WHAT CONSTITUTES A TAKING OF PROPERTY UNDER INTERNATIONAL LAW?

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I

In this article it is proposed to examine the question what constitutes a taking of the kind that brings into operation the widely recognized rule of international law that the property of aliens cannot normally be taken, whether for public purposes or not, without adequate compensation. This question is especially important when trying to decide what measures are open to an alien and his Government for protecting his interest in property which has been allegedly seized in contravention of international law. Thus, for example, it was for a time a highly relevant question after the first Cuban measures against foreign (mostly American) sugar and oil properties in the spring and summer of 1960. Many of these properties were seized under decrees authorizing what was called 'intervention' of the property in question. These decrees did not purport to affect title to the properties; but they did direct agents of the Cuban Government to take over the assets of the companies and to take complete charge of the operations of the companies in the national interest. The Cuban Government's action recalled President Truman's unsuccessful attempt to seize the American steel mills in April 1952 to avoid the crippling effects of a threatened nation-wide steel strike; this attempt to take over the operation of the mills was held to be illegal, but no one seriously argued that the United States Government was 'expropriating' the steel mills. In the event, counsels' struggles over whether the Cuban measures constituted an expropriation justifying an immediate claim for full compensation were


There is no intention or desire to become involved in the controversy whether those expropriations which might be called 'nationalization' should be accorded different treatment with respect to the requirement of compensation of aliens. Wortley, in Expropriation in Public International Law (1959), states that the prevailing view is that full compensation must be paid, regardless of whether the taking is a nationalization or not, and cites authorities for the majority and minority views (ibid., at pp. 34–35). See also Foighel, Nationalization (1957), at pp. 75–85; White, Nationalization of Foreign Property (1961), at pp. 183 et seq. For the purposes of this paper it will be unnecessary to enter this controversy.

See, for example, Resolution No. 195, 20 July 1960, National Agrarian Reform Institute, concerning sugar properties. As to the earlier 'intervention' of oil properties, see Department of State Bulletin, 43 (1960), p. 141.

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shortly brought to an end by the Cuban Government's decision officially and expressly to expropriate the properties involved.¹

The Cuban controversy is by no means the only occasion in recent times in which the question whether a State's interference with alien property amounted to expropriation assumed major significance. The property of Dutch nationals in Indonesia was first seized in December 1957 under the authority of various provisions of Dutch law, retained by Indonesia, which authorized seizure of property in times of national emergency.² The Indonesian Government contended that the property had not been nationalized and pointed out that the decree authorizing the seizure mentioned only a 'temporary taking'.³ This ceased to be a practical issue when the Dutch property was formally nationalized in December 1958.⁴

The question has also arisen in cases concerning the effect of legislation and administrative decrees of eastern European countries, where the measures have severely restricted the uses to which real property might be put but did not purport to affect title to the land;⁵ for instance, such measures might fix maximum rents, would frequently regulate the uses to which property might be put, the type of tenants to which it might be let and the amount of space, if any, the landlord might reserve for his own purposes. Do such restrictions taken together amount to expropriation?

The answer to this question may be important in determining the nature and timing of diplomatic protest, the local remedies to be sought and the adequacy of these remedies, and in relation to the question of damages. If the offending Government's actions amount only to a sequestration, then the complaining alien must ask for his property back and may claim damages only for unlawful detention. There may be occasions where the alien because of changed conditions does not want his property back but would rather treat it as expropriated and so possibly, in certain circumstances, become entitled to full compensation in lieu of restitution.⁶ There may be a further question: assuming that the offending Government has merely sequestered, or otherwise only interfered with the use of, the property in question, after what passage of time does this sequestration or other in-

³ Ibid., for a refutation of this thesis.
⁵ See below, pp. 313-16.
⁶ Wortley argues that when an alien's property has been expropriated in contravention of the principles of international law the alien's primary right is restitution (op. cit., above, in n. 1, p. 307, at p. 94; see also ibid., at pp. 100-1). The claim for damages arises only when restitution is inadequate or impossible. The learned author criticizes the view that the offending State can discharge its obligations under international law merely by offering and paying damages (ibid.). This is another controversy into which for the purpose of this paper it is unnecessary to enter.
terference come to be considered an expropriation? On the determination of this issue will depend not only the question when and how to protest but also, in appropriate cases, questions as to the date from which damages are to be assessed and from which interest is to run. Further, the determination of the exact date at which a seizure ripens into an expropriation may be important for deciding whether a particular delict is covered by an arbitration treaty with a fixed date limit on claims that can be pursued under it. Finally, with the increasing tendency of certain States to conclude bilateral treaties guaranteeing the property of their nationals against expropriation except for a public purpose and then only upon payment of prompt compensation, the question as to what amounts to expropriation will for the future assume importance in the interpretation of these treaties.

Thus, the problem is not without practical significance.

II

Such cases as there are recognize the principle laid down by the commentators, that interference with an alien’s property may amount to expropriation even when no explicit attempt is made to affect the legal title to the property, and even though the respondent State may specifically disclaim any such intention. But, while the principle may be clear, its application to particular situations of fact is not. There will, of course, be some easy cases, but there will be many difficult cases as well.

The precedents are relatively sparse, mainly for a reason already indicated, namely that the question of what constitutes a taking amounting to expropriation may be of great importance in the short run, yet it may often become less and less important as events take their course. But decisions of international tribunals and the related practice of States are, as we shall shortly see, of some help. Fortunately, there is also another very suggestive source of case law on the question. A great many ‘typical’

1 This possibility is suggested by the Mariposa Development Co. case (United States v. Panama), where the question arose whether claimant’s land had been confiscated during the period covered by the arbitration treaty under which the Commission in question was operating. Claimant claimed its property was confiscated as soon as the law which authorized the confiscation was enacted. The Commission concluded otherwise. Whiteman, Damages (1937), vol. 2, p. 1361. See also Sabine G. Helbig, Decision No. Hung.-941 (1958), Tenth Semiannual Report to the Congress for the Period Ending June 30, 1959, Foreign Claims Settlement Commission of the U.S., at p. 51.


3 See, for example, Wortley, op. cit., above, n. 1, p. 307, at p. 50 and sources cited therein; Herz, ‘Expropriation of Foreign Property’, American Journal of International Law, 35 (1941), pp. 243, 248. See also Commissioner Nielsen in a memorandum presented to the Turkish members of the Turkish-American Claims Commission in 1934. American-Turkish Commission, American-Turkish Settlement, Opinions and Report (1937), p. 78.
situations of fact have been considered in the United States by the International Claims Commission and its successor, the Foreign Claims Settlement Commission. These were domestic American tribunals established to rule on the validity of claims of American nationals based on war damage and on the nationalization of property in Russia, Yugoslavia, Czechoslovakia, Roumania, Hungary, Poland, and Bulgaria. The payment of these claims has often been provided for by an agreement between the United States and these countries. Often the funds to be distributed were funds belonging to the Governments of these eastern European countries which had been frozen by the United States Government and which funds, under the terms of these agreements, were transferred into accounts for the payment of American claims against the Governments. In setting up these Commissions, Congress evidenced an intention that claims were to be decided first in accordance with the terms of the particular agreements involved and, if the agreements in question were silent on the point, then the Commission was to look to 'international law' and finally to the principles of 'justice and equity'. Subsequent legislation extending the jurisdiction of the Commission has retained reference to international law as a source of decision.

It will be convenient now to consider first the decisions of international tribunals and the practice of States, and then to turn to the jurisprudence of the Foreign Claims Settlement Commission.

There are several well-known international cases in which it has been recognized that property rights may be so interfered with that it may be said that to all intents and purposes those property rights have been expropriated even though the State in question has not purported to expropriate. In the litigation concerning the dispute between Germany and Poland over German Interests in Polish Upper Silesia, a considerable part of the dispute centred on the seizure by Poland of a nitrate factory in Chorzów. This factory had at one time belonged to the German Government, which had arranged for a German company to operate the factory on its behalf. In 1919 the German Government transferred the factory to a German corporation set up for the specific purpose of acquiring title to this property and, at the same time, the company which had been operating the factory entered into a management contract with the company holding title to the property, whereby the operating company undertook to con-
tinue to manage the factory and to utilize, in the course of its management, certain patents, experiments and commercial contracts which it possessed. The Permanent Court of International Justice ruled that, by seizing the factory and its machinery, the Polish Government also expropriated the patents and contract rights of the management company, even though the Polish Government did not purport to expropriate these particular items of property.\footnote{German Interests in Polish Upper Silesia, Judgment No. 7, P.C.I.J., Series A, No. 7; Hudson, World Court Reports, 1 (23 May 1926), pp. 510, 541 (merits).} Compensation for these items was therefore adjudged in favour of the management company.

