U.N. GAOR Supp. 17, at 15, U.N. Doc. A/5217 (1962). For a contemporary account of this Resolution and the U.N. General Assembly, see Gess, *Permanent Sovereignty Over Natural Resources*, 13 INT'L & COMP. L.Q. 398 (1964). Thus, para. 5 asserts:

The free and beneficial exercise of the sovereignty of peoples and nations over their natural resources must be furthered by the mutual respect of States based on their sovereign equality.

See also G.A. Res. 1803, *supra* para. 7.

9. G.A. Res. 1803, para. 4, 17 U.N. GAOR Supp. 17, at 15, U.N. Doc. A/5217 (1962).

10. *Id.* See also *id.*, para. 8.

accordance with international law" which is independent of the domestic law standards also invoked in paragraph 4; namely, the requirement that "appropriate compensation" shall be "in accordance with the rules in force in the state" exercising its power to seize property.

Secondly, the debate, today, is not so much as to what international law requires, as to whether international law or domestic law standards should govern the compensation to be paid to expropriated owners. Contemporary trends, accordingly, would not so much appear to be disturbing the content of international law as to attacking its relevance. There would thus appear to be general agreement that the international standards remain those laid down by the Permanent Court in the *Factory at Chorzow* case and reflected in the *Norwegian Shipping Claims* arbitration between the United States and Norway where the tribunal said:

Whether the action of the United States was lawful or not, just compensation is due to the claimants under the municipal law of the United States, as well as under international law, based upon the respect for private property.<sup>11</sup>

The debate over whether domestic or international law standards should be applied has continued. And, in recent years the former position has won increasing adherence in the United Nations General Assembly. Thus, while the 1962 Declaration explicitly invoked, as has been pointed out, standards of "international law" as governing the payment of compensation to the victims of expropriation, the most recent statement from that body reverses the previous position. In December 1973 the General Assembly adopted a further Resolution on Permanent Sovereignty Over Natural Resources<sup>12</sup> which provided, in operative paragraph 3, that the General Assembly:

*Affirms* that the application of the principle of nationalization carried out by States, as an expression of their sovereignty in order to safeguard their natural resources, implies that each State is entitled to determine the amount of possible compensation and the mode of payment, and that any disputes which might arise should be settled in accordance with the national legislation of each State carrying out such measures.<sup>13</sup>

Only the United Kingdom voted against this Resolution (although the United States voted against paragraph 3 in a separate vote) while

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11. SCOTT, HAGUE COURT REPORTS, SECOND SERIES 39, at 69 (1932). Although the United States accompanied its payment of the compensation moneys to Norway with a protest against this award, it did not disagree with the principle that prompt, adequate and effective compensation should be paid for private property taken by governments.

12. G.A. Res. 3171, 28 U.N. GAOR Supp. 30, at 52, U.N. Doc. A/9030 (1973).

13. *Id.*, para. 3.

sixteen states abstained. The question must be answered asking whether the trend of General Assembly Resolutions from 1962 to 1973 reflect and announce a change in international law, and, themselves, provide the authority and evidence of that change.

*B. Appraisal of the Authority in Public International Law of the Permanent Sovereignty Resolutions*

Dr. Rosalyn Higgins<sup>14</sup> and Professors Falk<sup>15</sup> and Onuf<sup>16</sup> have pioneered the study of the law-creating functions of the political organs of the United Nations. Dr. Higgins has seen their competence as stemming from their capacity to impose obligations. Professor Falk, on the other hand, argues that the General Assembly, through consensus, produces norms that operate functionally as legal rules, even though they are not binding in a formal sense.<sup>17</sup> However, Professor Falk's thesis has not gone unchallenged, even among those who, in principle, welcome the recognition of new sources of international law. For example, Professor Onuf has written:

Obviously, Falk's advocacy is incompatible with his claim to a middle position in dealing with the question of the legal significance of General

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14. See, e.g., R. HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* *passim* (1963); Higgins, *The Development of International Law by the Political Organs of the United Nations*, 59 *PROC. AM. SOC. INT'L L.* 116 (1965).

15. Falk, *On the Quasi-Legislative Competence of the General Assembly*, 60 *AM. J. INT'L L.* 782 (1966) [hereinafter cited as Falk, *Quasi-Legislative Competence*].

16. See Onuf, *Professor Falk on the Quasi-Legislative Competence of the General Assembly*, 64 *AM. J. INT'L L.* 349 (1970) [hereinafter cited as Onuf].

