BERICHTE UND URKUNDEN

The Protection of Property Rights in Commercial Treaties of the United States*)

The United States has long maintained that, as a rule of customary international law, the property of foreigners may not be expropriated without the payment of just compensation[1]). In its note to the Mexican Government on August 22, 1938, the United States made its position quite clear:

> The Government of the United States merely adverts to a self-evident fact when it notes the applicable precedents and recognized authorities on international law support its declaration that, under every rule of law and equity, no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate and effective payment therefor[2]).

At the same time the Mexican government made its position equally clear in a note sent to the United States:

> ... there is in international law no rule universally accepted in theory nor carried out in practice, which makes obligatory the payment of immediate compensation nor even of deferred compensation, for expropriations of a general and impersonal character like those which Mexico has carried out for the purpose of redistribution of the land[3]).

Although the United States does not recognize the distinction made by the Mexican Government between specific and individual expropriations on the one hand and general and impersonal expropriations on the other, many other countries not only recognize the distinction but also consider it to be a fundamental element of national policy, based on the theory

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*) This article was written by the author in the course of his studies at the Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht.

[1]) See Dept. of State Bull., vol. 40 (1959), p. 784. See also Dept. of State Bull., vol. 47 (1962), pp. 192, 195; Dept. of State Bull., vol. 46 (1962), pp. 912, 914–15; Dept. of State Bull., vol. 40 (1959), p. 666.

[2]) Hackworth, International Law, vol. 3 (1942), pp. 658–59.

[3]) *Ibid.* at p. 657.

that social obligations arising out of the ownership of property outweigh the rights of the property owner to a far greater extent than they do in the United States[4]). As this theory continues to gain acceptance in many areas of the world, customary international law offers less and less protection to the foreign investor[5]).

Meanwhile, capital investment in foreign countries continues to grow at an ever-increasing rate. In 1951 the estimated value of foreign holdings of American business alone was $12 billion. At the close of 1961 the estimate had climbed to $ 34 billion, an increase of nearly 200 per cent in a single decade. According to a recent survey of the United States Department of Commerce, capital expenditures of United States business abroad in 1961 totaled $4.2 billion, and in 1962 such expenditures reached approximately $5 billion[6]). In an era of rapidly expanding foreign investment and increasing disagreement as to the validity and scope of customary international law rules concerning expropriation, bilateral agreements have become a potentially important source of rules for the treatment of foreign property; and the United States has become a leading exponent of this method by including property-protection provisions in its commercial treaties[7]).

The United States commercial treaty program, dating back to pre-Constitution days, is the oldest continuing economic program of the Government; and of the 136 commercial treaties signed since 1778, 42 of them are still in force, either in whole or in major part[8]). Over the years the objectives underlying the development of the commercial treaty program

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[4]) Rubin, Private Foreign Investment (1956), p. 15.

[5]) For authorities agreeing and disagreeing with the proposition that international law requires full compensation, see Bishop, International Law Cases and Materials, (2d ed. 1962), pp. 692–93, notes 54–55. On expropriation generally, see the authorities listed in Bishop, *supra* at p. 693, n. 56. See also the authorities listed in *Banco Nacional de Cuba* v. *Sabbatino*, 307 F. 2d 845, 863, n. 12 (1962).

[6]) Proceedings of the 1963 Institute on Private Investments Abroad and Foreign Trade, vol. 5 (1963), p. 1. See also Fleming, States, Contracts and Progress (1960), p. 120.

[7]) These treaties are popularly known as treaties of friendship, commerce and navigation; but the titles of many of them include various combinations of such other terms as amity, consular rights, establishment, extradition and peace. For the sake of convenience all these treaties will therefore be referred to as commercial treaties.

[8]) Dept. of State Bull., vol. 45 (1961), pp. 530–32, lists 39 commercial treaties in force, either in whole or in major part as of Sept. 25, 1961. Three additional commercial treaties have subsequently entered into force: the Belgium treaty of 1961, Treaties and Other International Acts Series (T.I.A.S.) 5432; the Viet-Nam treaty of 1961, United States Treaties and Other International Agreements (U.S.T. & O.I.A.) vol. 12, p. 1703, T.I.A.S. 4890; and the Luxembourg treaty of 1962, U.S.T. & O.I.A., vol. 14, p. 251, T.I.A.S. 5306. For a list of all United States commercial treaties signed through 1960 see Wilson, United States Commercial Treaties and International Law (1960), p. 331, app. 1.

have remained substantially the same. They include the creation of a framework in which the United States' economic relations with other countries can be conducted on a stable basis, the establishment of the rule of law in everyday relations with such countries, the promotion of international trade, the reduction of discrimination against United States shipping and the protection of United States citizens and their interests in foreign countries[9]). But while the general objectives of the program have remained relatively constant, the substantive content of the treaties has changed considerably over the years in response to the ever-changing political, social, economic and legal facts of international life; and this is particularly true in regard to the evolution of property-protection provisions. For purposes of this survey the treaties are divided into three chronological groups: those signed before World War I, those signed after World War I and those signed after World War II.

I. Treaties Signed Before World War I

The first treaty ever concluded by the United States, a Treaty of Amity and Commerce with France, was signed on February 6, 1778[10]). Although 24 of the 30 substantive articles dealt directly or indirectly with the promotion of maritime trade and the protection of vessels, crews, passengers and cargoes, few of the provisions could be considered relevant to the protection of real property or personal property on land. The United States had proposed a clause exempting American merchants residing in France from the *droit d'aubaine*, but the clause was rejected[11]), and the parties failed to include any general property protection provisions.

However, four years later the United States concluded a commercial treaty with the Netherlands, Article VIII of which provided:

> Merchants, masters and owners of ships, mariners, men of all kinds, ships and vessels, and all merchandizes and goods in general, and effects of one of the confederates, or of the subjects thereof, shall not be seized or detained in any of the countries, lands, islands, cities, places, ports, shores or dominions whatsoever of the other confederate, for any military expedition, public or private use of any one, by arrests, violence, or any colour thereof; much less shall it be permitted to the subjects of either party to take or extort by force anything from the subjects of the other party, without the consent of the owner; which, however, is not to be understood of seizures, detentions,

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[9]) Dept. of State Bull., vol. 26 (1952), pp. 881, 882.
[10]) 18 (2) Stat. 203.
[11]) Wilson, *op. cit. supra* note 8, p. 108.

and arrests which shall be made by the command and authority of justice, and by the ordinary methods, on account of debts or crimes, in respect whereof the proceedings must be by way of law, according to the forms of justice[12]).

In spite of the impressive length of the provision and the specificity of its language, it provided relatively little in terms of effective property protection. There is no indication in the language of the provision that it was intended to apply to real property; a narrow reading of the provision could easily limit its application to takings of a violent or forceful nature; and in any case the possibility of compensation is ignored. Nevertheless, the provision established an important precedent by extending treaty protection for the first time to at least some kinds of property, and in cases of seizure of property for debts or crimes, by demanding at least a minimum degree of fairness and procedural regularity.

Over the years the language of property protection provisions was often simplified and generalized in order to extend the scope of protection. While earlier treaties of this period often protected only "trade and commerce" or "vessels, cargoes and effects", most of the treaties signed in the latter half of the nineteenth century extended protection to "property" in general.

