EXPROPRIATION OF ALIEN PROPERTY

Aliens seeking compensation for expropriation of their property by foreign states today face difficulty not only in implementing whatever remedies might be available but also and more fundamentally in securing recognition by the expropriating state of the extent of the right to compensation which they seek to enforce. Their problem is highlighted by the unresolved debate between those who claim that the alien investor assumes all the financial risks of seizure to which nationals are subjected and those who contend that there may be no taking of alien property without payment of full compensation. It is proposed in this Note to examine the validity of these competing claims regarding the duty to compensate, the extent to which compensation today may be said to be governed by a rule of law, and the possibility of agreement on an internationally acceptable standard of compensation.

THE DEVELOPMENT OF STATE RESPONSIBILITY

The Duty To Make Whole

The ninety years between 1836 and 1926 witnessed the establishment of a rule of state responsibility in the expropriation of alien property; however, two distinct theories as to the extent of this responsibility emerged. The first case to enunciate the traditional international standard of full compensation involved British subjects dealing in sulphur in the Kingdom of Sicily. A treaty, in addition to granting Britain most-favored-nation treatment, had conferred upon British subjects the right to dispose of their property without loss or hindrance. In 1836, however, the Sicilian government established a state monopoly in the sulphur industry. The British government protested through diplomatic channels and with a naval demonstration, thereby inducing Sicily to revoke the monopoly and to agree that compensation for damages be paid to the aggrieved British sulphur interests.

Similar occurrences producing similar results strengthened the full compensation rule during the nineteenth century, and its vitality continued.

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4 In 1853 the property of an American citizen was taken by the Greek government. 6 Moore, Digest of International Law 262 (1906). The United States dispatched an emissary by warship to Athens to express the President's displeasure and his desire that compensation measured "by recent sales of land in the vicinity" be paid the claimant in order to end this "vexatious affair." Full compensation was paid. Note From Secretary of State Everett to the American Minister to Turkey, Feb. 5, 1853, in 6 Moore, op. cit. supra at 263-64. Four years earlier the British
This case, producing perhaps the strongest judicial statement in support of the duty-to-make-whole doctrine, arose when the British claimed compensation for damage resulting from the cutting by United States agents of the Hong Kong-Manila submarine telegraph cable during the War with Spain. Conceding the legality of the action, the British government argued that many acts, legal in themselves, nevertheless may not be undertaken without giving rise to a duty to compensate. Although agreeing with this argument, the court rejected the analogy between cable cutting and expropriation, and denied the claim. Unlike the wartime activity, said the court, a state's right to seize property is "not absolute but limited, and is in reality only itself acquired in consideration of the payment of compensation, and has no existence as a right apart from the obligation to make compensation." 

6 Eastern Extension, Australasia & China Tel. Co. (Great Britain v. United States), American and British Claims Arbitration 73 (1923) (report of Fred K. Nielsen). Another case evidencing twentieth century approval of the duty to make whole was Certain German Interests in Polish Upper Silesia, P.C.I.J., ser. A, No. 7 (1926). The court, speaking of treaty provisions allowing expropriation of foreign property without compensation, stated that such taking is "a derogation from the rules generally applied in regard to the treatment of foreigners and the principle of respect for vested rights." Id. at 22. However, the case itself turned on the narrow question of whether the expropriation by the Polish government was in derogation of the German-Polish Geneva Convention of 1922, article 6 of which stated that "Poland may expropriate in Polish Upper Silesia . . . undertakings belonging to the category of major industries including mineral deposits and rural estates. Except as provided in these clauses, the property, rights and interests of German Nationals . . . may not be liquidated in Polish Upper Silesia." Id. at 21. Although holding that the taking was in violation of the treaty, id. at 81, the tribunal, by the foregoing dictum, gave insight into the attitude of the time regarding the broader question.

6 Eastern Extension, Australasia & China Tel. Co., supra note 5, at 76. The quoted language necessitates consideration of a corollary of the full compensation rule: that payment is a condition precedent to a valid taking. See Case Concerning the Factory at Chorzów P.C.I.J., ser. A, No. 17, at 47 (1927) (taking in violation of treaty provisions); 1 HYDE, INTERNATIONAL LAW 710-20 (2d ed. 1945); Wortley, Expropriation in International Law, in 33 TRANSACT. GROF. SOC'y 25, 31 (1948); Wortley, Observations on the Public and Private International Law Relating to Expropriation, 5 AM. J. COMP. L. 577, 591-92 (1956). This position received its classic articulation from Secretary of State Hull: "[T]he right to expropriate property is coupled with and conditioned on the obligation to make adequate, effective and prompt compensation. The legality of an expropriation is in fact dependent upon the observance of this requirement." Note From the Secretary of
During the evolution of the full compensation rule, the narrower question of its applicability to pervasive, nondiscriminatory seizures was presented on several occasions. The earliest expropriation which resulted in full compensation, the Sicilian sulphur monopoly, involved a general seizure of all sulphur mines. However, the authority of this incident is limited in that payment was not the result of formal decision but rather of diplomatic and military persuasion; thus the legal effects of the nature of the expropriation did not receive judicial consideration. Judicial approval of the application of the full compensation rule to general, nondiscriminatory seizures is found in the *Norwegian Shipowners' Claims,* which arose out of the United States Emergency Fleet Corporation's taking—under a general scheme of ship requisition—of ships under construction for Norwegian owners. The dispute was referred to arbitration under the terms of a special agreement concluded and ratified by both countries in 1921. It is significant that the United States did not deny its duty under international law to render just compensation; thus the only controversy for the tribunal's determination was the amount owing and the interest thereon. Even so, the tribunal felt constrained to point out that "no state can exercise towards the citizens of another civilised State the 'power of eminent domain' without respecting the property of such foreign citizens or without paying just compensation as determined by an impartial tribunal, if necessary." Such cases and others indicate that nondiscriminatory seizures were con-

