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THE PROTECTION OF FOREIGN PROPERTY UNDER CUSTOMARY INTERNATIONAL LAW

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I. INTRODUCTION

A necessary condition for the development of the international trade and investment so essential for the progress of underdeveloped nations and for the continuing prosperity of more advanced nations like those of the Common Market and the United States is the security of property invested in foreign lands against such noncommercial risks as discrimination and confiscation.

Over the years, as modern trade and investment began to develop, international law evolved certain principles which bound nations to safeguard the acquired property rights of foreigners, under the rubric of "The Responsibility of States for Injuries to Aliens." These legal rules provided by the law of nations clearly granted protection to the acquired rights of foreign businessmen and, for their violation, the receiving State was deemed delinquent and liable to reparation.

A recent change in the political climate of the world, however, has had a substantial impact upon the security afforded foreign investment by traditional international law. Although this change has had no effect in the Common Market area, it is well to take note of it in order to clarify the present status of the law of State Responsibility.

With the emergence of new nations with strongly nationalistic sentiments, the old alignment of colonial power and colony has largely ceased to exist. These new States wish to take their places among the nations of the world and, to that end, they desire to assume control of the exploitation of their natural resources which had formerly been at the disposition of the colonial powers. In many cases, however,

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the rights to these properties are in the hands of foreign nationals who, understandably enough, are not anxious to relinquish them and the handsome profits which, in many cases, they entail.

Another potential source of trouble lies in the situation where the newly independent nations are unable to carry out development programs because of a lack of capital. Hence they must turn to the older and more prosperous States for financial assistance. As a result, the old alignment of colonial power and colony has been replaced by that of capital-exporting State and capital-importing State. Naturally, the investors from the capital-exporting nations want some return from their outlay of capital, but their wish in this regard has not always been respected by the capital-importing nations.

This conflict of interests has often marred the new relationship between capital-exporting State and capital-importing State. Under the influence of nationalistic sentiment, it is becoming increasingly common for the governments of capital-importing nations to expropriate or nationalize—the various terms used to describe this procedure do not seem to have any fixed meaning—the property of the nationals of the capital-exporting nations. These actions are usually complicated by the fact that the expropriating State is unable to compensate the expropriated owners. Immediately, therefore, there arises a clash between the property rights of the expropriated owners and the rights to sovereignty of the expropriating nation.¹

In some of the new nations, this political change has inevitably resulted in the rejection of the rules developed to protect foreign investment. It is argued that these rules were evolved to further the aims of colonialism and, today, do not qualify as international law. The effect, of course, has been a reduction in the flow of investment capital into these countries.

The American businessman who is contemplating expansion in the Common Market, however, need not be wary of the effect of this new attitude upon his investment. The attack on the traditional rules of international law emanates from the under-developed nations. None of the European Common Market countries can properly be regarded as under-developed. It seems clear, therefore, that traditional doctrine which, as it evolved, applied to investment in developed and under-developed nations, will continue to give protection to the acquired rights of foreign businessmen in the Common Market countries.²

¹ This conflict has continued without solution, as can be seen in the text of the Dec. 14, 1962, Resolution of the United Nations General Assembly on "Permanent Sovereignty over Natural Resources." U.N. Gen. Ass. Off. Rec. 17th Sess., Plenary 1194 (A/Res/1803(XVII)) (1962), reprinted in 2 *International Legal Materials* 223 (1963).

² The States of the Common Market, in keeping with the general practice of nations, take customary international law into their municipal law and apply it, where appropriate, to fulfill their international obligations. See, e.g., Seidl-Hohenveldern's com-

It is true, of course, that in a civilized municipal society, constitutional safeguards protect property rights from arbitrary government interference. The Common Market countries, as receiving States, have provided such municipal law protection for trade and investment from abroad. Municipal law protection, however substantial, does not make security based upon international law rules superfluous. Governments can change or, at least, governmental policies can change, with the resultant change in municipal law protection. Since the rules of international law transcend domestic politics, they can offer more substantial protection in certain circumstances.

It will be the purpose of this study, then, to set out the rules of customary international law which protect foreign property rights³ involved in peacetime international transactions. Some of these rules are accepted unquestioningly; others are the subject of controversy. But the decisions of tribunals, the practice of States, and the doctrinal writings seem ample enough to spell out authoritatively the requirements of the law of nations in this matter.

Properly included in this consideration of the legal rules based upon the consensus of the nations of the world is the question of the remedy to satisfy a claim in damages for the taking of alien property in violation of these rules.

It is hoped, thereby, that a clearer picture of the role of the law of nations in the protection of international business transactions will emerge. With this information the American businessman, planning his Common Market operations, can proceed with greater certainty that his property rights will not be jeopardized by arbitrary governmental action.

II. THE TREATY PROTECTION OF FOREIGN PROPERTY

A. *The Pacta Sunt Servanda Principle*

One of the rules of international law, which is calculated to protect alien property interests from arbitrary seizure, states that *pacta*

parative study of the impact of international law upon the legal systems of France, Germany, Italy and the Netherlands. Seidl-Hohenveldern, *Transformation or Adoption of International Law into Municipal Law*, 12 *Int'l & Comp. L.Q.* 88 (1963).

³ The meaning of the term "property rights" both in international law and for the purposes of this study may be stated as follows:

According to a great array of diplomatic and judicial cases and the great majority of authors, it comprises rights as well as tangible property, above all contractual rights, such as rights arising from contracts of concession, purchases, loans, etc.

Herz, *Expropriation of Foreign Property*, 35 *Am. J. Int'l L.* 243, 244-45 (1941). That modern international practice relating to claims for compensation and restitution thus admits of a broad definition of property is seen in the following treaty provision which is typical: Treaty of Peace with Italy, 1947, art. 78(9)(c) reads:

"Property" means all movable or immovable property, whether tangible or in-

sunt servanda. This principle dictates that a State is bound, in good faith, to carry out its treaty obligations.

Since the *pacta sunt servanda* rule is universally upheld,⁴ no one contests the proposition that a State must observe its treaty obligations with regard to the property interests of foreigners. The Permanent Court of International Justice, in the *Chorzów Factory* case, ruled that the taking of alien property in contravention of a treaty was "unlawful" and "illegal."⁵ This ruling by the Court was a wholly natural one, because the *pacta sunt servanda* principle obtains generally, in so far as it pertains to treaties, in the various areas of the law of nations. And the Court also pointed out, in its Judgment Number 8 in the *Chorzów Factory* case, that the violation of a treaty protecting alien property entails the duty to make reparation for the damage which has been incurred.

It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself.⁶

The *pacta sunt servanda* rule, therefore, protects alien property interests, and the violation of that rule, with regard to alien property, provides the basis for an international claim. And, as shall be shown directly, international law dictates that reparation, in these circumstances, must take the form of restitution in kind, if possible.

B. *The Taking of Foreign Property in Contravention of a Treaty*

International law precedents for restitution are very rare.⁷ There is solid authority, however, for a decree of restitution when the taking of alien property contravenes treaty prescriptions.

The principal basis for restitution, in these circumstances, is

tangible, including industrial, literary and artistic property, as well as all rights or interests of any kind in property. . . .

