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 RESPONDENT

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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 Republic of France 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

1. WHETHER THE UNITED STATES ACQUISITION OF AMERIND IS CONTRARY TO HER MUNICIPAL LAW AND THEREFORE IN VIOLATION OF INTERNATIONAL LAW?

2. WHETHER THE UNITED STATES ACQUISITION OF AMERIND IS AN EXPROPRIATION IN VIOLATION OF INTERNATIONAL LAW?

3. WHETHER ASSUMING ARGUENDO THAT THE EXPROPRIATION OF AMERIND IS VALID, FRANCE IS DISCHARGED FROM PAYMENT TO THE UNITED STATES FOR GOODS RECEIVED?

4. WHETHER THE FOREIGN INVESTORS ACT OF 1975 IS IN VIOLATION OF INTERNATIONAL LAW?

STATEMENT OF THE FACTS

On February 27, 1975, CNFP, a French corporation, and AMERIND, an American corporation, contracted for a shipment of plastic goods. The contract required CNFP, the buyer, to pay CANIND, a Canadian corporation and AMERIND's parent company, for that shipment. The goods were shipped on June 4, 1975, and CNFP was again requested to pay CANIND. On June 16, 1975, the Government of the United States notified CNFP that she now owned all AMERIND stock and payment was to be made to the United States Treasurer.

The United States then sued CNFP for payment in the appropriate French court. That court found the seizure of AMERIND stock by the United States to be contrary to international law and therefore incapable of transferring ownership rights. Pursuant to that finding, France made payment to CANIND.

The United States claims the Foreign Investors Act of 1975 operated to transfer ownership of AMERIND stock to her. The international validity of this Act, and the seizure of AMERIND stock, are the sources of contention between France and the United States in this case. This dispute has been submitted to this Honorable Court by Special Agreement.

SUMMARY OF THE ARGUMENT

By disobeying her own laws, the United States has caused injury to an alien, and therefore is to be held accountable for that harm under international law. The actions of the United States do not accord with her constitutional and corporation laws. The United States Constitution forbids ex post facto penalties and cruel and unusual punishment. The Constitution also provides that compensation must be made for property taken for a public purpose. Even assuming there is a public purpose, no compensation has been made for the taking of the AMERIND stock. Furthermore, under United States corporation law, a mere shareholder may not negotiate contract terms. The United States as a shareholder, however, is usurping the powers of management by demanding a unilateral change in terms of payment.

The seizure of one hundred per cent of AMERIND stock is not authorized by United States statutory law. If, as the United States contends, the seizure is a penalty for noncompliance with registration requirements, that penalty must be applied only to those who failed to register. The United States however, took the entire stock issue, thereby punishing innocent investors as well.

The seizure of AMERIND by the United States is an expropriation in violation of international law. Neither the motives nor the methods used by the United States are in compliance with standards of international law, and she has

also failed to meet the compensation requirements necessary for an expropriation valid under international law.

Assuming arguendo that the expropriation is valid, France is nevertheless discharged from payment to the United States. The doctrine of state succession binds the United States to the original contract which specified that payment for goods received should be made to CANIND. France, having made that payment pursuant to contract, specific orders from AMERIND after shipment and the judgment of the appropriate French court, is discharged from any obligations to make a duplicate payment.

The Foreign Investors Act of 1975 does not comply with international law. The Foreign Investors Act is contrary to the Code of Capital Movements adopted by the Organization for Economic Cooperation and Development. Furthermore, it transgresses the principles and spirit of the Convention of Establishment between the United States and France. For the benefit of the entire international community, this Honorable Court must hold invalid the Foreign Investors Act of 1975.

INTRODUCTION

The Special Agreement between the United States and France specifies that the "validity of the 1975 Amendments (to Securities Exchange Act of 1934) under the United States Constitution" is not to be addressed to this Honorable Court. France, therefore, carefully refrains from arguing the validity of the 1975 Amendments under the United States Constitution. France asserts, however, that the specific taking of AMERIND by the United States is a topic separate from the question of the constitutional validity of the Amendments. She contends that the actual taking of AMERIND--apart from the constitutionality of the legislation--is a matter of tremendous importance which must be presented to this Court. She requests this Court to examine her arguments showing the invalidity of the expropriation under international law, and on that basis declare that she is discharged from making duplicate payment.