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7 See notes 1-3 *supra* and accompanying text.
10 Norwegian Shipowners' Claims (*Norway v. United States,* 1 U.N. Rep. Int'l Arb. Awards 307, 313, 339-42 (1922)). The amount owing was to be based on the court's determination of the fair market value of the Norwegian property. *Id.* at 340.
11 *Id.* at 338.
12 Support for the traditional rule in instances of general taking may also be found in the Portuguese position in Expropriated Religious Properties (Spain, United Kingdom, and France v. Portugal), 1 U.N. Rep. Int'l Arb. Awards 7 (1920). This case was the outgrowth of Portuguese confiscation in 1910 of all religious association properties located within the state. The usual diplomatic protests followed on behalf of the foreign-owned properties affected, and the government of Portugal agreed to arbitration. The *Compromis* of Arbitration stated that the arbitrators were to "decide the aforementioned claims in accordance with the conventional rights applicable thereto, or that failing, according to the general provisions and principles of law and equity." *Id.* at 9. This provision apparently gave the tribunal sufficient latitude to decide whether compensation was owing upon expropriation of foreign-owned property; however, the exercise of these powers to the full was found unnecessary: "It was not the intention of the Government of the Portuguese Republic to seek in the seizure
sidered within the zone of applicability of the full compensation rule. This conclusion finds additional authority in language from the *Hopkins Claim*\(^\text{13}\) of 1926. Hopkins had purchased postal money orders from the Mexican authorities during the so-called "illegal" Huerta regime in Mexico; the subsequent government of Carranza, however, attempted to nullify all such interregnum obligations. The General Claims Commission held the Mexican government liable inasmuch as its obligation arose out of a routine governmental function—the sale of money orders—as opposed to a voluntary undertaking to supply a revolutionary government with arms and munitions.\(^\text{14}\) However, the decision obviously cannot be rested solely on the principle of state continuity;\(^\text{15}\) for even assuming state continuity, the claimant could not have recovered unless the commission had recognized a duty of compensation owing aliens—a duty generally repudiated by municipal legislation. In answer to Mexico's contention that the claimant's rights had been destroyed by the Mexican legislature's exercise of unilateral sovereign power, the Commission stated:

> [A] law by the Mexican Congress, could not possibly operate unilaterally to destroy an existing right vested in a foreign citizen or foreign State . . . . [T]hat foreign citizens may enjoy both rights and remedies against Mexico which its municipal laws withhold from its own citizens is immaterial . . . . [T]hat not infrequently happens that under the rules of international law applied to controversies of an international aspect a nation is required to accord to aliens broader and more liberal treatment than it accords to its own citizens under its municipal laws.\(^\text{16}\)

*The Principle of Equality As a Maximum*

In addition to the principle of a duty to make full compensation to aliens whose property had been expropriated, a second theory developed based on the rule of equality: that such compensation as is decreed municipally is sufficient, provided aliens receive no less than nationals.

The case of *Deutsche Amerikanische Petroleum Gesellschaft Oil Tankers*\(^\text{17}\) provides the most outspoken judicial language in support of the

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14 *Id.* at 42-46.
15 But see Friedman, *op. cit.* supra note 6, at 126.
equality principle. The German government had confiscated certain tankers owned by an American-controlled German subsidiary of Standard Oil. At the end of the war, Standard Oil claimed that it was the beneficial owner of the seized tankers and that therefore the ships should be returned to it rather than included in the German cession—pursuant to a provision of the Treaty of Versailles—of “German merchant ships.” The tribunal set up to adjudicate the claim held, first, that Standard Oil’s sole-shareholder relationship to its foreign subsidiary corporation did not constitute it the legal, equitable, or beneficial owner of any of the subsidiary’s tangible property; second, that Standard Oil was not entitled to indemnity inasmuch as the German seizure was a proper exercise of its power over enemy controlled property; and third, that no claim to the tankers could be founded on general equitable principles. In derogation of Standard Oil’s equitable claim, the tribunal stated that it is “a generally accepted principle, [that] any person taking up residence or investing capital in a foreign country must assume the concomitant risks and must submit, under reservation of any measures of discrimination against him as a foreigner, to all the laws of that country,” and that “the granting of compensation to the Standard Oil Company cannot be justified, as against these companies [other German shipping companies], by any consideration of equity.”

If it is harsh to characterize—as did the Oil Tankers tribunal—foreign investment as assumption of risk, equally arbitrary are the unstated premises of the full compensation rule: that the mere act of investment is prima facie evidence that the investor has not been apprised of the possibility of confiscation and that a confiscatory deprivation represents a breach of good faith and a violation of the host state’s legal duty.