A similar case is the \textit{Norwegian Claims} case.\footnote{Norway v. United States, Scott, The Hague Court Reports (2nd series), p. 39, United Nations Arbitration Reports, 1 (1922), p. 367.} That case involved a question of compensation for Norwegians who had shipbuilding contracts with American concerns at the time the United States declared war on the Central Powers. In the summer of 1917, the United States had issued orders to practically all American shipbuilders to the effect that all ships then under construction and all materials, machinery and equipment pertaining to these ships, were requisitioned by the United States and were to be completed on its behalf. The United States claimed that all it had requisitioned was the partially constructed ships, and that, accordingly, it was only required to pay compensation for the value of whatever partial payments and purchases of materials had been made by Norwegian shippers. The international tribunal, which was set up to arbitrate the claim under the special agreement between the two countries of 30 June 1921, declared that the United States had in fact requisitioned the shipbuilding contracts themselves and not merely partially completed ships. Accordingly, the Norwegian shipowners were entitled to the fair market value of their shipbuilding contracts, which, at the time of requisition, were of considerable value owing to the extreme shortage of shipping and the very high prices which any kind of shipping obtained. The United States paid the arbitration award, although it refused to regard the award as an authoritative precedent.\footnote{Scott, op. cit., above, n. 2, this page, at p. 40; United Nations Arbitration Reports, 1 (1922), pp. 344–6.}

The \textit{Norwegian Claims} and the \textit{German Interests in Polish Upper Silesia} cases show that a State may expropriate property, where it interferes with it, even though the State expressly disclaims any such intention. More important, the two cases taken together illustrate that even though a State may not purport to interfere with rights to property, it may, by its actions, render those rights so useless that it will be deemed to have expropriated them. Nor is it only ancillary rights which may be ‘expropriated’ in substance in this way, while the intention to expropriate is disclaimed. And
it would also appear that there may be some types of what might be called 'property rights' with which a State may interfere with impunity. As a first step, therefore, towards determining what sort of interference will render property rights so useless that they will be deemed to have been expropriated, and what types of property rights may be expropriated in this way, it will be instructive to examine cases in which claimant’s ownership and right to possession of land has been interfered with to such an extent that the land may be said to have been confiscated. In some of these cases there was an express disclaimer of intention to expropriate; in others there was not.

Cases involving real property

It will be useful to begin with the protracted negotiations between the Government of the United States and the Government of Greece over the affairs of the Reverend Jonas P. King, who at times also functioned as United States Consul, and had bought two tracts of land on the outskirts of Athens. Afterwards, the Greek Government decided that Athens would soon be expanding in population and importance as a seat of government and accordingly embarked on several improvements. As a result, portions of Dr. King’s land were requisitioned in order to build a national church. Finally, when Dr. King attempted to build on the remaining portion of the land he was prevented from doing so by the Greek Government. Nevertheless, during the years in which the controversy dragged on none of these projected public works was actually started and, apparently, Dr. King remained in full possession of all the property.

Mr. Marsh, the American Minister at Constantinople, received instructions from the State Department in which it was stated that ‘... It is evident that Dr. King has been and is deprived of the free use of his land, for public purposes, by the authority of the government; and that no compensation has been made to him for the losses which he has thereby sustained. ...’ After years of negotiation the Greek Government finally agreed to pay an indemnity to Dr. King, in return for which Dr. King agreed formally to convey title to the land to the Greek Government. While the Greek Government never expressly denied that Dr. King’s property had been taken for public use, the controversy is interesting because it does indicate that land may be considered to have been confiscated even though the public authorities have not entered upon it and begun to construct the proposed public works, and even though the claimant is still in full possession of the land. In a case of this kind an express intention to expropriate will, understandably enough, help to resolve any remaining doubt against the offending State.

2 Ibid., at p. 1388.
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A similar case is the De Sabla,¹ a claim by an American citizen against the Panamanian Government which was decided by a Commission established under the terms of the conventions between the United States and Panama of 28 July 1926 and 17 December 1932. The Panamanian Government had made conveyances of portions of the claimant’s land to Panamanian citizens on the ground that all the land in question was public land. It had also granted licences for the cultivation of a large part of the claimant’s remaining land.

Panama argued that since the claimant had failed to intervene in the proceedings in which all the land was found to be public land and portions of it conveyed to Panamanian citizens, the claimant could not now assert her title. The Commission held, however, that the notice and protest provisions had been inadequate and that, in addition, the Panamanian authorities had knowledge of the claimant’s title. Thus, the alleged ignorance of the fact that title was held by an alien could not relieve the Panamanian Government of liability for its actions. It is important to observe that, although the claimant still had a registered title to the property, the Commission held that, since for the land conveyed by the Panamanian Government to Panamanian citizens there now existed conflicting registered titles, the Commission must consider that portion of claimant’s property which had been so treated as ‘permanently lost to the claimant’. Accordingly, the Commission awarded an indemnity for the full value of this land. The Commission, however, also awarded an indemnity of one-half its value with respect to the land over which Panama had granted cultivation licences. These damages included not only payments for the use and deprivation of the land but also compensation for the fact that it had not proved very easy to dispossess the licensees.² This suggests that, had it proved impossible to dispossess the so-called licensees, Panama would have been held to have wrongly taken the land, however much it might have protested that it no longer regarded the licences as valid. Presumably a failure to evict squatters, however they got there, should lead to the same result, although this would admittedly be a harder case.

It has already been mentioned that a great many cases involving real property were considered by the United States Foreign Claims Settlement Commission. In the case of Jeno Hartmann³ the Commission found that the

¹ The case was decided on 29 June 1933. It is reported in toto in American Journal of International Law, 28 (1934), p. 602.
² Herz, in his article, ‘Expropriation of Foreign Property’, loc. cit., above, n. 3, p. 309, at p. 249, n. 18, states that the Claims Commission, in the De Sabla case, found that ‘The whole procedure... amounted to expropriation, although it was neither styled, nor intended to be, expropriation’. While expropriation was not intended in De Sabla, the Panamanian Government did, of course, intend to grant complete title to the land to Panamanian citizens.
claimant was the owner of a plot of land which had been improved by a building containing living quarters and a bakery, the latter with installed equipment and furnishings all of which belonged to the claimant landowner, although the business was conducted by other persons to whom the profits belonged. The Hungarian Government stated that title to the real property had not been taken into State ownership. In this respect the case differs from the *De Sabla* case where there were conflicting registered titles to the land. The Foreign Claims Settlement Commission nevertheless ruled that the claimant’s property had been nationalized or otherwise taken. It relied on the fact that claimant was not receiving any compensation for the use being made of his property, and it stressed that claimant could not use or enjoy the property as he saw fit, nor could he alienate it. In this situation, the fact that claimant still enjoyed the formal *indicia* of ownership could not prevent the conclusion that the claimant’s property had been taken from him.

Similarly, in the case of *Albert Bela Reet*, the claimant complained of the nationalization or other taking of his property in Hungary. The record showed that in 1950 the Government of Hungary had prohibited the sale, the placing of liens upon, or the occupancy of, a dwelling house and courtyard in which claimant had an interest. The Commission ruled that it was clear that the claimant was precluded from the free and unrestricted use of his property, and the fact that the recorded title to his property had not been transferred to the State was of little moment. It concluded that the claimant’s property had been taken from him without compensation.

In addition to these specific decisions the Commission has also rendered certain Panel Opinions for the guidance of its staff in the processing of Czechoslovakian claims. These Opinions have often given more general application to the principles underlying the earlier decisions; sometimes, however, they have enunciated principles going beyond those implicit in the previously decided cases.

The Commission declared in one Opinion that where claims are based on the taking of farm land, if the claimant cannot establish transfer of title but there are indications that the land was turned over to a ‘farm cooperative’ (collective farm), the land in question should be considered to have been ‘taken’. Here the Commission was following its previous decisions. Indeed, in one of the Hungarian claims it had considered an

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almost exactly similar situation. The claimant’s land had been absorbed into a Hungarian ‘farmers’ co-operative’ and there had been no formal transfer of title.¹ In the Panel Opinion the Commission went on to say that, if there is no record of the transfer of title to the co-operative, the date of the physical transfer of the property to the control of the farm co-operative should be used as the date of taking. But it will be necessary later on to say more on the question what should be considered the date of taking when the initial seizure is not expressly termed an expropriation or nationalization.²

The Commission would appear to have gone beyond the decided cases when it responded to the staff’s request for an opinion whether the restrictions placed on certain privately owned dwellings by the Government of Czechoslovakia should be considered a ‘constructive taking’.³ The Czechoslovakian Government had required owners of leased buildings with an annual gross rental income over 15,000 koruna to deposit the rent in a special account, from which account real estate taxes of from 45 to 50 per cent. of the gross rent were to be deducted. At least 30 per cent. of the gross rent was then to be transferred to a building repair account. Other legislation had previously been enacted under which owners were to register all available dwelling space with a Government agency, and the owners were then compelled to rent to persons selected by such agencies. Relying heavily on its earlier decision in the Albert Bela Reet case, discussed above, the Commission concluded that private real property having an annual gross rental income above 15,000 koruna should be considered as having been ‘taken’ by the Government of Czechoslovakia as from the effective date of the law requiring the deposit of rentals with the Government. The Commission noted that the requirement of depositing rentals, when coupled with the requirements of prior laws giving the Government the right to select tenants for such dwellings, amounted to confiscation. The Commission declared:

