

1970

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### Recommended Citation

George Jackson Eder, *Expropriation: Hickenlooper and Hereafter*, 4 INT'L L. 611 (1970)  
<https://scholar.smu.edu/til/vol4/iss4/2>

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## Expropriation: Hickenlooper and Hereafter<sup>†</sup>

If a government collects taxes, yet fails to safeguard the rights of its citizens, it is robbery pure and simple for, according to St. Thomas Aquinas, "It is not robbery if princes exact from their subjects that which is due to them *for the safeguarding of the common good*, even if they use violence in so doing; but if they extort something unduly by means of violence, it is robbery, even as burglary is. Hence St. Augustine says: 'If justice be disregarded, what is a king but a mighty robber, since what is a robber but a little king?' " (*italics supplied*.)<sup>1</sup>

In quoting this text, the writer has in mind our own Government which has collected taxes, yet has not only failed to safeguard the rights of its citizens but, as will be seen, has actually intervened to deprive its citizens and taxpayers of their rights, in defiance of the clear mandate of Congress. And this, St. Thomas tells us, is robbery.

### Expropriation in retrospect—B.C. (Before Castro)

If in this paper I stress the expropriations that have taken place in Latin America, it is partly because in that area the author can lay claim to some measure of expertise, but chiefly because, so far as American-owned property is concerned, expropriation has been largely a Latin American phenomenon. It may be said that, while the Latin Americans are the most *simpático* people in the world, their *políticos* and governments also have very taking ways.

It must be said at this point that people have short memories. It is

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<sup>†</sup>Based on an address given at the National Lawyers' Club, Washington, D.C., February 19, 1970, before a meeting sponsored by Inter-American Bar Relations Committee, Bar Association of the District of Columbia.

<sup>1</sup>St. Thomas Aquinas, *Summa Theologiae*, Part II, second part, Q. 66, Art. 9. London: Burns, Oates & Washbourne, Ltd., 1929.

probable that, aside from those whose properties have been confiscated, the great majority—when they think of expropriation—will remember that Peru expropriated International Petroleum Company a year ago, and will recall too the spectacular Cuban expropriations of a decade ago. And that is about as far back as the average memory extends.

To give an example, some ten years ago a delegation of officers of American corporations whose properties had been confiscated in Cuba, went to Washington to try to persuade the State Department to issue a general policy statement following the sense of the recommendations of the United States Chamber of Commerce, the Inter-American Council and the National Association of Manufacturers, that no further U.S. aid should be given to any country that had confiscated the property or property rights of United States citizens.

ITT, for whom the present writer was counsel, was not represented at this conference, as he was in Japan at the time. Furthermore, ITT's Cuban company had been confiscated some sixteen months earlier—it had the honor of being the first foreign company to be seized by Fidel Castro—and the author had already presented a lengthy memorandum to the President of Cuba in person, and filed copies with the American Embassy and with the State Department.

At any rate, the delegation was received by the then Under Secretary of State, who greeted their proposal approximately in these words: "But, gentlemen, you are unduly exercised by this one incident. There has only been one country that has expropriated American property—Cuba. We do not foresee any other expropriations, and we certainly cannot lay down a general policy on the basis of that one incident."

To say that the delegation was flabbergasted would be putting it mildly. A distinguished member of the group proceeded to list from memory the major cases of expropriation of American properties in Latin America, beginning with the first land seizures in Mexico in 1915, the confiscation of Standard Oil in Bolivia in 1936, and the nationalization of all petroleum properties and rights in Mexico in 1938. Then, the confiscation of the major American & Foreign Power subsidiaries by Perón in Argentina in 1943–46; nationalization of the tin mines in Bolivia in 1952, including Patiño Mines & Enterprises, partly U.S.-owned; expropriation of United Fruit Company in Guatemala in 1953; expropriation of another American & Foreign Power affiliate in Argentina in 1958, and of one in Brazil in 1959; and seizure of the Venezuelan Sulphur Corporation properties and revocation of its concession in that same year.

But the State Department had already made up its mind, and the Under Secretary didn't want to be confused by the facts. Nothing was done.

Nor is that example unique. The State Department seems to prefer to maintain its posture of ignorance so far as the confiscation of American properties abroad is concerned. In 1962, the Senate Foreign Relations Committee requested the Department to give it a list of such expropriations, and was told: "So far as is known, no complete list is maintained by any U.S. Government agency." A week later, the Department submitted a document purporting to list all major expropriations since World War II.<sup>2</sup>

A cursory glance at the State-Department list reveals the Department's failure to include the Costa Rican nationalizations of 1948; the seizure of ITT's Shanghai Telephone Company in 1949; the seizure of its Cuban Telephone Company in March 1959; the seizure of Venezuelan Sulphur Corporation in August 1959; and the 1962 revocation of the María Luisa Ore Company concession in Venezuela (a subsidiary of International Nickel, a Canadian company with a substantial American interest).

ITT certainly reported the seizure of the Shanghai and Cuban companies to the State Department, although it did not ask them to intervene, knowing it would be useless. And certainly, their embassies must have reported the other cases.<sup>3</sup>

So far as the Venezuelan Sulphur Company is concerned, the State Department not only knew about the case but, later, in December 1964, actively intervened to defraud the American company of its rights, by having the Justice Department file in the Pennsylvania Court of Common Pleas what they delicately refer to as a "Suggestion of Immunity." This intervention was contrary to official State Department policy—proclaimed by a previous Administration and never repealed—which distinguishes between the acts of foreign governments *jure imperii*, where sovereign immunity is recognized, and their ordinary commercial operations *jure gestionis*—such as operation of a steamship company by the Venezuelan Government, as in the Sulphur Company case. And State's intervention was in direct defiance, too, of the 1964 Hickenlooper Amendment which was expressly intended to prevent the use of the Act of State doctrine to defraud American interests, unless the President himself determines that it is necessary in a particular case.<sup>4</sup>

<sup>2</sup>Hearings, "United States Relations with Peru." Subcom. on Western Hem. Af., Com. on Fgn. Rel., U.S. Senate. 91 Congr., 1st Ses., April 14, 16, 17, 1969.

<sup>3</sup>This example of State Department incompetence is not unusual—an extraordinary state of affairs where even persons of outstanding ability in the Foreign Service and in the Department are rendered collectively ineffectual by reason of incredibly poor departmental organization. For further light on State Department incompetence, see George J. Eder, *Inflation and Development in Latin America*, Ann Arbor: University of Michigan, 1968, pp. 89–90, 146n, 160–62, 247–50, 607–8, 737n112.

<sup>4</sup>22 U.S.C. 2370 (e)(2).

Justice Michael Angel Musmanno's dissent in that case fully supports the view of Saints Augustine and Thomas Aquinas that for a government to collect taxes and fail to safeguard its citizens is robbery:

"The sovereign immunity doctrine . . . is an excrescence on the body of law . . . (It) is a stumbling block in the path of good neighborly relations between nations . . . a colossal effrontery, a brazen repudiation of international moral principles, . . . a shameless fraud. . . . What the Venezuelan Government has done . . . constitutes brigandage in violation of international law, condemned by every civilized government in the world. . . . I cannot see in this dollar-and-cents commercial dealing an international extremity which should compel us to abandon primary principles of law, elementary concepts of justice, ordinary rules of logic, and to turn our backs on our own citizens to enrich a nation which dispossessed American property owners, (and) collected \$380,000,000 (in U.S. aid) from the pockets of American taxpayers."<sup>5</sup>

This is only one of many, many cases in which the Justice Department, at the request of the Department of State, has filed a "Suggestion of Immunity" that has defrauded American taxpayers of even partial compensation for the confiscation of their properties abroad.<sup>6</sup>

What, then, is the law governing expropriation? It will not be necessary to go further into the question of sovereign immunity, which has been mentioned only to show the obstacles that confront an American citizen in attempting to get partial recompense for the expropriation of his property abroad, even when he manages to libel a ship or attach other purely commercial assets held by the expropriating nation in this country.

### **Latin American law on expropriation—and agrarian "reform"**

So far as domestic law is concerned, the constitutions of all the Latin American republics contain—or did before they were amended by revolutionary decrees—provisions similar to the following from the Argentine Constitution:

"Property is inviolable and no inhabitant of the Nation can be deprived of it except by a judicial decision based on law. Expropriation for reasons of public utility must be authorized by law and subject to prior indemnification."  
Article 17, Constitution of 1860.

Law 189 of 1866 reaffirms and regulates the constitutional provisions, provides for full idemnification, appeal to the courts, and costs for account of the Government in the event that the judicial decision awards a higher

<sup>5</sup>*Chemical Natural Resources, Inc. v. Republic of Venezuela*, 420 Pa. 134, 215 A. 2d 864, 881, 893 (1966).