17. Falk, *Quasi-Legislative Competence*, *supra* note 15, at 785. He writes:

[T]here is discernible a trend from consent to consensus as the basis of international legal obligations. This trend reflects an adjustment to the altered condition of international society, especially the growing perception of social and economic interdependence, the increased number of states participating in international affairs, the growth of international institutions as focal points for the implementation of the will of the international community and the diminishing willingness to insulate internationally important activity from international legal control by deference to the dogma of domestic jurisdiction . . . . If international society is to function effectively, it requires a limited legislative authority, at minimum, to translate an overriding consensus among states into rules of order and norms of obligation despite the opposition of one or more sovereign states.

Clearly, limits upon such a potentially wide and subjective set of criteria are called for. These, Falk indicates as follows:

[T]he limits upon quasi-legislative competence of the Assembly are less a reflection of the absence of the *formal competence* to legislate than they are a consequence of certain *political constraints* arising from the general requirement of mobilizing effective community power in support of legislative claims.

*Id.* at 788.

Assembly resolutions. His position is in fact a combination of analysis with a conservative thrust—General Assembly resolutions can be dealt with in the traditional terms of customary law formation—and advocacy with a radical thrust. The outcome is unsettling, for one feels that Falk really cannot have it both ways.

In support of this position Onuf argues that:

[I]f Falk were to follow through explicitly on his position that General Assembly resolutions should be a *sui generis* source of international law, then his analysis of the present status of these resolutions in terms of their functional operation as law undermines the assumption behind his advocacy that the process of customary law formation is inadequate to the needs of an interdependent international community possessing a coherent will of its own.<sup>18</sup>

Some of the writers who, like Professor Falk, support the thesis that the General Assembly enjoys a law-indicating quasi-competence, appear to be generalizing from a limited number of specific instances such as the prohibition of stationing weapons of mass destruction in outer space,<sup>19</sup> anticolonialism,<sup>20</sup> and developments in the law of the sea.<sup>21</sup> The submission here, on the contrary, is that it is premature to attempt to discover constitutional law creating competences in the General Assembly which are capable of formulation as rules of general validity rather like those which Professor Onuf sees as Professor Falk's thesis. Rather, at the present stage, specific topics in which there has been a general agreement among states, within international agencies, and among publicists, should be examined. The object should be to determine whether the doctrine or rule has become part of international legal life through its juristic clarification by scholars, through the political consciousness of states in that it conforms with their international goals (and with overriding community goals), and through its institutional viability from the point of view of international agencies. In this connection, scholarship may be more fruitfully employed in the discernment and articulation of emerging rules in the contexts of significant international interactions than in a search for standards of formal validity. Although, in the long run, the means of identifying emerging rules as law may increasingly depend upon consensus in the political organs of the United Nations as, more and more, legal issues are thrashed out in their committees, assemblies and conferences, and in the organizations they proliferate, the function of legitimation which they may come to perform needs to go beyond formal ideas of legal validity. The content of a norm is already becoming of primary importance for the purpose of its acceptance as a rule, just as the content of some customary rules has been the

18. Onuf, *supra* note 16, at 352-53.

19. See G.A. Res. 1884, 18 U.N. GAOR Supp. 15, at 13, U.N. Doc. A/5515 (1963).

20. See G.A. Res. 1514, 15 U.N. GAOR Supp. 16, at 66, U.N. Doc. A/4684 (1960).

21. See, e.g., Falk, *Quasi-Legislative Competence*, *supra* note 15, at 790-91.

occasion of their decline and of the contemporary skepticism regarding the traditional processes for developing customary international law.

In the specific context of the various General Assembly Resolutions on Permanent Sovereignty Over Natural Resources there is a basic point which can be gleaned from the various authors cited in the foregoing discussion, and is borne out by that discussion itself. General Assembly resolutions may emphasize continuing consensus for existing customary norms and may hasten the crystallization of rules which are emerging in the practice of states and of international agencies and organizations and which are coming to be noted in the writings of commentators. The 1962 Declaration on Permanent Sovereignty Over Natural Resources illustrates this. On the other hand, General Assembly resolutions do not have the power to amend the law or to legislate legal change. In this sense then, paragraph 3 of the 1973 Resolution is powerless to change the legal validity of paragraph 4 of the 1962 Declaration. While both resolutions may appear to enjoy the same formal status as expressions of the opinions of the General Assembly's membership, they differ fundamentally in their legal operations. The earlier document testifies to and reinforces positive international law while the latter is merely an attempt to obfuscate that testimony.