ARGUMENT I

THE SEIZURE OF AMERIND, INC. BY THE UNITED STATES IS NOT IN ACCORDANCE WITH HER OWN MUNICIPAL LAW AND THEREFORE VIOLATES INTERNATIONAL LAW.

The seizure of AMERIND by the United States government disappoints the most reasonable expectation any national or foreign investor could have: that a country will obey its own laws. By not living up to that expectation, the United States has violated a basic tenet of international law. That principle has been succinctly stated:

Failure of authorities of a State to comply with the law

of that nation will engage the responsibility of the State if injury is thereby caused to an alien.[1]

The injuries and potential injuries to both American citizens and foreign nationals require an examination of the United States' actions under her own law.

A. The United States actions are not in accordance with her constitutional and corporation laws.

1. The United States Constitution forbids ex post facto penalties.

Article I, § 9 of the United States Constitution says, "No Bill of Attainder or ex post facto laws shall be passed."[2] An ex post facto law was defined by Chief Justice Marshall in Fletcher v. Peck as one "which renders an act punishable in a manner in which it was not punishable when it was committed."[3] Yet the United States' "penalty" does exactly that.

AMERIND stock was offered to investors over the New York Stock Exchange, and investors who purchased, or planned to purchase, more than 5 per cent of the total shares were apprised by SEC 13(d)(1)[4] that they must register in accordance with specified procedures or incur penalties. CANIND, whose violation initiated the seizure of AMERIND stock, held less than 100 per

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[1]Sohn and Baxter, Responsibility of States for Injuries to the Economic Interests of Aliens, Harvard Draft Convention, Draft No. 12 (1961) reprinted in 55 Am. J. Int'l L. 545, 553 (1961).

[2]U.S. Const. art. I, § 9.

[3]Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 138 (1809).

[4]Securities Exchange Act of 1934, as amended by the Foreign Investors Act of 1975, --- Stat. ---, sec. 13(d)(1) (1975) [hereinafter cited at Foreign Investors Act of 1975].

cent of the total shares. Yet 100 per cent of the stock is now owned by the United States government. Therefore, those investors exempt from, and those who complied with, registration re-requirements lost their stock as well. The Court of Appeals, by its award, therefore enlarged the intended scope of the penalty clause and truly subjected to punishment that activity which was not unlawful at the time it was performed. This is the very essence of an ex post facto sanction.

2. The United States Constitution forbids cruel and unusual punishment.

The 8th Amendment of the United States Constitution says that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[5] The seizure by the United States of one hundred per cent of AMERIND stock, for the failure of an owner of less than that amount to register, is cruel and unusual punishment.

It is cruel and unusual that CANIND's failure to register resulted in forfeiture. The penalty is excessive in relation to the offense committed.[6] Typical punishment for a willful violation of SEC requirements is a fine (sometimes as much as $10,000).[7] Yet CANIND's offense, possibly an oversight, has resulted in the loss of a very large investment. An excessive fine has been imposed.

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[5]U.S. Const. amend. 8.

[6]See, e.g., Weems v. United States, 217 U.S. 349 (1910).

[7]See, The Securities Exchange Act of 1934, c. 404, § 32, 48 Stat. 904.

The seizure of stock is a forfeiture penalty imposed on all stock owners for the offense of CANIND. Punishment is only to be rendered for wrongful actions or for wrongful failure to act; it cannot be indiscriminately handed out to both those who violate the law and those who do not. Such arbitrary punishment must be viewed as cruel and unusual.

Furthermore, the United States Supreme Court has held that the proscription against "cruel and unusual punishment" in turn forbids "status crimes," crimes that do not require proof of any offensive conduct.[8] The actions of the United States can be viewed as declaring AMERIND stock ownership illegal in itself, since those who own stock are punished whether or not they have acted in violation of registration requirements.

In all its aspects, the stock seizure, if viewed as a punishment, violates the 8th Amendment.

3. The United States Constitution provides that compensation must be made for property taken for a public purpose.

The United States' taking of all AMERIND stock for the offense of one investor owning less than that amount, is therefore not a valid penalty. However, if the action is viewed as a taking for a public purpose, it still does not meet constitutional standards, since no compensation has been paid to the stockholders.

It has been stated that

All legal systems recognize that there are various

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[8] Robinson v. California, 370 U.S. 660 (1962).