<sup>6</sup>An even more flagrant example of State Department intervention to frustrate an American victim of the Castro seizures is *Rich v. Naviera Vacuba*, 295 F.2d 24 (1961), in which a Cuban Government ship, laden with sugar bound for Russia, was libelled by the victim, and then freed on the Department's request. For a penetrating study of the subject, see Richard B. Lillich, *Protection of Foreign Investment*. Syracuse: Syracuse University Press, 1965.

compensation than that originally offered by the Government. Prior to the advent of Perón, who replaced the justices of the Supreme Court and lower courts with Peronista jurists, these constitutional and statutory provisions were, almost without exception, rigorously enforced.<sup>7</sup>

The same was true throughout Latin America except during the turmoil of revolution; and even then the Latin American nations inevitably returned to the rule of law up to the time of the Mexican Revolution of 1910, which started a precedent of uncompensated seizures not followed by other Latin American countries until the nineteen-thirties. The agrarian expropriations began in Mexico in 1915 and, as Secretary Hull points out in his note of July 21, 1938 to the Mexican Ambassador in Washington, not only the large estates were seized, but hundreds of moderate-sized holdings belonging to American citizens who were still seeking redress twenty years later.<sup>8</sup>

Since then, on the advice of the United Nations, and at the insistence of the United States Government as a condition precedent for U.S. aid, similar confiscatory land-reform programs were adopted in Japan, and in Peru, Venezuela, Colombia, and elsewhere in Latin America. In Mexico, the redistribution of lands meant that 10,000 extensive properties were given to *políticos* and their friends, and 2,300,000 five-acre plots were given to the peasants, in fulfillment of Trotsky's slogan: "The land belongs to those who till it." The same peculiar system of redistribution was followed in Brazil where President João Goulart, the champion of the left-wing reformers, collected some 1,750,000 acres for himself, his family, and associates.<sup>9</sup>

Aside from agrarian "reform," the revolutionary governments of Latin America—whether Marxist or military—have evaded the constitutional requirements and seized public utilities, railroads, mines, oilfields, banks and other enterprises, without adequate and timely compensation, without

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<sup>7</sup>One exception that comes to mind was the confiscation of *Compañía Primitiva de Gas*, an English company. The company, following expiration of its concession, was operating on the basis of a *permiso precario*—a revocable permit. The Municipality of Buenos Aires revoked the permit, which it had a right to do, although it was not entitled under the law to take possession of the company's plant and installations without payment. None the less, it did take over these assets, placed its own valuation on them, and then deducted from that value the cost which it claimed the company would have to incur if it were ordered to remove the underground installations, repair the streets, etc. The net amount deposited was equivalent to \$50,000 U.S. and, of course, the Municipality did not remove the installations but continued to use them. Later, thanks to the intervention of the British Ambassador, a settlement was reached which was claimed to be equitable.

<sup>8</sup>Green Haywood Hackworth, *Digest of International Law*, vol. III, p. 655. Washington: Government Printing Office, 1942.

<sup>9</sup>George J. Eder, "Urban Concentration, Agriculture, and Agrarian Reform," *The Annals*, July 1965, pp. 27–62, at p. 36. Philadelphia: American Academy of Political and Social Science.

authority of law, and without an appraisal by an impartial judicial tribunal. So—what is the domestic law in Latin America on expropriation? It must be concluded that it is in a state of flux.

### **International law on expropriation**

The traditional American view of international law—to quote Secretary Hull's note to the Mexican Ambassador in 1938—is that "The taking of property without compensation is not expropriation. It is confiscation. . . . We cannot admit that a foreign government may take the property of American nationals in disregard of the rule of compensation under international law . . . based as it is on reason, equity and justice." And, in a second note, he defines the rule of compensation, supported by "recognized authorities on international law" as follows: "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. . . ."<sup>10</sup>

The 1962 Hickenlooper Amendment to the Foreign Assistance Act gives its own interpretation of "adequate and effective" by stipulating payment in convertible foreign exchange.<sup>11</sup> This interpretation has not been espoused by any recognized authority on international law, yet there can be little doubt that an impartial tribunal would rule that payment in a near worthless, blocked currency, or in long-term bonds worth only a fraction of their face value, would be neither adequate nor effective compensation.

The General Assembly of the United Nations, in 1962, by a vote of 87 to 2, with 12 abstentions, enunciated the rule that expropriation must be accompanied by "just compensation." But I doubt very much whether the General Assembly today, representing say a dozen highly developed nations with investments abroad, and say ten times as many underdeveloped debtor nations, would give the same support to this traditional principle of law and equity. And the revolutionary governments of Latin America most certainly do not. The Mexican Minister of Foreign Affairs, in reply to Secretary Hull's note, asserted:

"My Government maintains . . . that there is in international law no rule universally accepted in theory nor carried out in practice, which makes

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<sup>10</sup>Hackworth, *op. cit.*, pp. 656, 658-9. The principle of just, prompt, and effective compensation is reaffirmed in Article 3 of the O.E.C.D. Resolution of October 12, 1967, submitted to and accepted by the governments of most of the major nations of the free world, including the United States, but not including any of the Latin American countries. See G. W. Haight, "O.E.C.D. Resolution on the Protection of Foreign Property," *The International Lawyer*, January 1968, pp. 326-353.

<sup>11</sup>Foreign Assistance Act, 22 U.S.C. 2370 (e)(1).

obligatory the payment of immediate compensation nor even of deferred compensation, for expropriations of a general and impersonal character."<sup>12</sup>

And the Peruvian Government, as late as 1969, certainly did not hold to the principle of just and timely compensation. Citing Trotsky's slogan—perhaps without realizing its source—"the soil belongs to the peasants who work on it," Peru held that, because the "revolution is irremissible"—whatever that may mean—and because the Government does not have enough money to pay for what they have seized, it can pay whatever the Government considers the land worth, in bonds of dubious value, and with no right of judicial appeal.<sup>13</sup>

### International law on contracts

In international as well as in domestic law, unilateral revocation of a concession constitutes an expropriation of property rights quite as much as the seizure of tangible property. The prevailing rule of international law, up to the present, has been *pacta sunt servanda*—agreements must be kept. But there is a growing movement toward the theory that changing circumstances may warrant a departure from the rule. The theory is that agreements are inviolable, provided *rebus sic stantibus*—provided things remain as they were.

This concept, derived from Roman law and originally applicable only to treaties between sovereign states, has been adopted enthusiastically and vastly enlarged by Latin American jurists and those of other underdeveloped countries, who see in it a marvelous and legally respectable way of getting out of any contract by a unilateral declaration that conditions have changed. Thus far, fortunately for the future of international trade and investment, the Court of International Justice, and jurists in the more advanced nations, have not abandoned the rule of *pacta sunt servanda*, at least in theory.<sup>14</sup> But in view of the popularity of a free-wheeling theory of changing circumstances among the less developed nations, and the attitude of our own State Department in practice, we must conclude that international law is likewise in a state of flux.

<sup>12</sup>Hackworth, p. 657.

<sup>13</sup>Advertisement, The Government of Peru, *New York Times*, January 26, 1970, p. 73; Agrarian Reform Law, 1969.

<sup>14</sup>The Vienna Convention on the Law of Treaties (United Nations Conference, April 1969) expressly provides in Article 26, under the head *Pacta sunt Servanda*: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." Article 62 of the Convention narrowly limits the circumstances under which the principle of *rebus sic stantibus* may be invoked. While the Convention is limited by its terms to the construction of treaties, the principle of good faith should be applicable to all obligations, public and private. The arguments, *pro* and *con*, as to the applicability of the *pacta-sunt-servanda* principle to



All nations, of course, recognize that in contract cases as well as in expropriation, a foreign investor must exhaust local remedies before he can enlist the intervention of his own Government. This presupposes, of course, that there are local remedies available, and that the foreign investor can expect a fair and reasonably expeditious determination of his claim by an impartial tribunal.<sup>15</sup> Such was certainly not the case in Cuba in 1960, and is apparently not the case in Peru today.

### **The Calvo doctrine and the Calvo clause**

Then too, most Latin American countries have adopted the Calvo doctrine, and have written it into their constitutions, treaties and laws. The doctrine, that sovereign states are entitled to be free from interference by other nations, and that foreigners are entitled to no different treatment from nationals, was first enunciated by Carlos Calvo, an Argentine diplomat, in 1868.

The doctrine in itself has caused little difficulty. It is accepted between the Latin American nations themselves, while other nations have no cause to dispute it unless they consider that an injustice has been perpetrated on one of their nationals. In such event, as the Calvo doctrine is not a recognized principle of international law outside of Latin America, they feel free to ignore it.

More troublesome is the Calvo Clause which most of the Latin American countries have at one time or another attempted to incorporate in their contracts with, or concessions to, foreign companies. Essentially, in such contracts, the foreigner accepts the local law as the law of the contract; submits to the jurisdiction of the local courts; and renounces recourse to the diplomatic intervention of his own Government under penalty of immediate forfeiture of all rights under the contract, including property rights derived from it. Traditionally, the United States has refused to regard such a coercive provision as binding where there is an actual denial of justice.<sup>16</sup> What the attitude of the State Department today might be would probably depend on circumstances.

Some have managed to avoid the insertion of a renunciation clause by assuring government officials with whom they were negotiating that their clients had full confidence in the laws of the country or they would not be

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administrative contracts between a government and a private party, are too voluminous to summarize in this article. See *The International Lawyer*, October 1969, pp. 172-203, at 182, 193, for references to the Vienna Convention.

<sup>15</sup>Hackworth, op. cit., vol. V, pp. 501-26; *Interhandel*, International Court of Justice, Rep. 6 (1959).