The obvious applicability of the equality rule to a general, nondiscriminatory taking is illustrated in practice by the action of the Italian government in 1911. A bill was introduced in parliament which provided for a state monopoly of the life insurance business, no compensation being payable to the insurance companies, domestic or foreign. Protests and claims for compensation were pressed by Austro-Hungary, England, France, Germany, and the United States, all to no avail; the bill became law the following year.


20 Id. at 795.

21 See 1 HYDE, INTERNATIONAL LAW 717 (2d rev. ed. 1945).

22 See FRIEDMAN, op. cit. supra note 6, at 52-54; Williams, supra note 12, at 1-5.

23 Friedman points out that Uruguay, a weaker power whose congress passed legislation of a similar character in the same year, was forced to back down in the face of strong diplomatic protest.

24 However, perhaps by way of partial compensation, the insurance companies were allowed a longer period than originally proposed in which to wind up their business.
THE DUTY IN THE TWENTIETH CENTURY

In 1926

These precedents, termed "inconclusive" and "not decisive," have been the source of much controversy among both publicists and diplomats. Yet fairly taken, the nineteenth and early twentieth century cases reflect the conviction of the time that a standard which enabled aliens to survive acts of expropriation with full—or at least substantial—compensation was or ought to be the rule. Such support in the abstract as the principle of equality received might well have been withheld had the takings occurred in the later settings of social upheaval where equality would lose its protective character and become a ready means of avoiding the payment of any compensation whatever. And dismissal of these precedents as dictum by the opponents of the traditional standard merely emphasizes that the arbitrating parties seldom questioned the existence of a duty to compensate—an indication that such a duty had been accepted by states generally. Thus it would seem that the prevailing practice of demand for and payment of full compensation to aliens whose property had been seized had, in 1926, risen to the level of a rule of law—having satisfied the test variously described as a "general assent of states," "quasi unanimity," and a usage "generally accepted as expressing principles of law."

The Rule of Law Challenged

However, the rule in its broad sweep was not long to go unchallenged. In 1938 Mexico, which for some years had been engaged in general programs of land redistribution, told the United States government that "there is in international law no rule universally accepted in theory nor carried out in practice, which makes obligatory the payment of immediate compensation nor even of deferred compensation for expropriations of general and impersonal character like those which Mexico has carried out for the purpose of redistribution of the land . . . ." The Mexican

26 Williams, supra note 12, at 1-2, 14.
27 Compare Williams, supra note 12, at 2-15, with Fachiri, supra note 12, at 163-69.
28 See the exchange of notes between Secretary of State Hull and the Mexican government in the text accompanying notes 33-36 infra.
29 Cf. Statute of the Permanent Court of International Justice, art. 38, in P.C.I.J., ser. D, No. 1, at 45 (1947): "The Court . . . shall apply . . . (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations . . . ." This international custom was considered firmly intrenched indeed in 1926: "With the acceptance by the community of civilized nations of certain fundamental principles of law of which the inviolability of private property is one, all such treaty stipulations [those protecting private property] have become unnecessary." 34 Intl'l L. Ass'n Rep. 249 (1926).
government admitted a duty to compensate only "as determined by her own laws." 34

The United States Secretary of State, in reply to the Mexican note, expressed his surprise at the proposition that "it is wholly justifiable to deprive an individual of his rights if all other persons are equally deprived, and if no victim is allowed to escape," and restated the traditional rule: "No government is entitled to expropriate private property for whatever purpose, without prompt, adequate, and effective payment therefor." 35 He concluded by remarking that the equality principle was a minimum requirement and "wholly inapplicable to the issue." 36 A settlement was ultimately reached in which Mexico agreed to pay, on a deferred basis, an amount equal to the lost fiscal valuation prior to the expropriation. 37

The Rise of Partial Compensation

After the extensive nationalizations of capital assets in eastern Europe following World War II, alien compensation was governed increasingly by global settlements negotiated between interested governments and the expropriating state. 38

A global settlement is likely to preclude the payment of full compensation: 39 it springs from the inadequate compensation originally offered in the nationalization measure 40 and is not concerned with individual claims—the claimant state parcels out the settlement payment to its own citizens on a pro rata basis. 41 In practice, such settlements have resulted in com-

