PROPOSAL FOR THE ALLEVIATION OF THE EFFECTS OF FOREIGN EXPROPRIATORY DECREES UPON INTERNATIONAL INVESTMENTS

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Probably the greatest obstacle to international investment is political insecurity, whether in the form of threat of war or sudden changes in the government of a country. Nevertheless, among other formidable hurdles are policies of expropriation and nationalization. Expropriations in the past were isolated events. Now they are co-ordinated to meet the requirements of partial or total nationalization programmes. As long as these obstacles exist, however pressing a country's need for foreign funds, they will not be forthcoming.[1] A solution of a general nature to this

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[1] Other problems a foreign investor must face are exchange controls, inconvertibility of currencies and a thousand and one regulations discriminating against him. The United States Government recognized these problems when it submitted an amendment to a proposed resolution of the United Nations General Assembly's Second Committee, on the Right to Exploit Freely Natural Wealth and Resources, to the effect 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 . . . which they have supplied." U.N. Doc. A/C. 2L. 188 (1952). The amendment was rejected by the Committee, see U.N. General Assembly Off. Rec. 7th Sess., Supp. 20, at p. 18, and the resolution as finally adopted did not allude to the rights of private investors, the sanctity of contracts, nor long established international legal principles of prompt, adequate and effective compensation. *Ibid.* The adopted resolution was criticized by Mr. Keith Funston, President of the New York Stock Exchange in a letter to the United States representative to the United Nations, which stated that: "The resolution serves notice on investors everywhere that rights of long standing will no longer be respected. . . ." New York Times, Dec. 17th, 1952, p. 59, col. 4. Of course the resolution of the General Assembly has no legal effect and cannot serve to change a principle of international law. Charter of the United Nations, article 10. Nevertheless it is an important expression of a majority of the member states' view on private investment protection.

problem will become necessary in view of the increasing number of foreign economic co-operation agreements between states. Machinery for settling controversies which arise out of expropriation measures should be easily available. Certain basic standards of recognition of private property rights will have to be established and maintained in practice.[2] Such standards should embody protective provisions regarding the fair treatment to be given to foreign investments.

In pursuit of this aim the International Chamber of Commerce has drafted an International Code of Fair Treatment for Foreign Investments.[3] This Code was prepared jointly by its Committees on Foreign Investments and Foreign Establishments and issued in final form for consideration by the Economic and Social Council of the United Nations as well as by public opinion throughout the world.[4] It was presented as a model that might be followed in negotiating bilateral and multilateral treaties, and even as a basis for unilateral action by individual governments.[5]

Among the protective provisions of the Code it is provided that the property of foreign investors will not be expropriated nor dispossessed except in accordance with "the appropriate legal procedure" and with "fair compensation according to law." Of course this Code of Fair Treatment for Foreign Investments is not legally binding, nor does it carry any specific sanctions, however it is a significant declaration of policy in a very unsettled area of international economic law.

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[2] See Lewis, The United States and Foreign Investment Problems, (1948), pp. 150-151.

[3] See Introductory Report of the International Chamber of Commerce Committee on Foreign Investments, I.C.C. Brochure 129 (1949), p. 7.

[4] Draft Code of Fair Treatment for Foreign Investments, *ibid.*, p. 13, approved by I.C.C. Quebec Congress, June, 1949, *ibid*, p. 5.

[5] The purpose of the Code, as set out in its preamble was to be that "the High Contracting Parties, desirous of promoting an expanding world economy and convinced that an ample flow of private investments is essential to the economic and industrial growth of their countries and to the welfare of their peoples, decide to establish, by the provision of civil, legal and fiscal safeguards, conditions of fair and non-discriminatory treatment for investments made in their territories by the nationals (physical or legal persons) of the other High Contracting Parties." *Ibid.*, p. 13. The sweeping provisions of the Code have been criticized as bearing "curious similarity to those stipulated in the New Order . . . which the German industrialists under the leadership of I.G. Farben considered necessary for "fair treatment" in their negotiations with Austria, France, and other contiguous countries." Kreps, Point Four and the Domestic Economy (1950), 268 Annals 160, at p. 168. Compare these assurances in the President's Point Four Message to Congress, June 24th, 1949, Dept. of State, Point Four, 101 (Rev. ed. Jan. 1950): "In negotiating such treaties we do not . . . ask privileges for American capital greater than those granted to other investors in underdeveloped countries or greater than we ourselves grant in this country."

Similar provisions for compensation for expropriation were embodied in special agreements which the United Kingdom concluded with Czechoslovakia[6] and Yugoslavia[7] referring claims to the Foreign Compensation Commission,[8] to determine compensation for British property rights affected by nationalization or expropriation measures of the two latter countries.[9] In an earlier agreement between the United Kingdom and the Republic of Poland[10] providing for compensation to British citizens for expropriation of property by the Polish Government, a Mixed Commission, Committee of Arbitration, and Special Panel of Compensation were established.