<sup>16</sup>*North American Dredging Company v. United Mexican States*, General Claims Commission, 1926, Opinions 21 (1927).

thinking of investing in it; but that, if they were to renounce expressly the right to appeal to international law, it would imply on their part a lack of confidence in the kind of justice that they could expect to receive, and, on the part of the host government, an inferiority complex which was wholly unwarranted. It would be as though the tax authorities compelled the taxpayer to renounce all right to judicial appeal as a condition to filing an administrative claim.

So much for the legal aspects of expropriation, but it will be found that in the expropriations which have been mentioned, from the Mexican land seizures to the present time, the justification is perhaps 5% legal and 95% political—the latter based on allegations of real or imagined economic or social injustice, or on a claim of past corruption or illegal gain. The concession, we are told, is “tainted.” But, generally, it will be found also that when one is told that money or property rights are “tainted,” it merely means “‘taint yours and ‘taint mine.” If there is a taint, if there is corruption or illegal gain or the evasion of taxes, then the proper course is criminal or civil action in the courts, not seizure *vi et armis* as has occurred in Mexico, Bolivia, Cuba, Venezuela and Peru.

#### *Expropriation of International Petroleum Company*

What are the circumstances in the latest series of expropriations in Peru and Bolivia? In Peru, the case that has received the greatest publicity has been the seizure of the properties of International Petroleum Company, an affiliate of Standard Oil Company (N.J.). The properties are valued at approximately \$190 million. The Peruvian Government valuation is lower, chiefly because it covers only a part of the assets taken, and because Peru refuses to admit that IPC has any title to its crude oil reserves.

The Government has deposited a check for the local currency equivalent of their valuation—approximately \$71 million—but has simultaneously attached this deposit against a claim for an alleged debt of \$690 million which they compute by taking the entire IPC production for 44 years, since 1924, and multiplying it by hypothetical Texas oil prices, less hypothetical freight and other charges. The claim is based on the contention that IPC never has had any subsoil rights, and that therefore all the oil produced in the La Brea y Pariñas properties belongs to the Peruvian Government.

The company's claim to its mineral rights, on the other hand, is based on a contract of purchase of 1826. Ownership of the property was expressly confirmed by an arbitral judgment handed down by an international tribunal in 1922 under a treaty between Peru and Great Britain. The arbitral award was accepted by the Peruvian Government which received \$1

million in settlement of all claims. Following Peru's subsequent disavowal of the arbitral judgment, some forty years later, a settlement was reached with the legally elected Belaunde Government in 1968, whereby the company agreed to give up its lands, mineral rights and producing facilities, in return for a "quitclaim" on all alleged past debts, and concessions covering future operations.

Two months later, in October 1968, a military junta deposed Belaunde, moved in an army of 1,000 men, and confiscated all of the IPC properties, whether disputed or otherwise. Operations are now being run by the Government oil company—*Empresa Petrolera Fiscal* (now *Petro Perú*).<sup>17</sup>

### *Hickenlooper Amendment ignored*

To make matters worse, the Government has imposed a Draconian censorship of the press, named sixteen new justices to the Supreme Court to replace the legally constituted court, and is in the process of purging the entire judiciary.<sup>18</sup> To prevent an appeal, even to its own drumhead courts, a decree has subjected the case to a form of procedure heretofore employed in Latin America solely in tax cases—a coercive enforcement proceeding (*juicio por jurisdicción coactiva*), in which the sole defense is proof of payment or prescription. What chance is there of justice under these conditions?

And yet—sixteen months after the seizure, ten months after the deadline fixed in the Hickenlooper Amendment—the United States Government has not seen fit to impose the sanctions prescribed in that Amendment and in the sugar quota act: cessation of U.S. aid and revocation of the quota for Peruvian sugar. As taxpayers and consumers, we are continuing to pay Peru a subsidy of \$150 million a year, despite the sanctions imposed by Congress, which are mandatory unless the foreign government takes "appropriate steps . . . to discharge its obligations under international law . . . including speedy compensation . . . in convertible foreign exchange." (italics added)

There are, of course, the usual unsupported rumors of corruption and tax evasion, repeated by academic pundits in this country with completely irrelevant surmises and references to other wholly unrelated companies, Peruvian Government bonds, and such professorial poppycock as "a tremendous corporation with holdings of who knows how many tens of

<sup>17</sup>Statement of James F. Dean, President of IPC, *Hearings, op. cit.*, pp. 98–112. See also Francis H. Hogan, "The Hickenlooper Amendments," *Boston College Industrial & Commercial Law Review*, December 1969, pp. 77–89.

<sup>18</sup>*New York Times*, December 26, 1969, p. 18.

millions, hundreds of millions of dollars" and "they probably have written off their Peruvian enterprise, who knows how many times."<sup>19</sup>

To quote from the *New Republic*, certainly not an extreme right-wing publication:

"International Petroleum has been, for many years, not only Peru's largest taxpayer, but also its most dynamic force for social and economic progress. It has regularly met the wage demands of a Peking-oriented union; it has been a leader in low-cost housing development, education, medical care, and the development of recreational facilities for the poor. Its activities have set a standard that other employers . . . cannot and do not meet."<sup>20</sup>

If the IPC claims are indeed "tainted," if they have been guilty of tax evasion or other misfeasance, it seems strange that in all the 44 years of IPC operation, not a single Peruvian Government has seen fit to raise the challenge in a Peruvian court.

### *Consequences of ignoring the Hickenlooper Amendment*

Two months after expiration of the Hickenlooper Amendment deadline—with no action by the United States to impose the sanctions laid down by Congress—there ensued a series of confiscations of American-owned properties in Peru and elsewhere in Latin America, and of so-called "voluntary" agreements reached at pistol point, that has not been equalled, in the value of the properties affected, since Castro made a clean sweep of American investments in 1959 and 1960.

Can it be proven that the 1969 expropriations and pistol-point negotiations were the result of the failure of the United States to carry out the clear mandate of Congress in 1968? That it was not merely *post hoc* but *propter hoc*? Obviously not—there is evidence but not proof. But there has been enough experience in Latin America, and in actual negotiation with Latin American left-wing and military governments, to know that while it may be argued that it is wise to speak softly and carry a big stick, when the big stick turns out to be *papier maché*, it is worse than no stick at all.<sup>21</sup>

<sup>19</sup>Testimony of Harry Kantor, Professor of Political Science, Marquette University, Hearings, *op. cit.*, pp. 2-7, 26-51 *passim*. The first quotation refers to W. R. Grace & Co., the second to IPC. See also Richard Goodwin, *ibid.*, pp. 84-97.

<sup>20</sup>David Ross, "Washington Over the Oil Barrel in Peru," *New Republic*, April 12, 1969.

<sup>21</sup>It is true that there were confiscations of American property rights prior to 1964 at a time when the Hickenlooper sanctions were discretionary, not mandatory; e.g., the Argentine revocation of all foreign oil concessions in October 1963; *New York Times*, October 25, p. 41; October 26, p. 33; November 3, p. 42; November 9, p. 11; November 11, p. 1; November 16, p. 1. President Kennedy refused to apply sanctions despite Congressional insistence; November 17, p. 1, editorial, IV, p. 8. Argentine Foreign Minister Závala Ortiz threatened reprisals, and confiscation of other U.S. properties if U.S. aid were suspended; *New York Times*, November 20, p. 1. But even this meek acceptance of the Argentine ultimatum, and the continuation of U.S. aid, was less damaging to U.S. prestige and the safety of American

*Expropriation of W. R. Grace & Company*

The first confiscatory act following expiration of the Hickenlooper deadline on the IPC seizure had its origin in June 1969, when the military government in Peru enacted a decree-law under color of which it expropriated every sugar mill and every major sugar plantation in the country, including those of W. R. Grace & Company. There had never been the slightest suspicion, nor grounds for suspicion, in Grace's title to those properties, or of tax evasion or other misconduct in their operation. To the contrary, even the military Government had to acknowledge that Grace and the Gildermeisters, the largest and most efficient sugar producers in Peru, had been leaders in the economic development of the country, paying the highest agricultural wages, and providing schools, hospitals and working conditions that were a model in the industry.<sup>22</sup>

Yet the Junta seized the Grace and Gildermeister properties in September 1969, and they are now being run by Government "interventors"—the same term that Perón used in Argentina in 1945. The managers and technical staffs are working under production budgets or quotas. If they fail to fulfill those quotas, they are to be considered counter-revolutionaries and saboteurs, and can be jailed. It is reported that a group of Russian advisors is working with the interventors, and with the ever-present possibility of military sanctions, the field and mill managers have kept up production, certainly better than has been the case in Cuba, with Chinese advisors. The lands are not to be divided among the workers, but there is some talk of eventually converting the enterprises into workers' cooperatives, meaning, if one can judge by experience elsewhere, a system of compulsory peonage to the State with State-controlled labor unions.

Payment for the seizures, if and when made, will be in non-transferable, 20 to 30 year bonds, paying 4 to 6 percent interest which, in Peru, is a negative rate of return. The bonds can only be cashed by exchanging them for nonnegotiable shares in another Government enterprise, or by investing them in a new industry approved by the Government, and, in the latter case, only if the investor—whose property has just been confiscated—puts in an additional amount of new money equivalent to the value of the bonds. The valuation of the property seized and to be paid for in bonds will be determined by the Government, the decree-law providing that there can be

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investments, so long as the Hickenlooper sanctions were discretionary, than the failure to enforce the sanctions when they were mandatory.

