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## Review of "Nationalization: A Study in the Protection of Alien Property in International Law," By Isi Foighel

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## BOOK REVIEWS

**NATIONALIZATION: A STUDY IN THE PROTECTION OF ALIEN PROPERTY IN INTERNATIONAL LAW.** By Isi Foighel. Copenhagen: Nyt Nordisk Forlag Arnold Busk. London: Stevens & Sons Limited. 1957. Pp. 136. \$4.85.

Ours is a world which is politically centrifugal but economically centripetal. Politically our world is fragmentizing into an increasing number of states. Economically our world is becoming increasingly interdependent. Ideologically our world is being increasingly divided into Communist and non-Communist spheres. Each of these spheres in turn is separating into still further subdivisions. States of the Communist sphere exhibit varying degrees of acceptance of the leadership of the party in Russia and varying degrees of expansionist tendencies. States of the free world exhibit varying degrees of acceptance of the leadership of the United States, Great Britain, and France. In the Middle East, South and Southeast Asia, and part of Africa, such non-acceptance is found in a so-called neutralism which characteristically manifests itself in a perception of Western policies as imperialist, colonial, and repressive. An expansionist Egypt, as the energizing instrument of the United Arab Republic, encounters the outright resistance of Jordan and Tunisia and the covert resistance of other states. Communist China represents a steadily engulfing force at work, a force which may eventually threaten India to the south and Siberia to the north.

Against this background the phenomenon of nationalization becomes a symptom of deep-seated forces and an instrument for change. After a survey of the municipal laws of twenty countries relating to nationalization, Foighel concludes that nationalization is "one means among many towards the solution of economic-political problems in countries differing widely as regards geographical position, form of government, and the ideological basis of the individual governments."<sup>1</sup> Let us momentarily look at the roster of some of the countries which have employed nationalization. They range from the conservative, Western European states of Great Britain, France, and the Netherlands to Burma, Egypt and India and finally to states fully dedicated to Communism, such as Russia and China.

There are few areas in the relations of states which so strike at the fundamentals of international law as that of nationalization. Foighel's model of international law bears little resemblance to the accepted

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1. P. 69.

positivist model or that of Article 38 of the Statute of the International Court of Justice. He states that international law reflects a balance between power pressures, that each state is "an independent power unit" or "collectivity" and that "the main task of international law is to prevent collision between the individual power units."<sup>2</sup> "The sole policy of international law is to avoid conflicts."<sup>3</sup>

Consequently, past practice of states as evidence of the law is apparently to be of little weight in determining the law.

As the balance of power shifts, as the interests of the individual states change and/or old-established legal attitudes within the states are abandoned and replaced by new ones, this will bring about a change of content in the international legal rules. . . . As a result we see that the rules of international law which regulate the international effects of nationalization must be understood (or laid down) on the basis of a close examination of the actual interests of the states rather than on the basis of a practice that has developed in quite different political and economic circumstances.<sup>4</sup>

In the view of Foighel, law flows from the interests of states, not their practice. The prime interest of states is in freedom in the exercise of territorial jurisdiction. Since this is greater than the interest in protecting citizens abroad in their property,

the result consequently must be that nationalization affecting aliens—from the point of view of international law—is a legitimate expression of the jurisdiction of the state, and the home country of an alien affected by the nationalization so cannot enforce recovery or compel damages as against the nationalizing state.<sup>5</sup>

The last proposition is qualified by the rule that the non-payment of compensation for nationalized property is unlawful.<sup>6</sup> In determining the amount of compensation, Foighel states that we must start from the point that compensation "must be adequate," "be paid promptly,"<sup>8</sup> and "be effective."<sup>9</sup>

Foighel makes an extensive review of treaty practice in the matter of agreements concerning payments by states for the expropriated property of aliens and concludes that such treaty practice is consistent with and tends to support the rule that there is an international "liability to pay compensation to foreigners affected by nationalization."<sup>10</sup>

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2. P. 32.

3. P. 43.

4. P. 34.

5. P. 71.

6. P. 75.

7. P. 115.

8. P. 120.

9. P. 122.

10. Pp. 84-85.

Foighel is a writer of impressive analytical ability, precise and clear in his statements, and, in certain parts of his study, thorough in his investigation of data. The summaries of municipal laws in the matter of nationalization at pages 56-69 and of treaty practice at pages 77-84 and 127-133 are most helpful. Yet his reliance on international precedent at times seems extraordinarily meager. For example, his conclusion that concession agreements may be treated as simply another property interest from the standpoint of the international law of nationalization refers only to two international precedents in the matter, both of which represent contrary authority.<sup>11</sup>

Foighel's conclusion that nationalization is lawful but that the non-payment of compensation in such case is unlawful demands a more precise analytical clarification. When it is remembered that he defines the standard of compensation to be adequate, prompt, and effective, one can hardly conclude that the nationalizing state is privileged as a matter of law to pay less or that the right of the injured state to claim compensation is measured by less. From the standpoint of law, the reviewer would characterize the legal relation in the matter of the nationalization of property, as distinguished from contract, as that of a conditional power, that is to say, a power the exercise of which is dependent on meeting the condition of prompt, adequate, and effective compensation. With Foighel, he agrees that the stated condition becomes the starting point for negotiation of the settlement of the international dispute. Accordingly, as stated by Foighel:

The blocking of assets, the cessation or restriction of trade relations and credits, the refusal of diplomatic recognition, unfriendly political attitude, etc. as the case may be, may merely be expressing that the general—and not the least practical—means of upholding international law are applied to enforce legitimate claim for compensation against an unwilling party.<sup>12</sup>

The universality of the international law rule of a right to compensation is shown in "the fact that in the autumn of 1955 negotiations were commenced between Hungary and Yugoslavia, in which both these countries demanded compensation for nationalization of property belonging to their nationals in the other state."<sup>13</sup>

Foighel's insistence on the freedom of states in the exercise of power within their territorial jurisdiction as a criterion for determining the content of international law is surprising and disturbing. Assuredly the revulsion against the excesses of Nazi Germany and other

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11. For evidence in support of a contrary conclusion that nationalization of concession agreements is unlawful, see Carlston, *Concession Agreements and Nationalization*, 52 *Am. J. Int'l L.* 260 (1958).

12. P. 84.

13. P. 87.

totalitarian states is a consequence of reliance by such states on this proposition. The spread of subversion, the preparation for war, the resort to measures of economic nationalism, all within state borders and all in the supposed exercise of territorial jurisdiction are the very sources of interstate conflict today which Foighel affirms it is the role of law to repress and control.

Foighel's view of international law, its sources and methodology, requires examination and evaluation. Fundamentally, the questions which his view raises may be summarized: (1) Are the rules of international law to be viewed in discontinuity, with only the current aspects of the situation and current evidences of law being relevant, or are they to be viewed in continuity, with new factors in a similar situation to be evaluated in the context of the whole? (2) Does international law simply reflect a point of balance between conflicting power pressures, with its content changing as the interests of the relevant repositories of power change, or are its rules at least in part shaped by mutual interest in achieving common ends for shared benefits?

To state these questions in such terms is, of course, to reveal the point of view of the undersigned and his preference for the latter alternative in each question. He would agree that scholars of international law must be more realistic and comprehensive in their examination of factual and underlying aspects of today's international law problems. He would emphatically reject the notion that to do so one is driven to as sterile, artificial, and naïve a model of interstate action and consequent process of law formation as the thesis that law merely represents a momentary equilibrium in the power struggle. He would instead demand that the international law scholar be exhaustive in his search for relevant facts as well as law, that new problems be evaluated in the light of experience, and that the formulation of rules for state conduct be dictated by enduring realities instead of momentary expedience. He would insist that international law does not arise out of conflict but out of the cooperation of states, that the underlying principles of justice reveal the rules by which situations of international conflict are to be resolved, that international law must be found in the ways in which states seek to realize values common to all, and that deviant conduct which must be controlled in law cannot be determined until we have determined the approved norms.

The international law scholar must work with the past, the present, and the future before him. Like the judge, he is in large measure a captive of the received rules of the past. They determine the boundaries of his area of freedom in the performance of his role as a scholar. Any other course leads to the intrusion of the personal element into a process which should be primarily impersonal. Yet his fidelity to the

experience of the past must not blind him to the realities and needs of today and tomorrow. His evaluation of the evidence of the law which diligence has brought forth must proceed in a larger framework than the negative concept of avoidance of conflict. Conflict will be avoided when law points the way to achieving desired goals, growth, and shared advantage. It will not be avoided when law is perceived to be shaped only by naked power and force.

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TRIALS AND APPEALS. By Charles W. Joiner. Englewood Cliffs, New Jersey: Prentice-Hall, Inc., 1957. Pp. xxiv, 594. \$8.75.

The principal purpose of a law school is of course to teach students to think clearly and reason logically from legal principles. However, it is important to interest students in all phases of the legal profession, the actual practice of law, and the operation of the courts. That will produce lawyers who will bring about progress and improvement in the administration of justice. This book by Professor Charles W. Joiner of the Law School of the University of Michigan recognizes this need and its importance to the profession. He says the principal aims of the materials he has put into this book are: (1) To assist in the making of strong advocates, and (2) To assist in the development of lawyers with a sympathetic ear and an unflinching perseverance in the cause of improved judicial administration. In order to develop fully one system of procedure, the materials are built around the federal statutes and procedural rules. This is wise because all students will come in contact with federal practice wherever they may locate and because the rules of federal procedure, since their adoption in 1938, have had a great and ever-growing effect on state procedure. In fact, it truly may be said that there has been greater improvement in practice and procedure throughout the nation in the last 20 years, because of the example furnished by these rules, than in the preceding 75 years.

The scope of Professor Joiner's work can be seen from the chapter headings, which are: 1. Investigation of a case for trial; 2. Preparation of a case for trial; 3. Jury selection; 4. Opening statements; 5. Trial; 6. Instructions; 7. Deliberations and conduct of the jury and their verdict; 8. Judgment; 9. After verdict motions; 10. Trial by court without a jury; 11. Review. Thus it will be seen that this book is not intended for a course in pleading. Rather it affords a broad comprehensive basis for study and discussion of every phase of a trial lawyer's work from the time the case is commenced until it is finally

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