> circumstances under which it is legitimate for the State to obtain property from a private person against the will of that individual . . . provided it acts in conformity with the governing rules of municipal law.[9] (emphasis added)

The United States has definite rules regarding the taking of private property by the Government. Those rules embody John Locke's philosophy that ownership of private property is sacred and inviolable. The Constitution decrees,

> No person . . . shall be deprived of . . . property, without due process of law; nor shall private property be taken for public use without just compensation.[10]

Private property has on occasion been taken by the United States in the public interest without the requirement of compensation. For example, the Government has destroyed trees on private property, without compensating the owner, to prevent the spread of blight.[11] However, the distinction between such a taking and this seizure is obvious. The United States is not destroying the AMERIND stock or assets in the public interest; she is using them. She is using them as a basis on which to bring this suit to change previously negotiated contract terms, and if the stock is sold pursuant to the Foreign Investors Act provisions, she will use the money as she sees fit.

Similar action was condemned in the Walter Fletcher Smith Case.[12] The Cuban government took private property without

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[9]Sohn and Baxter, supra n. 1, at 555.

[10]U.S. Const. amend. 5.

[11]Miller v. Schoene, 276 U.S. 272 (1928).

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

compensation, allegedly in the public interest, but then turned it over to a private Cuban Company for profit-making activities; precisely what the United States Foreign Investors Act provides. The arbitrator held that, since the public interest was negated by the Government's subsequent action, the property should be returned to the original owner. At the very minimum, the owner was to be fully compensated. Such taking without compensation was held to be contrary to the Constitution and laws of the Cuban Republic and "wanton, riotous and oppressive."[13]

France asserts the seizure of the United States in violation of her own Constitution is just as wanton, riotous and oppressive.

4. Under United States corporation law, the United States' stock seizure does not give her the power to change previously settled contract terms.

This Court has recognized the application of domestic law on the subject of corporate management and ownership in international law questions. It was stated in the Barcelona Traction Case that

> . . .[I]nternational law has had to recognize the corporate entity as an institution created by States in a domain essentially within their domestic jurisdiction. This in turn requires that, whenever legal issues arise concerning the rights of States with regard to the treatment of companies and shareholders, . . . it has to refer to the relevant rules of national law.[14]

SEC Act § 13(d)(1)(D) provides that after divestiture of stock as a penalty for non-registration, ". . . the Secretary

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[13] Id.

[14] Barcelona Traction, Light and Power Co., Ltd. Case [1970] I.C.J. 3, 4.

[of the Treasury], as trustee, shall possess all the rights of ownership of the securities"[15] (emphasis added). The statute is therefore clear at least to this extent: The United States is to take only the securities.

Even assuming for the moment that the taking of all AMERIND stock is not contrary to domestic or international law, stock ownership does not give the United States the right to change contract terms.

Corporation law dictates that ownership of shares and management of a corporation are separate functions, and that shareholders' rights are limited to sharing in the profits and in the assets of a corporation upon dissolution.[16]

In Securities and Exchange Commission v. Transamerica Corporation the court stated, "The only power which stockholders normally have to control the corporate machinery is exhausted when they elect the corporate directors."[17] The fact that the United States owns the entire AMERIND stock does not increase this limited power. Another court has declared, "The corporation is an entity, distinct from its stockholders even if the . . . stock is wholly owned by one person. . . ."[18]

The General Incorporation Statute of Delaware, AMERIND's

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[15]Foreign Investors Act of 1975, sec. 13(d)(1)(D).

[16]Buenchner v. Farbenfabriken Bayer Aktiengellschaft, 38 Del. Ch. 490, 154 A.2d 684 (1959).

[17]Securities and Exchange Commission v. Transamerica Corp., 67 F. Supp. 326, 330 (D. Del. 1946), modified 163 F.2d 511 (3rd. Cir. 1947), cert. denied, 332 U.S. 847 (1948).

[18]Buenchner v. Farbenfabriken Bayer Aktiengellschaft, 38 Del. Ch. 490, 493, 154 A.2d 684, 686 (1959).

state of incorporation, specifies that, "the business of every corporation organized under the provisions of this statute shall be managed by a board of directors."[19]

Furthermore, this Court has recognized the principle that only a corporation's board of directors can make management decisions. In the Barcelona Traction Case the Court stated,

> It is a basic characteristic of the corporate structure that the company alone, through its directors or management, acting in its name, can take action in respect to matters that are of a corporate nature.[20]

Therefore, the French court's decision that CNFP should pay CANIND was virtually dictated by international law. This decision was particularly necessary since the place of payment set out in the original contract of February 27, was again specified on the shipment date of June 4, 1975. This was a strong indication to France that the AMERIND board of directors was still managing that company's transactions. It is the position of France that the will of legally contracting parties must be carried out.[21] She therefore asserts that CNFP has no obligation to a unilateral change in contract terms.