61 Stat. 1245, 1406, T.I.A.S. No. 1648. See Christie, What Constitutes a Taking of Property under International Law?, 38 Brit. Y.B. Int'l L. 307 (1964).

⁴ The Harvard Research in International Law, Law of Treaties states: No case is known in which any tribunal ever repudiated the rule or questioned its validity.

29 Am. J. Int'l L. Supp. 977 (1935).

⁵ P.C.I.J., Ser. A, No. 17, at 47 (1928). See *infra*, part II(B). See also the case Concerning Certain German Interests in Polish Upper Silesia, P.C.I.J., Ser. A, No. 7, at 21 (1926). The publicists reach the same conclusion. See Herz, *supra* note 3, at 253-54; Fachiri, Expropriation and International Law, 1925 Brit. Y.B. Int'l L. 159, 169; Williams, International Law and the Property of Aliens, 1928 Brit. Y.B. Int'l L. 1, 28 (1928).

⁶ P.C.I.J., Ser. A, No. 9, at 21 (1927).

⁷ Freeman, The International Responsibility of States for Denial of Justice 573 (1938); Feller, The Mexican Claims Commissions 291 (1935).

found in the judgment of the Permanent Court of International Justice in the *Chorzów Factory* case. This case arose because of a protest by Germany of the seizure by Poland of the industrial property of certain German nationals in Polish Upper Silesia, in contravention of the Geneva Convention of May 15, 1922, which had been concluded to protect these interests.⁸

The Court found that the application of the Polish expropriation law was not compatible with the guarantees established by the convention.⁹ In its later indemnity judgment, the Court considered the nature of the reparation due from Poland in consequence of her taking the property of German nationals in violation of the prescriptions of the treaty.¹⁰

The Court found that the payment of the just price of the seized property would not compensate the German Government for the "wrongful act" of the Polish Government, since the latter did not have the right to expropriate the property in question. The instant case was one not of "lawful liquidation" but of "unlawful dispossession."¹¹

Since the Polish Government had effected an "unlawful dispossession," the compensation was to be determined by the principles which govern reparation for an action contrary to international law. These principles indicate that restitution in kind, if possible, is the compensation due for an act of this nature.¹² The primary obligation of the Polish Government, therefore, was to make restitution.

The dispossession of an industrial undertaking—the expropriation of which is prohibited by the Geneva Convention—then involves the obligation to restore the undertaking and, if this is not possible, to pay its value at the time of the indemnification, which value is designed to take the place of restitution which has become impossible.¹³

⁸ 16 Martens, *Nouveau Recueil Général de Traités* 645 (3d sér. 1927).

⁹ P.C.I.J., Ser. A, No. 7, *supra* note 5, at 19-25.

¹⁰ P.C.I.J., Ser. A, No. 17, *supra* note 5.

¹¹ *Id.* at 46-47.

¹² The Court enunciated this principle as follows:

The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. 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—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.

Id. at 47.

¹³ *Id.* at 47-48.

Since, however, the parties had agreed on the impossibility of restoring the factory, the Court ruled that payment of the value was to be the reparation.¹⁴

The rationale for the Court's position with regard to the remedy of restitution is not self-evident. The Court did not discuss the question explicitly, but an examination of its remarks, concerning the principles for the determination of due compensation, seems to point out the logical basis for the finding.

The reason seems to be the nature of the case itself. The object of any suit in damages is, as far as possible, to place the claimant in the position he occupied before the tortious act—to place the claimant *in statu quo ante*. Ordinarily, when treaty obligations are not involved, a foreign proprietor understands that he retains his property subject to the host country's right of eminent domain. When foreign property is taken through the exercise of the State's right of expropriation, "the payment of fair compensation" is all that is required to render it lawful, as the Court pointed out.¹⁵

But when a State promises by treaty to respect alien property rights to accomplish some specific purpose—a purpose so important that its effectuation is entrusted to a treaty with its formalities and safeguards—it engages its good faith to keep its part of the agreement. This is precisely what Poland did when she signed the Geneva Convention, "the object of which is to provide for the maintenance of economic life in Upper Silesia on the basis of respect for the *status quo*."¹⁶

Poland's agreement, therefore, fell within the ambit of the cardinal rule of international law, *pacta sunt servanda*. The payment of monetary compensation thus would not "provide for the maintenance of economic life in Upper Silesia;" other things being equal, restitution alone was capable of restoring the proper *status quo ante*.

Hence, the measure of damages, in an expropriation case involving treaty obligations, is determined by the nature of the obligation. This means that property must be restored, if possible, if it has been taken in violation of a treaty promise.¹⁷

Precedents for restitution under peacetime conditions are admittedly rare. There is agreement, however, that sufficient evidence exists to support the proposition that customary international law

¹⁴ Id. at 48.

¹⁵ Id. at 46-47.

¹⁶ Id. at 47.

¹⁷ The Dosphath-Dagh Company case, an arbitration between Greece and Bulgaria, also supports the conclusion that restitution is the proper mode of reparation for taking alien property in violation of an express treaty prohibition. 3 U.N.R.I.A.A. 1405 (1949). See also the advisory opinion of the Permanent Court of International Justice in the German Settlers in Poland case. P.C.I.J., Ser. B, No. 6 (1923).

prescribes restitution, if possible, as the proper remedy for the peace-time taking of alien property in violation of an express treaty prohibition.¹⁸

American nationals, therefore, whose European properties are damaged in contravention of treaty obligations,¹⁹ may seek restitution in kind in lieu of an award of monetary compensation. When, however, there has been a change in circumstances—for example, a deterioration in the condition of the property—reparation can be effected by way of money damages.

III. THE WRONGFUL TAKING OF FOREIGN PROPERTY NOT PROTECTED BY A TREATY

Very often, of course, an alien and his property are not protected by a treaty. Respect for private property, however, is one of the substantive principles of the law of nations, and international tribunals have ruled that the security of the private property and of the acquired rights of aliens constitutes one of the general legal rules recognized by international law.²⁰ International law, consequently, has formulated several specific rules to protect these property interests from arbitrary seizure. With these rules it is possible to determine whether the taking of alien property is wrongful and furnishes grounds for a claim for reparation, even though there is no treaty protection.

A. *The Principle of Non-Discrimination*

This principle of international law states that alien-owned property must not be the object of discriminatory legislation; that is, the

¹⁸ See Sohn & Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens*, 55 Am. J. Int'l L. 545, 556-57 (1961).

¹⁹ One of the current projects for broadening the treaty protection of foreign investments is the 1962 draft multinational Convention on the Protection of Foreign Property of the Organization for Economic Cooperation and Development (O.E.C.D.), reprinted in 2 International Legal Materials 241 (1963). For an analysis of this Convention see van Emde Boas, *The O.E.C.D. Draft Convention on the Protection of Foreign Property*, 1 Common Market L. Rev. 265 (1963).

