Before The

INTERNATIONAL COURT OF JUSTICE

March, 1976

No. 002

THE UNITED STATES OF AMERICA

Applicant,

- Against -

THE REPUBLIC OF FRANCE

Respondent.

MEMORIAL FOR THE APPLICANT

Team # 2

Barbara L. Speers
Deborah O. Cantrell
Donald G. Nelson
W. Randall Webster

Attorneys for the Applicant

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JURISDICTIONAL STATEMENT

Both the Government of the United States and the Government of the Republic of France have agreed by compromis in the form of a Special Agreement, pursuant to Article 40, Section 1 of the Statute of the International Court of Justice to present, for decision of the International Court of Justice, the difference that has arisen between the two governments. The United States respectfully requests that the International Court of Justice take judicial notice of the Special Agreement appended to the Application before this Court. The United States of America appears as Applicant; the Republic of France as Respondent.

QUESTIONS PRESENTED

I. WHETHER, THE RESPONDENT MUST RECOGNIZE THE OWNERSHIP RIGHTS OF THE UNITED STATES GOVERNMENT IN AMERIND AND TENDER PAYMENT TO THE UNITED STATES FOR GOODS RECEIVED?

II. WHETHER, PAYMENT BY RESPONDENT FOR GOODS RECEIVED IS REQUIRED BY INTERNATIONAL LAW BECAUSE OF (A) THE UNITED STATES' ACQUISITION OF AMERIND BY PENAL FORFIETURE, (B) THE EFFECTIVE EXPROPRIATION OF AMERIND BY THE UNITED STATES?

STATEMENT OF FACTS

On June 12, 1975, a French government-owned corporation, CNFP, received a shipment of plastic products from AMERIND, Inc., an American oil refinery wholly owned by the United States Secretary of the Treasury, as trustee. France, after receiving notice to pay AMERIND, refused. The United States sued CNFP for payment in the appropriate French court. The French court held that payment should be made to CANIND, a Canadian corporation controlled by Saudi Arabian nationals. The purchase price was forthwith deposited in full in Canada.

The United States brings this suit to recover the purchase price owed for the goods received by France. Also submitted for decision to this court, by special agreement between France and the United States, is the validity under international law of the United States Foreign Investment Act of 1975 and the effect to be given previous national court decisions made on the issues presented here.

SUMMARY OF ARGUMENT

The United States Government succeeded to all rights of ownership in AMERIND on May 29, 1975, when the Secretary of the Treasury was duly recorded as owner of all the stock pursuant to court order. The right of ownership includes the responsibility of previous contract obligations. AMERIND's contract obligations with France were fulfilled under the auspices of the United States Government and therefore, it has the right to direct place of payment.

The refusal of France to tender payment for goods received infringes on the United States' right to protect and conserve her natural wealth and resources. Oil refineries, as part of the energy industry, are within the natural wealth and resources of a state. The United States, therefore, has merely exerted her inalienable right to sovereignty over her natural resources by claiming ownership of a domestic oil refinery that was previously illegally controlled by foreign nationals.

The Foreign Investors Act of 1975 is not in violation of international law. The United States has merely taken the necessary steps to protect her national security, as have most nations, from undesirable foreign intervention in the domestic economy. Any divestment of ownership effected by the Foreign Investors Act is a penal forfeiture and not an expropriation in violation of international law. A penal forfeiture, by definition, does not require compensation to the lawbreakers.

Assuming arguendo that the United States' acquisition of AMERIND is defined as expropriation, it is nevertheless an effective expropriation and recognized by international law. The "expropriation" of AMERIND is for a proper public purpose, and without discriminating or arbitrary procedures. The United States asserts that the appropriate compensation in this case is none at all, due to the blatant violation of domestic law by the Saudi Arabian investors. The acquisition of AMERIND by the United States Government therefore has a sound basis in international law, and payment must be made by France for goods received.

ARGUMENT I

FRANCE MUST TENDER PAYMENT FOR GOODS RECEIVED TO THE UNITED STATES.

A. The United States Government has succeeded to all rights of ownership in AMERIND and therefore may direct place of payment.

On May 29, 1975, the Secretary of the Treasury was duly recorded as owner of AMERIND by order of the Third Circuit Court of Appeals. Such order had the effect of vesting full ownership rights in the Secretary of Treasury, as Trustee. The Secretary then notified CNFP, a French government-owned company, on June 6 that payment for goods received should be made to AMERIND in the United States and not to CANIND, a Canadian company controlled by Saudi Arabian nationals. France, after receiving notice to do otherwise, proceeded to pay CANIND. France argues that, even assuming that the United States Foreign Investors Act of 1975 is valid under international law, she is discharged of any duty to pay the United States for two reasons:

(1) Payment for the goods in question has been paid in full to Canada pursuant to original contract terms.