Even assuming that the Secretary of the Treasury exercised his right to elect directors, thereby removing the prior AMERIND management body, the contract with France is still intact. The corporation cannot renege on contracts lawfully made merely

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[19]Del. Code Ann. tit. 8, § 141(a) (1953).

[20]Barcelona Traction, Light and Power Co., Ltd. Case, supra n. 14, at 35.

[21]Cf. 1 Formation of Contracts 243-243 (R.B. Schlesinger ed. 1968); Pierre Bonassies, Report on French Law, 1 Formation of Contracts 485 (R.B. Schlesinger ed. 1968).

because of a change in management or shareholders.[22] If it had the power to do so, a change of management would most certainly result in either rescission of contracts that had become "bad bargains," or, as in this case, in gaining unjust enrichment.

France, having paid CANIND pursuant to both contract and shipment date instructions, is justified by French, American and International law in considering herself discharged from payment.

B. The seizure of one hundred per cent (100%) of AMERIND stock is not authorized by United States statutory law.

The United States' actions are not in accordance with the very statute she uses as justification for her stock seizure.

If one makes a reasonable statutory interpretation, it is clear that the penalty of stock forfeiture is only to be imposed on one class of investors: those obligated to register with the Securities Exchange Commission prior to stock purchase. The only investors in this class are nationals of, or foreign investors controlled by, countries "determined by the President to be engaging in discriminatory trade practices or acts or policies the effect of which is to withhold supplies of vital commodities from international trade. . . ."[23]

If, as the United States contends, the seizure is a penalty for noncompliance with registration requirements, that penalty must be aimed only at those who were obligated, but failed, to

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[22] Empire Southern Gas Co. v. Gray, 29 Del. Ch. 95, 46 A.2d 741 (1946).

[23] Foreign Investors Act of 1975 sec. 13(d)(1)(D).

register prior to acquisition. The statutory language bears out this common sense idea, since after the determination that a particular acquisition would be harmful, the company involved "shall be informed that the proposed acquisition is illegal,"[24] (emphasis added) and a court order obtained "enjoining the proposed acquisition."[25] Only if the acquisition has been consummated will the special forfeiture-of-securities penalty be invoked.[26]

The taking of the stock of those who were exempt from registration or those who had complied was, then, clearly beyond ths scope of the statute. The Court of Appeals ordered that the stock be transferred to the Secretary of the Treasury as requested by the United States government. Apparently, then, the Court once again has allowed the Executive Branch to influence its decision in a case.[27]

ARGUMENT II

THE SEIZURE OF AMERIND BY THE UNITED STATES IS AN EXPROPRIATION IN VIOLATION OF INTERNATIONAL LAW.

The United States is now the recorded owner of one hundred per cent (100%) of AMERIND stock. She claims that she gained ownership due to CANIND's failure to obey her laws; however,

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[24] Id.

[25] Id. sec. 13(d)(1)(D)(i).

[26] Id. sec. 13(d)(1)(D)(ii).

[27] In the famous Sabbatino case a letter from the Secretary of State influenced the Court to refrain from ordering compensation for the taking of American holdings in Cuba, see, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

those who did obey her laws also forfeited their stock.

The United States has not been content merely to be a stockholder. Her demand for payment in defiance of previously negotiated contract terms indicates that she is running the company. Therefore, her taking must be termed an expropriation.

The right of expropriation is recognized by international law, and ownership rights pass to the expropriating State,[28] so long as the methods and procedures are legitimate, and compensation is paid.[29] However, the United States has not met these requirements: her motives are questionable, her procedures are, to say the least, unusual, and she has paid absolutely no compensation. Each of these failures in itself might have been enough to render the expropriation ineffective, but when combined, they dictate but one conclusion: this expropriation has not transferred ownership to the United States.

A. The motives and purposes of the United States in expropriating AMERIND are not legitimate.

While international law declares that public welfare outweighs the principle of respect for private rights, there

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[28] See, e.g., Goldenberg & Sons v. Germany (Rumania v. Germany) 2 U.N.R.I.A.A. 901 (1928); Eastern Extension, Australisia and China Telegraph Co., Ltd. Case (1923), American and British Claims Arbitration (Nielsen Report) 40 (1926).