²⁰ See *L'Affaire Goldenberg (Rumania v. Germany)*, 2 U.N.R.I.A.A. 901, 909 (1949). Respect for private property rights is an indispensable rule of all law, national and international, for the right to private property is, generally speaking, essential to the well-being and development of all peoples. Rapporteur Huber puts this well in the *British Claims in the Spanish Zone of Morocco (Great Britain v. Spain) Arbitration*, 2 U.N.R.I.A.A. 615, 641 (1949):

On the other hand, it is unquestionable that, up to a certain point, the interest of the State in being able to protect its nationals and their property must carry more weight than respect for territorial sovereignty, even in the absence of conventional obligations. This right of intervention has been claimed by all States: only its limitations can be the subject of discussion. Denial of this right would lead to inadmissible consequences: international law would be rendered helpless in the face of injustice amounting to a negation of human personality; for all denial of justice comes back to that.

legislation authorizing the seizure of property must affect aliens and nationals alike.²¹

In addition to cases of discriminatory expropriation based upon nationality, there have also been many instances of confiscation of alien property on racial grounds, such as those perpetrated by Nazi Germany before and during World War II. This latter form of discrimination has also been condemned by the courts as being violative of the precepts of international law.²²

The prohibition against discrimination could conceivably lose much of its significance as a means of protecting the property interests of foreigners, since seizure decrees are often couched in general terms to include both aliens and nationals. Granted that the expropriation law is verbally non-discriminatory, what protection does the alien owner have when, *de facto*, the property affected is entirely alien owned?

The Permanent Court of International Justice answered this question in its advisory opinion of February 4, 1932, in the *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory* case.²³

[T]he prohibition against discrimination, in order to be effective, must ensure the absence of discrimination in fact as well as in law. A measure which in terms is of general application, but in fact is directed against Polish nationals and other persons of Polish origin or speech, constitutes a violation of the prohibition. A similar view has already been expressed by the Court in its Advisory Opinion No. 6 relating to German settlers in Poland. Whether a measure is or is not in fact directed against these persons is a question to be decided on the merits of each particular case. No hard and fast rule can be laid down.²⁴

²¹ U.N. International Law Comm'n, Report: International Responsibility, 9th Sess., at 42-46 (Doc. No. A/CN.4/106) (1957); Bindschedler, *La Protection de la Propriété Privée en Droit International Public*, 90 *Hague Recueil* 179, 186-207 (1956) (II); Fachiri, *supra* note 5, at 160; Williams, *supra* note 5, at 28. See also the Chinn case, P.C.I.J., Ser. A/B, No. 63 (1934), where the Permanent Court of International Justice, although finding that Belgium had not discriminated against the transportation company of a British national in the Congo, upheld the international law prohibition against discrimination.

The form of discrimination which is forbidden is therefore discrimination based upon nationality and involving differential treatment by reason of their nationality as between persons belonging to different national groups. *Id.* at 87.

²² See *Hollart v. Moravia*, France, 1949, *Lauterpacht, Annual Dig.*, 1949, Case No. 7; *Jellinek v. Levy*, France, 1940, *Lauterpacht, Annual Dig.*, 1919-1942 (supp. vol.), Case No. 12.

²³ P.C.I.J., Ser. A/B, No. 44 (1932).

²⁴ *Id.* at 28.

The rule which prohibits the discriminatory taking of alien property is, therefore, a principle of customary international law, and it has been embodied in conventions. It is, indeed, a principle of universal application, and it is found in the municipal law of all civilized nations. It follows, therefore, that a discriminatory taking is unlawful, and would furnish grounds for a claim for reparation for an American businessman who might be subjected to such unequal treatment in his European business transactions.

B. *The Public Purpose Principle*

Another rule of international law, which is aimed at protecting alien property from arbitrary seizure, is the principle that the taking of alien property must be for a public purpose or, as it is often enunciated, for the purpose of public utility.

The Permanent Court of International Justice observed, in the *German Interests in Polish Upper Silesia* case, that generally accepted international law permits the expropriation of property belonging to foreigners for reasons of public utility.²⁵

More specificity is given to the public purpose principle in the *Walter Fletcher Smith* case, where the taking of alien property for private profit was ruled contrary to international law. In this case, real property, belonging to an American national and situated in Cuba, was subjected to expropriation proceedings by Cuban municipal officials for the benefit of a private company. In the arbitration which followed between the United States and Cuba, the latter claimed that the expropriation was effected for reasons of public utility. The arbitrator found, however, that such was not the case. He ruled that while the condemnation proceedings were municipal in form, the seized property was turned over immediately to the private company in question, ostensibly for public purposes, but, in fact, to be used by the company for purposes of amusement and private profit, without any reference to public utility. He concluded, therefore, that the expropriation was illegal.²⁶

The publicists, also, generally insist upon the operation of the

²⁵ P.C.I.J., Ser. A, No. 7, supra note 5, at 22.

²⁶ 2 U.N.R.I.A.A. 913, 917-18 (1949). See also the Norwegian Shipowners Claims case, 1 U.N.R.I.A.A. 307, 334 (1948) and *Jellinek v. Levy*, supra note 22, at 24. In these two cases the courts based the prohibition of the expropriation of alien property, except in the public interest, on the Fifth Amendment of the United States Constitution and French public policy, respectively. These particular sources of protection belong to the realm of municipal law but they are indicative of the general practice of States in the matter of safeguarding alien property rights. We have, therefore, from this general practice of States, a further affirmation of the rule of customary international law which states that the taking of alien property, not demanded by the public interest, is wrongful.

public utility principle in the area of alien property interests.²⁷ There are some dissenters, however.²⁸ In support of the latter position, it should be noted that the criterion of public utility can fail to be of real significance as a standard in judging the legality of an expropriation, because of the *modus operandi* of some States in this area. For, as has been observed, "if the legislature has the sole power to determine what is for the public benefit, . . . questions of motive or inducement become immaterial for all practical purposes."²⁹

A reasonable argument can be made in support of the more common view, namely, that international law requires that the taking of alien property be for a public purpose. A State, it may be argued, can legitimately limit the entrance of aliens into its territory, and it can place restrictions upon the property which aliens can take. But once an alien has met these requirements, the alien has the right to the expectation that he will be free from arbitrary expropriation, albeit with compensation. The fact remains, however, that there does not seem to be any case, involving the taking of alien property which is not for a public purpose, which grants a remedy other than the damages which would have been paid if the taking had been for a public purpose. It seems fair to say, then, that the utility of the public purpose rule is questionable.

C. *The Principle of Full Compensation*

Customary international law also states that the taking of alien property must be fairly compensated for. The more exact rendition of this rule is that the taking of alien property must be accompanied by "adequate, effective, and prompt payment."³⁰ This rule is the one most frequently involved in testing the legality of an expropriation; and where its requirements are not complied with, the taking of alien property is judged to be confiscatory.

This rule, too, is the one about which one finds the most serious controversy—whether general legislative reform measures (as distinguished from the usual eminent domain situation) to establish a better economic or social order, when applied to aliens and nationals alike, need to provide for full compensation for expropriated property. The evidence does not seem to allow a definitive answer to this question.

The difficulty in this matter is being emphasized more and more

²⁷ U.N. International Law Comm'n, *supra* note 21, at 42-46; Bindschedler, *supra* note 21, at 186-207; Fachiri, *supra* note 21, at 169-70.

²⁸ See, e.g., Herz, *supra* note 3, at 253.

²⁹ Kuhn, *The Mexican Supreme Court Decision in the Oil Companies Expropriation Cases*, 34 Am. J. Int'l L. 297, 299 (1940).