(2) The United States Foreign Investors Act provides only for the "forfeiture of the securities" and not confiscation of the assets nor take-over of management operations.

The United States succeeded to all ownership rights and

obligations on May 29, 1975. The contract responsibility to CNFP was then filled under the auspices of the United States Government on June 4, 1975; therefore it certainly has a right to direct place of payment for fulfilling that responsibility which it did on June 16, 1975.

Yet, France asserts that under the doctrine of pacta sunt servanda, the United States is prohibited from changing the terms of the original contract. It should be noted that this doctrine of international law has not been extended to apply to ordinary commerical contracts between private parties.[1] Nevertheless, the United States is not seeking to invalidate the contract or change vital terms; indeed, she has already performed all of her obligations. The United States has merely determined that because AMERIND is no longer a subsidiary of CANIND the proper place for payment is in the United States. Place of payment is, after all, primarily a banking transaction, dependent on convenience for the parties, and not a vital issue for negotiation.

France contends that the Foreign Investors Act of 1975 does not give the United States Government the power to assert management rights and negotiate contract terms, but only to obtain the stock interest. Such a contention is based on a superficial analysis. To suggest that one hundred per cent ownership is insufficient for actual control of a company is mere cant.

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[1]See, Restatement (2d), Foreign Relations Law of the United States § 193 (1965); Domke, Foreign Nationalization, 55 Am. J. Int'l L. 585, 597 (1961).

Furthermore, the statute indicates that the intent of Congress was to divest the lawbreakers of their ownership rights.

B. The United States has the right to protect and conserve her natural wealth and resources.

The General Assembly of the United Nations in 1962 by Resolution 1803 affirms the equality of developed and developing nations and the inalienable sovereignty of states over their natural wealth and resources, so that takings lawful in all their aspects are legal under international law.[2] If the United States has determined, then, that AMERIND's connection with her natural resources is so close as to make the natural resource of oil less useful without the means to refine it, then AMERIND is a part of her natural wealth. As recently as December, 1973, the United Nations General Assembly adopted a further resolution reaffirming the inalienable rights of States to permanent sovereignty over natural resources. Of particular importance in this case is the language asserting that the General Assembly:

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

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[2]G.A. Res. 1803, 17 U.N. GAOR Supp. 17 at 15-16, U.N. Doc. A/5217 (1962).

legislation of each State carrying out such measures.[3]

That France should argue that oil refineries are not intended by the General Assembly to be included as part of a State's natural resources is tenuous if not hypocritical. It should be noted that France has nationalized her entire energy industry,[4] presumably for just such reason of protecting natural resources. The energy industries of all nations rely almost exclusively on natural resources for fuel oil and gasoline. Oil refineries are an intimate and necessary component of the energy industry and are, therefore, certainly within the intent of the General Assembly resolution. It must be remembered that the Saudi Arabians were not only trying to make money from their investment in AMERIND; they sought a controlling interest, which means they would determine how the refinery is to use the oil. Protection of resources is a hollow phrase unless it includes protection of the means of refining and using those resources. The United States, then, has merely exerted her inalienable right to sovereignty over her natural resources by claiming ownership of a domestic oil refinery that was previously illegally controlled by foreign nationals.[5]

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[3]G.A. Res. 3171, 28 U.N. GAOR Supp. 30 at 52, U.N. Doc. A/9130 (1973).

[4]*See*, U.S. Dep't of Commerce, *Overseas Business Report* (February 1975).

[5]*See*, *e.g.*, *The Islands of Palmas Case* (Netherlands v United States), Hague Court Reports, 2d (Scott) 83, 2 U.N.R.I.A.A. 829, (Perm. Ct. Arb. 1928).

ARGUMENT II

ACQUISITION OF AMERIND BY THE UNITED STATES GOVERNMENT HAS A SOUND LEGAL BASIS IN INTERNATIONAL LAW; THEREFORE CNFP MUST COMPENSATE AMERIND FOR GOODS RECEIVED.

