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PUBLIC POLICY AND NEGATING DISCRIMINATORY EXPROPRIATIONS IN THE MUNICIPAL COURTS

Recent Arab expropriations which were intended as foreign policy offenses against particular states are raising anew the question of whether a discriminatory motive constitutes a sufficient objection to a state's act of expropriation to cause other states to deny it effect with respect to goods later entering their territories. At a time of severe fuel shortage, courts in several countries are being asked to invoke the customary international law principle of nondiscrimination to prevent their nationals from buying oil from the new government operators of certain expropriated concessions. In light of the relative ineffectiveness of objections to the present lack of compensation, this Note will examine the viability of the principle of nondiscrimination as a basic argument in those cases and the obstacles to successfully securing adjudication of the issue in national forums.

I

BACKGROUND

A. RECENT OIL EXPROPRIATIONS

1. Discriminatory Seizures

In December 1971, Libya's Revolutionary Command Council enacted an expropriation law by which the assets of the British Petroleum Company's Sarir field operation were seized. Only the British Petroleum Company was affected, and Libya's United Nations representative announced in the Security Council that the expropriation was in response to Britain's evacuation of the Tunb Islands in the Persian Gulf, an act Libya deemed prejudicial to Arab interests. Subsequently, in June 1973,
Libya expropriated the assets of Bunker Hunt, an American company operating in the Sarir field, and stressed in an announcement issued jointly with Egypt that the act was intended as retaliation against United States foreign policy in the Middle East. Only Bunker Hunt was affected by the act; the remaining United States and foreign oil companies in Libya were not affected. In February 1974, Libya expropriated three small American oil companies in order to deal "a severe blow to American interests in the Arab world" on the occasion of the conference of oil-importing nations in Washington.

At the outset of the Middle East war in October 1973, Iraq expropriated the American-owned share of the multinational Basrah Petroleum Company. Only the American interests were affected; British, French, Dutch, and Panamanian holdings were left untouched. A statement issued by the Iraqi Revolutionary Command Council indicated that the seizure was in reply to United States policy in the Middle East; a subsequent statement announced that Dutch interests in Basrah Petroleum had also been expropriated "in punishment for the Netherlands' flagrant hostile attitude and support for the Zionist enemy."

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5. President Sadat said that the decree which Colonel Qadafi announced marked the opening of a battle against American interests in the entire Arab world, and that it was incumbent upon America to recognize that she will never be able to protect her interests in the region if she continues in her provocation of the Arab nation and in the unlimited support of Israel. Al-Ahram, June 13, 1973, at 1, col. 6 (author's translation).

6. Bunker Hunt's Sarir field operation was an attractive target for seizure because it was relatively small and could easily be absorbed by the state enterprise created to operate British Petroleum's former Sarir-field concession. See N.Y. Times, Feb. 12, 1974, at 21, col. 2 (city ed.).
6a. N.Y. Times, Feb. 12, 1974, at 1, col. 5 (city ed.).
8. Id. at cols. 1-2.
9. [A] statement issued by the Iraq Revolutionary Command Council described the nationalization as "a decisive reply by the progressive nationalist revolution of Iraq against the Imperialist Zionist aggression on the Arab nation."

The statement continued: "Facing that aggression on the Arab nation necessitates directing a blow at American interests in the Arab nation so that Arab oil may be a weapon in our hands and not in the hands of imperialists and Zionists."

Id. at col. 1.
2. The Resulting Litigation

After the seizure of its concession, British Petroleum vowed to bring suit in municipal courts wherever Libya tried to market the oil. The company planned to challenge Libya's ownership of the oil by arguing that the seizure was not worthy of recognition abroad because the expropriation law lacked adequate provision for compensation to the owner and unjustly discriminated on the basis of nationality. By October 1973, British Petroleum had initiated actions against more than thirty cargoes of Sarir-field oil shipped to Italy and against twenty-four cargoes shipped to Greece. Following the seizure of its interest, Bunker Hunt joined British Petroleum in bringing actions against cargoes shipped to Brazil and to the United States. At this writing, none of the actions has been completed, and no actions are known to have arisen from the Iraqi seizures.