‘Thus in Czechoslovakia the owner of a building larger than a one-family dwelling having a gross rental income of 15,000 Koruna or more is precluded from the free and unrestricted use of such realty and its fruits, and even though he remains the record owner he is to all intents and purposes practically a managing and collecting agent for the government.’⁴

This is a most important Opinion which was followed by the Commission in subsequent cases involving this kind of situation.⁵ It appears to extend

² See below, pp. 322–4.
⁵ See, for example, Ida Pick, Proposed Decision No. CZ–2,295 (1961), Fourteenth Semiannual
the doctrine of what has been called 'constructive taking' beyond the limits to which it had been carried by the previous decisions and opinions either of the Commission or of international tribunals. Moreover, of all the cases and opinions considered in this paper, it perhaps comes the closest to devising a general test for distinguishing allowable restrictions on the use of private property from restrictions which amount to expropriation. Whether the test proposed is a good one is another matter which will be explored at greater length below.¹

In another Opinion, however, the Commission had been asked whether there had been a 'taking' of property where property was placed under 'national administration'.² The Commission expressed the view that Czechoslovakia's placing of certain property under national administration in 1945 did not constitute a 'taking', since a 'reading of the decree' disclosed that placement under national administration was originally considered by the Czechoslovakian Government as a temporary action to be terminated after the Government had ascertained whether such property should be returned to the original owner or confiscated, nationalized or disposed of in some other manner. The Panel Opinion concluded, on the other hand, that where a 'national administrator' was specifically appointed to liquidate the business, then the placing of such property under national administration would be considered to be a 'taking'. But even in circumstances where the placing of property under national administration did not by itself constitute a 'taking', such action could ripen into a taking where there was a continued failure to return the property in question.³

Cases involving property other than land

In the German Interests in Polish Upper Silesia and the Norwegian Claims cases discussed above,⁴ contract rights were held to have been expropriated by the action of States which disclaimed any intention to expropriate such rights. In those cases, it will be recalled, the respondent States, by taking over respectively a factory and partially completed ships, were held to have expropriated contract rights so closely related to the physical assets seized as to be useless without the physical assets themselves.⁵ But, as already

¹ See below, pp. 332–3.
³ As already noted, attention will be specifically directed to the question of when a temporary taking ripens into expropriation in a later section of this paper. See below, pp. 322–4.
⁴ See above, pp. 310–11.
⁵ In the German Interests in Polish Upper Silesia case, discussed above, pp. 310–11, the expropriation of the factory was deemed to be an expropriation of patents and contract rights being exploited through the use of the factory and its specialized machinery. In the Norwegian
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noted, it is not only ancillary rights which may be so interfered with as to amount to an expropriation regardless of a disclaimer of an intention to expropriate such rights or even to subject them to any interference. There are cases, for example, where personal property, both tangible and intangible, has been seized by a State and the seizure itself has been admitted, but the State has insisted that it was not trying to acquire any kind of title to the property in question. In those cases, when, upon reasonable demand, the authorities have refused to return the property, the property has been considered expropriated and an indemnity demanded for its total value. In the case of *Jabez C. Casto*, for example, it appeared that the Colombian authorities, expecting a strike, had seized fire-arms belonging to one Casto. Despite the fact that the Colombian Government had promised to return all fire-arms seized during the emergency, the local authorities refused to do so. Upon protest by the United States State Department the Colombian Government paid an indemnity to the claimant.¹

The *Casto* case and cases like it are, of course, the simpler ones. There are countless more subtle ways in which a country which refrains from outright seizure and which vigorously disavows any intention to expropriate may, none the less, very seriously and perhaps irreremediably interfere with the use of property. For example when property that had been sequestered during the First World War by Germany was mismanaged by the sequestrator it was held that such mismanagement constituted 'liquidation of the business' for which claimant was entitled to the replacement value of the property sold in the course of the mismanagement. In two of the cases it appears that the sequestrator sold stocks of wine held by wine establishments at a time when it was impossible to renew the stock and at a time when in view of the continual rise in the value of wine such a sale was not a prudent business decision.²

The opinions of the United States Foreign Claims Settlement Commission present other types of situations in which property that has been

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¹ Whiteman, *Damages* (1937), vol. 2, p. 860. Cf. *Société Anonyme des Manufactures des Glaces et Produits Chimiques de Saint-Gobain*, decided by the Franco-German Mixed Arbitral Tribunal (ibid., p. 897). Claimant was a French company which was a partner in the Glass Works Insurance Company, which company, in turn, owned the entire stock of a German glass company. In 1917 the property of the glass company was sequestered by the German authorities and its stock certificates were seized and sold. The tribunal granted the French company indemnity for the deprivation of the use of the income of the German glass company and, more important from the point of view of the present inquiry, it also granted the French company indemnity for the value of the plant. It should be noted, however, that under the treaty of Versailles, claimant had the option of either requesting restitution or of claiming indemnity for the value of the factory.

² See *Stamaslan—Alfred de Montebello (France v. Germany)* decided by the Franco-German Mixed Arbitral Tribunal (ibid., pp. 1526–8), and *Lallier van Cassel et Cie (France v. Germany)* decided by the Franco-German Mixed Arbitral Tribunal (ibid., at p. 1528).
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interfered with has been held to have been ‘taken’ for purposes of ‘international law’, and also, on the other hand, situations in which the interference, although very substantial, has been held not to constitute a ‘taking’. In Panel Opinion Number 6, issued in connexion with the processing of Czechoslovakian claims, the Commission had been asked whether the placing of property, both real and personal, under ‘national administration’ constituted a ‘taking’ of the property.\(^1\) As already noted, the Commission, relying on the fact that the decree in question stated that the placing of property under national administration was only a temporary measure, found that this action did not constitute a ‘taking’ of property unless the administrator was specifically appointed to liquidate the property in question. The Commission, nevertheless, indicated that a continued failure to return or otherwise dispose of the property could cause the placing of it under national administration to ripen into an expropriation. In its earlier processing of Hungarian claims, the Commission had actually been confronted with a case presenting such a situation. In that case it appeared that the Hungarian Government had seized the claimant’s personal property. Although some of the property was later ordered to be returned to the claimant, she never, in fact, received any of the property back. The Commission found that claimant’s property had been ‘taken’.\(^2\) Such a holding accords with the disposition of the Casto claim discussed above.

In several interesting proposed decisions formulated in the processing of Czechoslovakian claims, however, the Commission held that certain fairly substantial interferences with personal property did not constitute a ‘taking’. Thus, it has held that the refusal to grant an export licence for jewellery\(^3\) or to permit the transfer of funds abroad\(^4\) did not constitute a ‘taking’ of property under international law. In other proposed decisions the Commission has held that the suspension of payment of interest upon bonds\(^5\) or the failure to continue to make pension payments\(^6\) did not by themselves constitute the ‘taking’ of the bonds or of the pension rights.

But if, as already shown, contract and many other so-called intangible

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\(^1\) See above, n. 2, at p. 316.


\(^3\) Erna Spielberg, Decision No. CZ-2,466 (1961), Fourteenth Semiannual Report, at p. 146.

\(^4\) Mitski Schoo, Decision No. CZ-279 (1960), ibid., at p. 180. See also Karolin Furst, Decision No. CZ-14 (1960), ibid., at p. 116; cf. Ludvik (Louis) Kanturek, Decision No. CZ-2,250 (1961), ibid., at p. 147 (same as to devaluation). In Panel Opinion No. 1 (ibid., at p. 124), the Commission had refused to make any general findings of confiscation or to lay any general rules for the treatment of bank accounts such as those involved in these cases. See also Helbert Wagg & Co., Ltd., [1956] 1 Ch. 323. Cf. Kahler v. Midland Bank Ltd., [1950] A. C. 24 (foreign securities which could not be transferred abroad without permission of the Czechoslovakian National Bank); Rex v. International Trustee, [1937] A. C. 500 (effect given to U.S. annulment of gold clauses and devaluation of dollar).


\(^6\) Ignatius H. Pietrzak, Decision No. PO-1 (1961), ibid., at p. 196.
rights can, under certain circumstances, be expropriated, even by indirect interference, it has been asked whether there may not be other intangible property rights—and the physical assets with which these rights are sometimes associated—that, perhaps, will not be held to have been expropriated despite very substantial State interference and regardless of whether such interference is called direct or indirect. Whether property rights in the nature of good-will, for example, can be the subject of a taking for which compensation must be paid is a question which has plagued the writers.\(^1\)

The few actual cases presenting the issue have normally involved situations where a State has granted, or assumed for itself, a monopoly over a particular industry.\(^2\) Although the damages in these situations are, for the sake of convenience, often referred to as damages to the ‘good-will’ of a business, substantial loss of value even in physical assets may be involved. For example some of the physical assets may be such as to be of no use at all in any other type of endeavour, or the cost of conversion to other uses may be too great to be practicable; and it may be simply too expensive to make it worthwhile to transport the equipment to another country. Finally, a factory, or other real property, may be situated in a place where there is no other type of business, owing to the nature of the location, to which such

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\(^1\) Asserting that compensation must be paid for such a taking: e.g. Audinet, ‘Le Monopole des assurances sur la vie en Italie’, *Revue générale de droit international public*, 20 (1913), pp. 5, 10; Rolin, ‘Les Droits des sociétés étrangères’, *Revue de droit international*, 14 (1912), (n.s.), p. 82; cf. Borchard, *Diplomatic Protection of Citizens Abroad* (1915), p. 182; Fischer Williams, ‘International Law and the Property of Aliens’, this *Year Book*, 9 (1928), pp. 1, 25–26 (intangibles such as good-will should be treated the same as tangibles). Wortley also indicates that under some circumstances he would consider action destroying good-will to amount to an expropriation (op. cit., above n. 1, p. 307, at pp. 112–13).