A. The Foreign Investors Act of 1975 is not in violation of international law.

The Foreign Investors Act of 1975, an amendment to the Securities Exchange Act of 1934, is the United States legislation asserting control over foreign investment in the United States. It provides, in essence, that failure to register ownership of 5 per cent beneficial stock interest in an American company prior to acquisition may result in divestment of ownership, if it is determined by the Commission and the President that such acquisition is seriously detrimental to the United States economic interests. In view of the fact that the United States has put the entire petroleum industry under emergency legislation and has formally declared a national energy crisis created by "inadequate domestic production, environmental constraints and the unavailability of imports,"[6] it is not surprising that the President determined that Saudi Arabian ownership of an American oil refinery was contrary to the national interest. This emergency legislation, resulting in stringent regulation of the domestic oil industry, has not only been held constitutional but also determined to be a necessary

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[6]Emergency Petroleum Allocation Act, 15 U.S.C.A. § 751 (1973).

adjustment to changing international economic conditions.[7] Undoubtedly, the energy crisis and the emergency regulations currently imposed on the oil industry were of vital concern to the Commission and the President in deciding that Saudi Arabian control of an American oil refinery must be disallowed.

The previous Saudi Arabian owners of AMERIND were charged with knowledge of their duty to register with the Securities Exchange Commission. However, not only did the Saudi Arabians refuse to register, they contrived a complex plan to purchase the controlling interest in an American oil refinery without revealing their identity. Operating through two corporate entities they gradually and quietly purchased controlling shares in the stock market. Their non-compliance with the registration requirements, combined with such a surreptitious purchase, could reasonably indicate a less than honorable motive for desiring ownership of a United States oil refinery. The United States government has not acted contrary to international law in holding transgressors accountable for their willful violations of the domestic law of that state.[8]

Indeed, as stated in the Standard Oil Co. Case (1926), "In application of a generally accepted principle, any person taking up residence or investing capital in a foreign country

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[7]See, Condor Operating Co. v Sawhill, 514 F2d 351 (Temporary Emergency Ct. App. 1975), cert. denied, 421 U.S. 976 (1975); Reeves v Simon, 507 F.2d 455 (Temporary Emergency Ct. App. 1974), cert. denied, 420 U.S. 991 (1975).

[8]See, e.g., Gerhard Von Glahn, Law Among Nations, 218-19, 223 (2d ed. 1970).

must assume the concomitant risks and must submit, under reservation of any measures of discrimination against him as a foreigner, to all laws of that country."[9] It has been emphasized that one of those risks is that a public need may arise for the ownership or use of certain property and if such is the case, the alien and national alike must submit their ownership rights to the community.[10]

France contends that her refusal to tender payment to AMERIND is based on her determination that the Foreign Investors Act of 1975 is contra to basic standards of French public policy and in violation of international law. The Foreign Investors Act, however, is merely a reasonable solution to a common problem. It is important to remember, as foreign investors do, that, "politically the United States is the only major country in the free world with natural resources which is committed to capitalism."[11] Therefore, there is generally a feeling of confidence that there will be no expropriations in the United States.[12] Nearly every country in the world, however, has laws limiting and/or regulating investment by

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[9] The Deutsche Amerikanische Petroleum Gesellschaft Oil Tankers Case (Standard Oil Case, United States v Reparation Commission) 2 U.N.R.I.A.A. 777, 794 (1926).

[10] See, Bin Cheng, General Principles of Law 37 (1953).

[11] U.S. Treasury Dep't, Foreign Portfolio Investment in the United States 58 (1975).

[12] See, Id.

foreigners.[13] Such laws are presumably based on the need to avoid undesirable foreign intervention in the domestic economy. For example, the French foreign investment policy prevents any foreign controlled firm from gaining a dominant position in any given industry. Furthermore, the entire gasoline industry is nationalized and any foreign investment is prohibited in that area.[14] France, from her distant position, exhibits a great amount of hubris in stating that the United States government policy regarding direct foreign investment, which has been determined by the President, Congress, the Secretary of State and federal judiciary to be in domestic best interests, is to be disallowed in the international forum, particularly in light of her own, more restrictive policy.

B. Action taken under the Foreign Investors Act results in a penal forfeiture and not expropriation.

An examination of past expropriations discloses that the taking of AMERIND is significantly different. The agrarian and oil expropriations by Mexico,[15] the Cuban expropriations,[16]

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[13]See generally, G. Krefetz and R. Marossi, Investing Abroad (1965); Legal Aspects of Foreign Investment (W. Friedman and R. Pugh eds. 1959); Nationalism and the Multinational Enterprise (H.R. Harlo, J.G. Smith, and R.W. Wright eds. 1973).

[14]See, U.S. Dep't of Commerce, Overseas Business Report (February 1975).

[15]See, e.g., Letter of Secretary of State Hull to Mexican Ambassador (July 21, 1938) 19 Dep't of State, Press Releases 50-52 (1938).

