

NOTE: THE ROLE OF EXPROPRIATION IN THE FORMATION OF THE OPEC CARTEL

*James K. Hickel**

In October 1973, the Organization of Petroleum Exporting Countries (OPEC) stunned the oil-dependent, non-OPEC world. The Arab OPEC nations, bitter over American assistance to Israel in the Yom Kippur war, angrily slapped an embargo on petroleum exports to several countries, including the United States. Chaos erupted in the international oil market as the oil-consuming nations vied for access to the limited amounts of remaining world crude. Price and allocation regulations were imposed on petroleum products sold in the United States,¹ traffic slowed to 50 miles per hour to conserve gasoline,² and the world quickly learned that a small group of oil-rich nations held in its hands a powerful and dangerous new weapon. Ultimately, OPEC resumed normal levels of oil exports—but not before nearly quadrupling the price of those exports, thereby creating further disruption in the world economy.³

How had OPEC achieved such devastating, frightening power? Although OPEC had been formed in 1960, repeated attempts throughout the 1960's to monopolize the world oil market met with little success, and the Arabs were humiliated in a 1967 conflict with Israel without being able to wield their oil weapon as an effective and coordinated countermeasure.⁴ What had changed within the oil-producing nations that resulted in the powerful, more intimidating OPEC that emerged from the Mideast conflict in 1973?

OPEC's rise to power has been explored in critical detail since those chilling days in 1973,⁵ but one important factor has been neglected: beginning in the early 1970's, the OPEC nations systematically compelled foreign oil companies to surrender ownership and control of their oil fields. OPEC divided into two separate factions, not altogether differing in philosophy. The "radical" OPEC nations expropriated oil fields outright. The "conservative" nations, on the other hand, threatened to carry out such expropriations, but only after giving the oil companies a chance to voluntarily hand over complete control of their petroleum operations. For the most part, the oil companies complied. By 1973, both the radical and the conservative nations had won out, and the stage had been set for what can be considered the most powerful international cartel in world history.

*B.A. 1974, George Washington University; M.B.A. 1976, Case Western Reserve University; Senior Consultant, Cabot Consulting Group, Washington, D.C.

¹*Emergency Petroleum Allocation Act*, 15 U.S.C. § 751 *et seq.* (1976).

²*Presidential Address on National Energy Policy* (November 25, 1973).

³In October 1973, Persian Gulf oil sold at a posted price of \$3.07 per barrel. By April 1974, when the embargo was lifted, that price had been raised to \$11.65 per barrel. *Annual Report of the Council on International Economic Policy* 158 (March 1975).

⁴The Saudi Arabian government did close off oil exports in response to the 1967 conflict, but other sources of supply were available to the oil companies at that time. C. Solberg, *Oil Power* 206 (1976).

⁵A history of OPEC's rise to power is presented in L. Mosley, *Power Play: Oil in the Middle East* (1973). This prophetic book—which asks questions such as "Can the United States be blackmailed by a Middle East threat to stop oil supplies?"—was published before the 1973 oil embargo.

II

When oil production first became a major business in the Middle East, consortiums of oil companies dealt with the oil-producing nations on a country-by-country basis. The only responsibility that the host government had was to set the level at which the oil revenues were to be taxed, and sometimes even the level of taxation was determined in large part by the oil companies themselves.⁶ The posted price for Persian Gulf oil, and the production levels for that oil, were decided by the oil companies unilaterally.

Although there were complaints from the oil-producing nations about the degree of control that the oil companies maintained over oil production, those nations were generally unable to change that degree of control.⁷ In 1951, Iran became the first Mideast oil producing nation to attempt an expropriation of foreign oil holdings. Mohammed Mossadegh, head of the Iranian government, nationalized the oil producing property of British Petroleum, the only major oil company doing business in Iran. At that time, however, an effective buying cartel existed in the international oil market, and that cartel refused to purchase the nationalized crude of the Iranian government. The Iranian economy collapsed within a matter of years, and in 1954 Mossadegh was overthrown—allegedly with the assistance of the Central Intelligence Agency.⁸ There were few other active attacks against the oil companies throughout the 1950's; as a result, the companies became complacent in their actions in the Mideast.

Oil company complacency caused the first major outcry from the oil-producing nations as a unit. In the summer of 1960, in response to a glut in the international crude oil market, Exxon slashed the price of Persian Gulf oil by 14 cents a barrel, without first consulting with the Saudi Arabian government.⁹ Consequently, actual Saudi tax revenues fell short of projected revenues by 30 million dollars in 1960. An outraged Saudi government agreed to a Venezuelan request to enter into a compact with the oil-producing nations. That compact would provide the nations with a seller's cartel in order to deal with the buyer's consortium of oil-producing companies. On September 14, 1960, an agreement was reached among the oil-producing nations, and OPEC was formed.