A clause requiring compensation in the event of a taking also became a common feature in this type of provision, although these clauses varied widely in characterizing the amount to be paid. Thus the Prussia treaty of 1799, while applicable only to ships and goods detained or used in the course of an embargo, required "an equitable indemnity, as well for the freight as for the loss occassioned by the delay"[13]). A commercial treaty with Mexico in 1831 required only "corresponding compensation"[14]); seven later treaties, of similar scope, all with Latin American countries, provided for "a sufficient indemnification"[15]); and three similar treaties, one with New Granada in 1846[16]) and two with El Salvador in 1850[17]) and 1870[18]), required "equitable and sufficient indemnification". In a number of other treaties concluded after the middle of the nineteenth century, the United States began to add a phrase prescribing the time of payment. Thus four commercial treaties with Latin American countries

[12]) 18 (2) Stat. 533.
[13]) 18 (2) Stat. 648, art. XVI.
[14]) 18 (2) Stat. 476, art. VIII.
[15]) See, e.g., the Columbia treaty of 1824, 18 (2) Stat. 150, art. V.
[16]) 18 (2) Stat. 550, art. VIII.
[17]) 18 (2) Stat. 675, art. VIII.
[18]) 18 (2) Stat. 725, art. VIII.

required "a full and sufficient indemnification, which shall in all cases be agreed upon and paid in advance" [19]); and the Nicaragua treaty of 1867 provided for "full and just compensation to be paid in advance" [20]). Other treaties concluded during this period, however, were somewhat less demanding on this point. For example, the Italy treaty of 1871 called for "a sufficient indemnification previously agreed upon when possible" [21]); and the Spain treaty of 1902 required "a sufficient compensation, which, if practicable, shall be agreed upon in advance" [22]).

While the United States continued to use such treaty provisions specifically prohibiting the taking of property in the absence of compensation, it also made use of two other types of property-protection provisions. The first of these two types took the form of a national treatment clause, a most-favored-nation clause, or a combination of the two. One of the earliest treaty provisions requiring national treatment appeared in the Belgian treaty of 1845:

> There shall be full and entire freedom of commerce and navigation between the inhabitants of the two countries; and the same security and protection which is enjoyed by the citizens or subjects of each country shall be guaranteed on both sides ... and the privileges, immunities, and other favors, with regard to commerce and industry, enjoyed by the citizens or subjects of one of the two States, shall be common to those of the other [23]).

This provision left much to be desired in the way of property protection, since it is not at all clear whether the "privileges, immunities, and other favors, with regard to commerce and industry" would have been interpreted to include protection of real property. In any case, later provisions were much less equivocal in extending protection to all kinds of property. The Swiss treaty of 1850 provided that:

> In case of war, or of expropriation for purposes of public utility, the citizens of one of the two countries, residing or established in the other, shall be placed upon an equal footing with the citizens of the country in which they reside with respect to indemnities for damages they may have sustained [24]).

and the Paraguay treaty of 1859 stated that:

> The citizens of either of the two contracting parties residing in the territories of the other shall enjoy, in regard to their houses, persons, and pro-

[19]) See, e.g., the Peru treaty of 1887, 25 Stat. 1444, art. II.
[20]) 18 (2) Stat. 566, art. IX, para. 3.
[21]) 18 (2) Stat. 439, art. IV.
[22]) 33 Stat. 2105, art. V.
[23]) 18 (2) Stat. 48, art. I.
[24]) 18 (2) Stat. 748, art. II.

perties, the protection of the Government in as full and ample a manner as native citizens[25]).

One of the earliest treaty provisions requiring most-favored-nation treatment of property appeared in the French treaty of 1800. After guaranteeing French citizens in the United States the enjoyment of all "rights, liberties, privileges, immunities, and exemptions in trade, navigation, and commerce" accorded the most favored nations, the provision stated that United States citizens

> shall reciprocally enjoy ... the same privileges and immunities, as well for their property and persons as for what concerns trade, navigation, and commerce[26]).

Typical of the provisions guaranteeing either national or most-favored-nation treatment is the provision in the Two Sicilies treaty of 1845, which states that the citizens or subjects of one state, residing in the other,

> shall enjoy their property and personal security in as full and ample manner as their own citizens or subjects, or the subjects or citizens of the most favoured nations[27]).

The second of the two other types of property-protection provisions employed by the United States during this period simply promised the protection of the government in broad terms, which varied considerably from treaty to treaty. Some of these provisions were concerned only with commercial property. Thus the 1815 treaty with Great Britain restricted protection to "merchants and traders" and simply promised "the most complete protection and security for their commerce"[28]); and the Ethiopia treaty of 1903 contained the following provision:

> In order to facilitate commercial relations, the two governments shall assure, throughout the extent of their respective territories, the security of those engaged in business therein, and of their property[29]).

However, most provisions of this type extended protection to all citizens of the other country and to property in general. The Mexico treaty of 1831, for example, stated that citizens of the other country "shall enjoy in their houses, persons, and properties the protection of the government, with the most perfect security and liberty of conscience"[30]); and a number of treaties with other Latin American countries provided that such citizens

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[25]) 18 (2) Stat. 594, art. XIV.
[26]) 18 (2) Stat. 224, art. XI.
[27]) 18 (2) Stat. 772, art. VI.
[28]) 18 (2) Stat. 292, art. I.
[29]) 33 Stat. 2254, art. II.
[30]) 18 (2) Stat. 476, art. XV.

"shall enjoy in their houses, persons and properties the protection of the Government, and shall continue in possession of the guarantees which they now enjoy" [31]). The Borneo treaty of 1850 required "full and complete protection and security" for United States citizens and their property, whether acquired before or after the date of the treaty [32]); and the Argentina treaty of 1853 [33]), the Paraguay treaty of 1859 [34]) and the Japan treaty of 1894 [35]) all required "full and perfect protection for persons and property".

One additional approach can be found in a number of treaties combining a promise of government protection with a guarantee of national treatment. The Italy treaty of 1871, for example, states that:

> The citizens of each of the high contracting parties shall receive, in the States and Territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or shall be granted to the natives, on their submitting themselves to the conditions imposed upon the natives [36]).

Finally, one of the most unusual property protection provisions in the history of the United States commercial treaty program appeared in the China treaty of 1844. It provided that United States citizens

> shall receive and enjoy, for themselves and everything appertaining to them, the special protection of the local authorities of the Government, who shall defend them from all insult or injury of any sort on the part of the Chinese. If their dwellings or their property be threatened or attacked by mobs, incendiaries or other violent or lawless persons, the local officers, on requisition of the Consul, will immediately dispatch a military force to disperse the rioters, and will apprehend the guilty individuals, and punish them with the utmost rigor of the law [37]).

In response to the problems involved in developing and maintaining international trade and commerce during this period, the commercial treaties of the United States concerned themselves more with promoting maritime trade and the flow of goods than with protecting foreign-owned property and investments as such, and even those provisions dealing di-

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[31]) E.g., the Honduras treaty of 1864, 18 (2) Stat. 426, art. XII; the Nicaragua treaty of 1867, 18 (2) Stat. 566, art. XII; and the Costa Rica treaty of 1851, 18 (2) Stat. 159, art. XII.

[32]) 18 (2) Stat. 79, art. III.