[29] See, e.g., Chorzow Factory Case [1928] P.C.I.J., ser. A, No. 17; 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); De Sabla Case (United States v. Panama) United States and Panamanian General Claims Arbitration, 6 U.N.R.I.A.A. 377 (1933).

must be a genuine public need to make the expropriation acceptable.[30] Furthermore, the declaration must be "in good faith."[31] The court in the Norwegian Shipowners' Claims Case said in determining ". . . whether the 'taking' is justified by public needs, . . . the onus probandi [burden of proof] lies upon the Sovereign."[32]

The United States has not sustained her burden of proof that the taking of AMERIND was necessary for the public welfare. It appears instead that the United States has chosen this way of retaliating against the Saudi Arabian Government for her national policies regarding use of natural resources.

In international law, retaliation is a concept exclusviely reserved for action against foreign governments and is not to be used against the private property of the citizens of those governments.[33] The court in Bank of Indonesia v. Senembah Mpj et al. held that international law is violated when the purpose of the expropriation is "to attain purely political ends unconnected with the measures being taken."[34] Securities Exchange Commission 13(d)(1)(B) indicates the primary reason for the

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[30]See, 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).

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

[32]Norwegian Shipowners' Claims Case (United States v. Norway) Hague Court Reports (Scott) 40, 66, 1 U.N.R.I.A.A. 309, 332 (Perm. Ct. Arb. 1922).

[33]See, e.g., Domke, Foreign Nationalization, 55 Am. J. Int'l L. 585 (1961).

[34]Bank Indonesia v. Senembah Maatschappij and Twentsche Bank (Ct. App., Amsterdam) 30 Int'l L. Rep. 28 (1959).

expropriation: the stock forfeiture penalty applies to persons

> dominated or controlled by, a national or citizen of a country that is determined by the President to be engaging in discriminatory trade practices or acts or policies the effect of which is to withhold supplies of vital commodity sources from international trade.[35]

Therefore, the motive for the taking is not that the United States needs ownership in her hands. Rather, the United States has moved against Saudi Arabian nationals for actions of their Government. Such a motive is especially harmful, since their investment in CANIND would appear to be a portfolio investment. Saudi Arabians purchased shares in SAUDINC, a Lebanese holding company. SAUDINC acquired CANIND stock entirely in accordance with the new Canadian Foreign Investment Review Act;[36] therefore, Canada determined that such investment was of significant benefit to her economy.[37] Therefore, not only has the motive for the taking been retaliatory, it has also harmed a country with whom the United States has maintained friendly relations and within whose economy she has invested substantially.[38]

B. The methods and procedures used by the United States in this expropriation are invalid under international law.

The procedures used to effect the AMERIND expropriation are highly irregular. The United States claims the stock seizure

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[35]Foreign Investors Act of 1975, sec. 13(d)(1)(B).

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

[37]Zehr, Canadian Review of Foreign Investments To Be More Comprehensive in Phase 2, The Wall Street Journal, Oct. 14, 1975, at 14, col. 1.

[38]Old Friends Scrapping Again: This Time It's Over Oil, 76 U.S. News & World Report 33 (Jan. 21, 1974).

was a penalty, yet she "punished" those who had committed no offense. She only holds title to the stock; yet she is running the company. In other words, she has expropriated without admitting that she has done so.

United Nations General Assembly Resolution 1803[39] states that for an effective expropriation there must be an open and legitimate determination of public necessity. The Harvard Draft Convention requires that taking of an alien's property be ". . . under the authority of the State . . . for a public purpose clearly recognized as such by a law of general application. . . ."[40] The Explanatory Note states that this requirement is to preclude ad hoc determinations of public purpose by government officials acting without any express authority.[41] While the Securities Exchange statute gave the President authority to declare forfeiture of stocks in certain cases the President acted beyond that authority. Therefore, expropriation occurred without the benefit of such a general law.

Chile's nationalization of copper companies provides an example of a general expropriation law. After debate in the Legislature, a constitutional amendment was passed, declaring the necessity for the takings.[42] That country clearly stated what she was doing. In contrast, the United States refuses to

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

[40]Sohn and Baxter, supra n. 1, at 553.

[41]Id. at 556.