Initially, the purpose of OPEC was to serve as a bargaining group which would negotiate maximum royalties for the participating nations, and it achieved modest gains in that area in the first eight years of its existence. Although attempts to monopolize oil production failed, per-barrel royalties increased moderately as a result of OPEC-initiated changes in accounting procedures and tax treatments of oil revenues.¹⁰

The OPEC philosophy changed radically in 1968. Buoyed by successes in its early years, OPEC issued a Declaratory Statement of Petroleum Policy, which,

⁶Solberg, *supra* note 4, at 194.

⁷In 1960, the five major oil-producing countries—Iran, Iraq, Kuwait, Saudi Arabia, and Venezuela—received a total of more than two billion dollars in oil revenues. D. Rustow and J.F. Mugno, *OPEC: Success and Prospects* 2 (1976). Since these revenues were received in exchange for relatively little effort on the part of the host countries, the situation as it stood in the 1950's and 1960's presented a significant benefit to the oil producing states.

⁸D. Wise and T.B. Ross, *The Invisible Government* 159 (1964).

⁹Solberg, *supra* note 4, at 201.

¹⁰For example, royalties in Saudi Arabia increased from 78.7 cents per barrel in 1963 to 83.4 cents per barrel in 1966. Rustow and Mugno, *supra* note 7, at 7.

among other things, recommended that OPEC member countries observe the following principles:¹¹

1. Member governments shall endeavor . . . to explore for and develop their hydrocarbon resources directly.
2. Where provision for Governmental participation in the ownership of the concession-holding company under any of the present petroleum contracts has not been made, the Government may acquire a reasonable participation on the . . . principle of changing circumstances.
3. A schedule of progressive and more accelerated relinquishment of acreage of present contract areas shall be introduced.
4. [Posted prices] shall be determined by the Government . . .

Additional provisions of the Declaratory Statement provided that the OPEC nations could, in essence, change contract terms whenever, in the opinion of the host government, "circumstances" warranted such a change.

Issuance of the Declaratory Statement did not automatically implement those principles. The oil companies refused to consent to the demands outlined in the statement, and continued to maintain control of oil prices and production. Unsatisfied with OPEC's inability to immediately seize control of its oil fields, some nations acted unilaterally. In February 1971, Algeria expropriated French oil fields within its territory.¹² In August 1971, Venezuela mandated that government ownership of the oil fields be completed along a specified timetable.¹³ In December 1971, Libya expropriated most of its oil fields, in 1972 Iraq expropriated operations of the Iraq Petroleum Company, and in 1973 Iran nationalized the property of the Iranian oil consortium.¹⁴ OPEC implicitly endorsed those expropriations in the resolutions it passed during its conferences in that period. Two resolutions passed in 1972, for example, provided OPEC assistance to Iraq in its nationalization efforts, preventing those companies who were nationalized from increasing production in other OPEC states.¹⁵

The expropriating countries were successful in taking control of the foreign oil fields. World conditions had changed since the oil companies were able to fight off the Iranian nationalization of 1951. For one thing, the international oil economy was no longer a buyer's market. Small independent operators appeared on the scene, competing with the major oil companies for the right to purchase foreign petroleum.¹⁶ For another, the British military presence in the Persian Gulf, which made a show of force during the 1951 Iranian takeover, had disappeared by the early 1970's.¹⁷

¹¹*Declaratory Statement of Petroleum Policy in Member Countries*, Resolution XVI-90, OPEC Sixteenth Conference (June 25, 1968).

¹²Rustow and Mugno, *supra* note 7, at 22.

¹³That timetable provided that Venezuela would obtain 51 percent ownership of its oil fields by 1982. Rustow and Mugno, *supra* note 7, at 23.

¹⁴Mosely, *supra* note 5, at 391-411.

¹⁵Resolution XXVII-145, OPEC Twenty-Seventh Conference (March 12, 1972); Resolution XXVIII-146, OPEC Twenty-Eighth Conference (June 9, 1972).