It is the strategy of the oil companies to impose such legal obstacles to the marketing of the Sarir-field crude oil that the Libyan government will be willing to come to a settlement with respect to compensation.

11. The first case, BP Exploration Co. (Libya) v. Societa Industriale Catanese (SINCAT), was brought in Syracuse, Sicily. The facts of the case are reported in The Times (London), Jan. 3, 1972, at 13, col. 1. The motion for attachment and writ of summons in the case are reproduced in 11 INT'L LEGAL MAT'LS 328 (1972). The writ of summons charged, "[Libya] has adopted a singular measure of expropriation vis-à-vis a single foreigner ..., an eminently political and discriminatory measure ..., all the more serious in this particular case by reason of the fact that the expropriated company has not been given any reliable guarantee as to ... compensation." Id. at 342-43.


13. The two "asked a court in Brazil to block Petrobras, the Brazilian oil concern, from buying crude oil in Libya's nationalized Sarir field." Wall St. Journal, July 19, 1973, at 5, col. 2. "At the moment, there is a dispute as to the correct forum (i.e. State Court or Federal Court)." Sharpe Letter, supra note 12.

14. They named as defendant Coastal States Gas Producing Co. of Houston .... The suit, filed in state district court for Harris County (Houston), Texas, seeks the return of all cargos of Sarir crude or oil products derived from the cargos or, alternatively, payment of the full market value of the cargos. Wall St. Journal, Aug. 9, 1973, at 7, col. 1.

"The action ... was removed by the defendant to the U.S. District Court. A motion to remand the case to the State Court is due to be heard early next month." Sharpe Letter, supra note 12. A second shipment to the same defendant reportedly prompted a maritime chase by U.S. marshals before suit was brought in Philadelphia. Wall St. Journal, Aug. 21, 1973, at 9, col. 1. Both shipments to the American buyer had been purchased in Italy, not directly from Libya.

15. "The first such action against SINCAT ... resulted in an unfavourable decision at first instance earlier this year and the case has gone to appeal. Some of the other actions are due for their first hearing next month [November, 1973]." Sharpe Letter, supra note 12.

16. "But it isn't the Sarir oil, or payment for it, that British Petroleum really
Many observers believe that the bringing of such suits prompted the Iranian government to come to terms with the Anglo-Iranian Oil Company in the 1950's, despite the very small number of judgments actually favoring the company.  

Libya was thought to be especially vulnerable to litigation threatening the marketability of the oil because the unusually waxy nature of the Sarir-field oil requires uninterrupted shipping lest the oil solidify in the field's 320-mile pipeline.

B. IMPORTANCE OF DISCRIMINATION AS AN OBJECTION

1. The Principle of Nondiscrimination

The Permanent Court of International Justice defined the standard of nondiscrimination in *The Oscar Chinn Case*: "The form of discrimination which is forbidden is . . . discrimination based on nationality and involving differential treatment by reason of their nationality as between persons belonging to different national groups." It is the essence of the discrimination objection that the seizures at issue in these cases were not pursuant to general national plans for the industries, plans based on social and economic policy, but were punitive exceptions to those plans, specifically enacted to harm the nationals of particular states.

Although the principle is especially pertinent to expropriation cases, it is important to understand that those expropriations which appear to be discriminatory merely because the entire expropriated industry was controlled by foreigners or by nationals of a particular foreign state do not fall within the scope of the principle. That exception does not apply to the Libyan and Iraqi expropriations under consideration, and
the available facts suggest that the contention that those seizures were in violation of the nondiscrimination principle is a valid one. The cases being considered must also be distinguished from similar suits contesting seizures pursuant to a general policy. While doubtless based on the same strategy of encumbering marketing, those actions cannot convincingly rely on the nondiscrimination principle as an objection, and will have to rely entirely on allegations of noncompensation.