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

admit that she has expropriated. The Foreign Investors Act does not alert any investor that expropriation may occur, nor can the legislature that passed the statute have known that it would be used for such purpose. It would have taken clairvoyance to know that this statute would be used to effect an expropriation, since its title is the Foreign Investors Act and it deals only with registration procedures. To assert that this statute provides ample warning of possible expropriation insults one's intelligence. It must be concluded that expropriation of AMERIND has been carried out without notification to the public or to those whose property was expropriated.

C. The United States failure to pay compensation is not justified.

In determining whether an act of expropriation is to be recognized under international law, the most important consideration is whether compensation has been paid to the injured alien citizens. In fact, the right to expropriate has been declared to have ". . . no existence as a right apart from the obligation to make compensation."[43]

The United States has made no compensation, claiming that no compensation is required. This is a difficult position for her to maintain, since she has traditionally espoused the

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[43]Eastern Extension, Australisia and China Telegraph Co., Ltd. Case (1923), American and British Claims Arbitration (Nielsen Report) 48, 76 (1926).

standard of prompt, adequate and effective compensation[44] and proposed that standard for the 1962 United Nations General Assembly General Resolution 1803.[45] It is manifestly unjust to allow the United States to demand such a standard of compensation when property of her own nationals is expropriated, and change her position when she is the expropriater.

While it is true that arrangements for more flexible compensation measures are proposed by a majority of the writers on this subject,[46] the proposal is for the benefit of countries who cannot afford both full compensation and the proposed reform. However, even those countries generally pay deferred or lump sum compensation.[47] The United States has shown no intention to pay any compensation, and she is certainly not one of those countries who cannot effect reforms without some special compensation provisions. It seems that the most adamant proponent of prompt, adequate and effective compensation when her nationals' property is expropriated has a double standard.

For the above reasons this expropriation has not transferred title of AMERIND to the United States Government. The

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[44] See, e.g., Letter from Secretary of State Hull to the Mexican Ambassador (Mar. 30, 1938) 18 Dep't of State, Press Releases 444 (1938), see also, U.S. Aide-Memoire of Aug. 28, 1953, on Expropriation of United Fruit Company Property by Government of Guatemala, 29 Dep't State Bull. 35 (1953).

[45] See, U.N. Doc. A/C.2/6.668 (1962).

[46] See, De Vischer, Theory and Reality in Public International Law (translated by P.E. Corbett, 1957); 1 Oppenheim, International Law 352 (8th ed. Lauterpacht 1955).

[47] Sohn and Baxter, supra n. 1, at 553.

International Law Association Committee on Judicial Aspects of Nationalization and Foreign Property has stated, "[W]hen a taking is in violation of international law, such taking should be considered null and void. Consequently, a suit in replevin ought to be accepted in any such case."[48]

While France is only seeking discharge from payment to the United States, she feels sympathy for those whose expectations have been so rudely dashed. She asks this Court to consider the implications that approval of this expropriation would have on trade and investment among nations.

ARGUMENT III

ASSUMING ARGUENDO THAT THIS EXPROPRIATION IS VALID, FRANCE IS STILL DISCHARGED FROM DUPLICATE PAYMENT TO THE UNITED STATES.

When a State expropriates a company, that State assumes the obligations of the company at the moment of expropriation.[49] AMERIND had contracted with CNFP for the shipment of plastics; therefore, the United States was bound to fulfill all contract terms. In the Norwegian Shipowners' Claims Case, the Permanent Court of Arbitration held that, when the United States requisitioned certain shipbuilding contracts, the requisitioning governmental department assumed the obligations under those contracts.[50] The Court stated,

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[48]Knapp, Int'l L. Ass., Report of its Committee on the Judicial Aspects of Nationalization and Foreign Property (Hamburg, Conference 1960) 12 par. 44.

[49]See, e.g., Dreyfus Case (France v. Peru) 1 U.N.R.I.A.A. 215 (1921).

[50]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).