[16]See, e.g., E.F. Mooney, Foreign Seizures 77 (1967).

the copper industry expropriations by Chile,[17] were transactions effected by the revolutionary era in their history. The Indonesian nationalization of Dutch properties,[18] the Egyptian expropriation of the Suez Canal,[19] and the Cuban takings of American owned property[20] were essentially retaliatory acts against foreign investors or their governments. And it is obvious that the ulterior motive for all these expropriations must have been to take advantage of an opportunity to acquire an established and profitable venture in the name of the State. None of these expropriations were the direct result of blatant disobedience of the domestic law by the foreign investors. The taking, then, of AMERIND is not an expropriation in the traditional sense but a penal forfeiture. The sanction for breaking this SEC registration requirement is divestiture of ownership of which the Saudi Arabians are charged with notice. The distinction lies in compensation treatment. An expropriation involves compensation obligation questions while a penal forfeiture obviously does not, the penalty being loss of the property and its worth.[21]

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[17] See, Chilean Law No. 17,450, art. 10, § 10, reprinted at 10 Int'l Leg. Mats. 1067 (1971).

[18] See, e.g., G. White, Nationalization of Foreign Property 141-142 (1961). [hereinafter cited as White].

[19] See, e.g., White at 132; G. Schwarzenberger, Foreign Investments and International Law 84 (1969).

[20] See, Cuban Law 851 (the Nationalization Law) July 1960; and Executive Res. No. 1, August 1960.

[21] B.A. Wortley, Expropriation in Public International Law 40-41 (1959).

The penal forfeiture posture emerges in the old English decision of Blads Case.[22] In Blad the goods of an English citizen trading with Iceland were seized by one Blads as holder of letters patent from the King of Denmark, giving him exclusive trading rights with Iceland, then a Danish territory. As a penalty for infringement of exclusive trade rights, the goods were seized, sold and two thirds of the value of the goods were paid to the King of Denmark.

More recent examples of a taking in the nature of a penal forfeiture are the laws of various countries authorizing the seizure of assets used in violation of laws prohibiting dangerous drugs or obscene printing material. Certainly, assuming procedural fairness, compensation is not expected under international law.[23]

There is one other important distinguishing quality of this particular taking that makes it even less like a typical expropriation. The past expropriations all have a common ending. The Cuban government now operates all industry; the Chilean government runs the copper industry; the Iranian government controls the oil industry. The point is that in those situations the Governments expropriated money-making enterprises for the purpose of operating them and retaining the profits. The result of each of these expropriations was

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[22]Blads Case, 3 Swan's App. 603, 36 Eng. Rep. 991 (1674).

[23]See, H.J. Steiner and D.F. Vagts, Transnational Legal Problems 487 (2d ed. 1976).

permanent government ownership. In the case at hand, however, the SEC regulation only provides for temporary ownership by the United States government, the company to be sold to the highest bidder as soon as possible.

It is, of course, a basic tenet of international law that no State may plead its own domestic law to avoid a recognized principle of international law.[24] This, contrary to what France suggests, is not what the United States proposes before this Court. Rather, the United States asserts that no principle of international law is violated by the SEC regulation in question. International law does not proscribe a nation from developing law to protect its domestic economy from harmful involvement, financial or otherwise, of another state.

The United States does not claim that its domestic law is superior to international law, nor does she seek to evade any international legal principle. On the contrary, it is and has always been the practice of the United States to support and encourage the integrity of the International law.[25] Indeed,

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[24] See, e.g., Advisory Opinion on Treatment of Polish Nationals and Other Persons of Polish Origins or Speech in the Danzig Territory [1932] P.C.I.J., Ser. A/B, No. 44; Advisory Opinion on Greco-Bulgarian Communities [1930] P.C.I.J., ser. B, No. 17.

[25] For a recent example of the enumeration of principles of international law as a foundation for bilateral treaties, see, the Joint Statement on Principles of the United States-Polish Relations, 71 Dept' State Bull. 603-604 (Nov. 4, 1974); and, see, the 1970 U.N. Declaration on Friendly Relations, G.A. Res. 2625, 25 U.N. GAOR Supp. 28 at 121, U.N. Doc. A/8082 (1970), which the United States supports.

it is part of the domestic law of the United States.[26]

The United States merely suggests that the particular facts in this case have not given rise to an issue of expropriation in the international forum. The United States has very simply, with advance notice, punished a violator of domestic law. The facts of this case do not suggest a traditional expropriation case, but rather a new and unique challenge for the deliberations of this honorable Court. It is because international law is still developing and maintaining flexibility to accommodate the grievances of politically and economically different countries, that the question presented by this case is of such great importance.