2. Relative Weakness of the Noncompensation Objection

The argument that an act of expropriation should be denied effect abroad because it did not provide a reliable guarantee of adequate compensation is unlikely to prevail with respect to the seizures considered here. In past cases of challenged expropriations, courts have frequently assumed that, absent express language to the contrary, the taking government would pay just compensation. Some of the Anglo-Iranian Oil Company cases foundered on that very assumption. The decree “nationalizing” British Petroleum’s assets in Libya specifically provides that compensation will be paid, and the law relating to Bunker Hunt’s interests may be assumed to be similar. The Iraqi decree also declares

23. Libya’s general plan of fifty-one percent state participation has been resisted by the oil companies. Several companies, including Dutch as well as American interests, announced that they would seek to block the sale of Libyan crude oil by court action. Their contention was that the compensation offered by Libya was insufficient. N.Y. Times, Sept. 9, 1973, § 4, at 4, col. 2. Texaco has filed two suits against S.p.A. Raffinerie Sarde, an Italian importer, and other actions are expected. See Wall St. Journal, Sept. 28, 1973, at 19, col. 2. But clearly the fifty-one percent scheme is to be applied industry-wide, without regard to nationality. The more bitter pill of complete seizure suffered by British Petroleum and Bunker Hunt must be seen as exceptional treatment.

24. In Anglo-Iranian Oil Co. v. Idemitsu Kosan Kabushiki Kaisha, 20 INT’L L. REP. 305, 313 (High Ct. Tokyo 1959), the court ruled that language in the expropriation act calling for the payment of compensation made the act “not . . . completely confiscatory” and that as a result the court could not “try the validity or invalidity of such a law by examining the compensation and seeing whether or not it is ‘adequate, effective and immediate’ . . . .” In Anglo-Iranian Oil Co. v. S.U.P.O.R. Co., 22 INT’L L. REP. 23, 40 (Civil Ct. Rome 1954), the court was equally reluctant to look beyond the text of the law: “The search for any concealed . . . motives on the part of the law-giver, which are not revealed by the text of the law . . . would . . . be open to this Court . . . .” The court found that the statute’s provision for compensation was a sufficient guarantee: “[I]t is enough that there is some compensation for the expropriation to be lawful.” Id. at 36 (italics in original). Indeed, the court held that there was no need for the law to provide for compensation equal in value to the property seized.

25. Law Nationalizing British Petroleum Exploration Co. (Libya), art. V, Dec. 7, 1971, in 11 INT’L LEGAL MAT’LS 380, 381 (1972); “The State shall pay the party concerned compensation for all property of funds, rights and assets transferred in accordance with Article 1 above.” See 3 PROGRESSIVE LIBYA, Nos. 3 & 4, Nov.-Dec. 1973, at 9, reporting the designation of the committee to determine the compensation due Bunker Hunt. The formation of a similar committee to deal with the February 1974
that compensation will be paid. To be sure, some courts have been willing to look beyond the mere stated intention of the seizing government, and the noncompensation argument retains some vitality in those instances.

The importance attached to the discrimination contention is emphasized by the fact that both the British and American governments, after initially recognizing the right of Libya to nationalize the enterprises provided that compensation were paid, revised their positions and protested the Libyan seizures on the ground that they had been discriminatory. Both governments then undertook diplomatic initiatives to discourage other nations from buying the oil which they asserted had been seized in violation of international law.

C. Status of Nondiscrimination as International Law

1. The Views of Publicists and International Forums

Principles purporting to limit a country's right to expropriate the property of aliens are beset by doubts as to the present applicability of traditional formulations of international standards of conduct. From the perspective of some Third World countries, those principles are relics of nineteenth century Great Power domination whose modern role is the perpetuation of economic imperialism. Furthermore, it has been argued that the ability to discriminate against particular foreign states is essential to meaningful sovereignty. Yet the United Nations Resolution on Per-
manent Sovereignty Over Natural Resources is ambiguous on the question of discrimination, requiring that the reason for the expropriation be such as is "recognized as overriding purely individual or private interests, both domestic and foreign." 32

No case in an international court has repudiated the ruling in *The Oscar Chinn Case*. 33 More in point is the judgment announced by the arbitrator named by the International Court of Justice to consider British Petroleum's claim against Libya. 34 The company had asked the Court to name an arbitrator after Libya refused to cooperate in the arbitration called for in the concession agreement. The arbitrator held that the seizure violated international law in that it was made for "purely extraneous political reasons and was arbitrary and discriminatory in character." 35 But arbitration, while important here in showing the accepted international law, has no bearing on the litigation in the various national courts. Only the parties to the arbitration are bound by the out-

considerations of foreign policy, military alliances, and the like; ethnic or cultural preferences or aversions; retaliation; or . . . decolonization in fact as well as in law. Independence would seem an empty gesture or even a cruel hoax to many a new country if it were prevented from singling out the key investments of the former colonial power for nationalization. There is no support in law or reason for the proposition that a taking that meets other relevant tests of legality is illegal under international law merely because it is discriminatory [footnote omitted].