> The Fleet Corporation . . . took over the rights and duties of the shipbuilders toward the shipowners . . . the shipbuilders were entirely relieved of any obligation to the former owners, for the corporation inserted itself between the builders and the shipowners by an exercise of what is called, in the United States Law and Jurisprudence, the power of eminent domain.[51]

The Court also held that, under the United States Constitution, such contract rights are property, which cannot be expropriated without compensation.[52]

The assumption of AMERIND's obligation by the United States has an analogy in the doctrine of state succession. When a new government comes into power, that government is bound by the contracts and concessions of the old State.[53] In the German Settlers in Poland Case the Permanent Court of International Justice stated, ". . . [E]ven those who contest the existence in international law of a general principle of State succession do not go so far as to maintain that private rights . . . are invalid as against a successor in sovereignty."[54]

Under the state succession doctrine, a new party (the new government) becomes the obligor under the existing contract.[55] In the case before the Court, the United States, through the

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[51] Id. at 56, 1 U.N.R.I.A.A. at 323.

[52] Id. at 69, 1 U.N.R.I.A.A. at 334.

[53] See, e.g., Aguilar-Amory and Royal Bank of Canada Claims Case (Great Birtain v. Costa Rica), 1 U.N.R.I.A.A. 369 (1923).

[54] Advisory opinion on the German Settlers in Poland [1923] P.C.I.J., ser. B, No. 6 at 16.

[55] See, generally, 1 Oppenheim International Law 161-162 (8th ed. Lauterpacht 1955); Briggs, Law of Nations 235-236 (1952).

act of expropriation, becomes the obligor under the contract. Since the government of the United States is a successor in interest to the management of AMERIND, it must assume the obligations of AMERIND's contract with CNFP. Under the doctrine of pacta sunt servanda, it should be bound by the terms of that contract.

The doctrine of pacta sunt servanda has never been specifically held in a court to apply to contracts between States and private citizens of another country;[56] case law has only discussed the doctrine in the context of treaties between countries. However, respected international law scholars support this extension.[57] The Harvard Draft Convention for the Responsibility of States for Injuries to the Economic Interests of Aliens[58] states that "the violation through an arbitrary action of the State of a contract or concession to which the central government of that State and an alien are parties is wrongful."[59]

France contends that, even if the expropriation is held to be legitimate, and the United States owns AMERIND, she is nevertheless discharged from payment. Therefore she requests the Court to extend the doctrine of pacta sunt servanda to contract

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[56] See generally, Memorial of Swiss Government in Losinger and Co. Case [1936] P.C.I.J., ser. C, No. 78 at 32.

[57] See, 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 63-64 (1974).

[58] Sohn and Baxter, supra n. 1.

[59] Id. at 548.

terms between parties of different states.[60] Since one of the terms of the contract between CNFP and AMERIND is that payment for the goods be made to CANIND, France should not have to pay the United States for the shipment of plastics.

ARGUMENT IV

THE FOREIGN INVESTORS ACT OF 1975 IS INVALID UNDER INTERNATIONAL LAW.

A. The Foreign Investors Act of 1975 does not comply with international agreements to which the United States is a party.

A violation by a State of a treaty or other agreement between nations will give rise to a claim under international law.[61] The United States is a party to two agreements whose foundations are gravely endangered by the Foreign Investors Act.

1. The United States claims to be a proponent of the Code of Liberalization of Capital Movements adopted by the Organization for Economic Cooperation and Development.[62]

The Code seeks to abolish restrictions on movements of capital "to the extent necessary for effective economic

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[60] See generally, G. White, Nationalization of Foreign Property 86-90 (1961); Brandon, Legal Aspects of Private Foreign Investments, 18 Fed. Bar J. 298, 337-240 (1958).

[61] See, e.g., I.C.J. Stat. art. 38, para. 1 (a); Advisory Opinion on Conditions of Admission of a State to Membership in the United Nations [1948] I.C.J. 57.

[62] See, statement of William J. Casey, Under Secretary for Economic Affairs, Foreign Investment and Free Capital Movements, 70 Dep't State Bull. 170 (Feb. 18, 1974).

cooperation."[63] However, the Foreign Investors Act leaves no doubt that the United States has had second thoughts about welcoming foreign investment.[64] A law proclaiming total forfeiture of investments, no matter how extensive, for mere failure to follow a registration procedure will obviously restrict the movement of capital.

The Capital Movements Code also requires that all non-resident owned assets receive the same treatment.[66] The Foreign Investors Act contradicts this provision. The President may determine on an ad hoc basis, without guidelines, that certain foreign nationals are from or are controlled by a country whose policies do not suit him.[67] The Foreign Investors Act, by sanctioning such arbitrary decisions, invites discriminatory and retaliatory measures. Therefore, it violates the obligation of the United States to all member parties of the OECD.