[33]) 18 (2) Stat. 16, art. VIII.

[34]) 18 (2) Stat. 594, art. IX.

[35]) 29 Stat. 848, art. I.

[36]) 18 (2) Stat. 439, art. III.

[37]) 18 (2) Stat. 116, art. XIX. See also art. XI of the China treaty of 1858, 18 (2) Stat. 129; and art. IV of the Korea treaty of 1882, 23 Stat. 720.

rectly with property protection often expressed the obligations in extremely broad terms. Nevertheless, implicit in all of the provisions is the idea that the persons and property of foreigners are entitled to at least a minimum amount of respect and protection, regardless of the fact that the level of protection offered by domestic law may be lower, that such property cannot be taken by mere arbitrary executive decree, and that the provisions themselves are to be applied according to a broad rule of reason[38]). After World War I these principles became the foundation for more explicit and effective provisions.

II. Treaties Signed After World War I

Immediately after World War I a broadened and revitalized commercial treaty program, devoted particularly to the expansion of United States foreign trade, was developed under the direction of Secretary of State Charles Evans Hughes. The first treaty in this series, signed with Germany on December 8, 1923, contained the following property-protection provision:

> The nationals of each High Contracting Party shall receive within the territories of the other, upon submitting to conditions imposed upon its nationals, the most constant protection and security for their persons and property, and shall enjoy in this respect that degree of protection that is required by international law. Their property shall not be taken without due process of law and without payment of just compensation[39]).

During the next 15 years the United States signed commercial treaties with eleven additional countries: Hungary, Estonia, El Salvador, Honduras, Latvia, Norway, Austria, Poland, Finland, Thailand and Liberia. Each of these treaties, with the exception of the Thailand treaty, contained a property-protection provision identical with the above-quoted German treaty provision[40]); and of the twelve commercial treaties signed during this period, eight are still in force today[41]).

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[38]) Wilson, *op. cit. supra* note 8, p. 112.

[39]) 44 Stat. 2132, art. I, para. 4 = Reichsgesetzblatt 1925 II, p. 796.

[40]) Hungary, 1925, 44 Stat. 2441, art. I, para. 4; Estonia, 1925, 44 Stat. 2379, art. I, para. 4; El Salvador, 1926, 46 Stat. 2817, art. I, para. 4; Honduras, 1927, 45 Stat. 2618, art. I, para. 4; Latvia, 1928, 45 Stat. 2641, art. I, para. 4; Norway, 1928, 47 Stat. 2135, art. I, para. 4; Austria, 1928, 47 Stat. 1876, art. I, para. 6; Poland, 1931, 48 Stat. 1507, art. I, para. 4; Finland, 1934, 49 Stat. 2659, art. I, para. 5; Thailand, 1937, 53 Stat. 1731, art. I, para. 3; Liberia, 1938, 54 Stat. 1739, art. I, para. 4. The Thailand treaty provision is substantially equivalent, but it includes a national treatment clause.

[41]) Art. I of the German treaty of 1923 was terminated and replaced by the German treaty of 1954, U.S.T. & O.I.A., vol. 7, p. 1839 = Bundesgesetzblatt 1956 II, pp. 488 *seq.*

This standard formula contained two new phrases of interest in the evolution of property-protection provisions. First, it invoked customary international law as the required standard of protection. After World War II, when the United States again began to revise the language of property-protection provisions, this phrase was at first modified to make the international law standard merely a minimum requirement[42]); but in 1951 the reference to international law in this context was eliminated as a standard treaty clause[43]). Secondly, the provision required takings to be carried out according to "due process of law"[44]). Due process, within the meaning of the treaty provision, is not, of course, the technical due process of the United States Constitution. The phrase was merely meant to provide "protection against arbitrary and unjust treatment in any particular in which the Government of a country does not accord its own nationals as liberal treatment as that which is recognized by international law"[45]).

The "due process" and "just compensation" phrases caused some minor difficulties during the negotiation of two treaties. The German Ambassador stated that the German Constitution permitted the taking of property without payment of just compensation and that these two phrases, if included in a treaty, might constitute a violation of fundamental German law.

> While he intimated that it would be unlikely that the German legislature would avail itself of its constitutional right to take property of aliens without payment of just compensation, he stated that there was a strong feeling in his country that the Constitution should not be interferred with. The reply on behalf of the [State] Department was that the sentence in the American text did not contemplate a yielding of anything which the German Constitution forbade, and it was, therefore, in no sense a violation of that document; and that it merely marked an agreement by Germany not to exercise a consti-

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See art. XXVIII. The United States terminated the Hungarian treaty of 1925 and the Poland treaty of 1931 by giving the required notice on July 5, 1951. Dept. of State Bull., vol. 25 (1951), pp. 95–96; and it terminated the El Salvador treaty of 1926 by giving the required notice on Feb. 7, 1958. Dept. of State Bull., vol. 38 (1958), p. 238.

[42]) See the Ireland treaty of 1950, U.S.T. & O.I.A., vol. 1, p. 785, art. VIII, para. 2 and the text accompanying n. 73 *infra*.

[43]) See text accompanying n. 74 *infra*.

[44]) The "due process" language has also been eliminated as a standard treaty phrase. See text accompanying n. 55 *infra*.

[45]) From a memorandum of the Solicitor of the Department of State. Dept. of State file (National Archives) 711.622/60. Quoted from Wilson, *op. cit. supra* note 8, p. 114 n. 84.

tutional right, and one which if exercised would cause immediate protest by the United States in so far as it applied to American citizens [46]).

Poland also objected to the use of "just compensation" and suggested substituting "due compensation" on the ground that "just" was indefinite and might give persons of other nationalities in Poland, through the most-favored-nation clause, an excuse to question practically every case in which a Polish court might decree the granting of compensation for property. The State Department answered that the term "just compensation" was no more indefinite than "due process of law" or "that degree of protection that is required by international law". In refusing to modify the wording of the provision, the State Department added that, in the very nature of the subject, definiteness could not be obtained and indefiniteness was no objection [47]).

Although the standard property-protection provision employed in this period was in many respects a significant improvement over the various approaches appearing in pre-World War I treaties, it nevertheless failed to provide for the protection of property owned by artificial persons. It has sometimes been argued that the word "citizens," "nationals" or "subjects" might be read, in the context of a commercial treaty, to include corporations [48]); but it is now fairly well established that in general corporations do not come within the protective scope of a commercial treaty in the absence of an express provision to that effect [49]). As far as the protection of property is concerned, no express commercial treaty provisions were made for corporations and other types of artificial persons until after World War II.

III. Treaties Signed After World War II

Since the United States came out of World War II with a greatly expanded industrial machine and a surplus of private capital available for export, the investment of this capital in the production of goods and services in other countries was a matter of great importance to the eco-

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[46]) Foreign Relations of the United States (1923), vol. II, pp. 28–29.

[47]) Wilson, *op. cit. supra* note 8, pp. 114–15 n. 84.

[48]) During hearings before the Committee on Patents, House of Representatives, 77th Cong., 1st Sess., on House Joint Resolutions 32, 73 and 123, a witness expressed the opinion that art. XII of the German treaty of 1923, which concerns recognition of the juridical status of limited liability and other corporations and associations and their right to conduct business, extended the protection of art. I to such corporations and associations. Wilson, *op. cit. supra* note 8, p. 116 n. 86.