#### *IV. THE U.S. DILEMMAS AND THE U.S. STAKE IN AN UNPREDICTABLE WORLD*

Having argued that the present thrust of the Resolutions on Permanent Sovereignty Over Natural Resources is, despite paragraph 3 of the 1973 Resolution, to reinforce the traditional international law which allows states to expropriate foreign-owned assets, but requires the payment of prompt, adequate and effective compensation, it is necessary to turn from legal dogmatics to the real world of effective politics. There we find the traditional and still valid custom more honored in the breach than the observance.

As the contemporary trends in the international law of the sea illustrate, when international agreement on the binding effect of specific rules of law breaks down, each nation promotes its own version of the applicable rules of international law on the relevant points. The provenance of such versions is inevitably based on the self-interests of each of the states involved and so is diametrically opposed to premises and sources of the rules of general international law based on consensus. Because they are oriented from the standpoint of the specific national interests of the states advancing them and are not, or are only accidentally, intended to conform to world community interests, they necessarily reflect a retrogressive and degenerative trend towards an order whose highest values reflect (as Mussolino phrased it) the "sacred egoism" of states.

If the breakdown in consensus has led to the kind of change in international law which Justice Harlan envisioned in the *Sabbatino* case, and which would appear to be reflected around this table, it must be pointed out that the argument which asserts that now an expropriation without prompt, adequate and effective compensation is not in breach of international law still requires its independent justification and underpinning. The very premise of those who argue that the international law on the subject no longer applies is not that the established body of law has been replaced by a new one permitting such expropriations whose compensation is solely determined by the expropriating state's domestic rules on the subject, but only that there is an insufficient consensus to underpin the older rules and render them continually meaningful in the modern world.

In such a situation there is no new rule of international law. All that has happened is that an ideological atmosphere has arisen in which each state considers itself to be entitled to formulate, as many have done with respect to the breadth of the territorial sea, its own domestic rules supplanting the former international ones. Today, acting on the basis of this scenario, states have declared that their own views of their rights to exercise competences in, or to appropriate areas of, the maritime common provide the exclusive standards for their own international conduct. In such a situation the United States, no less than Mexico, Chile, or Peru, for example, is entitled to formulate its own laws of maritime jurisdiction and of international investment. In the latter context it might be prudentially advisable for this country to formulate its laws and policies so as to protect its own economy from the costs and burdens of foreign expropriations. The object would be to maximize this country's own immediate benefits when its neighbors do the same. To think in terms of more long-term or indirect benefits could well render the American economy unacceptably vulnerable to destructive conduct by other nations who are motivated to hunt for their most immediate and obvious advantages. Hence paying the cost now for long-term, contingent, advantages might involve a prudentially inadvisable gamble.

The problem we in the United States are now facing is whether our policy with respect to foreign expropriations should be oriented from the standpoint of public international law and world welfare or from that of individual state welfare. Expropriating states are, clearly, merely consulting their own perceptions of their immediate individual national welfare. They are not concerned with the problems their policies create for capital exporting countries. Nor do they concern themselves with the impact their expropriations may have on third countries—including other developing, capital importing countries. These latter may see other states' expropriations abridge their developmental possibilities. Hence a general economic retrenchment of economic possibilities could

result through a contraction of available developmental capital. Such a contraction would be the inevitable result of the creation of an unfavorable investment atmosphere through investors' apprehension that to invest abroad is to invite the eventual confiscation of that investment. Such a curtailment could, secondly, also result from the non-availability of a yield from expropriated foreign investments in say, Nusquamia, that might otherwise be available to assist the development of Utopia.

There are two different assumptions regarding our own ability to produce risk capital upon which we could operate. First, we might assume that the supply is inexhaustible and that our economy will not be affected if the U.S. policy were to accept worldwide expropriations of American business. Second, we could assume that such wealth is not inexhaustible and that, therefore, it is necessary to develop protective policies to prevent a deleterious diminution of necessary risk capital and foreign exchange-earning income. It is clear from the bills in the House of Representatives<sup>22</sup> and the Senate<sup>23</sup> which are asserting a U.S. fishery limit of 200 sea miles that the Congress is seriously considering reversing traditional policies and values in order to take up what appears to a number of Congressmen to be a sensible, if unilaterally announced, economically self-protective posture with respect to ocean resources on the sensible assumption that these are not inexhaustible.

#### V. CONCLUSION

It is with great personal distress that I see the analogy to which I have been pointing, in these brief remarks, between international investment law and the international law of the sea. In both we tend to see a breakdown of the rule of law through too much ill-will, vanity, chauvinism, selfishness and obsessiveness. It is necessary that this emotional climate should change for a calmer and more reasonable one conditioning the transnational interactions of states. Ideally, what is needed is a consensus on basic principles of distributive justice according to what each considers to be his due. But less would be enough; provided that the world's commerce could depend on a greater stability of expectations and a greater security of transactions, and business could make a more reasoned appraisal of its expectations.