ARGUMENT III

ASSUMING ARGUENDO THAT THE UNITED STATES' ACQUISITION OF AMERIND IS DEFINED AS EXPROPRIATION CNFP MUST NEVERTHELESS TENDER PAYMENT FOR GOODS RECEIVED.

A. Expropriations are recognized under international law so long as they satisfy established standards.

The right of expropriation has been explicitly recognized by international law.[27] The right has been regarded as a

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[26] See, e.g., U.S. Const., art. I, § 8; U.S. Const., art. VI, § 2; The Paquete Habana, 175 U.S. 677 (1900); The Nereide, 13 U.S. (9 Cranch) 388, 402 (1815); Ware v Hylton, 3 U.S. (3 Dall.) 199 (1796).

[27] See, e.g., Chorzow Factory Case [1928] P.C.I.J., ser. A, No. 17; De Sabla Case (United States v Panama) United States and Panamanian General Claims Arbitration, 6 U.N.R.I.A.A. 358, 366 (1933); Panama and Abundio Caselli Case (Panama v United States) United States and Panamanian General Claims Arbitration, 6 U.N.R.I.A.A. 377 (1933); G.A. Res. 626, 7 U.N. GAOR Supp. 20 at 18, U.N. Doc. A/2361 (1952).

discretionary power inherent either in the sovereignty which the State exercises over all persons and things within its territory, or in the right of self-preservation which allows it to oversee the welfare and economic well being of its inhabitants.[28]

Since expropriation is a lawful prerogative of a State, the act itself does not give rise to any international responsibility. It can do so only if it is deemed to be "unlawful" or "arbitrary."[29]

B. The taking by the United States is not "unlawful."

It is a generally accepted principle of international law that an expropriation is only termed unlawful when the State is expressly forbidden by a treaty to take such action.[30] The "expropriation" in the case before the court is not, then, unlawful since the United States has no treaty on this subject with Saudi Arabia.

It is suggested that the traditional concept of unlawful expropriation recently has been extended to cases where the

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[28] See, e.g., Norwegian Shipowners' Claims Case (United States v. Norway) Hague Court Reports (Scott) 40, 1 U.N.R.I.A.A. 309 Perm. Ct. Arb. 1922). Ricaud v. American Metal Co., 246 U.S. 304 (1918).

[29] See, F.V. Garcia-Amador, Draft Articles on the Responsibility of the State for Injuries Caused in Its Territory to the Person or Property of Aliens, Recent Codification of the Law of State Responsibility for Injuries to Aliens 46 (1974) [hereinafter cited as Codification].

[30] See, e.g., Chorzow Factory Case [1928] P.C.I.J., ser. A, No. 17; German Interests in Polish Upper Silesia [1926] P.C.I.J., ser. A, No. 7.

State and the alien are bound by a contractual relationship.[31] The rationale for this extension of course is that both treaties and contracts establish rights and duties of the parties thereto. The International Court of Justice indicates this position in its arbitral tribunal decision between Saudi Arabia and the Arabian American Oil Company (Aramco) involving expropriation under an oil concession agreement.[32] The Court stated that the principle of respect for rights acquired by a contracting party is "one of the fundamental principles both of Public International Law and of the municipal law of most civilized states."[33] Even under this expanded definition of unlawful expropriation, the taking by the United States incurs no international responsibility: there is no contractual agreement on this subject between Saudi Arabia and the United States.

C. The Applicant's "Expropriation" is not arbitrary as defined by international law.

International law posits three consideration to determine if an expropriation is arbitrary: (1) the motives and purpose for the expropriation; (2) the method or procedure effecting expropriation; and (3) compensation for the expropriated property.[34]

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[31] See, Codification, at 64.

[32] Saudi Arabia v Arabian American Oil Co. Arbitrarion Award, 27 Int'l L. Rep. 117 (1958).

[33] Id.

[34] See, Codification, at 49.

(1) The motives and purposes of the United States in this taking are beyond reproach.

The Permanent Court of International Justice in defining the power to expropriate in the Norwegian Claims Case expressly limited that power to that required for the "public good" or for the "general welfare."[35]

Furthermore, the Walter Fletcher Smith Case (1929) states that the declaration of public necessity must be "in good faith."[36]

In this case, the United States has determined that this "expropriation" is for national security and investor protection and has so declared that determination through the Securities Exchange Commission laws.[37] It has proclaimed that registration is necessary for the national security of the country, and that failure to register will result in a taking.[38] Unlike expropriation declarations which state at the time of taking that such action is in the public interest,[39] the United States

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[35]Norwegian Shipowners' Claims Case, supra, n. 28.

[36]Walter Fletcher Smith Case, 2 U.N.R.I.A.A. 913 (1929).