[49]) Walker, Provisions on Companies in United States Commercial Treaties, in: The American Journal of International Law (Am. J. Int. L.), vol. 50 (1956), pp. 373, 378.

nomy of the United States and to the economic development and prosperity of many other countries as well. The commercial treaties concluded by the United States after the war therefore continued to encourage American private investment abroad by expanding and strengthening the provisions protecting the investor and his property[50]).

These provisions fall into two categories: 1) those dealing directly with property itself, and 2) those dealing with subjects other than property, but which nevertheless play a vital role in determining the legal and economic status of foreign-owned property.

1. Provisions Dealing Directly with Property

The five types of commercial treaty provisions falling into the first category can be titled, for the sake of convenience as: a) Taking of Property, b) Protection and Security of Property, c) Equitable Treatment, d) Unreasonable or Discriminatory Measures, and e) Public Ownership.

a) Taking of Property

Provisions regulating the taking of property are almost as old as the commercial treaty program itself. Over the years these provisions have taken many different forms; and even in the short time since World War II, this particular type of provision has appeared with 13 variations.

Undoubtedly the most important improvement appeared in the very first treaty of this series, the China treaty of 1946. In this treaty protection against the taking of property in the absence of compensation was extended for the first time to "nationals, corporations and associations" [51]). The Ireland treaty of 1950 changed the wording to read "nationals and companies" [52]), and this language has been used in every subsequent treaty. Furthermore, all but two of the treaties in this series require compensation for the expropriation of interests held "directly or indirectly" by nationals and companies of the other party[53]). As a result of these provisions, corporate property is protected to the same extent as the property of individuals, and furthermore, each party to the treaty must pierce the corporate veil for purposes of assuring, but may not do so for purposes of

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[50]) Dept. of State Bull., vol. 26 (1952), pp. 881, 882.

[51]) 63 Stat. 1299, art. VI, para. 2.

[52]) U.S.T. & O.I.A., vol. 1, p. 785, T.I.A.S. 2155, art. VIII, para. 2. The phrase "nationals and companies" was also employed for the first time in the four other types of property-protection provisions discussed below.

[53]) The two exceptions are the China treaty of 1946, 63 Stat. 1299, and the Ethiopia treaty of 1951, U.S.T. & O.I.A., vol. 4, p. 2134, T.I.A.S. 2864.

denying, compensation to nationals of the other party on account of the interests they hold in any company whose property is expropriated, regardless of the nationality of the company, and however fractional or intermediately held such interests may be [54]).

Regarding the conditions imposed upon the act of taking property, the China treaty of 1946 [55]) and the Italy treaty of 1948 [56]) modified the post-World War I formula to provide that payment be "prompt" and "effective" as well as "just", but neither treaty attempted to clarify the meaning of these two newly-inserted adjectives. The Ireland treaty of 1950 [57]) deleted the requirement of "due process", and this requirement was never again included in subsequently concluded treaties, with the exception of the German treaty of 1954 [58]).

The Greek treaty of 1951 [59]) contributed two new elements to the standard property-protection provision. First, it added the requirement that property may be taken only for "public benefit" [60]), a requirement which has been retained, in various forms, in all subsequently concluded commercial treaties; and secondly, it added a sentence relating to the nature and timing of compensation payments:

> Property of nationals and companies of either Party shall not be taken within the territories of the other Party except for public benefit, nor shall it be taken without the prompt payment of just compensation. Such payment shall be in an effectively realizeable form and shall represent the full equivalent of the property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof [61]).

The last sentence is, in essence, an elaboration of the phrase "prompt, adequate and effective", and in regard to the first two elements, the sentence is somewhat meaningful. Unfortunately the term "effective" is still left a little vague and open to a number of conflicting interpretations. Must compensation be in the currency of the investor? What is "effective" compensation in terms of currency when the nationality of the company which made the investment is different from the nationality of its stockholders? Does the fact that an expropriated enterprise arose from a very small original investment plus a large reinvestment of local earnings

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[54]) Walker, *op. cit. supra* note 49, at p. 389.
[55]) 63 Stat. 1299, art. VI, para. 2.
[56]) 63 Stat. 2255, art. VI, para. 2.
[57]) U.S.T. & O.I.A., vol. 1, p. 785, T.I.A.S. 2155.
[58]) U.S.T. & O.I.A., vol. 7, p. 1839, T.I.A.S. 3593, art. V, para. 4.
[59]) U.S.T. & O.I.A., vol. 5, p. 1829, T.I.A.S. 3057.
[60]) *Ibid.* art. VIII, para. 3.
[61]) *Ibid.*

justify the payment of compensation in otherwise unacceptably soft local currency? In a world of exchange controls rather than free currency movements, these questions present a number of important and difficult problems which the United States commercial treaties have not yet adequately approached[62]).

Except for the Ethiopia treaty of 1951[63]), each of the treaties signed by the United States subsequent to the Greek treaty have used the above-quoted provision as a model; but each of them has modified the precise language to some degree. Some of the later provisions, for example, use the phrase "public purpose" instead of "public benefit"[64]); and the Nicaragua treaty of 1956 specifies "public purposes and reasons of social utility as defined by law"[65]). As another example, some of the treaties replace the word "taken" with the word "expropriated"[66]). Of the fifteen treaties signed after the Greece treaty of 1951, ten of them continue to use the language of the Greek treaty in requiring compensation to be the "full equivalent" of the property taken; but four of them, on the other hand, omit the word "full"[67]). It might be argued that the absence of the word "full" would allow the payment of less compensation than otherwise, but since the word "equivalent" conveys by itself the idea of full value for property taken, the argument is not persuasive. It appears, instead, that the word "full" may have been omitted from some of the treaties simply to avoid possible technical conflicts with the internal law of the other parties to these treaties[68]).

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[62]) Rubin, *op. cit. supra* note 4, p. 22.

[63]) U.S.T. & O.I.A., vol. 4, p. 2134, T.I.A.S. 2864. The Ethiopia treaty of 1951 simply states that the property of nationals and companies "... shall not be taken except for a public purpose, nor shall it be taken without the prompt payment of just and effective compensation".

[64]) E.g., the Japan treaty of 1953, U.S.T. & O.I.A., vol. 4, p. 2063, T.I.A.S. 2863, art. VI, para. 3. The Netherlands treaty of 1956, U.S.T. & O.I.A., vol. 8, p. 2043, T.I.A.S. 3942, art. VI, para. 4, requires a "public interest".

[65]) U.S.T. & O.I.A., vol. 9, p. 449, T.I.A.S. 4024, art. VI, para. 4.

[66]) E.g., the French treaty of 1959, U.S.T. & O.I.A., vol. 11, p. 2398, T.I.A.S. 4625, art. IV, para. 3. Paragraph 5 of the Protocol provides that the phrase "expropriated ... for a public purpose" extends *inter alia* to "nationalizations".