33. See notes 19 & 20 supra and accompanying text.


35. Although basing his decision on the arbitrary and discriminatory character of the seizure, Judge Lagergren did go on to consider the question of compensation: "Nearly two years has [sic] now passed since the nationalization and the fact that no offer of compensation has been made indicates that the taking was also confiscatory." BP Public Affairs and Information Department, Press Release of Oct. 11, 1973. Implicit in this is the difficulty of establishing noncompensation when the language of the law provides for it; there is no uniform rule providing that a two-year delay in payment is sufficient to belie the guarantee.
come, and third parties are not obliged to assist in implementing the decision.  

2. The Views of Municipal Courts

The principle of nondiscrimination, in the abstract, has enjoyed considerable support from the municipal courts. For example, all of the courts adjudicating the Anglo-Iranian Oil Company cases accepted the principle as a rule of customary international law.  

The initial judgment of the United States Court of Appeals for the Second Circuit in Sabbatino was in accord: “When a State treats aliens of a particular country discriminatorily to their detriment, that State violates international law.” There have been some expressions of doubt as to the universality of the rule and some judgments that, even as an international rule, it might not be applied because of the non-binding status of such rules under domestic law. However, no case has been found in which a court has expressly rejected the rule.

Nonetheless, the condemnation of discrimination has ordinarily either not formed the basis of a court’s award or has done so only in combination with other factors, notably noncompensation. Indeed, the Second
Circuit's first *Sabbatino* ruling, although including an unambiguous statement that discrimination itself was a violation of international law, would not go so far as to assert that discrimination alone would invalidate the expropriation; rather, the court relied upon a combination of factors, including noncompensation. This uncertainty about the independent significance of discrimination as an argument raised in a national court places the oil companies' strategy in some doubt. If they are to prevail, they must bring their suits in courts willing either (a) to find noncompensation despite the statutory language and to hold it sufficient to invalidate the seizure or (b) to find discrimination and to hold it sufficient to invalidate the seizure. The relative weakness of the noncompensation argument on the facts of the cases under consideration has already been noted; the discrimination argument is more persuasive, but is dependent upon access to national courts which will give effect to this customary principle of international law. In order to reach these issues, however, there are several initial obstacles which must be overcome.

II

LIONS IN THE PATH

A. THE ACT OF STATE DOCTRINE

The Act of State Doctrine is the first obstacle to be overcome en route to an effective adjudication of discrimination. Briefly stated, the doctrine is that "courts of one country will not sit in judgment on the acts of the government of another state done within its own territory." Most courts do not regard the doctrine as a binding rule of international law, but, "[i]f international law does not prescribe use of the doctrine, neither does it forbid application of the rule even if it is claimed that the act of state in question violated international law."

43. Even on the strength of a clear factual showing of noncompensation, that argument is no more self-executing than is discrimination. "[T]he authorities I have reviewed do show that these [English] courts have not recognised any principle that confiscation without adequate compensation is per se a ground for refusing recognition to foreign legislation." Re Helbert Wagg & Co. Ltd., [1956] 1 All E.R. 129, 140 (Ch).
44. "Refusal by the municipal courts of one sovereignty to sanction the action of a foreign state done contrary to the law of nations will often be the only deterrent to such violations." *Banco Nacional de Cuba v. Sabbatino*, 307 F.2d 845, 868 (2d Cir. 1962).
In general, however, the trend is away from firm rules barring evaluation of the acts of other states.\textsuperscript{47} Courts have often been willing to consider the acts of foreign states when those acts were judged to be commercial rather than governmental in nature,\textsuperscript{48} and some courts have declined to employ the doctrine when the act in question was alleged to be in violation of international law.\textsuperscript{49} Another exception to the doctrine has arisen when its application and the consequent victory for the foreign enactment would yield a result contrary to the public policy of the forum.\textsuperscript{50} Indeed, it may be more accurate to depict the invoking of the Act of State Doctrine as “the exception and not the rule.”\textsuperscript{51} In either case, the doctrine remains to be invoked or excepted to as the public policy of the forum demands.\textsuperscript{52}