The agreement with Poland was based on the principle of individual compensation, whereas the agreements with Czechoslovakia and Yugoslavia provided for global compensation in settlement of all British claims arising out of the expropriation and nationalization measures taken by these states. However the arrangement with Poland proved so unsatisfactory that in 1949 it was agreed to replace it with a global indemnity in pounds

[6] Agreement Between The Government of the United Kingdom and the Government of the Czechoslovak Republic Regarding Compensation for British Property, Rights, and Interests Affected by Czechoslovak Measures of Nationalization, Expropriation and Dispossession, London, 28th Sept. 1949, Great Britain (T.S.) No. 60 (1949).

[7] Agreement Between the Government of the United Kingdom and the Government of Yugoslavia Regarding Compensation for British Property, Rights and Interests Affected by Yugoslav Measures of Nationalization, Expropriation, Dispossession and Liquidation, London, 23rd Dec. 1948, Great Britain (T.S.) No. 2 (1949); Cmd. No. 7600 (1950).

[8] See the Foreign Compensation Act, 1950, 14 Geo. 6., c. 12, which established the Commission; and see, The Foreign Compensation (Czechoslovakia) Order in Council (1950), 1 Stat. Instr. 772 (No. 1191), which provided for the law to be applied by the Foreign Compensation Commission in determining claims against the Czechoslovak Fund. The Commission may be used to hear claims and determine and distribute compensation received by the United Kingdom under future agreements with foreign governments (s. 3). These future agreements are not limited by the Act to those settling claims arising upon measures of expropriation and nationalization. The administrative and financial provisions for the Commission and its powers are set out in Sections one and five of the Act.

[9] For a good discussion of the expropriation provisions in the Czechoslovak and Yugoslav decrees see, Doman, Compensation for Nationalized Property in Post-War Europe (1950), 3 Int'l L.Q. 323 and Fawcett, Foreign Effects of Nationalization of Property (1950), 27 Brit. Y. Bk. Int'l L. 371.

[10] Exchange of Notes Between the Government of the United Kingdom and the Government of the Polish Republic Concerning Compensation for British Interests Affected by the Polish Nationalization Law of January 3rd, 1946, Warsaw, 24th Jan. 1948, Great Britain (T.S.) No. 23 (1948); Cmd. No. 7403 (1948).

See also the Agreement Between the Government of the United Kingdom and the Polish Government Relating to Money and Property Subjected to Special Measures, Warsaw, 14th Jan. 1949, Great Britain (T.S.) No. 10 (1949); Cmd. No. 7627, (1949) especially article 7 providing for compensation for expropriation and nationalization in accordance with special agreements previously concluded between the two governments.

sterling.[11] It is noted from these compensation agreements that in every case British investors were deprived of one to two-thirds of their foreign investments notwithstanding the agreements. Consequently even specific international agreements do not always ensure the right to full compensation for expropriation, although they are the most suitable method in force at the present time.[12]

In the United States, the International Claims Settlement Act of 1949 provides for the method of settlement of certain claims of the United States Government on its own behalf, and on behalf of American nationals against foreign governments.[13] The International Claims Commission created thereunder is authorized to apply in the decision of such claims, provisions of the applicable claims agreements and "the applicable principles of international law, justice and equity." Previously these principles had been incorporated in commercial treaties which the United States had signed with Italy,[14] Uruguay,[15] and Ireland.[16] All these treaties provide for "just and effective" compensation, and contain prompt payment clauses and exchange withdrawal provisions. In addition, the treaties with Uruguay and Ireland contain clauses committing the countries to act in accordance with the standard of "equitable treatment."[17] The treaties also include compromissory clauses referring disputes as to interpretation and

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[11] Anglo-Polish Trade and Finance Agreement, 14th Jan. 1949, article 12, Cmd. No. 7628 (1949).

[12] The view that the treaty method of protection is the best method to follow was voiced by the Committees on Foreign Law and International Law of the Association of the Bar of the City of New York. These Committees in a joint report urged the Department of State to provide: ". . . where feasible . . . that Treaties of Friendship, Commerce, and Navigation and treaties, conventions and agreements providing for political, financial, and military assistance to and co-operation with other countries, entered into by the United States, contain clauses securing compensation of private American investments abroad in the event of expropriation." (1953), 5 Record 250.

[13] (1950), 64 Stats. 199; 24 U.S.C. 281.

[14] Treaty of Friendship, Commerce, and Navigation with the Italian Republic, Sen. Ex. D, 81st Cong., 2nd Sess., Message from the President of the United States, April 14th, 1948. Article 5(2) provides that foreign property within each country shall not be taken "without due process of law and without the prompt payment of just and effective compensation," including the right to withdraw compensation by obtaining foreign exchange at rates existing at the times the expropriation takes place.