<sup>22</sup>Advertisement, The Government of Peru, *op. cit.* See also *United States Business Performance Abroad: The Case Study of Casa Grace in Peru*, by Eugene W. Burgess and Frederick H. Harbison. Washington: National Planning Ass'n, 1954.

no judicial appeal, and that judicial action will not be allowed to obstruct or delay expropriation or return the properties to the rightful owners.<sup>23</sup>

And, as evidence that "agrarian reform" is no more than a slogan and a subterfuge for confiscation, one agricultural company which had had its lands and sugar mill confiscated, had deposits of some \$630,000 in First National City Bank of New York. The owners of the company withdrew these funds and have been charged by the Attorney General with "robbery!" Who is robbing whom? And what kind of land-distribution program is this in which the Government not only seizes a farmer's land, but confiscates his live stock, growing crops, installations and equipment, and even his money in the bank?<sup>24</sup>

Yet, only two months before enactment of the Agrarian Reform Law, Richard Goodwin, who, for some reason that has never been explained, was appointed a Latin American "expert," told a Senate Committee that the Peruvian Government had assured him that there would be no more expropriations after IPC, and that they were willing "to sign a treaty guaranteeing against any further expropriation." But, warned Goodwin, "If Hickenlooper is applied there will be consequences."<sup>25</sup>

### *Expropriation of Bolivian Gulf*

Well, Hickenlooper was not applied, and there have certainly been consequences. In September 1969, a military *coup d'état* in Bolivia ousted President Luis Adolfo Siles and immediately rescinded the Petroleum Code. A month later, the Bolivian Gulf Oil Company properties were taken over lock, stock and barrel.

Now, in this case, it is known that there was no "taint." The author was "Present at the Creation." Bolivia had enacted a Petroleum Code by decree in 1955, but no responsible company was going to risk its money on the basis of a mere decree by a revolutionary government. One of the essential points on which the State Department had insisted as a *sine qua non* for a monetary stabilization loan, was that the Petroleum Code must be enacted by the Bolivian Congress. As Executive Director of the Bolivian National Monetary Stabilization Council, and Economic Adviser to the President, it was the writer's task to see that the Code was enacted, which it was in October 1956. Gulf was the first private company to obtain concession rights under the new law. It can be stated unequivocally that

<sup>23</sup>Agrarian Reform Law, 1969. Much of the analysis above is based on a report by the manager of a Colombian sugar mill who visited the major sugar mills in Peru in October 1969 to investigate the effects of expropriation.

<sup>24</sup>*Diario las Américas*, Miami, February 15, 1970, p. 2.

<sup>25</sup>*Hearings*, *op. cit.*, p. 89.

President Hernán Siles was not the type of man to permit any taint of impropriety in any concession obtained during his regime. Furthermore, Gulf's presence in Bolivia is largely attributable to the action of the State Department, first in insisting that Bolivia enact an adequate Petroleum Code, drafted by an American expert employed by the International Cooperation Administration, and second in urging responsible American companies, among them Gulf, to bid for a concession. Thus, State has a moral as well as a legal obligation to protect this investment in every possible way.<sup>26</sup>

*Repayment of investment not adequate compensation  
for oil or mining enterprise*

Gulf has thus far received no payment for this seizure. The Hickenlooper deadline will be April 17, but at this point is necessary to interject one concept which no one in any Latin American government, and apparently no one in our Government, seems to have grasped. The general view seems to be that if a company invests \$100 million, and is paid \$100 million on expropriation, it has no cause for complaint. That may very well be true in the case of a public utility company which has a right to expect a reasonable return on its investment, and repayment of the amount of its investment in the event of expropriation—rights that are seldom honored in the Latin American environment.

But in the case of an oil company or a mining company, repayment of the investment is very definitely not fair and adequate compensation. A mining or petroleum concession is what is known in the Civil Law as an "aleatory contract"—one that depends upon an especially high degree of risk, on a throw of the dice, as the Latin derivation of the word implies. One never hears of a Latin American government expropriating a dry well. When Union Oil Company invested some \$15–20 million in Paraguay, and failed to find oil in commercial quantities, the Paraguayan Government never for a moment considered expropriating the abandoned properties and repaying Union Oil the amount of its investment. But when an oil company, through the expertise of its geologists and management, finds a bonanza, it is then that the *políticos* and Marxists and military demand nationalization. On that basis, a concession is a "heads I win, tails you lose" proposition. The only way to avoid expropriation is to find dry wells or unprofitable veins; success is practically a guaranty of nationalization.

The sound rule, the equitable rule, and the legal rule, is *pacta sunt*

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<sup>26</sup>For the full background of the Petroleum Code and the Gulf concession and operations, see George J. Eder, *Inflation and Development in Latin America*, *op. cit.*, pp. 58–61, 83, 193–5, 417n, 506, 551–5, 637n24.

*servanda*—an agreement must be kept, and in mining and oil concessions in particular there is no fair substitute for that rule. If a Government, despite its pledged word, does expropriate, then the only equitable basis for compensation, recognized in domestic law everywhere as well as in international law, and regardless of whether it is a case of tangible property or a concession or other property right, is that payment must be made for the fair value of the property at the time of expropriation. In that case, recognition must be given to the value of the oil or mineral reserves—not merely to the amount of capital invested—plus *lucrum cessans*, compensation for unrealized profits for the remainder of the concession term.

### *Further consequences of ignoring Hickenlooper*

To get back to the series of expropriations and gun-point agreements that have ensued throughout Latin America in the wake of non-enforcement of the Hickenlooper Amendment, the Peruvian military government issued an ultimatum requiring all mining companies to submit plans for the development and expansion of their operations, or face the loss of all their properties. Southern Peru Copper Corporation was required to guarantee that it would make a further investment of \$355 million, or face confiscation of its existing investment. When the company attempted to negotiate, the President, General Juan Velasco, asserted that it was a “take it or leave it” proposition—“that is the final decision of the Government.”<sup>27</sup>

The Peruvian Telephone Company, an ITT subsidiary, has been taken over by the Government after six months of negotiations. According to the ITT statement to its stockholders, the purchase price for ITT’s 69% interest was \$17.9 million, of which \$8.2 million will be reinvested in Peru in the shape of a new ITT-Sheraton hotel and a telephone equipment factory. According to the Peruvian Government announcement, the agreed price was \$15,718,000, of which \$12 million will be invested in the hotel and \$2 million in the factory. There is undoubtedly a reasonable explanation of the discrepancy—perhaps a matter of computation before or after tax—but, in any event, there is no evidence that the agreement was one reached on any basis other than *bona fide* negotiation on both sides.<sup>28</sup> That is not to say that ITT’s willingness to dispose of its properties was

<sup>27</sup>*New York Times*, December 4, 1969, p. 84; December 7, 1969, p. 32; January 26, 1970, p. 79. Southern Peru Copper Corporation is owned 51½% by American Smelting & Refining Co.; 22¼% by Cerro Corporation; 16% by Phelps Dodge Corporation; and 10¼% by Newmont Mining Corporation. *Moody's Industrials*.

<sup>28</sup>ITT Third Quarter Report 1969, November 12, 1969. Advertisement, Peruvian *Ministerio de Economía y Finanzas*, *New York Times*, January 26, 1970, p. 75.



not the result of pressures long antedating the present Peruvian regime—pressures that no Hickenlooper or other amendment could obviate.

With Peru's success in harrassing American enterprises by expropriation or "negotiation," the Hickenlooper Amendment ignored, and no help coming from the United States Government for its beleaguered citizens, Chile took over Anaconda's Chuquicamata and El Salvador mines in 1969, and a 51% interest in Kennecott's operations.

In December 1969, Colombia revoked the concession of All America Cables & Radio (an ITT subsidiary), only one of a series of such actions throughout Latin America, as satellite communications systems, financed chiefly by the United States Government through the Inter-American Development Bank, made it possible for those governments to dispense with private enterprise, and substitute an incredibly inefficient, bureaucratic telegraph service for the services rendered by AAC&R, Western Union, and RCA over the past many decades. A month later, Colombia demanded, and got, the return of a large part of the Texaco-Gulf concession after the oil companies had found promising deposits in ten of their exploratory wells.

A Massachusetts conglomerate, Standard International Corporation, announced that it was selling its Coca-Cola bottling franchises in Argentina, Chile and Uruguay, because arbitrary price controls and other pressures had, by 1969, become too great for them to continue in business. In that same year, in Mexico, the Government-owned petroleum company, *Petróleos Mexicanos* or PEMEX, persuaded four American oil companies<sup>29</sup> to relinquish their exploration contracts, and took over their proved oil reserves, installations and equipment for some \$22 million. In May 1969, Gulf Resources and Chemical Corporation of Houston, under pressure from the Mexican Government, agreed to sell its interests to *Metalúrgica Mexicana Penoles, S.A.* and *Crédito Minero y Mercantil, S.A.* for \$24 million. After this agreement had been reached, the Mexican Government continued to exercise pressure to force the company to lower the selling price to what the company considered a confiscatory figure, and it was compelled to shut down its operations. Senator Russell B. Long of Louisiana denounced the Mexican Government action as "a subtle form of confiscation," and demanded application of the Hickenlooper Amendment.<sup>30</sup>

<sup>29</sup>Pauley Petroleum, Inc.; Pan American Petroleum Corporation (a Standard Oil Co., Indiana, affiliate); American Independent Oil Co.; Mexofina (subsidiary of American Petrofina, Inc., in turn an affiliate of Petrofina, S.A., a Belgian company).