Taking the opposite position: e.g. Fachiri, ‘International Law and the Property of Aliens’, this *Year Book*, 10 (1929), pp. 32, 39–49; White, op. cit., n. 1, p. 307, at p. 49. See also Du-Besse, ‘The State Monopoly of Life Insurance in Italy’, *Annual Bulletin of the Comparative Law Bureau of the American Bar Association*, 6 (1913), pp. 23, 30, where it is asserted that the Italian insurance monopoly, to be discussed below, did not involve any violation of international law but that it did involve a violation of Italian law. Herz, loc. cit., above, n. 3, p. 309, at pp. 245–6, has a brief discussion of the problem and cites additional authorities. It should be noted, however, that he incorrectly classifies Borchard as supporting the position that no compensation is payable. It is only with respect to domestic law treatment that Borchard concludes compensation may not be obtainable (op. cit., at pp. 125–9).

\(^2\) Where an enterprise is directly seized by a State, whether on a temporary or permanent basis, the normal method of computing compensation would take into account the value of the enterprise seized as a going concern. Thus such compensation would usually include at least some payment for what might be called ‘good-will’. The question is briefly discussed, together with the citation of some authority, in n. 2, at p. 336, below. Similarly, suitability for a particular use is normally one of the elements of the value of individual pieces of property which a State might seize, although, admittedly, good-will includes more than this since it includes the unique value of the property to its owner. For example, the property upon which an alien maintains a department store may be condemned and there may be no other site in the vicinity to which the business may be transferred. See Nichols, *Eminent Domain* (3rd ed., 1950), vol. 2, § 5. 76, at pp. 109–12. The position taken by this writer at pp. 336, 338, below, is that loss of good-will, as such, is not compensable, although as indicated in n. 1, at p. 336 below, Wortley thinks the rule should be otherwise if the State has acted primarily for the purpose of destroying an alien’s business.
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property may be turned. Moreover, the contracts of such an enterprise and the profits expected to be made on such contracts must also be considered. Thus the issues raised by the monopoly cases are not solely those relating to whether good-will, in the sense of something beyond the capital invested in an enterprise, can be subject to an expropriation for which compensation must be paid. Rather these issues include the broader question whether the proclamation of a monopoly—or even, without the creation of a monopoly, the total prohibition of a certain type of business—also constitutes the taking of physical assets devoted to such economic activities and of contract rights relating to them. Furthermore, there is the question of the effect of measures falling short of the creation of an exclusive monopoly, or of the proclamation of a total prohibition, of a particular type of business.

The controversy between the United Kingdom and the Kingdom of the Two Sicilies has often been cited as authority for the proposition that claims for compensation on the part of foreigners engaged in a trade may arise from the grant of a monopoly by a State.1 In 1838 the Kingdom of the Two Sicilies entered into a contract with a private firm whereby the firm was granted a monopoly of the extraction and exportation of Sicilian sulphur. The United Kingdom, on behalf of its nationals engaged in the sulphur industry in Sicily, lodged a strong protest against this action and, it is said, even threatened the use of force.2 As a result of this protest, and through the mediation of the French Government which had tendered its good offices, the Kingdom of the Two Sicilies, in July 1840, cancelled the contract granting the monopoly and agreed to compensate British nationals who had been injured during the existence of the monopoly.3 Accordingly, a Commission composed of two Englishmen and two Neapolitans, with a French umpire to resolve deadlocks, was set up to hear the claims. Among the claimants who received compensation were those who had sulphur mines in Sicily at the time of the granting of the monopoly. These people received compensation for the losses they had sustained by virtue of being prevented from extracting or exporting sulphur. There were also two other classes of claimants. The first was composed of those who had contracts to supply sulphur which they were prevented from fulfilling. The other was composed of those who having purchased sulphur in Sicily had been prohibited from exporting the sulphur. In both these types of

1 For the disposal of this dispute see British and Foreign State Papers, 30 (1841–2), pp. 111–12.
2 See Wortley, op. cit., n. 1, p. 307, above, at p. 113. The Foreign Office correspondence at the time the monopoly was proclaimed is contained in British and Foreign State Papers, 28 (1839–40), pp. 1163–1242. It should be noted that Great Britain claimed that the Sicilian monopoly contravened the provisions of a treaty that British subjects should be subjected to no discrimination with respect to rights enjoyed by nationals of other States. But, of course, discrimination against, or among, aliens is ordinarily considered to violate international law.
3 Ibid. 29 (1840–1), pp. 1225–6.
situation compensation was awarded for the profits which the claimants would have made but for the granting of the monopoly.\(^1\) Likewise, in the *Savage Claim*,\(^2\) an arbitration tribunal awarded damages to an American who alleged that the promulgation of a decree in March 1852 by San Salvador, making the gunpowder trade a State monopoly six months from the date of the decree and imposing certain restrictions on that trade in the interim, rendered his gunpowder unsaleable and forced him to abandon it. Here attention was focused more on the physical assets involved.

Subsequent to both these incidents the Italian Government in 1912 made the business of life insurance a State monopoly.\(^3\) In response to the outcry raised when the question had been first discussed by the Italian Cabinet,\(^4\) the law as promulgated contained a provision under which foreign and domestic life insurance companies already operating in Italy might be authorized to continue writing life insurance for another ten years subject to a certain regulation of their operations and also to the requirement that they reinsure 40 per cent. of their risks with the company set up to exercise the State monopoly. In 1923 the hitherto suspended provisions for a State monopoly were repealed and, subject to certain conditions, private companies, both domestic and foreign, were permitted to continue to engage in the business of life insurance in Italy.\(^5\) Several writers at the time the monopoly was promulgated considered the creation of the State monopoly an expropriation of the good-will of the foreign companies for which, under international law, compensation was required.\(^6\)

Thus, until the famous *Chinn* case, there were strong reasons for contending that the grant of a monopoly was a compensable taking of enterprises and of assets owned by foreigners engaged in the same trade. In the *Chinn* case the Belgian Government, in an effort to subsidize exports from the then Belgian Congo during the great depression, directed a local water carrier in which the State owned slightly over a 50 per cent. interest to charge nominal rates on the carriage of certain types of goods. In return the Belgian Government agreed, subject to certain conditions, to make good the losses of the carrier. Mr. Oscar Chinn, a British national, owned

\(^1\) The three classes of claimants and the general nature of the awards are discussed, ibid. 39 (1841-2), pp. 115–16.


\(^4\) See Fachiiri, 'Expropriation and International Law,' this *Year Book*, 6 (1925), pp. 159, 166–7.

\(^5\) Law of 29 April 1923. For the current régime with respect to life insurance in Italy, see *Novissimo digesto italiano, Contratto di assicurazione*, vol. 4, pp. 563–618. Uruguay also tried to establish a State monopoly of life insurance in 1912, but strong protests from Britain and France caused Uruguay to abandon this scheme. The Uruguayan incident is discussed in several of the articles and books cited above in n. 1, at p. 319, including those of Fachiiri and Borchard.

\(^6\) See above, n. 1, at p. 319.

\(^7\) *The Oscar Chinn case, P.C.I.J.*, 1934, Series A/B, No. 63.
the only other common carrier by water operating in the Congo. Not being able to compete any longer, he was forced out of business. Great Britain argued that Belgium had in effect granted to one company a *de facto* monopoly of the carriage, as a common carrier, of goods and persons by water in the Congo. It argued further that this action constituted a taking of Mr. Chinn's property rights in a going business, in violation not only of certain treaties between it and Belgium but also of international law, for which taking Mr. Chinn was entitled to compensation. The Permanent Court of International Justice, in a 6 to 5 decision, thought otherwise.