¹⁶One factor leading to the increased number of small independent international crude oil dealers, and the resulting destruction of the power of the oil buying cartel, was the Mandatory Oil Import Program established by the United States in 1958. Under that program, historical major importers of crude oil were subject to strict import limits, while independent smaller importers were granted special exemptions. "The import control program . . . required that every refiner . . . be given an import quota; even refiners with no intent or ability to import were given grants of authority to do so." D. Bohr and M. Russell, *Limiting Oil Imports: An Economic History and Analysis* 71 (1971).

¹⁷Rustow and Mugno, *supra* note 7, at 17.

OPEC's next step was to accomplish as a unit what Algeria, Iran, Iraq, Libya, and Venezuela had achieved independently: total government control of foreign-owned resources. In July 1971, OPEC announced that it would take "immediate steps toward the effective implementation of the principle of Participation."¹⁸ The principle of Participation would allow the OPEC nations to seize control of their petroleum operations, while requiring the oil companies to bear the responsibility for the day-to-day management of oil production and marketing.

At first, the oil companies—particularly United States oil companies¹⁹—fought to resist the participation demands. After a long and seemingly hopeless round of uncompromising discussions, Saudi Arabia's King Faisal sent an angry note to the oil companies involved in the negotiations, urging the companies to accept the principle of participation. "We expect the companies to cooperate with us with a view to reaching a satisfactory settlement," Faisal wrote. "They should not oblige us to take measures in order to put into effect the principle of participation."²⁰ With this—the conservative Faisal's implicit endorsement of expropriation in the event that talks failed—the oil companies caved in. OPEC won its battle, and by 1972 the OPEC member nations were granted control over major oil company operations, either immediately or else on a strict timetable for gradual government ownership.²¹

In economic terms alone, OPEC's control over world petroleum exports today is staggering.²² In addition, OPEC has used its power over oil production to increase its political power and influence. That influence culminated in the oil embargo which followed America's airlift of emergency supplies during the Yom Kippur war. This slight flexing of OPEC's newly-found muscle brought the free world to its knees, and OPEC's influence on international economic and political affairs was assured. Once the OPEC nations realized that they had the unchallenged weapon of expropriation on their side, the rest was simple.

III

Why did the free nations of the world stand by quietly and watch the OPEC nations seize the carefully-developed oil producing operations of their energy corporations? If sanctions had been sought against the expropriating countries, such sanctions would not have carried the support of the world community. In fact, contemporary international law recognizes the right of every country to expropriate foreign-owned property within that country—and the United States respects that right in the conduct of its foreign affairs.²³

¹⁸Resolution XXIV-135, OPEC Twentieth-Fourth Conference (July 13, 1971).

¹⁹During the negotiations on participation, one American oil company executive told Saudi Arabian oil minister Ahmed Zaki Yamani, "No matter how you slice it, it's still nationalization, and that's something we don't believe in. We're Americans, remember? Free enterprise and all that. We'll never accept a government, even the American government, as our partner." Mosely, *supra* note 5, at 404.

²⁰Mosely, *supra* note 5, at 410.

²¹That schedule has since been advanced so that, today, virtually all OPEC governments control virtually 100 percent of all the oil operations within their borders.

²²Although the nationalized oil concessions, as well as the oil concessions taken under the threat of nationalization, are run largely by American and European oil companies today, the control of those oil fields is left largely in the hands of the foreign government. That control includes the right to dictate the posted price and the level of production. The extent to which the nationalized oil companies may have profited by OPEC's ability to charge monopoly prices remains unclear, but OPEC's degree of control over the vital elements of the international petroleum economy has been well established.

²³E. DeAréchaga, "State Responsibility for the Nationalization of Foreign Owned Property," 11 *J. Int'l. L. & Pol.* 179 (Fall 1978).

Contemporary international law on expropriation differs sharply with the traditional historical principles which considered expropriation to be an unlawful violation of the rights of the foreign owners of the expropriated property.²⁴ Today, the right of any country to expropriate the assets of a foreign company has been clearly established, and the only issue that remains to be discussed is the degree of compensation to be provided for the expropriated property—an issue that is left largely in the hands of the legal theory and institutions which prevail in the expropriating nation.²⁵

One important study of international law²⁶ guessed that, if an international tribunal had jurisdiction over expropriation, it would be guided by the following commonly-accepted principles:

1. A state has the right to take over assets situated within its territory.
2. If compensation is adequate, the taking [of foreign property] is not contrary to international law.
3. Compensation in cases where the taking was for a public purpose and was genuinely nondiscriminatory will be “adequate” even if falling short of the value of the assets seized providing that it is reasonable in the economic and political circumstances.
4. Where the tribunal is satisfied that the taking was intended to discriminate, and did so on no justifiable ground, full compensation should be paid. It is most unlikely that, in present day circumstances, a tribunal would apply the pre-1939 principle that damages should be awarded over and above an amount sufficient to compensate for the actual loss.