[37]For statement of position of Executive Branch in support of the use of the S.E.C. to obtain information on foreign investment, see, statement of Thomas D. Enders, Assistant Secretary for Economic and Business Affairs to Subcommittee on Foreign Commerce and Tourism of the Senate Committee on Commerce, 72 Dep't State Bull. 781 (June 9, 1975).

[38]See, The Securities Exchange Act of 1934 as amended January, 1975 by the Foreign Investors Act of 1975, sec. 13(d)(1)(D).

[39]See, e.g., Polish Law No. 285 of 1950 quoted in White at 147.

has made a prior statement, and that fact alone indicates her good faith.

France questions the good faith of Applicant by suggesting a retaliatory motive for the taking. Such expropriations are considered to be arbitrary. The United States "expropriation" has none of the characteristics of a retaliatory action.

The Cuban expropriations cases[40] provide the most recent exmaple of an alleged retaliatory expropriation. When the United States curtailed its sugar purchases from that country in 1966, Cuba passed a law stating it was expropriating American holdings due to the reduction of the sugar quota.[41] However, the United States has indicated its purpose for "expropriation" before the Saudi Arabian acquisition. The punishment for improper stock purchase fit the crime, and the punishment was declared beforehand. In the Cuban situation the punishment for United States action did not inexorably follow--Cuba cast about for a way to show her displeasure. While Applicant's action has the same detrimental effect on the pocketbooks of those foreigners who have invested illegally, its taking was forewarned and its action hurt the very people whom it warned; in the Cuban situation individual, private investors who had no control over the United States sugar quota decision bore the brunt of Cuba's action.

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[40] Banco Nacional de Cuba v Sabbatino, 376 U.S. 298 (1964); Banco Nacional de Cuba v Farr, 383 F2d 166 (1967).

[41] See, Cuban Law 851 (the Nationalization Law) July 1960.

(2) Applicant's method of expropriation is not arbitrary.

The following examples of arbitrary methods of expropriation have been identified: (a) a method providing lack of redress by legal action;[42] (b) non-compliance with the essential features of an expropriation procedure in force;[43] (c) failure to comply with expropriation procedures included in treaties;[44] or (d) discriminatory methods or procedures.[45] The United States has not denied the Saudi Arabians the opportunity to bring legal action. It has been stipulated that the hearing provided by the SEC Act has been afforded the interested parties, and that the United States and Saudi Arabia have no treaties in force on the subject.

The United States' method and procedure of "expropriation" are not discriminatory. The SEC Act lawbreakers, whether they are nationals or aliens, are subject to the same requirements. Both domestic and foreign investments are allowed only if it is determined to be in the country's best interests. The United States, in return for allowing foreigners the privilege of investing, asks only that they register

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[42] See, German Interests in Polish Upper Silesia [1926] P.C.I.J., ser. A, No. 7 at 24.

[43] See, Id. at 19.

[44] See, e.g., Treaty between the United States and Norway on Friendship, Commerce, and Consular Rights, Sept. 13, 1932, art. I, 47 Stat. 2135; T.S. 852 (1932).

[45] See, e.g., Convention of Establishment between United States and France, aft. IV, Nov. 25, 1959, ii U.S.T. & O.I.A. 2398, T.I.A.S. No. 4625 (1960).

with the Securities Exchange Commission, as is required of every national beneficial owner of 5 per cent of a company's stock. The penalty for avoiding registration is the same for both nationals and foreigners; 13(d)(1)(D) states that the failure "to make timely reports or take actions required by this Act" shall result in forfeiture.

France argues that the procedure for "expropriation" embodied in SEC (d)(1)(B) is discriminatory in that foreigners must register 30 days before stock acquisition whereas nationals may report within 10 days after acquisition.

The standard definition of discrimination is unequal treatment of those similarly situated. The situation of foreign and national investors is of necessity dissimilar.[46]

Foreign investment is not a right, but a privilege. Each nation has the right to decide upon permitting the importation of capital, and if it decides to do so, it has the right to enact laws regulating such investment.[47] If this were not so, treaties between nations regarding trade would not be necessary, and the Andean Foreign Investment Code[48] or the Canadian Foreign Investment Review Act[49] would not be in

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[46] cf. P.C. Jessup, A Modern Law of Nations 35 (1968).

[47] V. Folsom, The Taking by a State of the Property, Acquired Right, or Other Interest of a Foreign National, When No Contract is Involved, Rights and Duties of Private Investors Abroad: Symposium Dallas, Texas, July 1964 at 293 (1965).