<sup>30</sup>References for this and preceding two paragraphs: *Re Chile: New York Times*, December 14, 1969, p. 26; January 26, 1970, p. 79. *Re Colombia: Bank of London and South America Review*, January 1970, p. 52; *New York Times*, January 26, 1970, p. 76. *Re*

And so on and so on. With more intensive research, the list could undoubtedly be extended. Suffice it to say that, in an experience in Latin American affairs extending back over a period of fifty years, there has never before been such a multi-national succession of uncompensated expropriations of American properties, and of take-overs of American enterprises, ostensibly on a voluntary basis, but with all the earmarks of pistol-point coercion.

### Is the Hickenlooper doctrine dead?

There are those who allege that the Hickenlooper Amendments have not been effective in deterring confiscation of American property. But how can one say whether or not they are effective when the State Department, which fought them tooth and nail in 1962 and 1964, has been so manifestly remiss in enforcing them? And certainly, what has happened to American investments in Latin America in 1968 and 1969 would indicate that the failure of the United States Government to apply the Hickenlooper sanctions has been disastrous.<sup>31</sup>

One thing is certain. No American company that has the slightest chance of getting even partial compensation for its properties, or that has been cheated out of half its assets through allegedly voluntary agreements, is going to complain very loudly or very long for fear of jeopardizing whatever it may have been able to salvage out of the wreckage. And the pressures that the American Government can bring to bear on an American corporation, to compel it to accept even the most unfair arrangement, are just as inexorable as those exercised by the military and Marxist governments of Latin America, as is evidenced by the inadequate settlements to which American oil companies were compelled to agree following the confiscation of their properties in Bolivia and Mexico.<sup>32</sup>

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PEMEX: *Review of the Economic Situation of Mexico (Banco Nacional de México)*, December 1969, p. 26. *Re* Standard International Corp.: *Fortune*, October 1969, pp. 99-101, 207-8. *Re* Gulf Resources & Chemical Corp.: *New York Times*, January 1, 1970, p. 35; *Moody's Industrials*.

<sup>31</sup>Professor Richard B. Lillich, for example, is skeptical of the utility of the Hickenlooper Amendment but, in this author's opinion, he does not give sufficient weight to the reluctance of corporate officials to air their problems. See his *Protection of Foreign Investment*, Syracuse: Syracuse University Press, 1965, which, aside from that point, is perhaps the most valuable study of the subject. See also his testimony, *Hearings, op. cit.*, pp. 53-84; and Charles A. Meyer, *ibid.*, pp. 115-139.

<sup>32</sup>Standard Oil Company (N.J.) received \$1,750,000 six years after seizure of its properties, and this constituted only partial compensation for its invaluable geological surveys, exploratory studies and maps, with no compensation for its concession rights, properties and installations; George J. Eder, *Inflation and Development in Latin America, op. cit.*, p. 58. In Mexico, the oil companies received \$24 million which could only have been a fraction of the actual value of the properties and concession rights at the time of seizure. Their claims amounted to \$450 million. Hubert Herring, *A History of Latin America*, New York: Knopf, 1965, pp. 381-3.

So, by the same token, if the confiscations of the past two years are ultimately settled by negotiated arrangements between the Latin American countries and their victims, the silence of those victims is not to be taken as vindication of the State Department's policy of ignoring the Hickenlooper mandate; it may very well represent nothing more than the sacrifice of legitimate American interests, and the decision by the corporations involved that it is futile to struggle against both their own government and that of the foreign country where they must continue to operate as best they can.

It is probably because of the silence of American corporation officials as to the efficacy of the Hickenlooper Amendment that academic researchers claim they have been ineffectual. One can hardly expect an American company operating abroad to proclaim that it has been saved from expropriation, thanks to Hickenlooper, for that would only make expropriation inevitable. It is the author's own impression that, in Latin America at least, the Hickenlooper Amendments were highly useful as a deterrent, so long as there was a likelihood of their being enforced, but that they were of little if any value once expropriation had taken place, and might even be counter-productive.

Be that as it may, it would appear that the Administration is determined to ask Congress to do away with the Amendment, or at least the mandatory aspects of it. In the President's address before the Inter-American Press Association last October, he stated:

"I am also ordering that all other onerous conditions and restrictions on U.S. assistance loans be reviewed *with the objective of modifying or eliminating them*" (italics supplied).<sup>33</sup>

On the other hand, the Assistant Secretary of State for Latin American Affairs, in his statement before the Senate Committee, stated:

"We seek and indeed insist that the Government of Peru give prompt, adequate and effective compensation for the properties and assets which it has, in the exercise of its sovereign power, taken."<sup>34</sup>

If that insistence is carried through to the sticking point—and the Assistant Secretary has been remarkably effective in protecting American interests quietly behind the scenes, without fanfare or ballyhoo—it should make little difference to investors whether or not the Hickenlooper Amendments remain on the statute books, particularly as their non-enforcement over the past sixteen months has made them as useless as a bladeless knife without a handle. And, as Professor Lillich says, "it is inconceivable that (our) country is going to go on giving aid to a country

<sup>33</sup>*Bulletin*, Department of State, November 17, 1969, p. 411.

<sup>34</sup>*Hearings*, *op. cit.*, p. 117.

which has taken American property, or at least which has taken a substantial amount of American property.”<sup>35</sup>

### **Moral obligation to protect investors**

Considering that the United States Government has for the past quarter of a century used every means in its power to persuade Americans to invest in Latin America and other less developed areas, through exhortation, tax incentives, insurance, and even direct pressure, it would be unconscionable if that Government were to abandon the American investors in the face of expropriation and extortion. And that applies not only to new investors, but to old investors who have been persuaded to expand their investments in the postwar period. Despite the disillusioning events of the past sixteen months, it can scarcely be believed that this Administration intends to accept any solution short of that insisted upon by the Assistant Secretary of State for Latin American Affairs, namely, “prompt, adequate and effective compensation.” And that is why it is submitted that the teachings of St. Thomas Aquinas have particular relevance to our own Government: If a government collects taxes, yet fails to safeguard the rights of citizens—at home as well as abroad—it is robbery pure and simple.

And the Latin American governments have been at least as assiduous in their attempts to persuade American investors to invest within their borders. Special tax and other incentives, supposedly ironclad concession contracts, petroleum codes, mining codes, and the full battery of inducements have been offered to attract foreign investment, all for the purpose of promoting a broader economic development, in recognition of the fact that development requires private capital and the technical and managerial skills that only foreign private enterprise is capable of furnishing.

### **Expropriation means an economic loss to Latin America**

When well-meaning commentators seek to justify the continuation of American aid in the face of confiscation of American interests, on the ground that U.S. aid is essential for the economic development of the backward areas, they overlook the fact that the experience of governmental enterprise in Latin America is such that any government take-over of private enterprise in that area means a loss, not a gain, to the economy, other than the transient gain represented by the confiscation of foreign-owned assets. Over the long run, the waste, corruption and

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<sup>35</sup>*Ibid.*, p. 71. It may be “inconceivable” now, but it has certainly happened again and again in the past.

inefficiency of government enterprises, the covert and overt subsidies and earmarked taxes requisite to keep them running, and the tax and other laws that compel private industry to buy the products and services of government corporations, no matter how uneconomical this may be, represent a continuing drain on the economy that more than offsets any possible advantage derived from confiscatory nationalization.

Even the hypothetical saving of foreign exchange through the elimination of dividends to foreign shareholders is nullified by the flight of capital engendered by well-founded fears of continuing confiscation, and by the fact that it is common practice for Latin American governments and government corporations to pay a minimum overcharge of 10% to 20% on all their purchases, which is credited to the accounts of the *políticos* and their friends who are the chief beneficiaries of the government operation of business enterprises.<sup>36</sup>

While in Bolivia, and during the course of research activities at Harvard Law School and at the University of Michigan, the author examined the annual reports of at least sixty of the outstanding government-owned public utilities and industries. This includes the so-called parastatal corporations, whose stock is held by the public, such as Brazil's *Petrobras* and Colombia's *Paz del Río*, where the ill effects of bad management are most notable, inasmuch as they are free from the usual controls on salaries and other expenditures.