It is clear that the Act of State Doctrine need not defeat the oil companies’ efforts to obtain adjudication of their claims. But it is equally clear that the doctrine could be an insurmountable obstacle in forums having public policy interests which would be served by declining jurisdiction.

B. THE CHOICE OF LAWS

If a court is willing to consider the merits of the case, it will have to decide what body of substantive law is to govern the disposition of the oil. The rule ordinarily applied is \textit{lex rei sitae}, the law of the place where the oil was located at the time of the seizure.\textsuperscript{53} The application of the law of the expropriating country is not likely to benefit the oil companies.

\textsuperscript{47} See E. Mooney, \textit{Foreign Seizures} 176 (1967).
\textsuperscript{49} Though it should be admitted that, as a rule, a Court will not, and should not, sit in judgment on the lawfulness of acts \textit{jure imperii} performed by, or on behalf of, a foreign Government, this rule must be subject to an exception when the acts in question can be deemed to be in flagrant conflict with international law.
\textsuperscript{51} E. Mooney, \textit{supra} note 47, at 177.
\textsuperscript{52} The United States, in the wake of \textit{Sabbatino}, is a good example. The Sabbatino Amendment, 22 U.S.C. § 2370(e)(2) (1970), provides, in effect, that the doctrine be the exception rather than the rule, but that it be applicable in those cases in which the executive certifies that the public policy (in this case “foreign policy interests”) requires its use.
\textsuperscript{53} E.g., Anglo-Iranian Oil Co. v. Idemitsu Kosan Kabushiki Kaisha, 20 Int’l
One way to unseat an expropriation statute from its position as the applicable substantive law would be by showing that it was invalid within the legal system of the expropriating country. In that case the statute would not apply because it would not represent the true lex rei sitae. The proof of that invalidity would, however, be difficult in light of the presumptions favoring the foreign state's enactment and the limits, imposed by notions of comity, on the scope of the court's inquiry. In the cases of Libya and Iraq there is reason to doubt that constitutional provisions would in any way invalidate the seizures.

But lex rei sitae itself may be defeated if the outcome of applying the law of the expropriating country would be offensive to the public policy of the forum. Cheshire notes this overriding role of public policy in the


Article 10 of the Japanese Horii ... lays down that the acquisition or loss of ownership of movables and immovables shall be determined by the law of the place where the object in question is situated at the time of the occurrence of the fact or facts constituting the cause of such acquisition or loss . . . .


55. Unable to determine the validity of the expropriation decree in question under Spanish law, the French court in Moulin v. Volatron assumed its validity.


57. Article 8 of the Libyan Constitution provides for the protection of private non-exploiting ownership. The same article announces that public ownership is the basis for development and progress, and article 6 proclaims the goal of socialism. Expropriation as such, therefore, would not seem unconstitutional. The constitution, like article 1 of the Libyan Civil Code (available in unofficial translation in M. Anjell & L. Al-Arif, The Libyan Civil Code (1969)) provides for recourse to Islamic principles in the absence of specific provisions, and Islamic principles have no objection to discrimination against nonmuslim, foreign interests. P. Hitti, History of the Arabs 170 (1970); R. Levy, The Social Structure of Islam 66-67 (1969). It is characteristic of Islamic law that it is flexible and adjusts to accommodate the actions of political leaders. D. De Santillano, Law and Society, in The Legacy of Islam 306-07 (T. Arnold & A. Guillaume eds. 1931).