The *Chinn* case, nevertheless, does not completely dispose of the issue. In the first place, what was involved there was what the United Kingdom called a *de facto* monopoly. In this respect it differs from the circumstances present in the three previous situations discussed above where a monopoly had been expressly created. Second, the Court never questioned Belgium's assertion that its action was prompted by the serious economic situation resulting from the collapse of the world prices for colonial products. There was no proof at all that it was prompted by a desire to drive Mr. Chinn out of business,\(^1\) whereas there had been a desire to drive competing interests out of business in the earlier controversies discussed above. Third, the business of being a common carrier by water involves the use of what might be called public facilities, namely navigable waters;\(^2\) this was not the case, or at least not nearly to the same extent, in the sulphur trade, or in the life insurance business, or in the gunpowder business. Thus, the issue of whether the assumption or the granting of a monopoly by a State constitutes, in international law, a compensatable taking of the good-will and of the assets of foreign concerns actively engaged in that business, must be regarded to a large extent as still open. This issue, together with the other issues already raised by the cases thus far examined, will be discussed later.\(^3\)

*When does a 'temporary' seizure ripen into expropriation?*

It has already been noted that a seizure which, owing to its original temporary nature, is not considered a sufficient taking to justify a claim for full compensation, may, nevertheless, in course of time be deemed to ripen into an expropriation. In one case, that of *Sabine G. Helbig*,\(^4\) the question before the United States Foreign Claims Settlement Commission was whether the claimant's property had been taken before she became a United States national; for if this were in fact the case, she was not entitled, under the applicable statute, to the allowance of her claim. It appeared that in 1939 the claimant had stored certain items of personal property with

\(^1\) Indeed, the Court gave some indication that it specifically rejected any such insinuation; ibid., at p. 86.

\(^2\) Cf. ibid.

\(^3\) See below, pp. 330–6.

a storage concern in Hungary and she claimed that the Hungarian authorities seized the property subsequent to the date of her naturalization as an American citizen in April 1946. The record showed, however, that the Hungarian Government seized the claimant’s property in February 1946 and that the claimant had immediately appealed to the Hungarian authorities for the return of her property. On 27 February 1947 the Hungarian authorities ordered that a portion of the property be returned. No action was taken with respect to the other portion of the property, and in fact none of the property was ever returned to the claimant. The Commission found that the property had been taken prior to the claimant’s naturalization as an American citizen on 15 April 1946. It held that the claimant was permanently deprived of possession, control and dominion over her property at the time of the seizure by the Office of the Commissioner for Abandoned Property. The fact that the authorities subsequently ordered that a portion of the property be returned to the claimant, which order was never executed, did not constitute a change in the date when the property was actually taken from the claimant. This case suggests that, if property is seized under circumstances in which it is unclear whether expropriation is intended, the eventual ripening of the taking into an expropriation will make the initial seizure the act of expropriation. This will be so even if during the intervening period the offending Government expressly recognizes the alien’s title.

This issue was also considered by the Commission in subsequent Panel Opinions issued to provide general guidance to its staff and to future claimants. In one such Opinion the Commission considered a situation where, although the claimant could not establish transfer of title, the proofs showed that land in Czechoslovakia was turned over to a farm co-operative.\(^1\) As has already been indicated, the Commission declared such claims to be compensatable on the ground that under such circumstances the claimant’s property must be considered to have been permanently taken from him. With respect to the question of the date of the expropriation, the Commission was of the opinion that the date of physical transfer to the farm co-operative should be used as the date of taking.

A somewhat different tack, however, was pursued by the Commission in its Opinion dealing with claims based on the placing of property under ‘national administration’.\(^2\) The Commission was asked by its staff to furnish a ruling as to what was the date of ‘taking’ in cases where the restitution of property under ‘national administration’ was denied, or where restitution proceedings were still pending, or where restitution was not even

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applied for. In a partial response to this request, the Commission replied that where restitution had been denied, or where restitution proceedings had been suspended, the property should be considered 'taken' at the date of the order denying restitution or suspending the proceedings. This Opinion of the Commission would seem somewhat inconsistent with its decision in the Helbig case in which it was indicated that where restitution is denied the taking should be retroactively regarded as having occurred on the date of the initial seizure. The Commission's Opinion, however, would not necessarily be inconsistent with the views it had expressed in its Collective Farm\(^1\) Opinion where the taking was also deemed to have occurred at the time of the initial transfer of possession to a farm co-operative. For, in this latter situation, it could be argued that it was readily apparent—Czechoslovakian agricultural policy being what it was—that the land transferred was actually being expropriated and would never be returned. But, where it is doubtful what effect is intended, it seems sensible to date the expropriation from the time the offending Government refuses to return the property or to set a date for its return, and not to refer the date of expropriation back to the date of initial seizure. In so far as the Helbig case suggests a contrary rule, it seems to have been wrongly decided. In several recent decisions dealing with property which had been placed under 'national administration', the Commission followed the rule enunciated in its Panel Opinion.\(^2\)

**Forced sales**

A type of taking that is not expressly called an expropriation, and which, indeed, is normally accompanied by an explicit disclaimer of any such intention, is illustrated by a group of situations commonly included under the classification of 'forced sales'. In some cases there may be an elaborate legal procedure for accomplishing the 'forced sale'; it is obvious, however, that an apparently voluntary transfer made under the threat of an impending expropriation is, none the less, forced. Here again the commentators recognize the right to compensation of an alien who has been subjected to such treatment.\(^3\) But it would be helpful to have something more than abstract principles. Accordingly, while this is not the place for an elaborate treatment of this complex problem, it may, nevertheless, repay the effort to examine briefly, for whatever general guidance they may give, some of the attempts to handle the compensation of victims of so-called 'forced sales' during the Nazi régime.\(^4\)

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1 See above, n. 1, at p. 323.
3 See, for example, Wortley, op. cit., above, n. 1, p. 307, at pp. 1–2.
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During the military occupation of Germany laws were promulgated recognizing the right of victims of the Nazi tyranny to compensation for injuries to their interests in property. United States Military Government Law No. 59 is typical of the laws adopted by the three Western occupying Powers.¹ When the occupation was terminated the German Federal Republic agreed to keep these provisions in effect until all claims were dealt with.² Military Government Law No. 59 applied generally to aliens as well as German nationals.³ Among the categories of injuries for which restitution might be claimed were those arising as a result of 'a transaction contra bonos mores, threats or duress . . . or any other tort'.⁴ In lieu of restitution, a claimant, upon relinquishing all other claims, could demand from the person first acquiring his property the difference between whatever the claimant had received for the property and the fair purchase price.⁵ The framers of the law showed great practical awareness of the nature of the problems that would be presented in actual cases. A rebuttable presumption was created that any transfer of property during the Nazi régime (30 January 1933 to 8 May 1945) by a person who was directly exposed to persecutory measures, or who belonged to a class of persons who were to be eliminated entirely from the cultural and economic life of Germany, was an act of confiscation.⁶ The presumption of confiscation could be avoided by a showing that the transferor was paid a fair purchase price, and furthermore that he was not denied the free disposal of the moneys received, for reasons of race, religion, nationality, ideology or political opposition to National Socialism. Claimants coming from a class of persons who were marked for elimination from the cultural and economic life of Germany were given a right to avoid any transactions involving a transfer or relinquishment of property entered into during the period between the first Nuremberg laws (15 September 1935) and the end of the Nazi régime.⁷ This additional right could only be defeated by a showing that the transaction as such would have taken place even in the absence of National Socialism, or that the transferee successfully protected the claimant's property interests. The fairness of the purchase price was not a relevant consideration.⁸ Finally, a rebuttable presumption was established that

⁴ Ibid., Article 2.
⁵ Ibid., Article 16.
⁶ Ibid., Article 3.
⁷ Ibid., Article 4.
⁸ This is evident from the omission of such defences in the text and the cases have so held. See Schulz v. Rosenthal, I U.S. Ct. of Restitution App. 169 (1950); Rafele v. Benario, VI Supreme
any gratuitous transfer made by a person subject to persecution, as defined in the act, between 30 January 1933 and 8 May 1945, constituted a bailment or the creation of a fiduciary relationship rather than a donation.\(^1\)

With this brief description of Military Government Law No. 59 in mind, it will be helpful now to examine a few of the actual claims presented to the courts set up to adjudicate upon this kind of claim. It should be noted at the outset that the United States Court of Restitution Appeals and its successor after the termination of the occupation, the Supreme Restitution Court, Third Division, have uniformly held that it makes no difference that the transferee did not participate in the persecution of the claimant or in the application of any other form of duress against him.\(^2\) More directly pertinent to the question of what constitutes a taking, these Courts have rendered some interesting opinions as to what will constitute a forced sale resulting from State-sponsored duress in situations where there has been no outright attempt to use force. In one case\(^3\) the claimant, who was married to a Jewish woman, owned an hotel in Kulmbach which he had inherited from his parents. It was apparently the leading hotel in the city, and its restaurant had been very popular in the days before the Nazi régime. Once the Nazis reached power, however, the local Party leaders made it quite clear that they did not consider it proper for members of the Party to frequent the hotel because the proprietor was married to a Jewess. As a result of these pressures the claimant’s business started to decline. In particular, travelling government officials rarely stayed in his hotel, nor did the many business men who had been accustomed to stay there in pre-Nazi days. All this occurred at a time when, owing to increased economic and government activity, hotel accommodation in Kulmbach was scarce. The hotel was even picketed for a short while during the pogrom of 9 November 1938. Finally, in the spring of 1939, the local chapter of the German Automobile Club was severely criticized by the local paper for holding its annual meeting at this hotel. By this time the claimant was disturbed over the future prospects of his business, and accordingly sold out to the respondent under an arrangement whereby the hotel was leased back to him for five years. It was held that, under the circumstances, the claimant’s property had been confiscated, and restitution was decreed in his favour. Likewise, the legislation prohibiting the maintenance of denominational schools, coupled with a hint of possible expropriation, made the sale by a Catholic order of the buildings formerly housing its lycée for girls.
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a confiscation resulting from threats within the meaning of the restitution law.¹

In a case somewhat analogous to the State monopoly situations previously discussed above, another claimant, a known former critic of the Nazi régime, had been the owner of a furniture store which he had bought from his former employer, a Jew.² Despite the fact that the claimant’s wife belonged to the Party, he was denied a permit to operate a furniture store because he was considered, apparently quite correctly, still to be harbouring pro-Jewish sentiments. After repeated unsuccessful efforts to get the licence, the claimant sold out. He now sought, not restitution, but a sum as compensation for the inadequate price he said he had received for his business. The Court upheld his claim.