There was not a single company whose reports were analyzed that was not operating in the red, even though the reports themselves, in some cases audited by internationally known accounting firms, may have shown a "profit." The losses were disguised by including in operating revenues, or as "other income," such items as concealed or open subsidies, special appropriations, and "earmarked taxes" — that is, taxes on the general public or on certain industries, collected by the Government, but the proceeds of which are turned over to some particular Government or parastatal enterprise, frequently one which competes with the private industry that pays the tax. On the expenditure side, foreign exchange expenditures at artificial, official rates were frequently commingled with disbursements in domestic currency. Where exchange controls and multiple exchange rates

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<sup>36</sup>One estimate of capital flight in Bolivia, attributed to the activities of *políticos* and labor leaders, was equivalent to the total of U.S. aid up to that time. For this and other estimates of capital flight, see George J. Eder, *Inflation and Development in Latin America*, *op. cit.*, p. 501n. Total Latin American capital flight, principally to Zurich and New York, is estimated by the U.S. Government and U.S. private banks at \$1 to \$3 billion a year. The total Latin American capital investment abroad today is estimated at \$10 to \$12 billion, approximately equal to United States direct investment in South America. *Fortune*, October 1969, pp. 99-101, 207-8.

were in force, this could mean understating expenses by 99% or more—one dollar, worth 10,000 bolivianos, would be shown on the books as 190 bolivianos. Annual depreciation charges were, in every case, hopelessly inadequate, meaning that the company's "profits" actually represented the piecemeal consumption of capital, and that the replacement of worn-out plant and equipment would have to come from further debt or subsidies, or from the taxpayers who are compelled to buy the stock of the parastatal corporations as part of their income tax.

In those cases in which the investment in plant and equipment was made at official rates of exchange far below the true market rate—that is, in every South American country but Venezuela—a depreciation charge based on cost is ridiculous, and means that reported "profits" are actually losses, and that reported losses are in fact many times the admitted figure.

In most cases, the auditors have red-flagged these absurdities by footnotes in the back of the report, perhaps stating that local currency accounts have been converted into dollars or vice versa at rates which are manifestly inappropriate, or that depreciation rates are the same as those used in the United States, whereas, obviously, this is a warning to the careful reader that they should be far higher in most cases. But who reads footnotes to an accounting statement? Inevitably, the auditors preface their opinion with the statement that the accounts have been prepared "in conformity with generally accepted accounting principles," and this is a further warning to the careful reader, for, except under Dutch accounting methods, this assumes that money has a reasonably constant value. The presumption that everyone who reads an annual report knows what "generally accepted accounting principles" are, is like the legal rule that everyone is presumed to know the law—a necessary assumption but manifestly untrue.

In short, it is almost certain that there is not a single government-owned public utility in Latin America, and probably not more than a handful of other governmental enterprises, that is not operating in the red—selling services or products at less than cost, and representing a direct drain on the national economy. What with tax exemptions and subsidies to consumers as well as purchasers, plus graft and capital flight, the cost of this drain is beyond calculation. Thus, nationalization of a successfully operating private enterprise is not an aid but a deterrent to economic development.<sup>37</sup>

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<sup>37</sup>It would be well if those officials entrusted with the disbursement of U.S. aid, or representing the United States on the international lending agencies, prior to making a grant or loan to any governmental enterprise, would make a thorough examination of the annual reports and unpublished records of all other government corporations in that country to ascertain the borrower's capacity to operate a business enterprise. This, to the author's knowledge, has never been done. The records are not available in Washington.

### Why government enterprise is inimical to development

Why is it that Government operation in Latin America is so uniformly disastrous? How can it be that the State, created for the benefit of all mankind, is more corrupt, more incompetent, than private enterprise, created for private gain? In Latin America—in fact, in most countries of the world other than those of Anglo-American tradition—even to suggest such a thing is almost *lése majesté*. The King can do no wrong, and a state-owned enterprise is supposedly owned and managed by an august, intangible, and infallible entity working for the good of all the people.

In actual fact, of course, it is managed by very fallible human beings—*políticos* and political appointees chosen by whoever happens to be President or Dictator of the country at the time. And, clearly, the qualities that enable a person to rise to high political office in Latin America, whether by revolution or election, are not necessarily those which would qualify him to manage a business enterprise nor to choose those best qualified to run one. The fact that the appointee may be trained as a lawyer, engineer or economist—intelligent, dynamic and loyal to the political party in power—does not in itself qualify him to manage a bank, a public utility, a steel mill, or any other business enterprise. Many years of experience in a position of high managerial and financial responsibility in a successful business are needed before a man is ready to assume the presidency of an oil company or other business activity, and political appointments in Latin America are not traditionally made on that basis.

The record is clear, and it is a record of almost invariable incompetence and corruption, of political favoritism and nepotism in jobs, graft in purchasing and contracting, and of disastrous loss to the enterprise and to the national economy. If it be argued that businessmen too can be, and sometimes are, corrupt and incompetent, it may be answered that any government which is unable to control corruption in the private sector, and jail the malefactors, is manifestly not competent to operate a business enterprise in the public sector.

And, so far as incompetence in private business is concerned, the answer is that, while people are accustomed to referring to private enterprise as “the profit system,” it is in reality a “profit and loss system.” And the losses are just as important to a sound economy as the profits, for they ensure good management and weed out the incompetent, the unsuccessful, before they can become too great a drain on the system. Government enterprises, however, like governments, are not forced into bankruptcy—losses are made good by higher and higher taxes on all the citizenry, continuing subsidies to ailing public enterprises, increasing debts and defaults abroad, and printing-press currency and inflation at home.

That is the record of the past, and there is nothing to indicate any change in the future.

So that, if our Government refrains from applying the sanctions contained in the Hickenlooper Amendments on the ground that to do so would interfere with the economic development of Latin America, it is on pretty shaky ground, for there can be nothing so detrimental to the economy of those countries as the expropriation of a thriving private enterprise.

*Argentine experience with Government enterprise*

Two examples from the author's personal experience, on which he is familiar with the facts as an insider, and not merely from hearsay or from study of annual reports, may appropriately be cited. These two examples are typical and not exceptional.

The first relates to the Argentine telephone company, formerly an ITT subsidiary, which was sold to the Argentine Government for \$100 million. As the ITT lawyer, the author drew up and negotiated all of the contracts, and remained in Buenos Aires for nearly a year after the sale to advise the Argentine Government interventor and his legal staff on the many details of transfer of title, debentures, and so forth.

Within three months of the sale, the company was in a state of general disorganization; the number of employees had increased by 50%; many of the most experienced employees had been fired and replaced by political appointees; and the interventor was in jail, with revelations of some 25 million pesos in graft—purchases of equipment, real estate, automobiles, the printing of the new telephone books, the split of a \$500,000 notarial fee that was completely unnecessary. Wherever graft was possible, it flourished like a green baytree.

Some ten years later, no longer managed by an interventor, but operated as a so-called autonomous enterprise, the company asked ITT to send down a team to help it out of its difficulties. Again, as lawyer, the author drew up the contracts. The number of employees had more than tripled, and the service had deteriorated to the point at which it had become a public scandal. Tens of thousands of telephone instruments were damaged, and the company wanted ITT to set up a factory force to repair them and keep them in repair. More serious, tens of millions of dollars of new equipment had been purchased from manufacturers all over the world, some of it incompatible with existing equipment, and all of it lying on the docks, unprotected and rusting, because the buildings into which it was to have been placed had not yet been designed, and the conduits for the cables had not yet been dug or even engineered.

The finances of the company were in such precarious shape that it was



never certain from month to month that wages could be paid, let alone paying for the services the company wanted from ITT. The Minister of Communications—the only competent such official the author has ever known in all of his Latin American experience, with a practical business background in the communications field—pleaded for an increase in telephone rates. “The cost of telephone service,” he said in a public speech, “is the same whether we charge a dollar a month for it, or three dollars a month; the only difference is that in one case it is the telephone user who pays the bill, and in the other, the taxpayer.” A nugget of wisdom that should be, but isn’t, the touchstone for policy in every public utility operation in Latin America.

And bear in mind that this was in Argentina, the most homogeneously advanced of all the countries of the Hemisphere, a country that can be called underdeveloped only with respect to its standards of government. It is not for nothing that Buenos Aires has been called the Chicago of Latin America.

#### *Bolivian experience with Government enterprise*

The other example comes from one of the poorest, least developed countries of the Hemisphere—Bolivia. In 1952, a Marxist revolutionary *junta* seized the reins of government and, among other things, confiscated the tin mines of the Patiños, the Aramayos, and the Hochschilds. The author went to Bolivia in 1956 and '57 to stabilize the currency which, thanks to U.S. aid, and to incompetence, corruption and communism, had fallen from 60 bolivianos to the dollar to 14,000 to the dollar. An essential part of the task was a thorough investigation into the affairs of COMIBOL, the Government tin company that had taken over the mines of “The Big Three.”

Before the seizure, those mines had paid taxes so heavy that they comprised over 75% of all Government revenues, yet they managed to make substantial profits for their owners. Under Government operation, COMIBOL employed twice as many workers to produce half as much tin; it totally neglected the exploration and blocking out of new veins of ore; its equipment deteriorated beyond repair; and, instead of providing a major source of Government revenue, COMIBOL mismanagement was a major cause of the Government’s insolvency.

Today, after 18 years of Government ownership, during a period of unprecedentedly high tin prices, and after over \$130 million of U.S. aid to COMIBOL, aside from other aid to the Bolivian Government, the company reports that it is barely operating in the black. And it shows “profits” purely because of accounting methods which, if used in the United States,

would send the management to jail. It pays no taxes or royalties, and in fact gets as a subsidy, the royalties paid by all the privately operated mines in the country.