³⁰ From the note of Secretary of State Hull to the Mexican Government, Aug. 22, 1938, in the controversy over the Mexican expropriation of American agrarian and oil properties, quoted in 3 Hackworth, *Digest of International Law* 658 (1942).

today, with the emergence of the former colonial areas into the status of full-fledged independent States. These newly independent States, when taking alien-owned property in the execution of a general reform program, have generally relied upon the "equality-of-treatment" or "non-discrimination" doctrine, which states that international law requires a State to accord to aliens the same treatment which it gives to its own nationals, and no better.³¹ The capital-exporting States interposing on behalf of their nationals whose property has been expropriated without compensation have, on the other hand, insisted on the "minimum standard" principle, which obliges a State to grant a minimum of protection to aliens lawfully within its borders, regardless of the treatment given to its own nationals.³²

A realistic appraisal of this problem indicates that international law as it is currently conceived to be—that is, that body of rules based on the concurrence of the wills of the several sovereign States—cannot supply a generally approved rule to regulate the situations created by expropriation legislation of general application.

The conclusion must be, therefore, that this question will remain, for the time being, a political one. An expropriation of alien property which is discriminatory in its effect, or without any reference to public utility, engages the international responsibility of the expropriating State. But it cannot be said that a general, non-discriminatory, public-purpose taking does so, even if full compensation has not been paid.

There is no need to discuss this disputed question any further, in as much as it is the purpose of this study to state the international law subscribed to by the Common Market nations. As capital-exporting States, these nations endorse the full compensation principle. It is in order, therefore, to explore in more detail the protection afforded the American businessman in his foreign business transactions by the full compensation rule.

³¹ See the Czechoslovak Agrarian Reform (German Subjects) case, Czechoslovakia, 1925, McNair & Lauterpacht, Annual Dig., 1925-1926, Case No. 98. This case involved the expropriation of large tracts of property to effect an agrarian reform program. The law authorizing the seizure fixed the compensation at less than the actual market value of the estates. In ruling against a German national's claim for full compensation, the court stated that the purpose of the expropriation was, as regards German nationals, the same as for the Czechoslovak nationals' property; namely, to regulate internal agrarian conditions in harmony with the requirements of social justice. The court concluded that there was no principle of international law which bound a State to grant more favorable treatment to alien immovable property than that accorded to the State's own nationals. In any event the international law on this question was of a controversial nature, while the principle that the *lex rei sitae* governed immovable property was universally recognized. *Id.* at 134-35.

³² See the argument of the United States Government presented by Secretary of State Hull in his correspondence with the Mexican Minister of Foreign Affairs in the controversy over the Mexican expropriation of American oil and agrarian properties. 3 Hackworth, *supra* note 30, at 657-60.

Various arbitral tribunals have affirmed the principle that the expropriation of alien property requires just compensation. The *Norwegian Shipowners Claims (Norway v. United States)* case³³ involved a claim for compensation by Norwegian shipowners, as reparation for the seizure, without payment, of their contracts by the United States Government during World War I. The Tribunal of Arbitration, in its award of October 13, 1922, found that the United States had violated the respect for alien property sanctioned by municipal and international law. After ruling that "in the exercise of eminent domain the right of friendly alien property must always be fully respected,"³⁴ the court continued:

It is common ground that, in the absence of any treaty, the Norwegian owners of these contracts were protected by the fifth amendment of the Constitution of the United States against any expropriation not necessary for public use, and that they are entitled to just compensation if expropriation occurs. . . . 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 the international law, based upon the respect for private property.³⁵

The full compensation requirement has been incorporated into various commercial treaties, including those in force between the United States and the Common Market nations.³⁶ The authors, too, generally require compensation for the expropriation of foreign property.³⁷

³³ Supra note 26.

³⁴ Id. at 332.

³⁵ Id. at 334. The *De Sabla (United States v. Panama)* case, decided by the United States-Panama General Claims Commission established in pursuance of the General Claims Convention of July 28, 1926, and the Supplemental Convention of Dec. 17, 1932, gives striking support to the "expropriation demands compensation" rule of international law. In granting an indemnity in a claim for damages for violations of a foreign owner's title to land in Panama, the Commission stated:

It is axiomatic that acts of a government in depriving an alien of his property without compensation impose international responsibility. . . . It is no extreme measure to hold, as this Commission does, that if the process of working out the system results in the loss of the private property of aliens, such loss should be compensated.

6 U.N.R.I.A.A. 358, 366 (1955).

³⁶ See, e.g., the following treaties: Treaty With Italy, Feb. 2, 1948, art. V, 63(2) Stat. 2255, T.I.A.S. No. 1965; Treaty With the Netherlands, March 27, 1956, art. VI(4), [1957]2 U.S.T. & O.I.A. 2043, T.I.A.S. No. 3942; Treaty With the Federal Republic of Germany, Oct. 29, 1954, art. V, [1956]2 U.S.T. & O.I.A. 1839, T.I.A.S. No. 3593.

³⁷ Nielsen, *International Law Applied to Reclamations* 39 (1933). See also Feller, supra note 7, at 133; Freeman, supra note 7, at 517-18; 2 Whiteman, *Damages in International Law* 1386 (1937); Fachiri, supra note 5, at 169-70; Hyde, *Confiscatory Expropriation*, 32 Am. J. Int'l L. 759, 760-61 (1938); Kaackenbeeck, *The Protection of*

Two further points should be made in this consideration of the compensation principle. Although the decisions and the publicists are primarily concerned with the guarantee of "full" compensation, there are two other important factors relating to compensation, namely, "prompt" and "effective" payment. Traditional doctrine sees these factors as reasonable corollaries of the "full" compensation rule.³⁸ The recent practice, however, of accepting lump-sum settlements with deferred payments after takings³⁹ calls into question the insistence upon the "prompt" compensation formula as a rule of customary international law. Similarly, there is evidence that customary international law recognizes the right of host States, through convertibility and foreign exchange regulations, to pay compensation in local currency, even though, traditionally, the "effective" compensation rule has meant payment in the currency of the State of which the injured alien was a national.⁴⁰

It is submitted, however, that recent instances of postponed payment and foreign exchange restrictions pose no real problem for American business operations in the Common Market. The capital-exporting States in this institution subscribe to the legal rules which prohibit unjust enrichment and demand respect for acquired rights. These principles provide the rationale for the full compensation rule.

The concept of unjust enrichment is found in both civil and Anglo-American law.⁴¹ It is also found in international law.⁴² The prohibition of the wrongful deprivation of private property, embodied in the concept of unjust enrichment, finds further support in the international law rule which commands respect for acquired rights.⁴³

The Common Market nations, then, in common with other civilized societies, accept the inviolability of the rights of private property. This means that Americans doing business in these countries may rely

Vested Rights in International Law, 17 Brit. Y.B. Int'l L. 1, 16 (1936); Shawcross, *The Problems of Foreign Investment in International Law*, 102 Hague Recueil 336, 344-46 (1961) (I).

³⁸ See, e.g., Shawcross, *supra* note 37, at 345-46.

³⁹ For example, the United States recently agreed to such a settlement providing for payment over a twenty-year period. See *Agreement With Poland Regarding Claims of Nationals of the United States*, July 16, 1960, [1960]2 U.S.T. & O.I.A. 1953, T.I.A.S. No. 4545.