Finally, before concluding this brief examination of post-war German cases, it should be mentioned that in a case where the claimants belonged to a class whose elimination from German cultural and economic life was being sought, it was held that they could avoid a transaction even though, at the time of the transaction, the claimants were beyond the reach of Nazi power.³ The discriminatory laws promulgated with respect to Jewish-owned property were held to be persecution and duress enough, even if a particular claimant were outside Germany at the time. It was recognized that duress could be exercised solely against a man’s property; the claimant did not have to be in any physical danger.

These factual situations presented to the restitution courts cannot be dismissed as being of merely historical interest: there were instances of forced sales induced by a fear of coercion and political reprisals during the post-war nationalizations in eastern Europe.⁴ Moreover, it is easy to imagine very similar situations arising today. Let us assume for example, that an underdeveloped country decides that it wishes to rid itself of foreign interference in some particular sphere of its economy, or even totally to remove foreign participation from its economic life; and further that the intention to institute such measures is widely known: even assuming there is no definite indication that the State contemplating the expropriation of foreign property will refuse to recognize an obligation to pay compensation, many foreigners will still be tempted in this situation to sell out for what they can get. They will be even more tempted to sell if they are subject to constant although individually trivial instances of harassment and if unofficial

campaigns are instituted to stir up hate of foreigners. Under such circumstances, the allurement of the bird in hand will be very hard to resist. Could such aliens later claim that they were the victims of forced sales, particularly if they could point out that no compensation was ever paid to those who did not sell out? Would the answer to this question depend on whether those who sold did so to persons connected in some way with the Government then in power? In either event, after that passage of time which seems inevitable in the preparation and the securing of an opportunity of presenting an international claim, could many of the claimants get very far if they were not aided by the very sort of presumptions to which resort was had in the Nazi situation? One may seriously doubt whether they would. Unless a claimant has sold for a ridiculously low price the problems of proof may be insurmountable. The relevant events will have occurred long ago and witnesses may be hard to find. What witnesses there are may all be located in the respondent States. Memories may fail. In the Nazi situation claimants were materially assisted in the presentation of their cases by the fact that the Nazi régime had been overthrown. Yet even there it was held that where it was sought to prove a confiscation solely from the fact that the purchase price was allegedly inadequate and without any independent showing of duress, the price received must have been ‘such a mere pittance that it would “shock the minds of reasonable men”‘.1

But even leaving aside, for the moment, the question of proof, there are still other serious problems which must be considered; and the less the situation resembles the extraordinary cases during the Nazi régime, the more difficult these problems become. It might be asked, for example, whether, unless the respondent State has actually declared that it will not pay compensation, an alien ought to be entitled to sell out for what he can get and then come around with a bill for the excess? Perhaps he should be compelled to take his chances one way or the other? Or, perhaps, the question should depend on whether at the time of a sale in anticipation of expropriation reasonably ‘adequate’ compensation has been expressly promised? Regardless, however, of what is promised, suppose no compensation is in fact paid within a reasonable time? Will this justify the conduct of those who sold out for what they could get, and entitle them now to present a claim for the balance?

The whole question could, of course, be complicated even further if the price the alien received for his property were subjected to some sort of monetary restrictions. In the Nazi situation this, when added to other factors, was considered to make a transfer of property a confiscation.2 An

extreme case of such monetary restrictions taken from a situation of outright expropriation is Dr. Castro’s offer to compensate Americans, whose property had been nationalized, with thirty-year bonds, the interest and principal to be paid out of a fund into which would be paid 25 per cent. of the amounts received from the sale to the United States, at a support price of 5.75 cents per pound, of all sugar in excess of 3,000,000 tons annually.\(^1\) It is evident that some such similar scheme could also be applied to the proceeds foreigners received from so-called ‘forced sales’. In this respect, moreover, it has been suggested that currency regulations such as those imposed by Great Britain in 1947 and 1949 might have been subject to attack.\(^2\) Something more will be said about currency regulations later.\(^3\) The point is, however, that the mere recognition in general terms of a right to compensation on the part of an alien who has been involved in what might be called a ‘forced sale’ or other form of duress does not get one very far; this is, in fact, only another type of situation, albeit a rather different type, in which the question arises as to what is a sufficient taking so as to amount to an expropriation. The factual situations in this kind of problem can be very intricate and, unfortunately, there does not seem to be much authority. Future cases will have to decide how far a panicky alien property holder can question the good faith of the State in which he is operating, and how far he will be compelled to rely either on promises of future compensation or even on a presumption that adequate compensation will be paid by the State. The difficulty and inconvenience of claims based on forced sales would seem to require that the alien must in most cases take his chance of ultimately obtaining compensation from the State involved. If he prefers the bird in hand and sells out for what he can get, then he should normally be prepared to sacrifice any future claims based on the inadequacy of his receipts from the sale. If, however, the threats to an alien’s property are accompanied by threats to his physical security, the rule should be otherwise; similarly, if the State in question flatly declares that it will not pay any compensation for the alien-owned property whose seizure is threatened. But even in such situations, unless the alien can show that he received an obviously inadequate price for his property, he should be denied the right to assert a claim based on the insufficiency of the price he has received.

\(^1\) These provisions are contained in Cuban Law 851, 6 July 1960. An English translation of this law may be found in American Journal of International Law, 55 (1961), p. 822. In Banco Nacional de Cuba v. Sabbatino, 307 F. 2d 845, 862 (2d Cir. 1962), cert. granted, 372 U.S. 905 (1963), it was said that in the period 1934 to 1959 there were only three years when the United States bought over 3,000,000 tons of Cuban sugar and that for the ten years preceding nationalization the average price was 5.50 cents per pound.


\(^3\) See below, pp. 331–2.
III

Both the importance and the extreme difficulty of deciding what constitutes a sufficient taking so as to warrant a demand for full compensation for the property taken have been recognized. In hearings before the Committee on Foreign Relations of the United States Senate, the Committee on Foreign Law of the Association of the Bar of the City of New York proposed that definitions of the word 'taken' might be included in future bilateral treaties of trade and navigation in the provisions dealing with the expropriation or other taking of property.¹ This was an admirable suggestion. Unfortunately, the Committee did not go further than to suggest that this definition should be such as to make it clear that 'taking' would include '... measures which, though falling just short of the seizure of the full title to the property, effectively deprive its owner of the use and enjoyment thereof, for example, the appointment of a custodian'.²

The recent Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens also shows an awareness of the difficult nature of the problem,³ as does the American Law Institute's Draft Restatement of the Foreign Relations Law of the United States, which, in its provisions dealing with State responsibility for economic injury to aliens, greatly relied on the Harvard Draft.⁴ In Article 10, paragraphs 1 and 2, of the Harvard Draft, the taking under the authority of the State of an alien's property is, with certain exceptions, made wrongful. A 'taking of property' is defined in paragraph 3 (a) as follows:

'A "taking of property" includes not only an outright taking of property but also any such unreasonable interference with the use, enjoyment, or disposal of property as to justify an inference that the owner thereof will not be able to use, enjoy, or dispose of the property within a reasonable period of time after the inception of such interference.'

In the comments accompanying this article, Professors Sohn and Baxter state that they recognize that there are a variety of methods by which a State may interfere with an alien's right to use and enjoy his property and that this interference may even go to the extent of the 'State's forcing the alien to dispose of his property at a price representing only a fraction of what its value would have been had not the alien's use of it been subjected to interference by the State'.⁵ Among the measures which a State might

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¹ Hearings before the Senate Committee on Foreign Relations on Executives, E, G, and H, 84th Congress, 2nd session, 15 (1956).
² Ibid.
³ The portions of the draft relating to injuries to the economic interests of aliens are reprinted, together with some comments, in American Journal of International Law, 55 (1961), pp. 545-84.
employ are the blocking of factory entrances on the pretext of maintaining public order, the setting of wages for local labour at prohibitively high rates, the denial of visas for foreign technical personnel, the deliberate refusal of foreign exchange for the purchase of necessary machinery, interference with the alien’s occupation of his real property and, finally, the appointment of conservators, managers or inspectors who might interfere with the free use by the alien of his premises and facilities. The draftsmen also mention what they call the simpler method of forbidding an alien to sell his property. In the opinion of the draftsmen the crucial consideration in determining what constitutes a taking will be the duration of the interference. They conclude that ‘considerable latitude has been left to the adjudicator of the claim to determine what period of interference is unreasonable and when the taking therefore ceases to be temporary’. The unreasonableness of an interference must be determined ‘in conformity with the general principles of law recognized by the principal legal systems of the world’. No attempt was made to particularize on the expression because the matter seemed one ‘best worked out by international tribunals’.