[48] 11 Int'l Leg. Mats. 126 (1972) with corrected pages 141 and 142.

[49] Current Legislative Digest--Canada, 29th Parliament, 1st Sess. 13 (1973).

existence. Simply by virtue of this right to determine its own economic policy, a country has the right to treat foreigners differently in deciding whether it wants their investment.[50]

Due to distance and unfamiliarity with records of ownership in a foreign country, not to mention obtaining permission to gather information, the United States needs more time to decide whether a foreign investment will be in its own best interests, and SEC (d)(1)(B) reflects this necessity.

(3) The lack of compensation for property taken by the United States does not render the "expropriation" arbitrary.

France contends that due to Applicant's failure to compensate Saudi Arabia for the "expropriated" stock, the "expropriation" is null and void and she is discharged from all payment obligations to the United States.

The step-by-step analysis of Applicant's taking _supra_ demonstrated that, aside from lack of compensation, there are no grounds for declaring the "expropriation" to be ineffective. Applicant urges that examination of her reasons for denying compensation will prove that her taking is effective, and that she is justified in exercising ownership rights.

The United States adheres to the necessity for "appropriate" compensation as adopted in the 1962 UN Resolution on

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[50] _See generally_, _Legal Aspects of Foreign Investment_ (W. Friedman & R. Pugh eds. 1959); S.J. Rubin, _Private Foreign Investment_ 6-7 (1956).

Permanent Sovereignty over Natural Resources.[51] Since no compensation has been paid, one must conclude either: (1) that the United States' action is not to be viewed as expropriation but rather a penalty, a view which Applicant favors; or (2) that the circumstances of the expropriation take this case so far outside the general rule that no compensation is owed and would not be in the best interests of the international community.

In setting up a method for establishing compensation for expropriation or nationalization, the current majority position favors standards that are more flexible than the orthodox view of prompt, adequate and effective but do not leave payment of compensation entirely within a State's discretion.[52] In other words, it favors an ad hoc examination of an expropriation with circumstances dictating appropriate compensation.[53] The Applicant submits that if this flexible standard is used, the unique circumstances dictate that no compensation be paid.

Past expropriation cases give little guidance in this case since they are fundamentally different from the situation under examination. In previous expropriation cases most investors came into countries with at least implicit permission

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[51] G.A. Res. 1803, 17 U.N. GAOR Supp. 17 at 15-16, U.N. Doc. A/5217 (1962).

[52] See, Codification, at 58.

[53] See, e.g., G.A. Res. 3171, 28 U.N. GAOR Supp. 30 at 52, U.N. Doc. A/9130 (1973).

and usually concession agreements had been formulated.[54] Companies and investors, in return for such privileges, agreed to be regulated by the laws of the host country. They had justified expectations that, since they were allowed to invest, they would be allowed to reap the benefits of their investment. Expropriation was a rude blow to their expectations. Just treatment therefore required at a minimum an attempt to compensate monetarily for the losses the company or investor had suffered.

In the case before the court, no such justified expectations existed. There was no agreement between the United States Government and Saudi Arabian investors that the investment was approved; quite the contrary situation existed. The Securities Exchange Commission law clearly states that unless certain justifiable requirements are met, the investment will be "expropriated," and the proceeds of the sale will be kept as a fine. In such a situation, Garcia-Amador states, "An alien who makes an investment in such circumstances must remain subject to the provisions of that municipal law and accept as valid at international law any action taken by the competent state authorities in accordance with those provisions."[55]

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[54] See, e.g., Chorzow Factory Case (1928) P.C.I.J., ser. A, No. 17; Saudi Arabia v Arabian American Oil Co. Arbitration Award, 27 Int'l L. Rep. 117 (1958); Anglo-Iranian Oil Co. v Jaffarte, 20 Int'l L. Rep. 316 (Aden, Sup. Ct. 1953); Anglo-Iranian Oil Co. v S.U.P.O.R., 22 Int'l L. Rep. 23 (Civil Ct. of Rome, 1954); Anglo-Iranian Oil Co. v. Idenitsu Kasan Kabushiki Kaisha, 20 Int'l L. Rep. 3-5 (Dist Ct. Tokyo 1953).

[55] Codification at 53-54.

The 1975 provisions of the SEC Act have been held constitutional by a United States Court of Appeals, and the United States Supreme Court has not seen fit to overturn that holding.[56] Therefore, the national lawbreakers will not be compensated. The international law principle that foreigners can expect equality of treatment with nationals will be upheld.[57]

Judge Lauterpacht has stated that in nationalization situations the obligation to pay full compensation might have the effect of making a planned reform impossible.[58] His comment applies equally well to the "expropriation" by the United States: the planned reform is to tighten the United States investment laws to protect national security and welfare. The method chosen to accomplish this reform was to take without compensation the property of those who will not comply with the law. To pay the lawbreakers for their wrongdoing is an absurdity as it defeats the registration requirements.