⁴⁰ See Metzger, *Property in International Law*, 50 Va. L. Rev. 594, 603-07 (1964); A.B.A. Rep., *Comm. on Int'l Trade and Investment*, Section of Int'l and Comp. L., *The Protection of Private Property Invested Abroad* 79-81 (1963).

⁴¹ See Dawson, *Unjust Enrichment passim* (1951).

⁴² See *Lena Goldfields Arbitration*, 36 Cornell L.Q. 42 (1950-51); *Landreau Claim (United States v. Peru)*, 1 U.N.R.I.A.A. 347 (1948).

⁴³ See case *Concerning Certain German Interests in Polish Upper Silesia*, *supra* note 5; *Public Prosecutor v. Aerts, Tangier*, 1939, *Lauterpacht, Annual Dig.*, 1938-1940, Case No. 23. See also Verdross, *Les Règles Internationales Concernant le Traitement des Étrangers*, 37 Hague Recueil 327, 358-59 (1931) (III); Bindschedler, *supra* note 21, at 186-207.

upon the full compensation rule with all of its ramifications, 'secure in the knowledge that a taking of their property without prompt, adequate, and effective payment would be deemed confiscatory and would give grounds for a claim for reparation.

D. *The Form of Reparation*

Claims based upon the taking of alien property in contravention of the foregoing rules of law have generally been settled by awards of monetary damages.

The *De Sabla* claim⁴⁴ is typical of the cases decided by international arbitration, which prescribe that in the absence of a violation of a treaty obligation, money damages are the proper form of reparation for the seizure of alien property without compensation. This claim was decided by the United States-Panama General Claims' Commission established in pursuance of the General Claims Convention of July 28, 1926⁴⁵ and the Supplemental Convention of December 17, 1932.⁴⁶

The claim involved a request for damages by the owner of a tract of land in Panama. The claimant, a United States national, averred that officials of the Panamanian Government, with knowledge that the land was the private property of the claimant, treated the land as public property and, between the years 1910 and 1930, made grants of it to private individuals.

The Commission found that the Panamanian land laws exempted private property from such treatment, and that the officials were aware that the property in question was private. Hence Panama was internationally responsible. The Commission said:

It is axiomatic that acts of a government in depriving an alien of his property without compensation impose international responsibility. . . . It is no extreme measure to hold, as this Commission does, that if the process of working out the system results in the loss of the private property of aliens, such loss should be compensated.⁴⁷

The Commission, therefore, found for the claimant and, exercising the power given to it by the Convention to grant monetary compensation,⁴⁸ it awarded damages of \$76,646.25 for the losses due to the unlawful grants.⁴⁹

⁴⁴ United States v. Panama, *supra* note 35.

⁴⁵ 47 Stat. 1915, T.S. No. 842.

⁴⁶ 48 Stat. 1485, T.S. No. 860.

⁴⁷ United States v. Panama, *supra* note 35, at 366.

⁴⁸ See arts. V and VIII of the Convention, 47 Stat. 1915, T.S. No. 842.

⁴⁹ A similar award was made in the Walter Fletcher Smith case, an arbitration between Cuba and the United States, *supra* note 26.

A study of international arbitrations also discloses that money damages is the remedy prescribed by customary international law for the discriminatory taking of alien property.

The *Norwegian Shipowners Claims (Norway v. United States)* case,⁵⁰ mentioned previously, involved a claim by Norwegian ship-owners for reparation for the seizure, without payment, of their contracts for the construction of merchant ships in American shipyards, by the United States Government during World War I. Discrimination was one aspect of the claim which had to be reckoned with, and in that connection the Tribunal of Arbitration said:

The United States are responsible for having thus made a discriminating use of the power of eminent domain towards citizens of a friendly nation, and they are liable for the damaging action of their officials and agents towards these citizens of the Kingdom of Norway.⁵¹

The tribunal awarded monetary compensation to the Norwegian Government with respect to the losses sustained by the Norwegian owners,⁵² on October 13, 1922.

With regard to claims based upon the violation of the public purpose rule, the cases indicate reparation in the form of a cash settlement.⁵³

Recently, publicists like Wortley,⁵⁴ Schwarzenberger⁵⁵ and Rolin⁵⁶ have suggested that restitution in kind, not monetary damages, is the primary form of reparation for the discriminatory, uncompensated taking of alien property, when the seizure does not also contravene treaty obligations. Some decisions of national courts seem to support this opinion.

Anglo-Iranian Oil Co. v. Jaffrate (The Rose Mary), decided by the Supreme Court of Aden on January 9, 1953, is a case in point.⁵⁷ In 1952, the ship *Rose Mary*, flying the flag of Honduras, arrived in Aden harbor with a cargo of oil taken on in Iran. The oil in question had been produced by plants established by the plaintiff company in

⁵⁰ Supra note 26.

⁵¹ Id. at 339.

⁵² Id. at 340-41. The following international arbitral decisions also awarded monetary damages for the discriminatory taking of alien property: *El Triunfo Case (United States v. El Salvador)* (1902), Foreign Rel. U.S. 838-48, 857-73 (1903); *Delagoa Bay Railway Case*, 2 Moore, International Arbitrations 1865-99 (1898).

⁵³ See, e.g., the *George Finlay case*, 39 Br. & For. St. Paps. 906.

⁵⁴ Wortley, *Expropriation in Public International Law* 128-29 (1959).

⁵⁵ 1 Schwarzenberger, *International Law as Applied by International Courts and Tribunals* 657 (3d ed. 1957).

⁵⁶ Rolin, *Avis sur la Validité des Mesures de Nationalisation Décrétées par le Gouvernement Indonésien*, 6 Netherlands Int'l L. Rev. 260, 268, 269, 271 (1959).

⁵⁷ 1 Aden L.R. 46 (1953).

Iran, under its concession agreement of 1933 with the Iranian Government. In 1951, the latter government had enacted an Oil Nationalization Law, which purported to expropriate all the property vested in the plaintiff company by the 1933 concession, and since that time it had been selling oil as its own property.

The plaintiff brought an action in detinue requesting delivery of the oil. The court ruled that the Nationalization Law of 1951 was invalid under international law, since the company's property had been expropriated without compensation. The oil in question, therefore, had remained the property of the company, and it was entitled to restitution.

The court expressed the rationale for its decision in the following words:

The plaintiffs' contention can be based on two grounds. In the first place, that no State can be expected to give effect within its territorial jurisdiction to a foreign law that is contrary to its own public policy or essential principles of morality. Secondly, that a foreign law that is contrary to international law or in flagrant violation of international comity need not be regarded.⁵⁸

The Supreme Court of Aden, then, decreed restitution on the ground that a foreign *lex situs*, contrary to international law and, hence, contrary to its concept of public policy, need not be given effect within its jurisdiction. It seems quite clear, therefore, that the result reached in *The Rose Mary* reflects the application of a conflict of laws rule rather than the application of a rule of public international law. This conclusion is borne out by the contrary decisions reached by courts in Italy and Japan with regard to actions brought by this same Anglo-Iranian Oil Company.