[67]) The Israel treaty of 1951, U.S.T. & O.I.A., vol. 5, p. 550, T.I.A.S. 2948, art. VI, para. 3; the German treaty of 1954, U.S.T. & O.I.A., vol. 7, p. 1839, T.I.A.S. 3593, art. V, para. 4; the Netherlands treaty of 1956, U.S.T. & O.I.A., vol. 8, p. 2043, T.I.A.S. 3942, art. VI, para. 4; and the French treaty of 1959, U.S.T. & O.I.A., vol. 11, p. 2398, T.I.A.S. 4625, art. IV, para. 3. The Ethiopia treaty of 1951, U.S.T. & O.I.A., vol. 4, p. 2134, T.I.A.S. 2864, art. VIII, para. 2, simply requires the "prompt payment of just and effective compensation".

[68]) Compare Germany's objection to the phrase "just compensation" in the treaty of 1923, *supra* n. 46 and accompanying text.

Furthermore, as an additional and very important means of protection, all nineteen treaties signed after World War II require no less than national and most-favored-nation treatment with regard to all matters relating to the taking of property[69]).

b) Protection and Security of Property

As mentioned above, the "protection and security" clause appeared, in slightly different form, as early as 1815[70]) and was included in the property-protection formula used in the commercial treaty series after World War I[71]). After World War II the clause was altered in a number of ways. First of all, the promise of protection and security was no longer expressly qualified by the stipulation that nationals and companies submit to conditions imposed upon nationals and companies of the other party[72]). Secondly, the Ireland treaty of 1950 required "the most constant protection and security ... in no case less than that required by international law"[73]), thereby indicating that the customary international law standard of protection and security was to be considered only as a basic minimum standard rather than the exclusive measure of what the treaty demanded. However, this indication is somewhat puzzling, since the provision doesn't indicate what other standards might be employed to require protection and security of a higher degree than that required by international law. This particular difficulty was avoided by the Greek treaty of 1951, which eliminated the reference to international law altogether[74]); and just as in the case of the provision relating to the taking of property, the Greek treaty has served as a model for subsequent treaties:

> Property of nationals and companies of either Party shall receive the most constant protection and security within the territories of the other Party[75]).

Eight of the fifteen subsequent treaties employ the same language. Three other treaties, all with middle-eastern countries, elaborate on the scope of

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[69]) E.g., the German treaty of 1954, U.S.T. & O.I.A., vol. 7, p. 1839, T.I.A.S. 3593, art. V, para. 5.

[70]) See the Great Britain treaty of 1815, 18 Stat. 292, art. I.

[71]) See text of provision accompanying n. 39.

[72]) Compare the China treaty of 1946, 63 (2) Stat. 1299, art. VI, para. 1, with the German treaty of 1923, 44 Stat. 2132, art. I, para. 4.

[73]) U.S.T. & O.I.A., vol. 1, p. 785, T.I.A.S. 2155, art. VIII, para. 2. (Emphasis added).

[74]) Nevertheless, this reference to international law has been retained in most of the treaties in those provisions dealing with the protection and security of persons. See, e.g., the German treaty of 1954, U.S.T. & O.I.A., vol. 7, p. 1839, T.I.A.S. 3593, art. III, para. 1; and the Luxembourg treaty of 1962, U.S.T. & O.I.A., vol. 14, p. 251, T.I.A.S. 5306, art. III, para. 1.

[75]) U.S.T. & O.I.A., vol. 5, p. 1829, T.I.A.S. 3057, art. VII, para. 1.

the word "property". Thus the Ethiopia treaty of 1951[76]) and the Iran treaty of 1955[77]) both state that property includes "interests in property", and the Muscat and Oman treaty of 1959 extends "all possible protection and security" to property, including "direct and indirect interests in property"[78]).

The phrase "the most constant protection and security" seems fair enough on its face, but in the absence of further definition or elaboration, the concept is so vague that it is difficult to imagine this provision as the basis of a claim that one of the parties had violated the treaty. However, two recently-signed treaties, the Belgian treaty of 1961 and the Luxembourg treaty of 1962, have modified the provision in order to give it at least a minimum amount of legal substance:

> Property that nationals and companies of either Contracting Party own within the territories of the other Party shall enjoy constant security therein through full legal and judicial protection[79]).

Although opinions may vary widely on what constitutes full legal and judicial protection, the provision can reasonably be read to require the existence of a judicial remedy for unlawful or arbitrary governmental interference with the security of the property of treaty aliens. And implicit in the existence of such a remedy is the idea that the ownership of property is a right requiring some minimum amount of recognition and respect on the part of the state, a right not easily impaired merely by the invocation of "social considerations".

c) Equitable Treatment

Unlike the two types of provisions discussed above, the equitable treatment provision is a relatively new development, since it first appeared in the Ireland treaty of 1950:

> Each Party shall at all times accord equitable treatment to the capital of nationals and companies of the other Party[80]).

But like the phrase "most constant protection and security", the expression "equitable treatment" is, in the absence of further explanatory language, a somewhat vague standard on which to base an international claim. On the other hand, there is an indication that "equitable treatment"

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[76]) U.S.T. & O.I.A., vol. 4, p. 2134, T.I.A.S. 2864, art. VIII, para. 2.
[77]) U.S.T. & O.I.A., vol. 8, p. 899, T.I.A.S. 3853, art. IV, para. 2.
[78]) U.S.T. & O.I.A., vol. 11, p. 1835, T.I.A.S. 4530, art. IV, para. 2.
[79]) The Belgium treaty of 1961, T.I.A.S. 5432; the Luxembourg treaty of 1962, U.S.T. & O.I.A., vol. 14, p. 251, T.I.A.S. 5306, art. IV, para. 1.
[80]) U.S.T. & O.I.A., vol. 1, p. 785, T.I.A.S. 5306, art. V.

was intended to include the concept of due process in the international law sense of the word, since the Ireland treaty of 1950 was not only the first commercial treaty to use the phrase "equitable treatment" but was also the first commercial treaty to drop the due process language from the provision regarding the taking of property. It would thus appear that the guarantee of at least a minimum amount of fairness in matters regarding the taking of property was, in effect, replaced by a guarantee of the same amount of fairness in all matters relating to the capital of treaty-aliens. All but one of the sixteen treaties signed after 1950 contain an equitable treatment clause[81]), but they all differ from the Ireland treaty version. First of all, these subsequently-signed treaties replace the word "capital" with the phrase "persons, property, enterprises and other interests"[82]), thereby extending the scope of the provision beyond mere capital to all property in the general sense of the word. Secondly, five of the treaties specify treatment that is "fair and equitable"[83]), a modification which perhaps emphasizes the idea expressed by the provision but which has little if any legal significance.

d) Public Ownership

Although many large-scale expropriations are carried out in the name of social or economic reform, the fact remains that selective expropriation of property on the basis of the nationality of the owner can be an effective means of economic discrimination and political retaliation, even in those cases where the owners are awarded "full" compensation. In order to avoid this threat and to insure that expropriations, when they occur, are carried out in a non-discriminatory manner, the United States has succeeded in inserting a public ownership provision in fourteen of the commercial treaties of the present series. The provision in the Ireland treaty is typical:

> Moreover, enterprises in which nationals and companies of either Party have a substantial interest shall be accorded, within the territories of the other Party, not less than national and most-favoured-nation treatment in all matters relating to the taking of privately owned enterprises into public ownership and the placing of such enterprises under public control[84]).

Subsequent provisions in this category are substantially similar, but

[81]) The one exception is the Japan treaty of 1953, U.S.T. & O.I.A., vol. 4, p. 2063, T.I.A.S. 2863.