34 Ibid.
36 Ibid.
37 This, of course, is not "full" or "adequate" compensation; to be considered as such, the amount paid must reflect the full loss sustained by the owner in consequence of the taking. See Hyde, Compensation for Expropriations, 33 AM. J. INT’L L. 110 (1939). "Just compensation includes all elements of value that inhere in the property, but it does not exceed market value fairly determined." Olson v. United States, 292 U.S. 246, 255 (1934). The recent Cuban land reform law provides that the tax value be the base for determining payments. See N.Y. Times, June 12, 1959, p. 10, col. 2. The United States has vigorously denied that such arbitrary valuation provides a basis for just compensation. See Letter From Benedict M. English, Assistant Legal Advisor, Department of State, to the University of Pennsylvania Law Review, July 8, 1959, on file in Biddle Law Library, University of Pennsylvania. But see Snyder, Measure of Compensation for Nationalization of Private Property, 3 CATHOLIC U.L. Rv. 107, 116 (1953), for an argument that if the tax return value of assets is not a true one, the alien is merely paying for his past sins and omissions.
38 See, e.g., the settlements cited in notes 41-44 infra.
40 E.g., the recent Yugoslav Building Nationalization Law which provides for payment of approximately 1% of the value of the expropriated property over a fifty-year period, both aliens and nationals to be treated alike. However, provision is made for individual foreign governments wishing to negotiate settlements for the property of their nationals affected. See Peselj, International Aspect of the Recent Yugoslav Nationalization Law, 55 AM. J. INT’L L. 428, 431 (1959).
41 See, e.g., United States-Yugoslav Claims Settlement, 19 DEP’T STATE BULL. 137-40 (1948). It would appear that in this instance neither government knew what the total amount of the claims of United States citizens against Yugoslavia actually was. Doman, Postwar Nationalisation of Foreign Property in Europe, 48 COLUM. L. REV. 1125, 1151 (1948).
Compensation varying between estimates of one-third and two-thirds of the value of the property seized.

Disregard of the full compensation standard—while it may have originated in new and underdeveloped states' defiance of international norms—has in recent years attained a fair degree of respectability. At the Conference of American States at Bogota in 1948, a proposal to amend the Economic Agreement so as to sanction the rule of equality was narrowly defeated by a ten-to-nine vote. Coolness toward the traditional rule has also been evidenced in the United Nations. While passing a resolution lauding state sovereignty and the inherent right of "peoples freely to use and exploit their national wealth and resources . . .", the General Assembly rejected a United States amendment which provided that: "Countries deciding to develop their natural wealth and resources should refrain from taking action, contrary to the applicable principles of international law and practice and to the provisions of international agreements, against the rights or interests of nationals of other Member States in the enterprise, skills, capital, arts, or technology which they have supplied." Even the United States, a staunch advocate of full compensation, has been forced reluctantly to accept the inevitable: it created the International

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42 The amount actually paid in these settlements is often difficult to determine. For instance, in the Yugoslav-British settlement of 1948, Yugoslavia agreed to pay a sum unofficially estimated at one-half the British losses, but payment was contingent upon the consummation of a favorable trade agreement. See Friedman, op. cit. supra note 6, at 46. Similarly, the British-Hungarian agreement of 1956 provided for payment of £4,050,000 as final settlement of British claims unofficially estimated at £23,000,000; payment, however, was to be by yearly installments equal to 6.5% of the F.O.B. value of Hungarian exports to the United Kingdom. See Wortley, Expropriation in Public International Law 69 (1959); Lauterpacht, The Contemporary Practice of the United Kingdom in the Field of International Law, 6 Int’l & Comp. L.Q. 126, 150-51 (1957). One commentator points out that the value of the settlement bears little relation to the damage caused. Friedman, op. cit. supra note 6, at 211.

43 British-Czechoslovakian Agreement of 1949, see Friedman, op. cit. supra note 6, at 42; Greek Land Reforms of 1952, see Wortley, op. cit. supra note 42, at 98; Cuban Agrarian Land Reform Act of 1959, see N.Y. Times, June 12, 1959, p. 10, col. 2.

44 Belgian-Polish Settlement of 1948, see Friedman, op. cit. supra note 6, at 38-39.

45 The Mexican member of the International Law Commission, Mr. Padillo Nervo, tacitly admitted that equality as a maximum had no sanction in traditional international law when he stated: "The vast majority of new states had taken no part in the creation of the many institutions of international law which were consolidated and systematized in the nineteenth century. . . . With state responsibility . . . international rules were established not merely without reference to small States but against them . . . . [T]he whole world was perfectly natural for new States to be reluctant to submit . . . [to rules] created to serve the purposes of their probable opponents." 1 Yb. Int’l L. Comm’n 155 (1957).

46 See Domke, Some Aspects of the Protection of American Property Interests Abroad, 4 Record of N.Y.C.B.A. 268-69 (1949); Re, supra note 2, at 340-41.


Claims Commission to parcel out to American claimants the undoubtedly partial compensation resulting from en bloc settlements.\(^5\)

The overwhelming modern practice of states which make pervasive expropriations of alien property has been to pay compensation,\(^5\) but in an amount substantially less than the fair market value\(^5\) of the property affected. However, owing to the loyalty shown the old rule by its original adherents,\(^5\) partial compensation as yet lacks the degree of unanimity necessary to supplant full compensation under the traditional principles of international law.\(^5\)

The Classical Theories in Today's World

Full Compensation

The majority view among publicists is that "the rule of international law forbidding the expropriation without just compensation of private property of aliens continues to be the positive international law."\(^5\) This position is based upon a view of international law which requires, as a precondition to the application to aliens of the same system which a state applies to its nationals, that the system meet a minimum standard of fundamental justice.\(^5\) Few are disposed to deny the existence and desirability

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\(^5\) See Kuhn, supra note 39, at 710.