The United States has never seriously fought against the right of countries to expropriate foreign property. As far back as 1938, the Secretary of State wrote, in response to the Mexican expropriation of oil producing property owned by United States citizens, that “my government has frequently asserted the right of all countries freely to determine their own social, agrarian, and industrial problems. This right includes the sovereign right of any government to expropriate private property within its borders in furtherance of public purposes.”²⁷ Even during the unpopular Cuban takeover of United States property in 1959, the State Department noted: “The United States recognizes that under international law a state has the right to take property within its jurisdiction for public purposes in the absence of treaty provisions or other agreement to the contrary.”²⁸

The courts have had a tendency to turn their backs on requests for the return of expropriated property. Shortly after the Cuban takeover, the Supreme Court of the United States held that redress would generally not be available within the judiciary system for that expropriation. Instead, the judicial branch would follow the “act of state” doctrine, which holds that “the courts of one country will not sit in judgment of the acts of the government of another, done within its own territory.”²⁹ In the *Sabbatino* case, the leading Supreme Court case on the “act of state”

²⁴DeAréchaga, *supra* note 22, at 180.

²⁵DeAréchaga, *supra* note 22, at 183.

²⁶D. Greig, *International Law* 171 (2d ed. 1976).

²⁷W. Bishop, *International Law: Cases and Materials* 687 (1962).

²⁸40 *St. Dep't. Bull.* 958 (1959).

²⁹*Underhill v Hernandez*, 168 U.S. 250, 252 (1897), cited in *Banco Nacional de Cuba v Sabbatino*, 376 U.S. 401, 416 (1964).

doctrine, the Court refused to allow an American company whose assets in Cuba had been expropriated, to raise the issue of expropriation in defense of its decision to sell off Cuban property and keep the revenues as partial repayment for its expropriated assets.³⁰

Congress responded to *Sabbatino* by amending the "Hickenlooper amendment" to the Foreign Assistance Act.³¹ The amendment provided that "...no court in the United States shall decline on the ground of the federal act of state doctrine" to determine the merits of a case involving confiscation by a foreign country in violation of international law.³² In its conference report on the Foreign Assistance Act, Congress explicitly provided that the Hickenlooper amendment was "intended to reverse in part the decision of the Supreme Court in ... *Sabbatino*."³³

Because the Hickenlooper amendment recognized the liberal principles of international law, and because certain specific exceptions were provided for within the amendment itself, its effectiveness in allowing recovery for damages by expropriated citizens was inherently limited.³⁴ In addition, the Supreme Court appears to have ignored even this half-hearted slap on its wrist. Courts have narrowed the Hickenlooper amendment by reading the statute as literally as possible.³⁵ Thus, the extension of territorial waters in such a way that property was taken was not considered "confiscation",³⁶ contractual rights were not considered to be "claim of title or other right to property",³⁷ and, in one interpretation created entirely by the court, the Hickenlooper amendment has been held not to apply where neither the expropriated property nor its proceeds are in the United States,³⁸ leaving one to wonder how a nation could expropriate property outside its own borders without actually declaring war.

³⁰*Sabbatino*, 376 U.S. 404 (1964).

³¹*Foreign Assistance Act*, 22 U.S.C. § 2370(e)(1976).

³²The complete text of the relevant section of the Hickenlooper amendment, as it stands in 1981, reads:

Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state (or a party claiming through such a state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation and the other standards set out in this subsection: *Provided*, That this subparagraph shall not be applicable (1) in any case in which an act of a foreign state is not contrary to international law or with respect to a claim of title or other right to property acquired pursuant to an irrevocable letter of credit not more than 180 days duration issued in good faith prior to the time of the confiscation or other taking, or (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court. *Foreign Assistance Act*, 22 U.S.C. § 2370(e)(2)(1976).

³³United States Congress, *Conference Report No. 1925* (October 1, 1964).

³⁴One case held that, where the behavior of a foreign government "could not be so unreasonable or unjust as to outrage current international conduct," the Hickenlooper amendment would not apply. In that case, the Cuban government's refusal to exchange pesos for dollars—thus leaving their suppliers with worthless paper currency—was held not to be unreasonable conduct. *French v Banco Nacional de Cuba*, 23 N.Y. 2d 433, 242 N.E. 2d 704 (1968).