[82]) E.g., the Greek treaty of 1951, U.S.T. & O.I.A., vol. 5, p. 1829, T.I.A.S. 3057, art. 1.

[83]) E.g., the German treaty of 1954, U.S.T. & O.I.A., vol. 7, p. 1839, T.I.A.S. 3593, art. I, para. 1.

[84]) U.S.T. & O.I.A., vol. 1, p. 785, T.I.A.S. 2155, art. VIII, para. 3.

three specific variations from the pattern should be noted. First, the Greek treaty of 1951 specifically requires that the action of the expropriating government be "in conformity with applicable law" [85]). Secondly, the Israel treaty of 1951 limits the application of the provision to enterprises in which nationals and companies of the other party have a "controlling interest" [86]). Thirdly, the Netherlands treaty of 1956 adds to the very end of the provision the words "or administration" [87]).

e) Unreasonable or Discriminatory Measures

In order to reduce the possibility of governmental harassment short of expropriation, a provision against unreasonable or discriminatory measures was included in the Ireland treaty of 1950; and all United States commercial treaties signed thereafter contain some sort of provision concerning the problem. The Ireland treaty provides:

> Neither Party shall take unreasonable or discriminatory measures that would impair the legally acquired rights or interests of nationals and companies of the other Party in the enterprises which they have established or in the capital, skills, arts or technology which they have supplied [88]).

This clause, in substantially the same form, appears in eleven subsequent commercial treaties. However, the last eight treaties in this group of eleven have modified the language of this provision to read "... in their capital, or in the skills, arts or technology which they have supplied" [89]). This change in construction released the word "capital" from the qualification "which they have supplied", and thereby extended the application of the provision to all capital of the enterprise concerned, that is, both the capital originally invested in the enterprise and the capital created by the enterprise itself. This distinction can be crucial in a situation where an enterprise represents a relatively small original investment which has grown through the reinvestment of local earnings.

Three other treaties deal with the problem in a much more general manner:

> Each High Contracting Party ... shall refrain from applying unreasonable or discriminatory measures that would impair their legally acquired rights and interests ... [90]).

[85]) U.S.T. & O.I.A., vol. 5, p. 1829, T.I.A.S. 3057, art. VIII, para. 4.
[86]) U.S.T. & O.I.A., vol. 5, p. 550, T.I.A.S. 2948, art. VI, para. 5. (Emphasis added).
[87]) U.S.T. & O.I.A., vol. 8, p. 2043, T.I.A.S. 3942, art. VI, para. 5.
[88]) U.S.T. & O.I.A., vol. 1, p. 785, T.I.A.S. 2155, art. V.
[89]) E.g., the Japan treaty of 1953, U.S.T. & O.I.A., vol. 4, p. 2063, T.I.A.S. 2863, art. V, para. 1.
[90]) E.g., the Ethiopia treaty of 1951, U.S.T. & O.I.A., vol. 4, p. 2134, T.I.A.S. 2864, art. VIII, para. 1.

and two of these three treaties continue with a clause specifically protecting contractual rights:

> ... and shall assure that their lawful contractual rights are afforded effective means of enforcement, in conformity with the applicable laws[91]).

A few of the treaties in the present series have attempted to elaborate on the subject of unreasonable or discriminatory measures. For example the Ireland treaty of 1950 goes on to provide:

> Neither Party shall deny appropriate opportunities and facilities for the investment of capital by nationals and companies of the other Party; nor shall either Party unreasonably impede nationals and companies of the other Party from obtaining on equitable terms the capital, skills and technology it needs for its economic development[92]).

However, this kind of language is not a regular feature of the commercial treaty program.

Like the term "protection and security", the phrase "unreasonable or discriminatory measures" appears fair enough on its face, but is has been criticized for its lack of precision. It would appear that the treatment required by this provision is not the equivalent of national or most-favored-nation treatment, since the requirement is not stated in those terms. It is therefore less than clear exactly what kind of protection and how much protection this provision affords against such institutions as wage, labor, allocation and price controls[93]).

2. Provisions Dealing Indirectly with Property

Although most United States commercial treaty provisions are not primarily concerned with the protection of property itself, many of them nevertheless directly affect foreign investors by guaranteeing a certain amount of freedom in the conduct of business and by specifying a number of areas where the government retains the right to impose restrictions upon and to limit the activity of enterprises owned by treaty-aliens. To the extent that such provisions inform the foreign investor as to what he can expect in the way of treatment by the government, and to the extent that these provisions reduce the possibility of governmental harassment of enterprises owned by treaty aliens, these provisions play a significant role in protecting the value and maintaining the stability of investments. Although each of the treaties in the present series differs in varying degree from the

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[91]) *Ibid.*
[92]) *Supra* note 88.
[93]) Rubin, *op. cit. supra* note 4, p. 79.

other treaties in approaching the problems discussed below, the Luxembourg treaty of 1962 may be considered typical[94]).

In regard to the permissible form of enterprises and the scope of their activities, the treaty calls for national treatment with respect to engaging in all types of commercial, industrial, financial and other activity for gain. National treatment in this context is defined to include (a) the right to establish and maintain branches, agencies, offices, factories and other establishments appropriate to the conduct of the business in question, (b) the right to organize companies under domestic law and to acquire majority interests in domestic companies, and (c) the right to control and manage enterprises once established or acquired[95]). The treaty also reserves the right of the parties to limit foreign participation in strategic industries such as communications, banking and transportation, but new limitations of this kind cannot be applied to foreign-owned enterprises already established in one of these areas[96]). Furthermore, treaty aliens are granted national treatment with respect to (a) leasing property appropriate to the conduct of permissible commercial activities, (b) leasing property for residential purposes, (c) occupying and using such property, and (d) other rights in real property permitted by local law[97]).

These rights of establishment are admittedly of more interest to the potential investor than they are to the already-established investor; but they are not without importance in the latter case, because arbitrary or discriminatory refusal on the part of the government to allow economically necessary expansion of an existing enterprise could seriously affect and even destroy the value of the original investment. It might be difficult to measure with any accuracy the loss sustained by a manufacturing enterprise suddenly faced with governmental regulations preventing the expansion of marketing and distribution facilities necessary for efficient operation, but the loss in investment value could be substantial, and it is this kind of loss which these provisions can help to prevent.

Closely connected with the freedom to determine the form and scope of the enterprise and to exercise independent control over it is the freedom of entry and sojourn for management and the freedom to hire personnel of the management's own choosing. The treaty guarantees the right of nationals of either party to enter and to travel freely within the territories of the other party and to choose their place of residence, particularly

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[94]) U.S.T. & O.I.A., vol. 14, p. 251, T.I.A.S. 5306.
[95]) *Ibid.* art. VI, para. 1.
[96]) *Ibid.* art. VI, para. 2.
[97]) *Ibid.* art. IX, para. 1.

when such nationals are engaged in carrying on trade between the two countries or in related commercial activities, or when such nationals are acting to develop and direct the operations of an enterprise in which they have invested, or are actively in the process of investing, a substantial amount of capital[98]). Nationals and companies of each party are also given the specific right to hire accountants and technical experts of all kinds, executive personnel, attorneys, agents and other specialists of their choice. Furthermore, the accountants and other technical experts are not required to qualify for the practice of their profession within the territory of the other party in order to make examinations, audits and technical investigations or to render reports, as long as such activities remain on an internal basis[99]).