\(^6\) Even in cases of expropriations resulting from bitter class or national conflict, the duty to pay aliens has always been admitted. \(E.g.,\) Russia admitted liability of 9.6 million rubles for prerevolutionary bonds and capital investments held by foreign interests. However, the Russian government insisted upon a set-off of 39 million rubles representing the damages caused by the Western intervention of 1919-20. See Friedman, \(op. \ cit.\) supra note 6, at 19-20. Similarly, Indonesia has recognized its liability to Dutch investors whose property has been taken, the precondition for payment being the return by the Netherlands government of Western New Guinea. See N.Y. Times, June 12, 1959, p. 10, col. 4.

\(^52\) See Delson, Nationalization of the Suez Canal Company, Issues of Public and Private International Law, 57 Colum. L. Rev. 755, 766 (1957); Re, supra note 2, at 337.

\(^53\) In Western Europe, such nationalization as has transpired has been accompanied by full compensation related to market or stock exchange values. See Doman, supra note 41, at 1141-43. However, since the amount of foreign investment in a capital-exporting country is likely to be small in relation to its own holdings abroad, such payment is likely to find its motivation in expediency rather than conviction.

\(^54\) See notes 30-32 supra.


\(^56\) This view was eloquently stated by Elihu Root in 1910: "There is a standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world. The condition upon which any country is entitled to measure the justice due from it to an alien by the justice which it accords to its own citizens is that its system of law and administration shall conform to this general standard. If any country's system of law and administration does not conform to that standard, although the people of the country may be content or compelled to live under it, no other country can be compelled to accept it as furnishing a satisfactory measure of treatment to its citizens." 4 Proceedings Am. Soc'y Int'l L. 21 (1919).
of some minimal international standard, save certain underdeveloped states which fear—perhaps rightly—that it would be used as a weapon to intervene in their affairs.\textsuperscript{57} Indeed, the traditional minimum standard may clearly be called into play in extreme cases of injustice such as \textit{Walter Fletcher Smith},\textsuperscript{68} where, eight hours after a judicial decree\textsuperscript{69} had awarded preliminary possession of an alien's land to a governmental unit, the buildings were razed by a private organization which then used the property as a place of amusement.\textsuperscript{60}

Recognition of a minimum standard, however, is a matter quite different from contending—as do the adherents of the traditional rule—that that standard requires full compensation whenever there is interference with the vested right of property. In the face of a dearth of supporting judicial holding and confronted by nonconforming modern state practices, the traditionalists' argument necessarily assumes a moral tone—that the right to full compensation is sufficiently fundamental to be included within the minimum standard of international justice.\textsuperscript{61} But believing the full compensation rule to be conclusively established by precedents, its adherents dismiss modern state practice on the ground that where settlement for less than fair value has been accepted, it has been accepted \textit{ex gratia} by the creditors.\textsuperscript{62} That any movement for change will be bitterly resisted is evidenced by the fact that lack of enthusiasm for the traditional rule is characterized as disregard of international law\textsuperscript{63} and contrary practice is labelled "unjust enrichment."\textsuperscript{64} To stress, however, that military necessity and social needs have replaced the storied inviolability of private property with a "right that is only relative and conditioned more and more on the needs of the community"\textsuperscript{65} is but to belabor the obvious.\textsuperscript{66} If international law is not to be disastrously split into two opposing camps,\textsuperscript{67} it appears

\textsuperscript{57} See \textsc{Friedman, Expropriation in International Law} 139 (1953).
\textsuperscript{58} Dept' State Press Release, May 16, 1929 (United States v. Mexico), in 24 \textsc{Am. J. Int'l L.} 384 (1930).
\textsuperscript{60} See 24 \textsc{Am. J. Int'l L.} 384, 385-87 (1930).
\textsuperscript{61} Fachiri, \textit{International Law and the Property of Aliens}, 10 \textsc{Brit. Yb. Int'l L.} 32, 49 (1929).
\textsuperscript{62} E.g., \textsc{Wortley, op. cit. supra} note 42, at 167.
\textsuperscript{63} See Cheng, \textit{Expropriation in International Law}, 21 \textsc{Sol.} 98 (1954).
\textsuperscript{64} See Kissam & Leach, \textit{supra} note 55, at 189.
\textsuperscript{65} \textsc{Friedman, op. cit. supra} note 57, at 6.
\textsuperscript{66} "To ignore these contemporary attitudes and merely to re-iterate the maxims of the past would simply be a species of self-deception." Speech by Oscar Schacter, Director of the General Legal Division of the United Nations, Second Conference on International Investment Law, Washington, D.C., Nov. 22, 1958, reproduced and on file in Biddle Law Library, University of Pennsylvania.
\textsuperscript{67} See \textsc{Friedman, op. cit. supra} note 57, at 206-07.
imperative that its framework be capable of accommodating varying social structures.  
Whatever the law may have been when the "civilized nations"—the creators of the full compensation rule—were in agreement on property's inviolability, today the principle is merely a corollary of one socio-economic system whose validity as a universal principle has been effectively rebutted by the expressed attitude of many states of the modern world. Inalienable rights may or may not be an affront to sovereignty—in the words of one arbitral tribunal, "an unrestrained menace"; those which relate to disputed economic ideology can hardly fail to be. Insofar as the often impossible duty to compensate fully stands between a nation and its accomplishment of what it considers to be the social good, the doctrine is not acceptable in this era of nonintervention and national self-determination.