³⁵"It must be recognized . . . that [the Hickenlooper amendment] was adopted over the objections of the Executive Department [and] has been narrowly construed by our courts." *Hunt v Coastal States Gas Producing Company*, 583 S.W. 2d 322, 325 (Tex. 1979), cert. denied 444 U.S. 992 (1979), citing *Occidental of Umm Al Qaywayn v Cities Service Oil Company*, 396 F. Supp. 461 (D.C. La. 1975), aff'd. in part 579 F. 2d 1196 (5th Cir. 1978), cert. denied 442 U.S. 929 (1979); *Occidental Petroleum Corp. v Buttes Gas and Oil Co.*, 331 F. Supp. 92 (D.C. Cal. 1971), aff'd. 461 F. 2d 1261 (9th Cir. 1972), cert. denied 409 U.S. 950 (1972); *United Mexican States v Ashley*, 556 S.W. 2d 784 (Tex. 1977).

³⁶*Occidental of Umm Al Qaywayn*, 396 F. Supp. 461 (D.C. La. 1975).

³⁷*French*, 23 N.Y. 2d 433, 242 N.E. 2d 704 (1968).

³⁸*United Mexican States v Ashley*, 556 S.W. 2d 784, 786 (Tex. 1977), citing *Mendez v Saks*, 485 F. 2d 1355, 1361, 1372 (2d Cir. 1973), rev'd. on other grounds *Alfred Dunhill of London v Republic of Cuba*, 425 U.S. 682 (1976); *Banco Nacional de Cuba v First National City Bank*, 431 F. 2d 394, 399-402 (2d Cir. 1970), rev'd. on other grounds 406 U.S. 759 (1972); *French v Banco Nacional de Cuba*, 23 N.Y. 2d 433, 242 N.E. 2d 704 (1968).

The executive branch of the federal government has been no more enthusiastic in its support of sanctions against expropriating countries than the courts have. When the Hickenlooper amendment was first brought up in Congress, it was strenuously opposed by the State Department on, among other things, the grounds that “a vital element of foreign policy would be placed at the mercy of one unreasonable action by a foreign official. . . .” and “the interests of the United States require the balancing of many factors.”³⁹ Even after the Hickenlooper amendment was passed, the executive branch largely negated the effect of the amendment by simply ignoring it. For example, one section of the Hickenlooper amendment forbids the President from providing foreign aid assistance to any country which expropriates the property of any United States citizen without “speedy compensation for such property in convertible foreign exchange.”⁴⁰ Yet, when Peru expropriated a Peruvian subsidiary of Standard Oil in 1968 without paying any compensation at all—a clear violation of even the most liberal interpretation of international law—the President ignored the Hickenlooper amendment, allowing legislatively-mandated deadlines to pass without imposing any of the required sanctions.⁴¹

Throughout the 1960’s and 1970’s, therefore, every branch of the United States government has signaled its opposition to a strong stand against expropriation by foreign countries—the legislative branch through its explicit endorsement of the liberal principles of international law, the executive branch for its opposition even to the watered-down provisions of the Hickenlooper amendment, and the judiciary for its continued narrowing of the terms of that amendment.

IV

The implications of international and domestic United States expropriation law on OPEC’s development as a powerful international monopoly are not difficult to comprehend. Imagine that you are the oil minister for an OPEC member nation. It is 1970, and you are weighing the relative merits of expropriation plans being considered throughout the oil-producing countries. No Mideast country has actually expropriated any of its oil production facilities yet, and naturally you are concerned about the reaction of the American government to the expropriation of American property. You must make a recommendation to the head of your country regarding whether or not expropriation or the threat of expropriation would be advisable, and so you have asked an assistant to research the current status of American law with regard to expropriation. The assistant has returned, and advises you that the United States government explicitly recognizes the principles of international law which permit nationalization of foreign property, that the executive branch of the government has looked the other way when expropriations have been carried out in violation of international law, and that United States courts generally will not sit in judgment on the acts of foreign governments committed within their own territories.

³⁹Legislative Reference Service, *Expropriation by Peru of the International Petroleum Company* 87 (1969).

⁴⁰*Foreign Assistance Act*, 22 U.S.C. § 2370(e)(1)(1976).

⁴¹A full account of the decision-making process through which the White House decided to ignore the provisions of the Hickenlooper amendment in the Peruvian expropriation is presented in J. Einhorn, *Expropriation Politics* (1974).