In order to prevent unwarranted interference with the privacy of home and business, to insure the security of business records and to reduce the possibility of government harassment, the treaty contains a provision protecting the dwellings and all other premises of treaty aliens from searches or measures other than those permitted by law and in execution of law. Such searches, when necessary, must be carried out with careful regard for the convenience of the occupants and the conduct of business; and in all matters relating to searches and examinations of premises and their contents, treaty aliens are entitled to at least national treatment[100]).

Another essential property-protection device is the provision prohibiting discriminatory taxation. The treaty states that treaty aliens shall not be subject to the payment of taxes, fees or charges imposed upon or applied to income, capital, transactions, activities or any other object which are "more burdensome than those borne in like situation" by nationals and companies of the taxing country or of any third country. This requirement is essentially the equivalent of national and most-favored-nation treatment, but it is framed in terms sufficiently liberal to allow reasonable administrative and procedural differences between the taxation of nationals and the taxation of foreigners. Furthermore, each party is prohibited from taxing the income of non-resident treaty aliens not reasonably allocable or apportionable to its territory. Finally, both parties reserve the right to grant tax advantages to nationals and companies of third countries on the basis of reciprocity or by virtue of agreements for the avoidance of double taxation[101]).

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[98]) *Ibid.* art. II, para. 1.
[99]) *Ibid.* art. VIII.
[100]) *Ibid.* art. III, para. 5.
[101]) *Ibid.* art. X.

The difficult problem of exchange restrictions is covered by a series of provisions in the following manner. First, treaty aliens are accorded national treatment and not less than most-favored-nation treatment with respect to payments, remittances and transfers of funds or financial instruments to any point outside the country. Secondly, regardless of the exchange controls imposed by one of the parties on its own nationals or on nationals of a third country, it is prohibited from imposing exchange restrictions in a manner unnecessarily detrimental or arbitrarily discriminatory to the investments and other interests of nationals and companies of the other party. Third, neither party may impose exchange restrictions except to the extent necessary to maintain or restore adequacy to its monetary reserves, particularly in relation to its external commercial and financial requirements. Fourth, if either party should impose exchange restrictions in accordance with the treaty, it must, after making necessary provisions to assure the availability of foreign exchange for essential goods and services, make provision, to the fullest extent practicable in light of the level of monetary reserves and its balance-of-payments, for the withdrawal in the currency of the other party of compensation for the taking of property, earnings of all kinds, amounts for amortization of loans and depreciation of direct investments, and, under certain circumstances, capital transfers. Finally it is clearly stipulated that these provisions do not alter the obligations either party may have to the International Monetary Fund, nor do they preclude imposition by either party of particular restrictions authorized or requested by the Fund[102]).

Although these provisions may appear suitably extensive, some of the built-in loopholes are fairly broad. First of all, the Articles of the Fund Agreement give a rather free rein to restriction-minded countries[103]). Furthermore, a restriction-minded country could easily consider an "adequate" monetary reserve to be an extremely large one, and it might also give the term "essential goods and services" a very broad meaning. The Japan treaty of 1953 and the German treaty of 1954 attempted to be more specific by allowing exchange restriction deemed necessary to "assure the availability of foreign exchange for goods and services essential to the health and welfare of the people"[104]); but this language is little better, since few governments would not consider their exchange controls neces-

[102]) *Ibid.* art. XI.

[103]) Rubin, *op. cit. supra* note 4, at pp. 77–78.

[104]) Japan treaty of 1953, U.S.T. & O.I.A., vol. 4, p. 2063, T.I.A.S. 2863, art. XII, para. 3; German treaty of 1954, U.S.T. & O.I.A., vol. 7, p. 1839, T.I.A.S. 3593, art. XII and Protocol para. 15.

sary to the health and welfare of the people. Finally, implicit in these provisions is the concession that expropriation is not dependent on the availability of foreign exchange for the expropriated foreign owner.

In order to maintain conditions of competitive equality when publicly owned or controlled enterprises compete with privately owned and controlled enterprises of treaty aliens, the typical treaty declares that such state-owned enterprises should not be given special economic privileges which could injure the competitive position of such private enterprises. This broad statement of principle does not apply, however, to special necessary concessions in aid of state-owned enterprises during periods of economic crisis, especially to relieve unemployment; it does not apply to the manufacturing of goods for government use or to the supplying of goods and services to the government for government use; and it does not apply to the process of supplying, at prices substantially below competitive prices, the needs of particular population groups for essential goods and services not otherwise available to such groups[105]).

Freedom of access to the courts, an essential element in any arrangement designed to protect property rights of foreigners, is guaranteed by a provision granting nationals and companies of either party national treatment with respect to access to the courts and administrative bodies of the other party. Furthermore, companies of either party not engaged in activities within the territories of the other party are given the same right of access without the requirement of registration and domestication[106]). Settlement of private controversies through arbitration is encouraged by a clause providing for judicial enforcement of arbitration awards in cases where the parties have contracted to arbitrate their disputes[107]).

Finally, the entire treaty is strengthened and given additional significance by a provision requiring the submission of all otherwise unresolvable disputes over the interpretation or application of the treaty to the International Court of Justice[108]). Along with the systematic provision

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[105]) Luxembourg treaty of 1962, U.S.T. & O.I.A., vol. 14, p. 251, T.I.A.S. 5306, art. VII. Compare the German treaty of 1954, *supra* note 104, art. XVII, which requires government owned or controlled enterprises to make their purchases and sales involving either imports or exports affecting the commerce of the other party solely in accordance with commercial considerations, including price, quality, etc.

[106]) The Luxembourg treaty of 1962, U.S.T. & O.I.A., vol. 14, p. 251, T.I.A.S. 5306, art. III, paras. 2 and 3.

[107]) *Ibid.* art. III, para. 6.

[108]) *Ibid.* art. XVII. Some of the treaties in the present series simply provide for arbitration and state that the dispute shall be submitted to the International Court of Justice only upon agreement of the parties. See, e.g., the German treaty of 1954, U.S.T. & O.I.A., vol. 7, p. 1839, T.I.A.S. 3593, art. XVII, para. 2.

for corporate rights, the unreserved acceptance of the jurisdiction of the Court for determining treaty rights and obligations may be one of the most important developments arising out of the current United States commercial treaty program [109]).

IV. General Observations

Once it has been established that a taking has occurred, the taking and public ownership provisions, along with the national and most-favored-nation clauses, appear to provide most of the protection that an investor can reasonably expect. Perhaps the most serious weakness in this arrangement lies in the exchange restrictions provisions, which provide a number of excuses for a country attempting to avoid paying compensation in hard, unblocked currency, and in the indefiniteness of the phrase "effectively realizable form". However, in view of the sensitive nature of the problem, the weakness is not altogether unavoidable. Balance of payment problems and other financial troubles threatening the very life of a country's economy can arise so quickly and unexpectedly that it would not necessarily be unreasonable for a country which is willing and able to compensate United States investors in dollars for property expropriated today to nevertheless avoid obligating itself by treaty to do so ten or fifteen years from now. In view of this difficulty it is conceiveable that the rather flexible and liberal commitment contained in the present treaties is all that the United States can expect from many countries in the near future.