[15] Treaty of Friendship, Commerce and Economic Development Between the United States and Uruguay, 23rd Nov. 1949, T.I.A.S. No. 1955, Article 8(2); D.S.B. (1950), p. 502.

[16] Treaty of Friendship, Commerce and Navigation Between The United States and the Republic of Ireland, Sen. Ex. H., 81st Cong., 2nd Sess., 21st Jan. 1950.

[17] See Schwarzenberger, The Province and Standards of International Economic Law (1948), 2 Int'l L.Q. 402 for an analysis of the use of "equitable treatment" as a standard.

application to the International Court of Justice. Consequently questions of what treatment would be "just," or what compensation would be adequate is left to the court as the final authoritative arbiter, rather than to any signatory state's arbitrary decision. This is an important advance over international economic agreements such as the Bogota Agreement[18] under which eight South American countries filed reservations stating that the expropriation provisions in that treaty were to be subordinated to the provisions for expropriation provided in the constitutions of the signatory countries.[19] As a consequence, a private investor in such a country has little assurance of how much, when, or how he will be compensated.

A commitment to refrain entirely from expropriation seems impossible to obtain from the majority of states. Even the investment provisions of the International Trade Organization Draft Charter[20] failed to provide security from expropriation. Although the International Trade Organization members pledged themselves not to take "unreasonable or unjustifiable action" against foreign investment, they reserved the right "(i) to take any appropriate safeguards necessary to ensure that foreign investment is not used as a basis for interference in internal affairs or national policies; (ii) to determine whether and to what extent and upon what terms they will allow future foreign investment; (iii) to prescribe and give effect on just terms to requirements as to the ownership of existing and future investments; (iv) to prescribe and give effect to other reasonable requirements with respect to existing and future investments." [21]

Realizing that the private investor must for the present face some expropriations, businessmen have sought adoption of the principle that compensation should be paid in the currency of the injured investor.[22] The underdeveloped countries however refuse

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[18] Bogota Agreement, Colombia, April, 1948, Ninth International Conference of American States; United States Dept. of State Pub. 3263 (1948), p. 214.

[19] These States are Argentina, Cuba, Ecuador, Guatemala, Honduras, Mexico, Uruguay, Venezuela.

[20] The Havana Charter For an International Trade Organization, 24th March, 1948, United States Dept. of State Commercial Policy Series 113-114.

[21] *Ibid.*, article 12; For further discussion on the I.T.O. see Woolsey, Problems of Foreign Investment (1948), 42 Am. J. Int'l L. 121.

[22] See for example the Herter Bill, H.R. 6026, Sec. (11) (6) (1) (A), following the idea of the I.C.C. Draft Code, article 11 (c) & (d), which provided for "an unqualified commitment of convertibility of the proceeds of just compensation . . . into currency of the investor's country or other currency acceptable to him. . . ."

to accept such principles and the only thing that can be hoped for is that a compromise might be reached so that convertibility might be made at the rate of exchange existing when expropriation occurs. Then at least the problem of depreciating currencies would be avoided. A more extreme proposal to safeguard private investment is the governmental guarantee against noncommercial risks of private investment. The Gray Report to the United States President on Foreign Economic Policies[23] recommended such guarantees "as a worthwhile experiment." Shortly before this report President Truman had introduced the guarantee proposal in his Point Four message, which was implemented in the Foreign Assistance Act of 1948.[24] This proposal accepted the inevitability of foreign expropriations and committed the United States Government to recoup the losses of its private investors.[25]

Any guarantee programme which is to achieve important results will of necessity be extremely expensive. A suggested solution to this problem is to require investors who receive guarantees to pay insurance premiums.[26] However insurance is only effective where there are predictable risks, whereas expropriations are unpredictable. The sudden expropriation by a government could destroy millions of guaranteed investments, consequently any insurance premiums to cover such a risk would have to be highly prohibitive. At the same time, businessmen might hesitate to seek a guarantee if it necessitated, as it probably would, considerable subjection to administrative scrutiny. The results of a guarantee scheme would also create other problems. The investor's government, after reimbursing the private investor for his losses, would have to pursue the private claim against the foreign government. The negotiations over what is fair compensation or discriminatory legislation would become prolonged and complicated, creating international ill-will. Further, a sensitive government in an under-

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[23] United States Government Printing Office, Washington D.C., 10th Nov. 1950, p. 62.

[24] (1948), 62 Stats. 144 as amended; 22 U.S.C. 1509 (b) (3).

[25] In 1949 the Export-Import Bank Act, (1945), 59 Stats. 526, 61 Stats. 130 was amended by S. 2197 and H. R. 5594, 81st Cong., 1st Sess. (1949) to enable the Bank to "guarantee United States private capital invested in productive enterprises aboard which contribute to economic development in foreign countries by assuring either or both (i) the conversion into United States dollars of foreign currency derived from an investment and (ii) compensation in United States dollars for loss resulting from expropriation, confiscation, or seizure."