Based on that analysis, what recommendation would you make to the head of your country?⁴²

V

Oil production and refining companies, along with extractive companies as a whole, provide tempting targets for expropriation by foreign governments. In the period between 1960 and 1974, 12 percent of all United States oil properties and 18 percent of all United States mining concessions were expropriated or nationalized.⁴³ Extractive industries require large amounts of capital to establish but, once established, can provide a great deal of revenue on a regular basis.⁴⁴ One study of the nationalization of American businesses⁴⁵ revealed four major characteristics of industry composition which appear to be crucial to the vulnerability of a corporation or industry to expropriation. The petroleum industry was particularly vulnerable in each of the four areas:

1. *Composition of ownership.* Surprisingly, corporations owned jointly by a private American company and the host government are ten times more likely to be expropriated, and a joint venture with a foreign multinational company is eight times more likely to be expropriated, than an operation which is 100 percent operated by a U.S.-owned subsidiary. Foreign petroleum operations are traditionally undertaken as joint ventures, and these joint ventures and consortiums were precisely the types of organizations that were expropriated in the OPEC takeovers of 1971-1973.⁴⁶
2. *Technology barriers.* An industry with a high technology level is less subject to expropriation, due to the fact that the local government is simply untrained and unequipped to operate the business. Although oil production and refining certainly involve a high degree of technology, "a number of engineers formerly with U.S. oil companies are now making twice their previous salaries as employees of Middle East governments. Thus, a company's technology must be advanced and proprietary before it can be considered a significant deterrent to expropriation."⁴⁷ Oil technology, while advanced, is generally too widely-known and well-established to provide protection from a foreign takeover.
3. *Vertical integration.* A company which is dependent upon raw materials from its own international subsidiaries or affiliates is less likely to be

⁴²If your country was Libya, and your recommendation was to expropriate, the American legal system has vindicated your decision. In *Hunt v Coastal States Producing Company*, 583 S.W. 2d 322 (Tex. 1979), cert. denied 444 U.S. 992 (1979), the Supreme Court of Texas applied the "act of state" doctrine to Libya's nationalization of the oil concession agreements, determining that Libya's nationalization was beyond the scope of the court's review (but note that the suit was filed against the company which purchased the oil originally assigned to Hunt, and was not filed against the government of Libya, with whom the Hunts had reached a settlement in May 1975).

⁴³D. Bradley, "Managing Against Expropriation," *Harv. Bus. Rev.*, July/August 1977, at 75, 78. The industry classifications with the next highest expropriation rates were the utility, transportation and the banking/insurance industries. Only four percent of all United States properties in these classifications were expropriated between 1960 and 1974, and those expropriations were generally undertaken only because their control was viewed "as necessary to the implementation of public policy." *Id.*

⁴⁴American Petroleum Institute, *The Future of American Oil* 52 (1976).

⁴⁵Bradley, *supra* note 42.

⁴⁶See generally Rustow and Mugno, *supra* note 7, at 1-45. Note that joint ventures with a local private party, as opposed to the host government itself, have a substantially reduced risk of expropriation. Bradley, *supra* note 42, at 80.

⁴⁷Bradley, *supra* note 42, at 81.

expropriated than a company which depends on the open market for its materials. Unfortunately, crude oil itself is a raw material, and no amount of oil company integration can alter the fact that, regardless of the degree of vertical integration, companies must ultimately depend on the oil well itself for its access to crude. Oil-rich nations are well aware of their power in this regard.

4. *Size of assets.* The larger the size of a company's assets, the greater its chances of being expropriated. Among the extractive industries, those with total assets of \$100 million or more have been expropriated at a rate of 22 percent.⁴⁸

There is little that the oil-producing industry, or any of the natural resource-based extractive industries, can do to restructure themselves in order to prevent future expropriations. Based on the four criteria set forth above, such industries make attractive prospects to foreign governments in an early stage of development and with no philosophical opposition to nationalization. Although regional trends in expropriation vary over time, in the past two decades significant nationalization has taken place in the resource-rich areas of the Middle East, Latin America, and Africa.⁴⁹ However, it is important to note that there is no pattern to expropriation within countries or regions.⁵⁰ A nation which has developed a history of continuous and systematic nationalizations of foreign property may abruptly and inexplicably end that pattern of behavior, and a nation with a certain level of commitment to free enterprise principles may suddenly begin the selective expropriation of particular industries. Even the government of Canada has begun to consider the implementation of a program of "Canadianization" of its oil companies: a program which is designed "to give Canada's federal government new power over the nation's energy resources—including wresting control away from non-Canadian companies."⁵¹

Given the unpredictability of foreign governments and their policy toward expropriation, combined with the inherently tempting structure of the resource-based extracting industries, energy companies with foreign operations must, by their nature, depend upon government protection in order to preserve their international-level property rights. At present, neither United States law nor international law provides adequate protection to American citizens whose assets are nationalized by a foreign government.⁵² The trend in future expropriations depends mainly on the expropriation policy developed by the United States and foreign governments in the years ahead.