The comments of the editors of the *Netherlands International Law Review* during the controversy over the Indonesian seizure of the property of Dutch nationals have already been alluded to. The first factor which the editors stress as determining what constitutes a sufficient taking so as to give rise to a claim for full compensation is the assumption of managerial control. This in itself is said to constitute confiscation. The second important factor they stress is the refusal to grant permission in advance for the transfer of operating profits to the owners.

It is obvious, of course, that in any doubtful case the passage of time will strengthen the conclusion that the property in question has been expropriated. One cannot quarrel with the importance the Harvard draftsmen gave to this factor. Presumably also, as the cases indicate, the express declaration by a State that the taking in question is ‘temporary’ will cause the conclusion of an expropriation to be postponed somewhat longer than it might otherwise have been. The conclusion that a particular interference is an expropriation might also be avoided if the State whose actions are the subject of complaint had a purpose in mind which is recognized in international law as justifying even severe, although by no means complete, restrictions on the use of property. Thus, the operation of a State’s tax laws, changes in the value of a State’s currency, actions in the interest of the

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1 Ibid., at p. 559.
2 See above, n. 3, p. 308.
4 Ibid., at p. 242.
5 As has already been seen above, the mere fact that an alien still has a ‘record’ title will not avoid a conclusion of expropriation where the restrictions on use are complete or almost complete. See above, pp. 313–15.
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public health and morality, will all serve to justify actions which because of their severity would not otherwise be justifiable; subject to the proviso, of course, that the action in question is not what would be 'commonly' called discriminatory either with respect to aliens or with respect to a certain class of persons, among whom are aliens, residing in the State in question. The word 'commonly' is used because there have been, and no doubt still are, some who would hold that a progressive income tax is discriminatory or otherwise unreasonable, just as there are others who urge that all excise taxes are discriminatory. It is enough to say that the purposes justifying such taxes are generally recognized in international law. They are referred to in paragraph 5 of Article 10 of the Harvard Draft.

'Purpose', however, is a much abused word in international law. It is impossible to read many of the authors who have written widely on the subject of expropriation and nationalization without coming to suspect that, at least some of the time, they are not talking about the purpose which a State actually gives for its actions but rather about some 'real' purpose, some subjective purpose, which motivates the State or, rather, the persons who have the supreme power in a State. But it certainly would seem that if the facts are such that the reasons actually given are plausible, search for the unexpressed 'real' reasons is chimerical. No such search is permitted in municipal law, and the extreme deference paid to the honour of States by international tribunals excludes the possibility of supposing that the rule is different in international law.

All this having been said, there is still a long way to go before one can come to any reasonably concrete conclusions on the subject. General rent control, for example, is normally not considered to amount to expropriation. But what if that control is long continued and the general inflationary trend to which all modern States seem to be subject makes the return on property woefully inadequate? Such situations have, of course, arisen in the industrially advanced States of the West, i.e. the States whose usual role is as plaintiff in expropriation cases. How does this situation differ, other than in the period of time it took to develop, from the conditions in Czechoslovakia which, as noted above, were considered by the Foreign Claims

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1 In The Times of 4 April 1962, at p. 5, is printed an excerpt from editorial comment in The Times for 4 April 1862 on the budget for 1862–3 presented the day before by Mr. Gladstone, then Chancellor of the Exchequer. The retention of the income tax was criticized. It was said that income taxes were not as conducive to thrift as were indirect taxes which latter worked to discourage consumption. Income tax and other direct taxation, it was said, would encourage gambling-type activities and extravagant expenditures.


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Settlement Commission and seemingly rightly found, according to the general principles enunciated by most of the commentators, to amount to a complete taking of the property in question for which full compensation was appropriate? It will be recalled that the facts underlying the Commission’s Opinion were that in addition to requiring owners of real property to lease to whomsoever the State directed, the total gross income of property bringing in over a certain annual amount had to be deposited into a special account from which about 80 per cent. was deducted for real estate taxes and contributions to a building repair fund. This would seem a very difficult case.

The editors of the *Netherlands International Law Review*, as has been already pointed out, suggested that the refusal on the part of Indonesia to grant permission in advance for the transfer of funds abroad to the owners of the Dutch enterprises taken over by Indonesia in effect deprived the Dutch owners of all enjoyment of their property. The British currency regulations in late 1940 severely restricted the transferability of sterling outside of the sterling area. Did they amount to an expropriation? Wortley seems to suggest that they may well have done so. But successful repudiations of gold clauses suggest that in this field, as in so many others, when the necessity is great enough, almost any interference will be permitted. So does the holding of the Foreign Claims Settlement Commission that the refusal to permit the transfer of funds abroad does not constitute confiscation. As previously noted, the Commission has also held that the suspension of interest payments upon bonds and the failure to continue to make pension payments did not constitute a taking of the underlying rights involved. Even the refusal to grant an export licence for jewellery did not, according to the Commission, constitute a ‘taking’ of alien property.

The right which seems, from an examination of the cases and of the underlying realities, to be least subject to successful interference, is the right of the owner to manage his enterprise. And yet, even here one cannot be dogmatic. The fact that an alien employer is suddenly forced to take nationals of the local State on to his board of directors would not seem, by itself, to amount to expropriation. Nor would it seem to be expropriation if the alien owner were forced to take representatives of his labour force on to his board. There might even be circumstances where operating control over the enterprise might be completely taken from the alien owner.

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1 See the Panel Opinion of the Foreign Claims Settlement Commission discussed above, p. 315.
5 See above, n. 4 at p. 318.
6 See above, n. 5, at p. 318.
7 See above, n. 6, at p. 318.
8 See above, n. 3, at p. 318.
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without rendering the State liable even for 'damages' for use. Suppose a State took over certain foreign enterprises and operated them prudently, paying a fair return, perhaps the actual profits of the enterprise, to the owners. Presumably after a sufficient passage of time such action would amount to an expropriation, but how long this period might be one would not wish to hazard a guess. If the State announced in advance that the taking would be for the duration of the 'present economic emergency' but 'in no event' longer than, say, 'five years', it would seem doubtful whether an alien could complain that his property had been expropriated. Under somewhat analogous circumstances there are strong indications that, in the United States at least, such property would not be considered to have been expropriated.¹ In such circumstances one might be tempted to ask whether the foreigner could alienate his property during the stated period and try to resolve the controversy on this ground. The editors of the Harvard Draft suggest this as a possible test.² But if the enterprise were sufficiently large this criterion would add nothing because of the lack of possible buyers other than the State itself.

The difficulties surrounding the question of what constitutes a 'taking' become even more acute when consideration is turned to the question of whether a grant of a monopoly or the total prohibition of a certain line of endeavour constitutes the 'taking' of property devoted to such activities. It is one thing to say, as was said in the Chinn case,³ that no one has a right to be free from competition or from changes in the public's tastes even though the new competition or the changed public tastes might in fact result in driving the complaining party out of business. It is another thing actually to forestall the struggle for economic survival by denying a business the chance to compete, whether through the creation of a State monopoly or by giving a business no scope to influence public tastes through the total prohibition of a particular line of endeavour. Certainly, in these latter instances, if an alien can show that his property is such that it has no other uses and that its withdrawal to another State is impractical, he has incurred every bit as great a financial loss as if the State physically destroyed the property in question. The difficulties in this area are, of

¹ In an appendix to his Concurring Opinion in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), (at pp. 615 et seq.), Mr. Justice Frankfurter compiled a 'Synoptic Analysis of Legislation Authorizing Seizure of Industrial Property'. The validity of a small number of seizures under this legislation was unsuccessfully challenged in the lower federal courts. All this legislation was possessed of two characteristics. First, seizure was authorized for a limited duration and in most instances the limits were prescribed with reasonable precision, e.g. 'the duration of the war', 'in time of war', 'not . . . longer than is necessary for the suppression of this rebellion', &c. Second, this American legislation without exception contained provisions for the determination and payment of just compensation for the use of the property seized by the Government. The seizure in Youngstown, of course, was not based on statutory authority.

² Article 10, para. 3 (a) of the draft.

course, compounded by the fact the grant of State monopoly over, say transportation, or the prohibition of the liquor or tobacco trade, is so intimately connected with a State's police power, for the exercise of which many domestic systems generally favourable to private enterprise normally do not provide compensation. Thus, if, as in the Chinn case, the monopoly granted concerns the use of public facilities, such as the navigable waterways or the public highways or the airways, the grant of a monopoly will normally not constitute an indirect taking or expropriation unless the revocation of a franchise is involved, in which case other factors will have to be considered. Nevertheless, where the police power is not involved—and a State's mere assertion that the police power is involved is obviously not conclusive on this issue—there seems no reason why a claim for compensation should not be allowed. Unless a State can show, for example, that the rates charged by private companies are exorbitant, or at least somehow unreasonable, the creation of a State monopoly on life insurance would not seem to be a justifiable exercise of the State's police power through which the obligation to pay compensation for any fixed assets affected may be avoided. The same conclusion would seem to be applicable to most types of manufacturing for civilian, as opposed to military, consumption.