2. The Foreign Investors Act transgresses the principles and spirit of the Convention of Establishment between the United States and France, signed on November 25, 1959.

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[63]Code of Liberalization of Capital Movements [O.E.C.D./C (61) 96] art. I (1961).

[64]Cf. The Wall Street Journal, Oct. 1, 1975, at 4, col. 1.

[65]Brandon, Legal Aspects of Private Foreign Investment, 18 Fed. Bar J. 298, 340 (1958).

[66]Code of Liberalization of Capital Movements, supra n. 63.

[67]Foreign Investors Act of 1975 sec. 13(d)(1)(B)(ii).

Article II provides that each party may enter the other's territory and remain therein for the purpose of: "(b) developing and directing the operations of an enterprise in which they have invested, or in which they are actively in the process of investing a substantial amount of capital."[68]

The Convention further requires that property may only be expropriated for a public purpose with just compensation provided for at the time of taking.[69] However, under the 1975 Act, a French investor's property may be divested whenever the President dislikes the economic policy of France or any other country controlling that investor. Failure to register, or failure to realize that one must register, prior to acquisition causes an expropriation. Even if expropriation measures are a legitimate means of regulating foreign investment, the convention says they must provide for compensation. However, the Foreign Investors Act unequivocally states that all proceeds from the sale of property will be kept as a fine. Imposing a "fine" of sale at fair market value of controlling interest of an oil refinery is an excessively severe penalty. On its face the Foreign Investors Act of 1975 is contrary to the Convention of Establishment and therefore violates the agreement between the United States and France.

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[68]Convention of Establishment between the United States and France, art. II, Nov. 28, 1959, 11 U.S.T. & O.I.A. 2398, T.I.A.S. No. 4625 (1960).

[69]Id. art. IV.

B. For the benefit of the entire international community, this Honorable Court must hold invalid the Foreign Investors Act of 1975.

By Special Agreement the United States has submitted to this Court for decision the validity of the Foreign Investors Act of 1975. This law, which shocks any natural sense of justice, is vague and confusing in its terms and harsh and arbitrary in its application.

Whereas the investment climate and laws regarding political instability in many countries provide a warning to an investor that he is risking expropriation, the United States offers no such warning. The Interim Report to Congress on Foreign Portfolio Investment in the United States says a commonly expressed thought regarding international investment is: "The United States government does not interfere with a man's investment; there is confidence that there will be no expropriations."[70] Yet, the Foreign Investors Act of 1975 gives the President and Commission unlimited power to choose which individuals will be subject to the penalty of Sec. 13(d)(1)(D). The result is nothing more than expropriation without compensation.

Furthermore, the Foreign Investors Act is blatantly discriminatory in setting up two classes of foreign registration, decreeing that one group must register thirty days before stock acquisition and the other ten days thereafter.[71] Only the

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

[71] Foreign Investors Act of 1975, sec. 13(d)(1)(B), sec. 13(d)(1)(D)

President has the telepathy to know which foreigners belong to which group. The Oscar Chinn Case explains the concept of discrimination:

> The form of discrimination which is forbidden is therefore discrimination based on nationality and involving differential treatment by reason of their nationality as between persons belonging to different national groups.[72]

The Foreign Investors Act encourages discrimination based on nationality and therefore infringes upon basic principles of international law.

Also, the legislation unabashedly allows retaliation against nationals of countries with whom the President is piqued. This Court has never sanctioned retaliation against individuals for the alleged wrongs of their countries,[73] and it should not do so now.

CONCLUSION

> [F]oreign legislation, whatever the place of its purported effect, which is itself contrary to International Law, . . . may properly be treated as a nullity and, with regards to rights or property, as incapable of transferring title to the State concerned either within its territory or outside it.
>
> Judge Lauterpacht[74]

France, finding the United States seizure of AMERIND in violation of French law and public policy as well as contra to

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[72] Oscar Chinn Case [1934] P.C.I.J., ser. A/B, No. 63 at 87.

[73] See, e.g., Domke, Foreign Nationalization, 55 Am. J. Int'l L. 585, 601 (1961).

[74] 1 Oppenheim, International Law 268 (8th ed, Lauterpacht, 1955).

international law could not in good conscience pay the United States Treasurer. Therefore, payment was made to CANIND pursuant to contract terms. For these reasons and those stated above, France respectfully requests that she be discharged from payment to the United States.

Respectfully submitted,

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