In *Anglo-Iranian Oil Co. v. Societa Petrolifera Orientale (The Miriella)*, the Civil Tribunal of Venice, on March 11, 1953, refused to decree restitution of a shipment of oil.⁵⁹ The Venetian court, in its decision, viewed this controversy as one to be decided by conflict of laws principles. Since the oil had been in Iran at the time of the expropriation, Iranian law, the *lex rei sitae*, was the proper one to determine the question of ownership. Furthermore, the legal effects of the Iranian law could not be rendered ineffective in Italy on public policy grounds, for the Nationalization Law sufficiently provided for compensation, as required by Italian public policy for the expropriation of the private property of foreign nationals. The Civil Court of Rome took the same approach in deciding a similar case against the company, on

⁵⁸ *Id.* at 53.

⁵⁹ Lauterpacht, *International Law Reports*, 1955, 19.

September 13, 1954, in *Anglo-Iranian Oil Co. v. Societa Petrolifera Orientale*.⁶⁰

In *Anglo-Iranian Oil Co. v. Idemitsu Kosan Kabushiki Kaisha*, the District Court of Tokyo, in 1953, also ruled that the Iranian Nationalization Law did not violate Japanese public policy and that there had been no confiscation.⁶¹

These decisions of the courts of Aden, Italy, and Japan indicate quite clearly that these cases were decided primarily in accordance with conflict of laws rules, not by rules of public international law. This fact, of course, is highly relevant in assessing their value as evidence of an international law rule of restitution in expropriation cases when property is not protected by treaty. It seems clear that these cases do not qualify as such evidence.

The differing results reached in these cases are also worthy of note. Since the settled practice of nations is a source of international law, these conflicting decisions, as illustrative of the divergent practice of national courts in the matter of restitution as reparation, indicate that there is no international law rule of restitution in these circumstances. This lack of uniformity of practice proceeds from the controversy concerning the so-called Act of State doctrine.

Under the Act of State doctrine the courts of one State refuse to question the validity or legality of the official acts of another sovereign State, in so far as these acts operate directly upon persons or property within the territorial jurisdiction of the latter State.⁶²

The Act of State doctrine is not followed universally. Only American and English courts follow it regularly.⁶³ French courts, however, refuse to apply the Act of State doctrine, when foreign legislation is viewed as being contrary to their conception of public policy.⁶⁴

⁶⁰ Id. at 23.

⁶¹ Lauterpacht, *International Law Reports*, 1953, 305.

⁶² 1 Oppenheim, *International Law* 267 (8th ed. Lauterpacht 1955). See also, generally, Association of the Bar of the City of New York, *Comm. on Int'l L., A Reconsideration of the Act of State Doctrine in United States Courts* (1959).

⁶³ See, e.g., *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918) (no action for Mexican-owned hides seized in Mexico); *Luther v. Sagor* (1921), 3 K.B. 532 (C.A.) (no action for wood owned by Russian corporation and seized in Russia). See also Wortley, *The General Principles of Private International Law*, 94 *Hague Recueil* 91, 244 (1958) (II); Hyde, *The Act of State Doctrine and the Rule of Law*, 53 *Am. J. Int'l L.* 635, 637 (1959); Zander, *The Act of State Doctrine*, 53 *Am. J. Int'l L.* 826 (1959).

The United States Supreme Court has recently reaffirmed that the Act of State doctrine is binding upon American courts. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

⁶⁴ See, e.g., *U.S.S.R. v. Compagnie Ropit, France*, 1928, McNair & Lauterpacht, *Annual Dig.*, 1927-1928, Case No. 43 (refusal to give effect to Russian decree nationalizing Russian ships in Russia); *Moulin v. Volatron, France*, 1937, Lauterpacht, *Annual Dig.*, 1935-1937, Case No. 68 (refusal to recognize the expropriation of a company registered in Spain by the Catalonian Government during the Spanish Civil War). See also Wortley, *supra* note 54, at 17-18.

German courts, too, have refused to recognize the validity of foreign Acts of State, when the latter violated German public policy.⁶⁵ The German courts, however, have not been consistent in this matter. In *N. V. Verenigde Deli-Maatschappijen and N. V. Senembah-Maatschappij v. Deutsch-Indonesische Tabak-Handelsgesellschaft m.b.H.*, two Dutch companies, whose tobacco plantations in Indonesia had been nationalized in 1958, claimed property rights in the tobacco harvest of 1958, which had been shipped to a German company in Bremen, Germany. The Dutch companies, alleging that the nationalization was discriminatory and without compensation, asked for injunctive relief on the grounds that the Indonesian Nationalization Act violated international law and that recognition of the Nationalization Act by German courts would be contrary to German public policy.⁶⁶ On August 21, 1959, the Hanseatic Court of Appeals in Bremen dismissed appeals from decisions of the District Court of Bremen which had denied the injunctions requested by the Dutch companies, ruling that the Indonesian Nationalization Act was entitled to recognition as a foreign Act of State and that such recognition did not violate German public policy.⁶⁷

Part of the nationalized 1958 tobacco harvest had also been sent to Amsterdam, the Netherlands, where it was held by the Bank of Indonesia. One of the expropriated Dutch companies sought restitution of the tobacco. The Appellate Court of Amsterdam, affirming the decision of the District Court of Amsterdam, delivered the tobacco to the Dutch company, in *N. V. Senembah Maatschappij v. Republiek Indonesie Bank Indonesia and N. V. De Twentsche Bank*, on June 4, 1959. The court ruled that, although Dutch courts generally refrained from challenging foreign Acts of State, the Indonesian Nationalization Act would not be recognized because its discriminatory treatment of Dutch interests and its failure to provide for compensation were adverse to Dutch public policy.⁶⁸

⁶⁵ Expropriation (Soviet Zone of Germany) case, Germany (American Zone), 1949, Lauterpacht, Annual Dig., 1949, Case No. 10 (refusal to recognize the expropriation without compensation of a firm in the Soviet zone); Expropriation of Insurance Companies case, Germany (West Berlin), 1950, Lauterpacht, International Law Reports, 1951, Case No. 43 (refusal to recognize the expropriation without compensation of an insurance company in the Soviet zone).

⁶⁶ 28 International Law Reports 16 (1963).

⁶⁷ Id. at 25-39.

⁶⁸ See Domke, Indonesian Nationalization Measures before Foreign Courts, 54 Am. J. Int'l L. 305, 307-08, 315-16, 318-20 (1960), for an analysis of this case before the Dutch court. Domke concludes his analysis with the statement that while the decisions of the Dutch courts correspond with the concept of non-recognition of foreign confiscatory decrees which still prevails in Western countries, the German courts in "abandoning" the prevailing view do not submit convincing reasons for "changing the well-established principles of international law." Id. at 323.

Baade takes issue with Domke's statement. He argues that the decisions of the Ger-

As is evident, the national courts of the different States, including those in the Common Market, take opposing positions with regard to the application of the Act of State doctrine. At the present time, various publicists are urging that the doctrine be abandoned, particularly in the United States⁶⁹ and in the United Kingdom⁷⁰ where the doctrine has been followed regularly. It is urged particularly that municipal courts afford, on many occasions, the only means for according respect to property rights. Be that as it may, the controversy concerning the Act of State doctrine continues, and, with it, the divergent practice of national courts in the availability of restitution as reparation for the wrongful taking of alien property.