Equality

The argument that the principle of equality determines the maximum amount of compensation to be paid seems to be gaining supporters: some writers and many governments find it a convenient vehicle for expropriation as applied to aliens who—in common with nationals of the expropriating state—receive little or no compensation. But those disposed to show that no compensation need be paid for takings of a general character also feel obligated to prove that no rule requires payment to aliens for any type of taking. And having rationalized the complete absence of any duty to compensate foreigners, they then backtrack sufficiently to exclude cases in which aliens are subjected to an individual taking on the grounds that "the considerations applicable are quite different," or "such discrimination would rightly be regarded by the states of the foreigners affected as an unfriendly act . . . ." It may be, as suggested, that different considerations should apply, but it is awkward to deny generally the inviolability of the right of property as lacking the sanction of positive law, while resurrecting it in specific contexts on policy grounds. Certainly foreign states resent general confiscations no less than those of a specific character.

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69 Perhaps today it is more accurate to say "politically independent."
72 See Rubin, Private Foreign Investment 14-21 (1956).
74 See Friedman, op. cit. supra note 57, at 211; Williams, supra note 73, at 28.
75 Friedman, op. cit. supra note 57, at 211.
76 Williams, supra note 73, at 28.
77 See, e.g., Note From Secretary of State Hull to the Mexican Ambassador to the United States, Aug. 22, 1938, in 19 Dep't State Press Releases 139 (1938).
In any event, the doctrine of equality—in common with the standard of full compensation—today lacks the nearly universal acceptance necessary for its incorporation into international law. The ability of socialism and other schemes for which expropriations are carried out to raise the living standards of a country remains unproven in many minds; indeed, even the namesake of the equality theory prophesies falsely in expropriation-for-socialism cases: the dispossessed foreigners do not share in the disputed benefits of socialistic change. Some attempt has been made to explain away the nearly universal practice of states to pay—or at least to admit a duty to pay—something by way of compensation on the basis that such payments are merely made ex gratia “in mitigation of the frequently considerable sacrifices demanded.” But neither the expropriating states nor the aliens whose property has been taken are in the main philanthropists, and payment or receipt of an amount less than full compensation is more readily explained in terms of a growing international practice bred by necessity rather than by largesse.

THE SEARCH FOR AN INTERNATIONALLY ACCEPTABLE STANDARD

Fachiri, writing in 1929, stated that if nations generally withdrew the protection then accorded private property, the right of property could no longer be termed “fundamental” and thus protected under international law. Although he wisely abstains from characterizing the right of property as fundamental per se, Fachiri’s position seems to be that if quasi-unanimity established the rule, quasi-unanimity is required to change it. This prerequisite would permit a minority of states adhering to an outworn rule to veto a change desired by the majority. Such a doctrine of prior in time, prior in right has little justification in the formulation of international law in these quickly changing times. To remain in force, any particular rule must maintain a continuing quasi-unanimity; it cannot rely merely on the historical fact that it once commanded the adherence of states generally. To hold otherwise in the instance of the rule of full compensation ignores the views of many established states of the world and forces new underdeveloped nations to enter the world arena subject to a rule that not only ignores them but actively discriminates against them.

It would thus appear that the once acceptable rule of law is open to serious question today with regard to extensive nondiscriminatory takings.

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70 The use of a similar argument has been noted in the case of creditors. See text accompanying note 62 supra.
80 FRIEDMAN, op. cit. supra note 57, at 210-11.
81 See Fachiri, supra note 61, at 50.
82 However, it should not be possible for a few states who have once assented to the rule to invalidate it by occasional contrary practice. Cf. Williams, supra note 73, at 3.
83 See note 45 supra and accompanying text.
And inasmuch as the pressure for the rule's change very likely originated with the obstacles to social reform presented by the requirement of payment in full, its application to large-scale discriminatory or special seizures is equally dubious. To the smaller special takings resulting from the day-by-day use of the power of eminent domain, the pragmatic considerations which have undermined the full compensation rule do not apply; thus, it is not surprising that, as to such expropriations, there is no substantial dissent from the traditional rule. As to payment in other than the eminent domain cases, however, there is quasi-unanimity only on the proposition that some compensation should be paid. No general agreement exists as to the quantum of the payment.

The exact quantum of compensation which international law will ultimately regard as an acceptable rule cannot as yet be predicted. Certainly factors such as ability to pay and the availability of foreign exchange will be influential. It is also possible that some underdeveloped states may be persuaded—in order to attract sorely needed foreign capital—to

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84 See Delson, supra note 52, at 765-66.
85 E.g., in the special taking of British oil interests in Mexico, the government paid compensation estimated to equal only a third of the fair market value of the property expropriated. Schwartzbenber, The Protection of British Property Abroad, in 5 CURRENT LEGAL PROBLEMS 295, 306 (1952). Also in this category of taking are the very recent seizures of virtually all property owned by American concerns in Cuba. It is as yet too early to determine what the amount of compensation will be. However, at the present time it seems doubtful that any substantial payment will be made under the plan of reimbursement announced by the Cuban government. Premier Fidel Castro, whose expropriation decree was an expected retaliation for the cut by the United States of the quota for Cuban sugar, has stated that "compensation" will be made by issuing fifty-year bonds, payable from revenues derived from Cuban sugar sales to the United States in excess of three million tons sold at 5.4 cents a pound annually. Sunday Bulletin (Philadelphia), Aug. 7, 1960, § 1, p. 1, col. 8.