I am, regretfully, strongly reminded of the opening sentences of Susan Sontag's essay on Camus' *Notebooks*. She wrote:

Great writers are either husbands or lovers. Some writers supply

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22. H.R. 8665, 93d Cong., 1st Sess. (1973) (Bill to extend on an Interim Basis the Jurisdiction of the United States over Certain Ocean Areas and Fisheries in Order to Protect the Domestic Fishing Industry, and for Other Purposes).

23. S. 1988, 93d Cong., 1st Sess. (1973) (Interim Fisheries Zone Extension and Management Bill).

the solid virtues of a husband: reliability, intelligibility, generosity, decency. There are other writers in whom one prizes the gifts of a lover . . . moodiness, selfishness, unreliability, brutality . . . .

She added, later in the same piece:

Today the house of fiction is full of mad lovers, gleeful rapists, castrated sons — but very few husbands. The husbands have a bad conscience, they would all like to be lovers. Even so husbandly and solid a writer as Thomas Mann was tormented by an ambivalence toward virtue . . . .<sup>24</sup>

Can we find parallels between contemporary literature and contemporary politics? Can the dwindling band of states which still provide the husbandly virtues of reliability, generosity, and respect for the interests of others be expected to continue in their increasingly thankless roles? May, paradoxically, these husbandly roles themselves become self-mutilating?<sup>25</sup> On the other hand, if all the states of the world were to

24. S. SONTAG, *AGAINST INTERPRETATION* 52-53 (1969).

25. Do we find an almost Thomas Mann like ambivalence in our own Supreme Court on "act of state" issues? In a *Survey of International Law*, 24 SYRACUSE L. REV. 105 (1973), I recently commented, at 130-31, on the Supreme Court's decision in *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972), as follows:

[T]he figure at the end of this paragraph graphically highlights the impasse in which the Supreme Court's decision leaves contemporary law and doctrine. (Ironically, while *First National City Bank* has the hallmarks of qualifying as the despair of international lawyers, it could bid for a pre-eminent position in the calendar of delights of analysts of the Supreme Court's voting patterns and of teachers of legal process.) That chart is as follows:

| ISSUES  | VOTES   |            |                              |   | TOTALS                    |
|---|---|------------|------------------------------|---|---------------------------|
|   | REHNQUIST J.;<br>BURGER C.J.;<br>WHITE J.       | DOUGLAS J. | POWELL J.                    | BRENNAN J.;<br>STEWART J.;<br>MARSHALL J.;<br>BLACKMUN J. |                           |
| (1) For order reversing Court of Appeals and remanding case                   | 3 Yes   | 1 Yes      | 1 Yes                        | 4 No  | 5 Yes<br>4 No             |
| (2) <i>National City Bank v. Republic of China</i> should govern              | 3 Yes   | 1 Yes      | 1 No                         | 4 No  | 5 No<br>4 Yes             |
| (3) <i>Bernstein</i> should govern  | 3 Yes   | 1 No       | 1 No                         | 4 No  | 6 No<br>3 Yes             |
| (4) Act of State doctrine as enunciated in <i>Sabbatino</i> should govern     | 3 No  | 1 No       | 1 No                         | 4 Yes   | 5 No<br>4 Yes             |
| (5) <i>Sabbatino</i> Amendment governs  | not mentioned; but possibly leaning towards Yes | 1 No       | 1 No                         | 4 No  | 6 No<br>3 Possible<br>Yes |
| (6) Foreign expropriations characterized as non-justiciable                   | 3 No  | 1 No       | 1 No                         | 4 Yes   | 5 No<br>4 Yes             |
| (7) Separation of powers and judicial independence invaded by Court's opinion | 3 No  | 1 Yes      | 1 No<br>( <i>dubitante</i> ) | 4 Yes   | 5 Yes<br>4 No             |

play the parts of self-centered, obsessive lovers, who will be left to assure the continuity, stability, and the security of transactions so necessary to maintain contemporary levels of commercial activity and productivity which, in turn, are essential to the standards and expectations that are indispensable to the continued and peaceful development of the modern world?

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Can an apologist for this case demonstrate that the Supreme Court has produced any holding (apart from the exercise of its power in issuing the order of reversal and remand) on the problems which were raised for its judicial solution in the light of reason and authority? The legal profession would appear to have been left with more dilemmas than answers.