What measures short of the grant of a total monopoly or the complete prohibition of a particular trade, should be held to give rise to a claim for compensation will, of course, be a difficult question. Suppose that, instead of granting a monopoly to a State-chartered enterprise, a State embarked on a comprehensive subsidized insurance scheme that substantially destroyed the markets of private insurance companies. Not only could there be a claim that the police power is involved here but the private companies are still technically free to write as much business as they want. It would seem, on balance, that in cases of 'partial monopoly' or 'partial prohibition' the difficulties are so great that the only practicable solution is to resolve all doubts against the alien claimant.

Difficult as these questions are where the claims are based upon the loss of value of physical assets, it is even more difficult to say whether aliens,

1 As to England, see Wortley op. cit. above, n. 1, p. 307, at pp. 50–57, 110–11. As to the United States, see Nichols, Eminent Domain (3rd ed., 1950), § 1. 42. See particularly ibid., § 1. 42 [3]. As both writers recognize, the police power may be abused. In international law, of course, a State's reasons for its actions are not binding on international tribunals although they will be admittedly loath to set such reasons aside. Cf. above, n. 4, at p. 332.

2 In the United States § 401 (i) of the Federal Aviation Act of 1958 specifically declares, in a provision taken almost verbatim from the Civil Aeronautics Act of 1938, that 'no certificate of public convenience and necessity shall confer any proprietary, property, or exclusive right in the use of any air space, Federal airway, landing area, or air-navigation facility' (72 Stat. 756, 49 U.S.C. § 1371 (i).

3 See Wortley, op. cit., above, n. 1, p. 307, at pp. 55–57. Even if franchises to operate public utilities are considered revocable, Wortley thinks that the revocation of a franchise for a fixed term gives rise to a claim for compensation, ibid., at pp. 57, 113. Since these are direct takings they are beyond the scope of this paper.
whose businesses have been destroyed by the promulgation of a monopoly or the total prohibition of certain types of activities, may claim damages for loss of good-will. Many writers assert that no such claim for damages may be made.\(^1\) It might be pointed out that, in the United States, for example, there is no constitutional right to compensation for such alleged losses and generally no awards for loss of good-will are made.\(^2\) It would seem difficult to argue, particularly in the light of the nebulous and hard-to-ascertain value of such ‘good-will’, that a different rule should obtain in international law.

One thing, however, emerges very clearly from this examination: even slight variations in the facts can produce substantial differences in results. There are some guiding principles in deciding what kind of interference will constitute a taking, but they apply only to a certain degree. To push them further may lead to unsound conclusions. Thus, outside of the fairly clear cases—such as the *Norwegian Claims* case\(^2\) where the requisition of partially completed ships rendered completely valueless claimant shipowners’ contracts for the construction of new ships, or the transfer of control of claimant’s land to a collective farm where it is obvious the land is being expropriated although no attempt is made to affect record title—one must proceed with caution.

IV

Conclusions

Granting, then, that what is considered a reasonable restriction on the use of property will depend to a very large extent on the social and economic

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\(^2\) See Nichols, *Eminent Domain* (3rd ed., 1950), vol. 2, § 5. 76. Where a business is directly taken over by the State, compensation is normally computed on the basis of the value of the business as a going concern. This value may often include amounts which cannot readily be assigned to any other account than good-will. See ibid., § 5. 76, at p. 113; cf. Wortley, op. cit., above, n. 1, p. 307, at p. 112. This is, however, a question that is beyond the scope of this paper which is concerned with what constitutes a taking and not the measure of damage for ‘direct’ takings, where the taking is, so to speak, admitted. It should at least be noted, in this connexion, that under the Treaty of Versailles whereby Germany was required to make good damage to ‘property, rights and interest’ it was held that Germany was liable for maintenance of the good-will of French enterprises which had been sequestered by the German authorities. *La Soie*, decided by the Franco-German Mixed Arbitral Tribunal, *Recueil des tribunaux arbitraux mixtes*, 2 (1923), p. 734. Certainly part of the compensation for taking over and using an established business would probably be attributable to good-will since payments for such use would, it would seem, be computed on the basis of the value of the sequestered firm as a going enterprise. The Mixed Arbitral Tribunal, however, may have gone further than this and, in so far as it may have done so, may have established some authority contrary to the position taken in the text, i.e. authority for the proposition that the temporary take-over of an alien-owned firm may constitute a partial taking of the good-will of that firm for which taking damages over and above those payable for the use of the enterprise must be paid.

\(^3\) See above, n. 2, at p. 311.
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views prevailing at any given time, one may hazard the following general conclusions.

(1) Although most interference with property, particularly if it is at all general in nature, can be clothed under the rubric of some recognized social purpose, the cases have clearly indicated that a State’s mere declaration that expropriation is not intended is not determinative of the issue. Even when these protestations are made in good faith the cases have shown that expropriation can be an unintended result of a State’s action. For example, when the use of certain property is so intimately connected with the control of other property which has been expropriated as to be useless without it, then the former property may itself be said to have been ‘taken’ or expropriated.¹

(2) Almost any outright seizure of property, if not initially an expropriation, will eventually ripen into an expropriation. An initial statement that the taking is only ‘temporary’, provisions prescribing the maximum length of State control, detailed provisions calling for judicial or administrative determination of whether the property should be returned to its original owners, provisions calling for the payment of compensation for the use of the property seized, will all serve to postpone a conclusion that the property in question has been expropriated. Moreover, while no one can ordinarily claim exemption from even substantial regulation in the public interest, an alien property owner cannot indefinitely be deprived of virtually all beneficial enjoyment of his property. This conclusion is not altered by the fact that the alien is permitted to remain nominally in possession of his property. The alien cannot indefinitely be reduced merely to a managing and collecting agent for the State. When a seizure which is not originally deemed to be an expropriation ripens into one, the date of ‘taking’ should not be held to go back to the time when the property was initially seized, but the ‘taking’ should, rather, date from the time at which it is determined that there was no reasonable prospect that the property would ever be returned.

(3) There are certain types of State interference which, from the outset, will be considered as expropriation even though not labelled as such. Among these are the appointment of a receiver to liquidate the business or other property. This conclusion, as well as the previous one, is founded upon the premiss that the most fundamental right that an owner of property has is the right to participate in its control and management.

(4) The refusal to give permission in advance for the transfer abroad of operating profits, or other funds, does not by itself amount to expropriation. When coupled with other interferences with the use of property, however, the refusal to permit transfer of funds abroad is a relevant factor in

¹ Throughout this article, of course, these words have been used practically interchangeably.
determining whether expropriation has occurred from the combined effect of all the interference imposed on an alien's use of his property.

(5) The refusal to permit the alienation of real property, or of personal property not easily removable from the State issuing the prohibition, would seem, under some circumstances, to amount to an expropriation for which, accordingly, compensation is payable. If, however, such prohibition can be justified as being reasonably necessary to the performance by a State of its recognized obligations to protect the public health, safety, morals or welfare, then it would normally seem that there has been no 'taking' of property.

(6) Despite the Oscar Chinn case,¹ and the reliance placed by some commentators thereon, it is not at all clear that the prohibition of the sale of certain items (as noted in the fifth conclusion above) or the grant of a monopoly may not amount to the expropriation of the property of alien competitors. In monopoly situations the existence of generally recognized considerations of the public health, safety, morals or welfare will normally lead to a conclusion that there has been no 'taking'. Whether compensation may be obtained solely for the loss of good-will involved in the grant of a monopoly or in the prohibition of a certain line of trade is a more difficult question, and one to which a negative answer would appear to be indicated.

(7) A State's declaration that a particular interference with an alien's enjoyment of his property is justified by the so-called 'police power' does not preclude an international tribunal from making an independent determination of this issue. But, if the reasons given are valid and bear some plausible relationship to the action taken, no attempt may be made to search deeper to see whether the State was activated by some illicit motive.

(8) Where a State compels an alien to sell his property for less than its true value either to the State or to a third party, a compensable claim arises. Where an alien sells his property for less than its true value because of a fear of possible expropriation, the serious practical considerations already discussed² would seem to require that no claim for additional compensation should be permitted unless the State has clearly indicated that it will not pay any compensation to those whose property it may expropriate or unless the alien property holder is actually placed in physical jeopardy.

(9) It is evident that the question of what kind of interference short of outright expropriation constitutes a 'taking' under international law presents a situation where the common law method of case by case development is pre-eminently the best method, in fact probably the only method, of legal development. This article has attempted primarily to lay out the cases in this area and then to give some general indication of the stage of legal development which has been reached, and the lines along which further development may be expected.

¹ See above, n. 7, at p. 321.
² See above, pp. 327-9.