86 Delson, supra note 52, at 764.
88 Cf. United States-Yugoslav Claims Settlement, 19 STATE DEP'T BULL. 137 (1948), in which $17,000,000, an amount equalling 42.5% of the "amount originally claimed" was extracted from Yugoslavia, the Yugoslavs having $47,000,000 in gold on deposit in the United States. See Rubin, Nationalisation and Compensation: A Comparative Approach, 17 U. Chi. L. Rev. 458, 463-65 (1950). See also Rubin, op. cit. supra note 72, at 50. But cf. Kissam & Leach, supra note 55, at 189.
89 Of the currency problem, it has been said, "between the concession that the compensation, even if in local currency, must be something more than merely formal compensation and the contention that lack of foreign exchange resources does not limit the power to nationalize or expropriate lies an area almost wholly undefined." Rubin, supra note 88, at 462. Perhaps trade agreements are an answer to the difficulties arising when an expropriating state lacks sufficient foreign exchange to pay usable compensation. Cf. Fawcett, Some Foreign Effects of Nationalization of Property, 27 Brit. Yb. Int'l L. 355, 374-75 (1950). No treaty of the United States requires that sufficient foreign exchange be available to the expropriating state in order to pay compensation at the time of the taking. Rubin, op. cit. supra note 72, at 78.

90 It has been estimated that the underdeveloped nations of the world (not including oil producers) were able to generate only 7.5 billion dollars of capital in 1957. Of the additional 15.2 billions that would be required to raise their annual incomes 4% per person, only 4.9 billions were forthcoming. PARLIAMENTARY GROUP FOR WORLD GOVERNMENT, A WORLD INVESTMENT CONVENTION? 22-23 (1959).
guarantee that no expropriations will be made except upon the payment of full compensation. In this vein, the United States has been able to negotiate with a few countries treaties providing for prompt payment “in an effectively realizable form and [which] shall represent the full equivalent of the property taken . . . .” That this method of insuring full compensation has not enjoyed greater success probably arises from the unwillingness of many states—due to their conception of future economic necessity—to limit themselves in this regard.

The ideal solution, of course, would be a uniform international rule—a necessarily compromised multilateral treaty acceptable, on the one hand, to the investor and his capital-exporting state and, on the other, to the underdeveloped nations. Perhaps because the interests of the Western lending nations are more immediately concerned—involving primarily the protection of property already in existence—most proposals for such a convention have emanated from those countries and, as a result, have taken as their point of departure the full compensation rule. Some drafts, such as that of the Invisible Transactions Committee of the Office of European Economic Cooperation, seem to do no more than restate it: “just and effective compensation . . . which shall represent the genuine value of the property affected . . . in transferrable form . . . paid without undue delay.” Similarly, the Havana Charter provided that “no member shall take unreasonable or unjustifiable action within its territory injurious to the rights or interests of nationals of other member countries in the enterprise, skills, capital, arts or technology which they have supplied.” But apart from these bland restatements, there are also certain recent innovative approaches worthy of consideration.

The Harvard Law School Draft

Although not abandoning the proposition that just compensation be paid aggrieved aliens, the Harvard Law School draft attempts to render this rule more palatable to expropriating states by making several concessions. First, it abandons the doctrine that the taking must be for a

91 See 26 Dep't State Bull. 881 (1952).


93 There are also unfortunate political connotations of capitulation associated with bilateral treaties. See Speech by Mr. Oscar Schachter, supra note 66.


"public purpose," 97 the only limitation on the expropriation being that it must be "under the authority of the State." 98 Second, it disavows the application to takings of the terms "lawful" and "unlawful." This disavowal indicates the draftsmen's recognition that restitution as a remedy is impracticable; the alien is to have compensation as his sole remedy. 99 Third, the draft permits, in cases of general economic and social reform, 100 the payment of the compensation required (fair market value) 101 over a period of years, provided that bonds bearing a reasonable rate of interest 102 are given and that prompt payment is made of a reasonable portion of that which is owing. 103 The reasonable interest and partial payment conditions are designed to "protect those aliens of limited wealth who might otherwise be left destitute"; 104 and the provision as a whole indicates an awareness that the very circumstances of general expropriation make it impossible to pay full and immediate compensation. 105 Fourth, as to aliens who have resided in the taking state for a considerable period, the draft permits the expropriating state to make payment in its own currency 106 on the theory that such aliens have thrown their economic lot in with the state of their residence. 107

Should these concessions seem shadowy and somewhat short of true compromise, it must be pointed out that a code containing a substantial, enunciated retreat from the full compensation rule would not be acceptable to the capital-exporting states. 108

The International Law Commission Draft

In his second report to the International Law Commission, Mr. F. V. Garcia Amador advocated the following rule for governing the expropriation of alien property: "The State is responsible for the injuries caused to an alien by the expropriation of his property, save in so far as the measure