[26] See Comment, Point Four: A Re-Examination of Ends and Means (1950), 59 Yale L. J. 1277, at p. 1314; See also, Mutual Security Agency, Investment Guarantee Manual (1952), p. 1.

developed country might infer that an investor taking out an expropriation guarantee doubts the government's good faith.[27]

Perhaps the best way to provide for the need to combine responsibility in foreign development with security for private investment would be to establish a new international court for the handling of expropriation measures and other trade disputes.[28] The obligation to arbitrate disputes embodied in an international investment contract is not sufficient, because the investor may not be able to get bona fide collaboration from the respondent state while settling the dispute. In the past, claims by foreign investors for expropriation have been left to *ad hoc* procedures. Because of the absence of an independent judiciary in some countries, resort to judicial and administrative remedies often results in delay, while business operations are suspended. It is believed that the determination of such claims by an independent international tribunal would also help to relieve the foreign offices and state departments from pressing claims, which, in view of political expediency, might not be considered timely and appropriate. The International Court of Justice can only act over disputes arising between states, but not over those arising between individuals such as private investors.[29] Furthermore, the court has no special interest in the area of commercial relations. Therefore a new international institution would seem to be imperative.[30]

The preferred solution therefore would be for the states of the international community to establish an International Investments Tribunal whose jurisdiction could be invoked by aggrieved investors without recourse to their own governments. Because this

[27] See Economic and Social Council, Economic Development of the Underdeveloped Countries, U.N. Doc. E/1333, App. II, p. 33 (7th June, 1949) for other problems created by a guarantee programme; See also, Note, (1953), 66 Harv. L. Rev. 514.

[28] A somewhat analogous type of special arbitration was suggested for the unsettled state of controversies arising out of international loans. Under the auspices of the League of Nations, a special committee suggested the creation of International Loan Tribunals. Report of the Committee for the Study of International Loan Contracts, League of Nations, C. 145. m. 93. 1939 II A.

[29] Statute of the International Court of Justice, article 34 (1).

[30] The Committee on Foreign Economic Co-operation of the Section of International and Comparative Law of the American Bar Association resolved:

"That the establishment of an international commission be approved to adjudicate and determine all claims in respect to property taken by confiscation, directly or indirectly, by concealed or constructive expropriation, and for such other related purposes as shall be defined in jurisdiction to be given to the commission by treaty or agreement bilaterally between the United States and other powers or multilaterally. . . ." Report of the Committee on Foreign Economic Co-operation, Proceedings, Section of International and Comparative Law, [1952] A.B.A. 64.

proposal involves some departure from the traditional notion that only states are subjects of international law, it might be desirable in situations where the government of the unsuccessful litigant espoused his claim to permit an appeal from the proposed tribunal to the International Court of Justice on any relevant question of international law or treaty interpretation.

It has also been proposed that the Permanent Court of Arbitration be utilized for the purpose of hearing claims against governments arising out of acts of expropriation.[31] Either this proposal or the establishment of a separate tribunal would serve the purpose best. The main idea behind this suggestion is to revitalize the Permanent Court of Arbitration by improving its organization and procedures so as to make it a more attractive instrumentality to provide arbitral panels to hold hearings anywhere in the world. It has been expressed that, functioning through arbitral panels, the Permanent Court of Arbitration could provide not only an effective forum, but also panels of experts especially qualified to adjudicate claims arising out of the expropriation and nationalization of foreign-owned property.[32]

The political problems involved in establishing the proposed tribunal raise issues beyond the scope of this article. Its creation would probably necessitate either a new multilateral agreement or modification of the United Nations Charter. If other procedures are unavailable, perhaps the International Bank for Reconstruction and Development could make adherence to the necessary agreement a condition precedent to any financial assistance.

It is conceded that the search for a solution to the problem of just compensation for expropriation is not an easy one. Insistence on abstract legal rights with no consideration for political and economic realities will not provide such a solution. Probably the ultimate safety of foreign capital depends on the rapidity with which the backward areas are modernized, and upon the emergence of a system in which the small nations can assume that their rights will be respected in practice. To the extent that national and international policies are directed toward the attainment of these objectives, foreign investors will benefit by the alleviation of national inferiority complexes which breed expropriation. The lawyer, it appears, cannot attain these goals on his own initiative. On the other hand, the interest of the lawyer is vitally required

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[31] See Proceedings, Section of International and Comparative Law, [1952] A.B.A. 50.

[32] *Ibid.*, at p. 51.

in supporting the creation of a practicable international order. Investment is so necessary for the fulfilment of the aims of the United Nations Charter that it would be a pity for it to be hampered by an attitude of indifference on the part of the lawyer.