⁴⁸Bradley, *supra* note 42, at 82.

⁴⁹Bradley, *supra* note 42, at 79.

⁵⁰*Id.*

⁵¹"Canada's Oil Policy is Starting to Hurt", *Bus. Week*, December 8, 1980, at 24.

⁵²Private and public insurance protection is available against expropriation of foreign property. The primary insurer in this area is the Overseas Private Investment Corporation (OPIC), an agency of the United States government, which offers insurance against expropriation at a cost significantly below the cost of private insurance. All of these insurance programs are funded by the current American owners of foreign property and do not involve direct payments by the expropriating governments. In the case of OPIC, the United States taxpayer is an additional party to the funding mechanism, since OPIC is backed by the "full faith and credit" of the United States Treasury. See Bradley, *supra* note 42, at 63 and R. Poats, "Reply to 'Managing Against Expropriation'", *Harv. Bus. Rev.*, November/December 1977, at 190.

VI

To what extent can the United States government act to end the trend toward expropriation of American fuel and mineral resources in foreign nations?

Expropriation was a critical tool in the development of the monopoly power of OPEC, and it could easily be an important tool in the international cartelization of other fuel and mineral resources. Multiplying the impact of OPEC on the world economy by the number of other resources which can be expropriated by foreign governments helps to understand the priority which must be placed on developing a firm and consistent policy regarding the protection of American assets in foreign lands. An important first step in reversing the worldwide trend toward expropriation would be to review and reconsider contemporary international legal principles regarding nationalization. The recognition, in international law, of the right of a foreign government to nationalize property owned by a citizen of another nation is a twentieth-century phenomenon; traditional international law considered any interference with foreign-owned property to be an unlawful violation of internationally protected rights.⁵³ Although some pre-World War II law began to bend that traditional principle,⁵⁴ it was not until the United States formally decreed its philosophy that the bond with the traditional principle was fully broken. The United Nations subscribes to the contemporary principle in its declaration that "each state has the right . . . to nationalize, expropriate,⁵⁵ or transfer ownership of foreign property, in which case appropriate compensation should be paid. . . ." ⁵⁶ How shall the amount of compensation be determined? ". . . It shall be settled under the domestic law of the nationalizing state. . . ." ⁵⁷

OPEC's actions, combined with recent trends in expropriations worldwide, have made it abundantly clear that other OPECs may be formed in other energy and mineral resources, and that the nations of the world may well have to confront a wholesale disruption of the international economy if they continue to adhere to the contemporary principles of international law. In its unique position as world leader, the United States can act on two levels to revise current thinking on the legal principle governing expropriation. The first level is international: the United States can work with other members of the world community—through international organizations and treaties with other nations—to ensure that the property rights of foreign citizens are respected. The second level is national: the United States can make fundamental changes in its policy toward expropriation which would allow aggrieved United States citizens to pursue their grievances through the courts, and would implement governmental actions responding to the nationalization of American property.

⁵³DeAréchaga, *supra* note 22, at 180.

⁵⁴Greig, *supra* note 25, at 575.

⁵⁵In international law, there was at one time an important distinction between "nationalization" and "expropriation." During the transition between traditional and contemporary legal principles, one of the interim principles held that nationalization, a wholesale takeover of an entire property classification, was legal. Expropriation, on the other hand, was the discriminatory taking of one single unit of property, and was considered to be a violation of the rights of the owner. Under contemporary international law, the distinction is meaningless, and the terms are used interchangeably in most literature on the subject.

⁵⁶G.A. Res. 3281, 29 U.N. GAOR, Supp. (No. 31) 50, U.N. Doc. A19631 (1974).

⁵⁷*Id.* Note that the resolution was passed by the United Nations one year after the oil embargo by the Arab members of OPEC.

Prospects are not good for an effective response on the international level. The United States would encounter strong opposition to a change in contemporary international legal principles regarding expropriation. A total of 59 non-communist countries have nationalized United States property since 1960,⁵⁸ and it is unlikely that these countries would support any international action which would tend to imply that these nations were the recipients of illegally-obtained goods. Coupled with the fact that the communist nations would not have a philosophical problem with the concept of nationalization, it would appear that chances for success on the international level are remote.