97 Id. at 66. The actual existence of such a doctrine is dubious at best as international law does not contain its own definition of public utility, Friedman, op. cit. supra note 57, at 141, and it would seem most inappropriate to pass on the methods and social objectives of states. As was said in the Shufeldt Claim (United States v. Guatemala), 2 U.N. Rep. Int'l Arb. Awards 1081, 1095 (1930): "Reasons are no concern of this Tribunal." See also Oscar Chinn, P.C.I.J., ser. A/B, No. 63, at 64, 79 (1934). See generally Friedman, op. cit. supra note 57, at 140-44. But see Walter Fletcher Smith (United States v. Cuba), in 24 Am. J. Int'l L. 384 (1930); Kissam & Leach, supra note 55, at 190.
98 Harvard Draft, art. 10, para. 1, at 64.
99 Harvard Draft, explanatory note at 66; cf. note 6 supra.
100 Harvard Draft, art. 10, para. 2, at 64.
101 Harvard Draft, art. 10, para. 1(b), at 64.
102 Harvard Draft, art. 10, para. 2(c), at 64.
103 Harvard Draft, art. 10, para. 2(b), at 64.
104 Harvard Draft, explanatory note at 69.
105 Harvard Draft, explanatory note at 68.
106 Harvard Draft, art. 39, para. 2, at 150.
in question is justified on grounds of public interest and the alien receives adequate compensation." In his commentary, which shares the ambiguity of the authorities relied upon, Mr. Amador apparently concludes that property may be expropriated in the public interest, that the question of compensation is one properly decided municipally, and that the compensation paid the alien, unless discriminatory, is a matter of international concern only if the expropriating state fails to conform to the minimum standard of civilized societies.

As one might expect, the public interest qualification was attacked on the one hand as unduly restrictive and on the other as too vague to prevent taking motivated by "political considerations." And apparently the members of the Commission believed the prescribed adequate compensation to be the traditional minimum standard of full compensation, for the proposal was both criticized and applauded on that basis. However, the citation in the reporter's commentary of diametrically opposed authorities with seemingly equal approval would tend to leave the quantum of the minimum open to question.

The arbitrary minimum standard approach does not appear to be a workable reformulation of the rule of compensation. If given traditional meaning, the rule would be obviously unacceptable to underdeveloped states; and if it is to connote the modern practice of states, few potential investors would find reassurance in the certainty of partial compensation at best. Neither of these formulations provides an acceptable basis of compromise.

The Rome Conference Proposal

The feasibility of a new point of departure in the reformulation of the rule is illustrated by the proceedings of the recent Rome Conference on International and Comparative Law. The conference, sponsored by UNESCO, was attended by representatives of nearly all the Western capital-exporting powers as well as by those of India, Lebanon, the Soviet Union, and three other Communist countries. On the question of nationalization of foreign property, agreement was reached, with only a single dissent, on the proposition that "foreigners should be entitled to

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110 Compare Williams, supra note 73, at 28, and Kaeckenbeeck, La Protection Internationale des droits acquis, 59 HAGUE RECUEIL 321, 412 (1937), with Fachiri, 6 BRIT. YB. INT'L L. 159, 171 (1925).
112 1 YB. INT'L L. COMM'N 158 (1957).
113 Id. at 165.
114 Id. at 158.
115 Id. at 165.
116 See note 110 supra.
118 That of Czechoslavakia, id. at 587.
claim equal treatment with nationals . . . [and] in any case entitled to compensation, but whether such compensation should be full, or 'just,' or simply some compensation, was to be treated as a question of fact in each case." 119

This formulation provides an excellent basis for an international agreement among the states of the world. As a part of that agreement, a new tribunal—unfettered by past pronouncements on the subject—could be set up to arbitrate disputes arising over the amount of compensation to be paid. Inasmuch as states are unwilling to accept general restrictions on their power to expropriate and aliens equally unwilling to accept as a predetermined certainty less than substantial compensation, it does not seem advisable or even possible to attempt to secure agreement on the factors, other than those of a most general nature, which should influence the arbitrators' determination. And any such factors which are enunciated should not foreclose the alien's equitable arguments relating to the good faith of the taking or the possibility of using the future profits of his enterprise as deferred compensation, or prevent him from showing an implied undertaking by the state when he entered the country not to expropriate his property. To the underdeveloped states such an ad hoc, judgemade law should offer assurance that their socio-economic aims will be considered "less in relation to some abstract standard of truth than as a means of expressing widely-felt human needs." 121

Attention should be directed toward the formulation in each case of a standard mutually acceptable to the parties concerned. Certainly the attempts to produce finely drawn agreements covering a multitude of possible cases have thus far reached no tangible results—or even theoretical accord. Perhaps the agreement reached at Rome indicates an underlying desire to compromise through an expeditious retreat from the slogans and extreme ideological positions of the past—an attitude worth, in the words of Mr. Justice Holmes, "a hundred citations to Grotius."

A. B. M.

119 Id. at 586-87.
120 Cf. PARLIAMENTARY GROUP FOR WORLD GOVERNMENT, op. cit. supra note 90, at 14.
121 Statement of Mr. Radhabinod Pal, Indian member of the International Law Committee, in 1 Yb. Int'l L. Comm'n 158 (1957).