It is apparent that the standard adopted by Applicant in the UN General Assembly Resolution 1803,[59] that of "appropriate," has been paid in the case before the court. The appropriate compensation in this unusual case is no compensation at all.

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[56] United States v Amerind, ---- F.2d ---- (3rd Cir. 1975).

[57] F.V. Garcia-Amador, Report on International Responsibility, [1956] 2 Y.B. Int. L. Comm'n 173, 199-203, U.N. Doc. A/CN.4/96 (1956).

[58] 1 Oppenhiem, International Law 352 (8th ed. Lauterpacht ed. 1955).

[59] G.A. Res. 1803, 17 U.N. GAOR Supp. 17 at 15-16, U.N. Doc. A/5217 (1962).

It must be concluded that the taking by the United States of Saudi Arabian property, if it is to be viewed as an expropriation, is an expropriation which the International Court of Justice should recognize as valid.

CONCLUSION

The simple fact remains that the United States government has not been paid for the plastic goods it sent to France. As 100 per cent owner of AMERIND, the United States is entitled to payment. France's decision to pay CANIND was based on a faulty analysis of the United States action and misplaced reliance on the German Court decision.

The decision of the German Court, on which the French court based its conclusion that the United States Government should not be recognized as owner of AMERIND, is unconscionable in view of Germany's Constitution. Article 23 declares, "Restrictions and expropriations can only be carried out in the public interest and on lawful grounds. They will be carried into effect in return for compensation for losses suffered _unless_ the law determines otherwise"[60] (emphasis added). Furthermore, the Superior Court of Hamburg in the 1973 _El Teniente Case_ held

> an expropriation which has been effected abroad must in principle be recognized as being formally valid, since in accordance with the internationally recognized principle of territoriality, measures of expropriation cover without limitation the property which was subject to the sovereignty of the expropriating

[60]Grundgesetz art. 23 (1949) (W. Ger.).

state at the time of the expropriation.[61]
The reliance of the French lower court on the German decision is faulty on a third basis. As Germany indicates in the El Teniente Case an expropriation cannot be effective against property outside the boundaries of the expropriating state. In the German transaction, unlike the later French shipment, the shipment of goods had left the United States before the Treasurer was recorded as owner. The products under contract to France, however, did not leave the United States borders until six days after the Secretary of the Treasury was recorded as owner of AMERIND. There is, therefore, no valid reason for the payment by CNFP to CANIND.

It should be emphasized that the United States is the only country before this court claiming ownership of AMERIND and right to payment for this shipment. France should not be allowed to escape payment to the United States solely on her nebulous arguments not even put forward by the countries to whom they belong (i.e. Canada and Saudi Arabia).

In the Barcelona Traction Case the International Court of Justice held: ". . .[W]here it is a question of an unlawful act committed against a company representing foreign capital, the general rule of international law authorizes the national State of the company alone to make a claim."[62]

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[61] Sociedad Minera El Teniente v Aktiengesellschaft Norddeutsche Affineria, 12 Int'l L. Mats. 251 (Sup. Crt. of Hamburg, W. Ger. 1974).

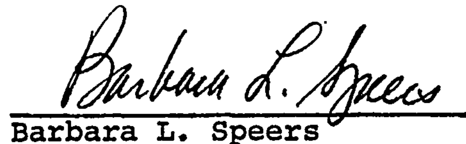
[62] Barcelona Traction Case (New Application, 1962, Belgium v Spain, 2d Phase) [1970] I.C.J. 3.

Apparently neither Canada nor Saudi Arabia have filed actions of any type against the United States concerning the alleged "illegal expropriations." It is therefore, not unreasonable to suspect that France is using such straw defenses as a gambit to avoid payment to the United States.

The United States, as the world's major proponent of free enterprise, does not take lightly the French allegation of expropriation. Indeed, the United States knows only too well the frustration and injustice of draconian expropriations and can feel empathy with those who have also experienced such treatment. It is fundamental to sovereignty, however, that a nation has a right to regulate investments within its boundaries. Certainly it is not asking too much to expect foreign investors to obey the laws of the host country.

Based on the authorities, reasoning, and policy considerations developed herein, Applicant urges this Honorable Court to direct France to order payment to the United States for products received.

Respectfully Submitted,


Barbara L. Speers

Deborah O. Cantrell

Donald G. Nelson

W. Randall Webster