58. The Islamic background is equally pertinent to Iraq, as the Provisional Constitution of April 29, 1954 (available in unofficial translation in L. Kimball, The Changing Pattern of Power in Iraq, 1958 to 1971, at 299 (1972)), invokes the spirit
English courts, and Schlesinger points out that it can be observed in most civil law systems. Most of the reported challenges to expropriations have relied principally upon this public policy exception in their efforts to defeat the expropriation laws, contending that noncompensation and discrimination offend the policy of the forum. Frequently there need not be any specific interest of the forum state or one of its nationals in the litigation to prompt the application of public policy; the mere presence of the contested property within the forum is a sufficient contact.

It is clear that a forum's choice of laws decision need not result in the application of the challenged expropriation decree. It is equally clear, however, that, barring the unlikely finding that the decree was unconstitutional within the legal system of the seizing state, the oil companies can only hope to raise their discrimination objection effectively if the public policy of the forum would thereby be served.

C. THE PUBLIC POLICY

1. Identifying the Content of Public Policy

It has been shown that both access to the courts and the displacement of the law of the seizing state depend principally upon the public policy of the forum. Scholars have long been frustrated in their efforts to

of Islam. That document provides, however, that private property is to be inviolable. Nonetheless, the "charter" promulgated in July of 1964 calls for socialism and the struggle against imperialism, and it would undoubtedly be difficult to establish the unconstitutionality of the Iraqi seizures. See H. & P. WILLEMART, Dossier du Moyen-Orient Arabie 112 (1969).


In my judgment the true limits of the principle that the courts of this country will afford recognition to legislation of foreign states in so far as it affects title to movables in that state at the time of the legislation . . . rests in considerations of international law or in the scarcely less difficult considerations of public policy as understood in these courts, ultimately I believe the latter is the governing consideration.

Re Helbert Wagg & Co. Ltd., [1956] 1 All E.R. 129, 140 (Ch.).


63. The terms "public policy" and "ordre public" are here used interchangeably, in conformance with Lauterpacht's assessment that they are essentially the same, save for the possibility that ordre public might be a somewhat broader term. See Case Concerning the Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v. Sweden), [1956] I.C.J. 55, 90-91 (separate opinion of
derive formulae which could predict the scope of judicial invocations of public policy.64 The consensus that a policy which is to override the otherwise applicable law should be a policy of some importance does little to further predictability.65 Friedman despairs at "the relative character of municipal law conceptions . . . [which] depend upon whether or not the municipal judge considers that the fundamental conceptions on which the particular expropriation is based conform to his ideas of public policy."66

Lauterpacht’s definition of public policy as “fundamental national conceptions of law, decency and morality” emphasizes the indefiniteness of the concept.67 Indeed, public policy is frequently treated with such generality that the identity of those conceptions is concealed.68 Carlston has suggested that the formal rules proclaimed by the courts can only be understood in terms of the interests which they seek to safeguard.69 Without doubting the occasional rule of abstract principles of justice subscribed to by the forum, it is suggested that two factors which are sometimes represented in public policy are the interests of nationals of the forum and the nonlegal interests of the forum state.

It is probably not coincidental that the challenged expropriation cases in which the former owners have been victorious have generally been those adjudicated in the states of the dispossessed owners’ nationalities.70

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64. See Nutting, Suggested Limitations of the Public Policy Doctrine, 19 Minn. L. Rev. 196, 200 (1935).
66. S. FRIEDMAN, supra note 32, at 222 (footnote omitted).
68. See P. LAGARDE, RECHERCHES SUR L’ORDRE PUBLIC EN DROIT INTERNATIONAL PRIVÉ (1959), at 238:

The foreign rule is not set aside because it is contrary to a fundamental principle of the law of the forum. It is set aside because, integrated into the law of the forum, it could not be combined in a coherent way with the diverse rules of the forum with which it would come into contact (author’s translation, emphasis added).
Indeed, some courts have been perfectly candid in applying a different standard to the claims of their nationals. On that basis, one might reasonably expect the public policies of the states of the dispossessed owners to favor entertaining their suits, and to find discriminatory acts sufficiently distasteful to require exclusion of the otherwise applicable foreign law.