My investigations revealed graft of unbelievable proportions in all of the COMIBOL operations and, to cap the climax and show what Government operation has meant to the workers: Just prior to stabilization, they received a basic wage of 37¢ a day which, with fringe benefits, amounted to a gross of 83¢ a day. When the currency was stabilized, these rates were raised to \$1.00 and \$2.04 respectively. They are now getting \$2.20 a day. When the mines were owned by private operators, according to a Ford, Bacon & Davis survey, Patiño was paying \$2.61 a day, and, according to a United Nations report, the average wage, plus fringe benefits, was \$5.91 a day. That is what communism and Government ownership have meant to a country that is still the poorest in all South America, even though the currency has remained stable for over a decade and prices are rising less rapidly than in the United States.<sup>38</sup>

#### *State Department acts to compel confiscation*

Perhaps the saddest commentary on the whole affair is this: When the author was sent down to Bolivia by the State Department, he was told that a *sin qua non* for U.S. aid that would form part of the monetary stabilization fund was assurance of a negotiated agreement with Patiño for compensation for seizure of the mines, Patiño being the only one of "The Big Three" who had a substantial American interest. But in 1961, when the United States for the first time extended aid to a Government enterprise that had been confiscated from American ownership, one condition of the agreement insisted upon by the United States was that no money must be paid to Patiño, Aramayo and Hochschild until agreement was reached on the total amount of indemnity. Considering that the Bolivian Minister of Mines refused to consider any indemnity in excess of \$40,000 for properties that had been appraised in 1926 by an impartial fiscal commission at \$135 million, this meant that the United States not only acquiesced in the confiscation but made it inevitable. The agreement was "classified"—top secret—in the United States, meaning that its terms are not available to Congress or to the general public; but they are freely available to anyone who reads the annual reports of the Bolivian Central Bank.<sup>39</sup>

<sup>38</sup>See George J. Eder, *Inflation and Development in Latin America*, *op. cit.*; Index under COMIBOL, Corruption.

<sup>39</sup>*Ibid.*, pp. 442–5, 542–51, 733n67, 747n53. During all of the time that the writer was in Bolivia, and cleared to read top secret documents, the criterion for such classification was seldom that the material might become known to our enemies, or hurt Bolivian feelings, or embarrass United States foreign policy. No. The criterion, in the great majority of cases, was

## Conclusions

All in all, it must be conceded that the foregoing is a pretty sorry picture of expropriation in Latin America, and of the apparent demise of the Hickenlooper doctrine. But is the picture uniformly black and, if so, what can we as lawyers do about it? In the first place, expropriation is, generally speaking—with such exceptions as the Cuban case—pretty well confined to such enterprises as railways, public utilities, banks, agricultural land, and mining and petroleum operations. Ordinary commercial operations, and small or medium sized industrial plants not affected with a public interest, are unlikely to be touched, although, of course, the aberrations of Marxist or military governments, price controls, excessive social security charges, and the elimination of an independent judiciary, can result in piecemeal confiscation of any kind of business, and that kind of confiscation is harder to combat than outright expropriation.

## *The role of Government*

What to do? First let us give our support to the Assistant Secretary of State for Latin American Affairs, as, for the first time in many years, we have in that position a man with first-hand knowledge of business in Latin America, who has, on at least one occasion, taken swift and effective action to protect American interests in ways that he has wisely refrained from broadcasting to the press and public.

Let us make it part of our task, on behalf of our clients, to make clear to him some of the perils that confront American interests in that part of the world, that may be very different from the problems faced in such a business as that of Sears, Roebuck & Co., with which he is most familiar.

Let us hope that he can overcome the resistance of the permanent bureaucracy that may have very different ideas, inimical to what we regard as legitimate American interests. A very wise Assistant Secretary of the Treasury said to the author, as he prepared for his Bolivian assignment, that when he and the Under Secretary and Secretary of the Treasury attempted to change the policies and methods established by the permanent bureaucracy, it was much like trying to sweep feathers out of a room with a broom—there was no resistance, but the feathers just drifted back into the room, and things remained just as they were before the sweeping.

When John B. Hollister, then director of United States aid operations, announced that there would be no aid for government-owned business enterprises, the permanent bureaucracy in the State Department was out-

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that it might become known to the United States Congress or to the press, and thus seriously embarrass the State Department, because the corruption and incompetence in the distribution and use of U.S. aid was simply incredible.

raged, horrified—and a few days later John Hollister was out of a job. So let us not only support the present Assistant Secretary of State for Latin American Affairs, but let us have patience, and hope that he will not have to face sabotage at home, as well as problems abroad.

### *The failure of multilateral conferences*

There is one more thing that it is to be hoped that this Administration will learn, and learn quickly—that it is the height of folly for the United States Government to attempt to negotiate certain matters, such as foreign aid, loans, subsidies, tariff preferences or compensation for expropriation, in multilateral conferences, at which the debtor nations and the expropriators will inevitably vote against us twenty-two to one. Inevitably, we leave such conferences poorer than when we went in—not merely in the sacrifice of the interests of American consumers, taxpayers and investors, but in the sacrifice of the respect that our country once enjoyed among the Latin American nations themselves. Above all, if we are inveigled into such conferences, let us go in with a set of our own demands, and let us refuse to back down on them if they are justified.

Multilateral conferences have their place in discussing such matters as uniform laws for negotiable instruments or bills of lading, international postal and telecommunications regulations, international maritime law, and so forth, but to attempt to decide in a multilateral setting how much money the United States should provide in aid to each of the Latin American nations, and what restrictions we should impose, is like having a bank's debtors decide by majority vote how much they should be allowed to borrow, and at what interest rates.

Each new Administration comes into office with high hopes of settling everything in an ideal world in some universal parliament of man. As it is a rule of politics never to admit a mistake, and as statesmen and bureaucrats will seldom admit even to themselves that they have squandered taxpayers' money, it generally takes about eight years for the new office holders to learn that there are some things that just cannot be negotiated successfully in a multilateral setting under the floodlight of publicity.

Let us hope that the present Administration learns this lesson more quickly than its predecessors. There is some evidence that it has, despite certain regrettable mistakes in the Pan-American field.

What the Administration can do multilaterally is to confer with the creditor nations of the world and agree on certain rules to which all creditor nations will subscribe. The logical point of departure is the Resolution on the Protection of Foreign Property adopted by the Council of the Organization for Economic Cooperation and Development on October 12,

1967, whose principles have been accepted by the leading nations of the free world, outside of Latin America. The United States Government should actively pursue its multilateral negotiations and push for signature and ratification of a Convention embodying those principles which stress that government contracts with private parties are binding, and provide for just, prompt, and effective compensation in the event of expropriation.<sup>40</sup> And such a Convention should be ratified by the creditor nations of the world, regardless of whether or not the underdeveloped, debtor nations are willing to agree.

The President, in his Report to Congress on Foreign Policy, states, with obvious reference to the "Latin American Consensus of Viña del Mar," and the demands presented on behalf of all the Latin American nations by the Chilean Foreign Minister, Gabriel Valdes Subercaseaux: "Above all, our special partnership must accomodate the desires of the Latin Americans to consult among themselves and formulate positions which they can then discuss with us."<sup>41</sup>

This statement evidences a degree of tolerance and understanding that should commend itself to the statesmen of the Latin American countries. It certainly should be reasonable to expect a like degree of understanding from those countries if the United States, confronted with a consensus of the debtor nations—demanding credits, grants, preferences, subsidies, negative interest rates, tolerance of confiscation—should confer with other creditor nations in an attempt to arrive at a similar consensus, which should be embodied in an international Convention.

Then, in bilateral discussions with each of the Latin American nations, we can arrange matters to mutual advantage by negotiation and not by confrontation. And we should insist that at least the major principles of the international Convention be embodied in the bilateral treaties before we agree to further aid, subsidies or preferences. It is not a question of *divide et impera*, but of not putting ourselves in a position where twenty debtor nations gang up on one creditor nation—which adds neither to their self-respect nor to our own. Let us, as lawyers, whose profession is the art

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<sup>40</sup>See G. W. Haight, *op. cit.*, for the text of the O.E.C.D. Resolution, and comments. Aside from the Convention, the U.S. Government should also support, as a matter of policy and practice and not necessarily by treaty, the principles embodied in the recommendations of the International Chamber of Commerce on Fair Treatment for Foreign Investment, and should lay down, in conference with other creditor nations, guidelines to prevent unfair competition in short-term supplier credits. The burden of interest and capital payments on such credits constitutes one of the most serious problems confronting Latin America today, generally winding up with United States aid providing the wherewithal and thus unwittingly financing the exports of Germany, Japan, and other countries, including those behind the Iron Curtain.

<sup>41</sup>*New York Times*, February 19, 1970, p. 20.

of persuasion and negotiation, attempt to persuade our Government of the wisdom of this course.

*Fallacy and fact in American investment*

Furthermore, the President has the right to expect from his advisers in the State Department, the factual material and analysis necessary to refute any misleading assertions with respect to American investments that might rationalize a policy of expropriation—for example, the claim voiced by Foreign Minister Valdés, and repeatedly by other Latin American commentators, that American investors are actually taking out of Latin America each year more than they invest in that region—so that, in reality, it is Latin America that is financing the U.S. and not *vice versa*.

It should be obvious, assuming an average return of 5% per annum in interest and dividends, if Americans have been investing in Latin America for twenty years in equal amounts each year, that at the end of that period the annual interest and dividend payments are bound to equal the annual inflow of new capital. And, considering that the United States has been investing in Latin America for well over 100 years, although not of course in equal amounts each year, it would be reasonable to expect the cumulative return on past investments to exceed the annual increment of new investments.