Instead, the United States can act on a unilateral level to begin the process of reversing the current trend in international law. Several steps can be taken, either independently or as part of a comprehensive program, to begin that reversal.

Either Congress or the Supreme Court can repeal the "act of state" doctrine.⁵⁹ That doctrine is strictly a court-made rule of law; it is not required by the Constitution,⁶⁰ nor is it the product of international law or the inherent nature of sovereign authority.⁶¹ The Supreme Court can revoke the doctrine by overruling *Sabbatino*, or Congress may pass legislation requiring that the doctrine not be applied by the courts in matters of expropriation. Congress may have been under the impression that it had passed precisely such legislation when the Hickenlooper amendment was enacted, but the courts and the executive branch have worked to narrow that amendment virtually out of existence. The clause in the Hickenlooper amendment most responsible for that narrowing is the clause which recognizes the contemporary principles of international law—under such principles, there are few acts of expropriation which can be considered illegal.

In addition, the executive branch can work to reassert the authority that it lost through its inaction on the Peruvian expropriation of American oil fields in 1968. Clear guidelines can be established and consistently enforced to prevent or punish expropriations. The boycott of Cuban goods by the United States⁶² serves as the textbook example of an effective executive-level response to foreign expropriations: although the United States remains unaffected by that boycott, the Cuban economy has been shattered and exists primarily on handouts from the Soviet Union. At a minimum, in the future the executive branch can enforce those provisions of the Hickenlooper amendment which deny foreign aid to those countries whose expropriations violate even the liberal principles of international law. At its discretion, the executive branch may consider expanding that enforcement to

⁵⁸Bradley, *supra* note 42, at 78.

⁵⁹The defense of sovereign immunity is a separate issue from the "act of state" doctrine. Unlike "act of state", which may be raised by any party to a suit, sovereign immunity may be invoked only when a foreign government or its agent is a defendant. Although the *Foreign Sovereign Immunities Act of 1976*, 28 U.S.C. § 1605 (1976), withdraws sovereign immunity in cases where the action is "based upon an act outside the territory of the United States in connection with a commercial activity of a foreign state where that act causes a direct effect in the United States," courts have held that "nationalization is the quintessentially sovereign act, never viewed as having a commercial character." *Carey v National Oil Corp.*, 453 F. Supp. 1097, 1102 (S.D.N.Y. 1976), *aff'd*, 592 F. 2d 673 (2d Cir. 1978), citing *Victory Transport Inc. v Comisaria General*, 336 F. 2d 354, 360 (2d Cir. 1964), *cert. denied* 381 U.S. 934 (1965). Two types of nationalizations are specifically exempt from sovereign immunity under the *Foreign Sovereign Immunities Act*: where property within the United States has been taken, and where property has been taken by a foreign agency engaged in commercial activity in the United States. 28 U.S.C. 1605(a)(3). Such nationalizations are so rare that, at this writing, no court decisions have been based on those specific provisions of the Act.

⁶⁰*Sabbatino*, 376 U.S. at 423.

⁶¹*Sabbatino*, 376 U.S. at 421.

⁶²Presidential Proclamation No. 3447, 27 *Fed. Reg.* 1085 (1962).

encompass certain expropriations which may not have strictly violated generally-accepted interpretations of international law, but may have had the practical effect of denying American citizens their fundamental property rights as defined under the United States Constitution.

Whatever the future American response, it is clear that current principles of international law do nothing to discourage OPEC-type expropriations of American property. Among the options which the United States has for dealing with foreign expropriations, those which require unilateral action by the United States alone seem to be the options with the most potential for success.

CONCLUSION

The United States has chosen to disarm itself in the fight against expropriation of its property abroad. Our application of the "act of state" doctrine requires that the courts of the United States must not examine the acts of foreign governments, even when those acts involve the property of American citizens. All three branches of government can work to strengthen the American response to expropriation. Although it is almost certainly too late to impose sanctions on OPEC nations for their seizure of American property, the OPECs of the future—in fuel and mineral resources, as well as other raw materials—are being developed at this moment. The full exercise of the federal government's power to respond to nationalization can go a long way toward preventing these future OPECs. As the OPEC nations learned in the first eleven years of OPEC's existence, it is difficult to develop a cartel in a free market. However, as OPEC has learned since 1972, monopoly power can be expropriated from a world unwilling to defend itself against the wholesale nationalization of its vital resources.