It is submitted, therefore, that cases like *The Rose Mary* do not point to an international law rule of restitution for the illegal expropriation of alien property. Customary international law sanctions reparation by cash settlement only, when the wrongful taking does not involve a treaty violation. This, then, is the means of reparation upon which American nationals can rely if their foreign business operations are damaged by discriminatory, uncompensated takings by host States.

IV. BREACH OF CONTRACT BY HOST STATE

As has been seen, the *pacta sunt servanda* principle binds a State to carry out its treaty obligations with regard to alien property interests. The question now is whether this same rule should also be applied to contractual agreements between States and aliens. International investment and trade, in great measure, are carried on by means of contracts and concession agreements between States and foreigners. And the latter, like the parties to any agreement, have the right to expect the performance of the contracts which they conclude with foreign governments. When a State-contractor, therefore, by an arbitrary exercise of its sovereign power, defeats that expectation of performance, it impedes the development of the mutual trust so necessary for expanding world trade. Quite clearly, much could be done to rectify this unfortunate situation by applying the *pacta sunt servanda* rule to contractual agreements between States and aliens. But

man courts, refusing to disregard the effectiveness of Indonesian expropriation decrees as against the property of Dutch nationals, are in accord not only with well-established principles of international law, but also with the concept of recognition of foreign confiscatory decrees which prevails in most States, including the Western countries. Baade, *Indonesian Nationalization Measures before Foreign Courts—A Reply*, 54 Am. J. Int'l L. 801 (1960).

⁶⁹ See the proposals of the Committee on International Law of the Association of the Bar of the City of New York, *supra* note 62, and Hyde, *supra* note 63. These proposals, however, have been challenged by Reeves, *Act of State Doctrine and the Rule of Law—A Reply*, 54 Am. J. Int'l L. 141 (1960).

⁷⁰ See Wortley, *supra* note 63, at 211-13.

does international practice warrant this extension of the *pacta sunt servanda* principle?

While the proposition that a State must observe treaty restrictions upon the taking of alien property interests is unopposed, the legal force of restrictions upon the expropriation of foreign property, found in contractual agreements between States and aliens, is a disputed point of international law. The traditional position has been that the breach by a State of a contract with an alien does not, of itself, engage that State's international responsibility.

If the violation of the contract has been "arbitrary" or "tortious" then a violation of international law occurs, and the question of the State's international responsibility arises. This is on the ground of the commission of an international tort, and not because of the breach of the contract.

This traditional rule with regard to a State's breach of its contract with an alien is exemplified by the practice of the United States Government. With regard to claims for non-tortious breaches of contract, Moore states that "it is not usual for the government of the United States to interfere, except by its good offices, for the prosecution of claims founded on contracts with foreign governments."⁷¹ The reason is, of course, that such a contract violation does not contravene international law. Mr. Bayard, Secretary of State, states this clearly in his letter to Mr. Bispham on June 24, 1885, as follows:

If the sovereign appealed to denies the validity of the claim or refuses its payment, the matter drops, since it is not consistent with the dignity of the United States to press, after such a refusal or denial, a contractual claim for the repudiation of which, by the law of nations, there is no redress.⁷²

The situation is different, however, when the foreign government arbitrarily annuls its contract with an American national. Such was the case when the United States Government intervened in behalf of the Intercontinental Telephone Company, a New Jersey corporation, which was doing business in Venezuela. The corporation, for a valuable consideration, had been granted certain rights by the Venezuelan Government. Subsequently, the corporation's rights were nullified by an arbitrary executive order in violation of the contract. In instructing Mr. Scott, the Minister to Venezuela, to press the corporation's claim against that Government, Mr. Bayard, the Secretary of State, wrote on August 12, 1887, as follows:

⁷¹ 6 Moore, Digest of International Law 705 (1906).

⁷² Id. at 716.

I observe . . . that in one part of your note to Dr. Seijas, you speak of the case as one of violation of contract, though you subsequently very properly rest the claim on tort. The case is indeed one of violation of contract, but it is not on the contract, for the purpose of obtaining either its fulfilment or damages for its non-fulfilment, that this Government now proceeds. The case is one of arbitrary confiscation and spoliation of the rights and property of citizens of the United States who acquired these rights and this property in Venezuela, under the express sanction of its Government and the most solemn guarantees of its protection. You are therefore instructed to renew the claim in this specific shape to that Government, and to say that the Government of the United States insists upon such action being taken by that Government as will . . . compensate the claimants for the wrong done them⁷³

The United States would also press the contractual claims of its nationals against foreign powers, if American nationals were unduly discriminated against by a debtor government or denied a domestic judicial remedy against it.⁷⁴

Notwithstanding this traditional international practice with regard to a State's breach of its contract with an alien, some authorities currently advocate the direct application of the *pacta sunt servanda* rule to contractual agreements between States and foreigners. In this view, a State which repudiates its contractual obligations is guilty of a violation of international law, ipso facto.

Since a taking of alien property in breach of a State's contractual obligations is, it is argued, wrongful, the reparation due for such a taking must, on the authority of the *Chorzów Factory* case, go beyond the payment of prompt, adequate and effective compensation. The *Chorzów Factory* case stated that restitution in kind, if possible, is the proper reparation for an act in violation of international law; it follows, therefore, that a State should make restitution in kind, through specific performance, of alien property taken in contravention of contractual rights. The State may respond in monetary damages only where restitution is impossible.⁷⁵

It must be stated that no conclusive evidence from international law sources exists which supports the position that the *pacta sunt servanda* principle applies directly to contracts concluded between

⁷³ Id. at 724-25.

⁷⁴ Id. at 725-27.

⁷⁵ See Report of the 1958 Conference of the International Law Association 150-51 (1959); 1959 Proc. Am. Soc'y Int'l L. 266-73 (1959).

a State and foreigners, however much this view appeals to logic and a sense of justice.⁷⁶ Nevertheless, there are many indicia of the position favoring such an application of that rule.

In the Award of the Tribunal in the Arbitration between Saudi Arabia and the Arabian American Oil Company (Aramco), dated August 23, 1958, it is stated as follows:

The Government has laid much stress upon the principle of restrictive interpretation when, as is the case here, a State is a party to the contract, and in particular when the contract is a concession The Government relies on a considerable number of judicial decisions of international tribunals and of international arbitral awards, as well as on decisions given by the Courts of the United States. . . .

The Arbitration Tribunal cannot accept the contention that, for the sole reason that a State is a party to a contract with a private person, the rights of the latter must be interpreted restrictively. In its opinion, the rights of the Parties must be evaluated and examined in a spirit of complete equality. . . . The restrictions of its powers, which a State accepts by contract, are a manifestation of its sovereignty and States are bound to fulfill their obligations to the same extent as private persons. . . .

In its capacity as first concessionaire, Aramco enjoys indeed exclusive rights which have the character of acquired or "vested" rights and which cannot be taken from it by the Government by means of a contract concluded with a second concessionaire, even if that contract were equal to its own contract from a legal point of view. The principle of respect for acquired rights is one of the fundamental principles both of public international law and of the municipal law of most civilized States. . . .