Unfortunately, the treaties do not attempt to define a taking. Lack of definition is no problem in cases where the expropriating government readily admits what it is doing, but because of certain modern developments in laws and regulations affecting the economy of a country, it is becoming increasingly difficult in many cases to determine if and when a taking has occurred [110]). The enactment of exchange controls, allocation measures, price controls, labor laws and zoning ordinances, when examined individually, may all be legitimate and reasonable exercises of the police power; but, under certain circumstances, when they are all enforced simultaneously, the cumulative effect on a foreign-owned enterprise can be fatal. Whether these measures are the result of the government's good-faith effort to protect the health of the economy, or whether they are merely

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[109]) Walker, Treaties for the Encouragement and Protection of Foreign Investments: Present United States Practice, in: The American Journal of Comparative Law (Am. J. Comp. L.), vol. 5 (1956), pp. 229, 239.

[110]) Rubin, *op. cit. supra* note 4, pp. 29–30.

an attempt to avoid possible international law obligations by eliminating the formalities of an outright taking, the results as far as the investor is concerned are indentical: he has lost most if not all of the value of his investment, he has received no compensation, and the enterprise is now substantially in the hands of the government[111]).

It is in this area of "creeping expropriation" that the property-protection provisions of the commercial treaties of the United States are perhaps least effective. In such cases the complaining party must rely primarly on the protection and security provision, the equitable treatment provision and the unreasonable or discriminatory measures provision; and while the principles set out in these provisions are unquestionably sound, they are at the same time so broad that they offer little help in determining the legality of governmental conduct in specific cases.

On the other hand, the lack of specificity in these provisions is not surprising. Although provisions could be drafted to apply specifically to many of the numerous steps a government might take to affect adversely the life of an enterprise or the value of an investment in the absence of a taking and even in the absence of any attempt to harass, it is unlikely that such provisions would gain much acceptance in many of the capital-importing countries. Such provisions would necessarily entail a certain degree of restriction on what is otherwise thought of as the legitimate exercise of the police power; and even some of those states fully supporting the rule of just compensation for the taking of private property for public use might understandably reject any commitment which, in their opinion, restricts the full exercise of their sovereignity. This reaction might also be particularly strong in many less developed nations, where the subject of sovereignity is often a sensitive and even explosive political issue. In any case, the present provisions, although not entirely adequate from the investor's point of view, give the complaining party at least a minimum legal foothold in attempting to protect the property interests of its nationals from "creeping expropriation"; and to this extent the provisions are an improvement over the rules of customary international law.

A weakness inherent in the treaty program itself lies in the fact that many of the treaties have been concluded with countries which would provide much the same degree of protection to foreign-owned property even in the absence of treaty obligations. To put it another way, the United States has been unable to conclude meaningful treaties with many of those countries most in need of foreign investment. Since many of these

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111) *Ibid.* at p. 39.

countries are strongly motivated by such factors as nationalism, the desire for fast economic growth and distrust of foreign capitalists, their lack of interest in the program is not surprising. But what the United States might do to stimulate their interest is a difficult question. It might be possible to employ extraneous bargaining power by offering government loans, grants and tariff concessions in order to induce reluctant countries to join the program. This approach would be an unfortunate one, however, because it would suggest that the rules set out in the treaties are based not on sound principles, but on considerations of "private advantage and profit, suited to the haggling of the market place"[112]). Secondly, the United States could liberalize the rules of property protection in order to make the treaty much more attractive to a number of countries which might disagree with the philosophy underlying the treaties in their present form. In fact the United States has done so insofar as some of the treaties with less-developed countries are less comprehensive than the others[113]). But again, any substantial shift of United States policy in this direction would tend to defeat the purpose of the program, not only by reducing the degree of protection guaranteed to foreign investors but also by weakening the very principles upon which the property-protection provisions are premised. Under these circumstances, then, the United States can do little more than to make it perfectly clear that it is ready and willing to negotiate a commercial treaty at the convenience of any country willing to recognize these principles in good faith and to hope that these principles will gain acceptance in some of those areas of the world where they are most needed. That this hope is not entirely in vain is evidenced by the fact that commercial treaties have been signed with such countries as Ethiopia, Iran, Korea, Muscat and Oman, Pakistan and Viet-Nam.

Furthermore, there are a number of other ways in which the United States can protect the investments of its nationals in countries unwilling for one reason or another to conclude a commercial treaty. Since 1948, for instance, the United States has concluded 56 investment guaranty treaties, which provide for insurance against various combinations of convertibility, expropriation, war, revolution and insurrection risks, upon payment of a stipulated premium by the American investor, for qualified new investments approved by both the United States and the host country[114]). This

[112]) Walker, *op. cit. supra* note 109, at p. 246.

[113]) E.g., the Ethiopia treaty of 1951, U.S.T. & O.I.A., vol. 4, p. 2134, T.I.A.S. 2864; the Iran treaty of 1955, U.S.T. & O.I.A., vol. 8, p. 899, T.I.A.S. 3853; and the Muscat and Oman treaty of 1958, U.S.T. & O.I.A., vol. 11, p. 1835, T.I.A.S. 4530.

[114]) See U.S.C.A., vol. 22 (1964), §§ 2181–84. See also Miller, Protection of United States Investments Abroad: The Investment Guarantee Program of the United

program is not intended as a substitute for the commercial treaty program. To the contrary, both programs supplement and reinforce each other[115]).

On the other hand, the existence of a commercial treaty between the United States and another country does not necessarily guarantee the existence of attractive investment opportunities in such country. In deciding whether to make an investment in any given country, an investor will take into consideration such factors as the political climate, economic and social conditions, and environmental characteristics; and all of these factors lie outside the possible scope of a treaty. Even within the field of legal conditions, the scope of the commercial treaties is limited. Although the treaties guarantee national and most-favored-nation treatment in many situations and attempt to insure at least a minimum amount of fairness in the content and administration of certain types of laws and regulations, these treaties certainly do not guarantee that such treatment and such laws will necessarily be attractive to foreign investors. "A forbidding tax may be no less forbidding because it falls on everyone alike"[116]).

V. Conclusion

Although some of the United States commercial treaty provisions give less than complete effectiveness to the principles underlying the treaty program, the mere statement of the principles themselves is an important function of the treaties. In order to achieve their purpose, legal rules for the protection of foreign property must be based on the idea of equality for the foreigner under the law and respect for his person and property. Without this foundation, specific treaty provisions, no matter how precisely drafted, offer little real protection. These treaties are, above all, treaties of "friendship", and by signing such a treaty a country indicates a friendly attitude on its part toward these principles, an attitude which, in the long run, may be as important to the investor as the text of any provision.

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States Government, in: The George Washington Law Review (Geo. Wash. L. Rev.), vol. 32 (1963), p. 288; Columbia Law Review (Col. L. Rev.), vol. 64 (1964), p. 315.

[115]) See generally Clubb and Vance, Incentives to Private U.S. Investment Abroad Under the Foreign Assistance Program, in The Yale Law Journal (Yale L. J.), vol. 72 (1963), p. 475.

[116]) Walker, *op. cit. supra* note 109, at p. 245.