As for the nonlegal interests of the forum state, it has been urged that public policy overrides the normal outcome in instances "[w]here a transaction prejudices the interests of the . . . [forum] or its good relations with foreign powers." Thus, a party in a position to influence the economic interests or diplomatic relations of the forum state could indirectly influence crucial determinations on which the litigation depends. Domke has suggested, for example, that the decision in The Bremen Tobacco Case was effectively dictated by a newspaper editorial detailing the economic hardships which would beset Bremen if the court reached the wrong decision. In that case, the public policy was declared to recognize a special anticolonial exception to the otherwise acceptable nondiscrimination rule. Similar outcomes might be foreseen in the oil expropriation cases.

2. Oil Shortage and the Public Policy

In a time of oil shortage, the oil consuming nations have shown themselves to be vulnerable to pressure from the exporting nations, and those aspects of the cases which are dependent upon determinations of public policy are less likely to be decided favorably to the companies when such a decision threatens the fuel supply of the forum state. In the months

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73. G. Cheshire, supra note 53, at 138. Cheshire was writing with specific reference to the United Kingdom.

74. If the court obviates the declared intention of the Indonesian Government to transfer the centre of tobacco dealing to Bremen, it will go to other countries without doubt, under circumstances even to a territory beyond the Iron Curtain.


75. 28 INT'L L. REP. at 36: "[E]quals must be treated alike, but the dissimilar treatment of those who are not equal is permitted."

76. Cf. N.Y. Times, Sept. 9, 1973, § 4, at 4, col. 2:

But in the present state of the international oil market, as consuming
since most of the suits were brought, the fuel shortage has become much more severe, and trading in oil has clearly become a seller's market.\textsuperscript{77} The device of posting a bond for the value of the cargo while permitting the oil itself to enter the stream of commerce is clearly a short-term solution, pending the outcome of the litigation;\textsuperscript{78} it no longer strains credulity to posit a seller's simple refusal to do further business with a state whose courts have awarded the proceeds of a sale to the dispossessed concessionaire.\textsuperscript{79} The increased price being received by the producers makes the sales to any particular state less important,\textsuperscript{80} and other buyers are available, including not only socialist countries which are unsympathetic to the dispossessed owners,\textsuperscript{81} but also nations whose needs for fuel require that principles of cooperation with their allies be compromised.\textsuperscript{82}

Thus, insofar as the concrete, nonlegal aspects of public policy are dominant, the principle of nondiscrimination will be applicable only in those states whose nationals will profit from its application. Those states will be faced with the need to choose between a policy favoring the rights of the expropriated concessionaires and one more likely to assure a continued supply of fuel. Lauterpacht has observed that countries vary with respect to their willingness to permit public policy to interfere with title to goods in such cases, but he concludes that apparent restraint of public policy is often offset by procedural and substantive rules yielding the same result as an unabashed application of public policy.\textsuperscript{83} "On the whole, the result is the same in most countries—so much so that the recog~
nition of the part of ordre public must be regarded as a general principle of law in the field of private international law.\textsuperscript{84}

CONCLUSION

The recent oil expropriation laws by which Libya and Iraq sought to further their foreign policy objectives arguably violated international law both in being discriminatory and in failing to provide adequate compensation to the dispossessed owners. Of these two objections, discrimination is the stronger to raise in a municipal court outside the expropriating state because it does not require the court to question the good faith of the seizing country's stated intention to compensate. Although nondiscrimination is an acknowledged rule of customary international law, its actual application by the municipal courts is subject to question.

A study of the possible obstacles to obtaining effective adjudication of the discrimination issue in the municipal courts indicates that considerations of public policy are dominant. Public policy is found to encompass not only abstract principles of justice, but also the nonlegal interests of the forum state and of its nationals. Thus, public policy considerations might be expected to favor the dispossessed owners in cases brought in their national courts. Even there, however, and more so in third-party forums, the worsening fuel shortage, and the new found ability of the sellers to act in concert against uncooperative nations, may be expected to dictate public policy determinations favorable to the expropriating state, resulting not in a condemnation of discrimination, but rather in a host of legal rationales designed to avoid facing the question.\textsuperscript{85}

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\textsuperscript{84} Id.

\textsuperscript{85} The makings of a determination that the public interest is not served by the oil companies' strategy of impeding marketing can be discerned in the press response to Senator Frank Church's inquiries into its effect on consumer prices. Wall St. Journal, Feb. 15, 1974, at 1, col. 1.