[V]alid contracts bind both parties and must be performed, for rights resulting from agreements concluded for due consideration are absolutely secure; when one party has granted certain rights to the other contracting party, it can no longer dispose of the same rights, totally or partially, in favour of another party.⁷⁷

It should be noted, too, that various attempts at codification of the law of nations governing the treatment of alien property

⁷⁶ Hyde, *Economic Development Agreements*, 105 *Hague Recueil* 271, 312-24 (1962) (I).

⁷⁷ 27 *International Law Reports* 117, 190-92, 205, 206 (1963). See also *Radio Corp. of America v. Nat'l Government of the Republic of China*, 30 *Am. J. Int'l L.* 535 (1936).

rights, have judged the breach of a contract between a State and an alien to be a violation of international law.

The Preparatory Committee of the Conference for the Codification of International Law, the Hague, 1930, addressed a question, on this subject, to the governments of the States participating in the Conference. The query was whether a State becomes responsible for enacting legislation incompatible with the terms of concessions or contracts granted to or concluded with foreigners. Twenty-three governments replied to the question, and the Committee stated its findings in the following observation:

The prevalent opinion is that a State renders itself internationally responsible if it enacts legislation incompatible with a concession which it has granted to, or a contract which it has made with a foreigner.⁷⁸

Acting on these findings, the Committee formulated "Basis of Discussion No. 3" as follows:

A State is responsible for damage suffered by a foreigner as the result of the enactment of legislation which directly infringes rights derived by the foreigner from a concession granted or a contract made by the State.⁷⁹

Although the Hague Conference did not act upon the Preparatory Committee's formulation, the latter gives support to the position which states that the violation, through legislation, of alien contractual rights by a State, of itself, is a breach of international law.

Municipal law decisions also give weight to the view that States, no less than individuals, are bound by their contracts. The United States Supreme Court stated this most emphatically, when it condemned the federal government's repudiation of the gold clause in the redemption of government bonds, in *Perry v. United States*.⁸⁰ By virtue of its power to borrow money, the Court ruled, Congress is authorized to pledge the credit of the United States as assurance of the stipulated payment, "as the highest assurance the Government can give, its pledged faith."⁸¹ To say that Congress can repudiate that pledge, the Court continued, is to assume that the Constitution was considering a vain promise; this Court has never sanctioned such a conception of the Government's obligations.

⁷⁸ 24 Am. J. Int'l L. Supp. 49 (1930).

⁷⁹ Id. at 50. See also the Harvard Research in International Law, *The Law of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners*, 23 Am. J. Int'l L. Supp. 167-68 (1929).

⁸⁰ 294 U.S. 330 (1935).

⁸¹ Id. at 351.

When the United States, with constitutional authority, makes contracts, it has rights and incurs responsibilities similar to those of individuals who are parties to such instruments.⁸²

It can be plausibly argued, therefore, that the *pacta sunt servanda* principle should be applied directly to violations of contracts between States and aliens, just as it is invoked when a State's interference with alien property rights contravenes a treaty. And it has to be admitted, too, that the extension of this rule to include contracts would reduce the number of "nationalizations" which have inordinately strained international peace and order in recent years. It is submitted, however, on weighing the evidence, that international law, *de lege lata*, does not encompass State-alien contracts within the purview of the *pacta sunt servanda* principle.⁸³

It follows, of course, from the foregoing submission, that international law does not prescribe specific performance of a State as reparation for the taking of alien property in violation of a contractual obligation.

A State, therefore, is internationally responsible for breach of its contract with an alien, only if the contract violation has been "arbitrary" or "tortious." In this case, such international arbitrations as the *El Triunfo Case (United States v. El Salvador)*,⁸⁴ the *Delagoa Bay Railway Case (United States and Great Britain v. Portugal)*,⁸⁵ the *May Claim (United States v. Guatemala)*,⁸⁶ the *Cheek Claim*

⁸² Id. at 352. See also the Sinking-Fund Cases, 99 U.S. 700 (1879), where the Court ruled as follows:

The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen.

Id. at 719. Evidence from other nations is cited by Mann, *The Law Governing State Contracts*, 21 Brit. Y.B. Int'l L. 11, 13-14 n.10 (1944).

⁸³ Learned opinion and practice are agreed that non-performance of State-alien contracts does not, per se, constitute an international wrong. International claims, involving contracts, can only relate to issues of their arbitrary or tortious violation. U.N. International Law Comm'n, Report: International Responsibility, 9th Sess., at 36-41 (Doc. No. A/CN.4/106) (1957). Mann makes the same point in his recent consideration of the problem. Mann, *State Contracts and State Responsibility*, 54 Am. J. Int'l L. 572 (1960).

Two recent studies, the proposed official draft American Law Institute Restatement of the Foreign Relations Law of the United States and the proposed Harvard Law School draft convention, reach the same conclusion. See Restatement, Foreign Relations Law of the United States #198, comments b, c, d (Proposed Official Draft 1962); Sohn & Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens*, 55 Am. J. Int'l L. 545, 566-75 (1961).

⁸⁴ (1902) Foreign Rel. U.S. 838-48, 857-73 (1903).

⁸⁵ 2 Moore, *International Arbitrations 1865 (1898)*; (1900) Foreign Rel. U.S. 903-04 (1902).

⁸⁶ 6 Moore, *supra* note 71, at 730-31.

PROTECTION OF FOREIGN PROPERTY

(*United States v. Siam*),⁸⁷ and the *Landreau Claim* (*United States v. Peru*)⁸⁸ indicate that customary international law requires the payment of monetary damages as the proper form of reparation. This is the current state of the law in the Common Market nations.

V. CONCLUSION

In the foregoing summary of existing customary international law the emphasis has been upon the substantive rules which protect the foreign investor. There is no intention, of course, of denying the applicability of the so-called procedural rules pertaining to the theory and practice of international claims law, such as the local remedies and nationality requirements. Under generally accepted international practice, no State can put forward a claim for injury sustained by one of its own nationals, unless that national has exhausted the remedies available to him under the municipal law of the country allegedly responsible for the injury.⁸⁹ Any detailed consideration of these "procedural" rules is, however, beyond the scope of this article.

Some appraisals of the protection of private foreign property given by customary international law find that the latter is deficient from the standpoint of protection.⁹⁰ Admittedly, there are shortcomings but, as the writer has attempted to point out, they generally appear when the receiving State is an underdeveloped country.

To American law the principles of *pacta sunt servanda*, non-discrimination, public purpose, and full compensation, are rudimentary. They are also basic to the legal systems of the Common Market nations which, like the United States, promote free enterprise. These same principles have received, in these countries, strong affirmation as the basic rules of customary international law with respect to State responsibility for economic injuries to aliens. Violations of these legal principles require reparation by restitution in kind, when the taking contravenes a treaty, and by monetary damages in all other cases. It is submitted, therefore, that this international agreement on fundamental concepts of fair play to private investors gives substantial protection to American private property in the Common Market.

⁸⁷ 2 Moore, *International Arbitrations* 1899 (1898).

⁸⁸ 1 U.N.R.I.A.A. 347 (1948).

⁸⁹ See Bishop, *International Law* 704-37 (2d ed. 1962).

⁹⁰ See, e.g., Metzger, *supra* note 40, at 608-09.