And when Latin American economists add to the dividend and interest remittances the total value of exports of oil, tin, copper, bananas, etc., to prove that American investors are “taking out” of Latin America more than they put in, the reasoning is preposterous. Whether or not the foreign enterprises are nationalized, the same products will be exported. The only difference is who gets the dividends, if any, and experience has shown that the flight of capital through illicit channels, when an enterprise is nationalized, far exceeds the loss of foreign exchange through the payment of dividends and interest.

Furthermore, there is an exaggerated idea of the profitability of American investments in Latin America, fostered in part by the misleading figures published by the U.S. Department of Commerce. When it is claimed that U.S. investments in Latin America pay an average rate of return of 7 or 8%, it should be emphasized that this refers solely to those companies which have managed to survive. They are the only ones reporting. It does not take into account the thousands of investors who have put their money into Latin America, and lost everything, whether because of revolution, inflation, dry wells, confiscation, or just poor management. Moreover, the amount of the investment in many cases—reporting is not on a uniform basis—reflects merely the amount of the original investment,

and overlooks the fact that the typical, successful U.S. corporation pays relatively low dividends, and plows back into the country a substantial part of its earnings. A thorough examination of the accounts would almost certainly show that the average dividend rate on *existing* U.S. investments in Latin America runs under 5% on total investment, and, if allowance is made for "drop-outs," through confiscation or otherwise, the average would probably be closer to 3%.

The question to ask is not how much foreign investors are "taking out" of Latin America, but how much foreign investors have contributed, and are continuing to contribute to Latin American economic development, from the earliest railroad builders to the latest industrial, agricultural, mining and petroleum enterprises.

### *The role of lawyers*

What else is there for us to do as lawyers? Eight practical, work-a-day suggestions are offered hereunder. As many more might be submitted, to fit each individual case which practicing lawyers are likely to face.

1. In the first place, if the business is one that must depend on a concession, such as a public utility, it would seem preferable to have a revocable franchise rather than a fixed-term concession for twenty or fifty years. That would hardly be practical in the case of a mining or petroleum operation but, for a utility and for many other enterprises, it is ideal. In the first place, with a fixed-term concession, it becomes impossible to float long-term bonds as the concession term draws to a close, and, of course, only governments are foolish enough to finance long-life capital investments with short-term money.

In the second place, a twenty-year concession is much more liable to political attack than a revocable franchise; if it can be revoked at any time, there is less likelihood of any urgent political or popular pressure for revocation. As the French say, nothing is so permanent as the temporary—as we see in some of the temporary World-War-I buildings still standing in Washington. But, chiefly, no matter what the franchise says, some future Marxist or military government may decide to cancel it.

So, for many years, this writer has been drafting franchises in Latin America—as in a Virgin Islands franchise here paraphrased because it is in English: "This franchise, being revocable, may be revoked by the Government at any time on two years' prior notice, and, in the event of revocation for any reason, payment shall be made in accordance with the provisions of Article 'x'." The article in question gives, in precise, non-ambiguous detail, a definition of capital investment, both for rate-making purposes and for expropriation. It provides, in the case of franchises in foreign countries, for

payment in the country and currency of the country of origin of the investment, in other words, in dollars. Another article provides that if, because of civil disturbance or for any other reason, the company is taken over temporarily by the Government—and you may be sure the Government will do that even if it is not in the franchise—the Government shall pay compensation monthly at the agreed rate on the value of capital investment as defined in Article “x,” payment also to be made in the country and currency of origin.

In the case of a mining or oil company, the value of the enterprise could not be stated in terms of invested capital for the reasons I have explained, but would have to be actual value at the time of expropriation, including oil or mineral reserves appraised by a competent and impartial body. The concession should emphasize that the indemnity provisions are equitable because the contract is aleatory; that the rule must be *pacta sunt servanda*; and that revocation, an exception to the rule, is to be demanded only because of extraordinary circumstances, and with a provision for *lucrum cessans*—loss of future profits—for the concessionaire. Remember that, while it may be difficult to obtain all of the equitable provisions that the client would like to have at the time the contract is written, it will be ten times more difficult to obtain equitable treatment in the absence of such provisions at the time the contract is breached.

Finally, every contract with a government must be fair and equitable on its face—not merely fair in fact and substance, but so simply and clearly worded that it can be shown to the press and public, now or ten years from now, without fear that it will ever be characterized as leonine, as a sell-out of the national interest. Remember, too, that any ambiguity will always be construed in favor of the government, or will provide a pressure point for demands of graft to have it construed equitably.

2. The second suggestion a lawyer can give his clients—whether concessionaires or not—is to make sure that the valuation of assets is kept currently up to date on the books. It may mean that this will cost money in taxes, but that may be small insurance to pay if there is any danger of expropriation, or of excess-profits taxes, or of price-fixing based in part on the value of assets.

To give an example, it will be recalled that in the Congressional debate preceding the 1962 Hickenlooper Amendment, reference was made to the expropriation of the ITT telephone company in Rio Grande do Sul, Brazil.<sup>42</sup> Two years before that date, the writing had appeared on the wall—the Governor of the State of Rio Grande do Sul—the mildest manner’d man

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<sup>42</sup>*Congr. & Adm. News*, 1962, vol. 1, p. 2051.



that ever scuttled ship or cut a throat—confiscated the American & Foreign Power operation, and deposited the sum of one cruzeiro—half a cent—with the court as the “fair value” of the property, using as a base the historic cost in drastically depreciated cruzeiros, and then offsetting that value with the claim of excess profits over the past ten years, based on an accounting process that would be funny if it were not so serious.<sup>43</sup>

So, when the Governor let it be known that the ITT company would be next in line, and proposed a mixed company with the State controlling 51% of the stock and ITT the rest, the opportunity was grasped at once to get an appraisal—although ITT’s initial reaction, cabled to Brazil, was to reject the deal for obvious reasons. The mixed company would have been outrageous—the book value of the company, less whatever the Governor wanted to deduct, would constitute its 49% of the stock, and, in depreciated cruzeiros, despite repeated write-ups, it would have meant losing over 90% of the investment. The Government, on the other hand, would only have to put up 10% of its 51% share, and obtain control of the company for virtually nothing.

In talks with the Governor’s aides, it was suggested that, while the books of the company had been kept according to law, it was realized that the Government and the public considered that they were unreliable or worse, and that they included a large part of plant that the Government believed should be written off. So it was proposed—why not ignore the books, except as an inventory check, and have a complete appraisal made by Brazilian engineers, one named by the Governor, one by us, and one by mutual consent. The appraisal would show current replacement values for new plant and equipment at true labor and material costs, less the actual observed depreciation by percentage for each category of plant, regardless of book value or book depreciation, thus arriving at a true figure for present fair value. The Governor was delighted; although when the appraisal was made, and showed a value of some \$7.3 million, the Governor was not delighted.

Some time later, in February 1962, more than a year after the author had severed connections with ITT, the Governor ignored the appraisal, deposited a sum in cruzeiros equivalent to \$400,000 as his valuation of the

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<sup>43</sup>The court refused to accept that as fair value, and called for a deposit of Cr. 20,000,000, equivalent to \$110,000. Later, in November 1964, after enactment of the second, mandatory Hickenlooper Amendment, A&FP was able to sell the company to the State for a negotiated amount, although representing less than adequate compensation. Following the take-over of the A&FP property, the Governor was able to finance the necessary expansion of plant thanks to a loan from the World Bank. It may be noted here that the establishment and expansion of government enterprises in Latin America, including those confiscated from American investors, has almost invariably been financed by U.S. aid or by one of the international lending agencies.

plant—imagine, a going telephone company whose main building alone was appraised at more than that! He then took over the company.

Now, when anyone claims that the Hickenlooper Amendments are of doubtful value, it would be well to ponder this: If it had not been for a very able management of ITT in New York at that time, which brought the case to the attention of Senator Hickenlooper, and enactment of the amendment to the Foreign Assistance Act; and if it had not been for the fact that the Federal Government of Brazil was then trying to get several hundreds of millions of dollars from the United States, ITT would have received the same atrocious deal that was meted out to American & Foreign Power. And if ITT had not had that three-party appraisal made, authorized by a law and contract drafted with the assistance of very able Brazilian counsel, it would never have been possible to prove that the company was worth more than a few million cruzeiros. Hickenlooper or no Hickenlooper, one could hardly expect the United States Ambassador to back up ITT in demanding current replacement value in dollars, when the company was operating without a concession on the basis of a revocable permit, and when Brazilian law—based on U.S. precedents and doctrine—expressly provided that “historic cost” in cruzeiros was “fair value” for a public utility.

3. The third suggestion is to get out before being pushed out. That is not always feasible. But ITT has been foresighted. It got out of Spain in 1945 while the getting was good—sold the 'phone company to the Spanish Government and invested in a factory. It sold its Rumanian properties just months before the Russians moved in, and got paid in dollars. It sold out to the Argentine Government in 1946 for \$100 million in cash. It was not so lucky in Shanghai, and for years it had tried to get the Chilean Government to take over its concession, but without success. President Jorge Alessandri very shrewdly said he was not going to be as foolish as Perón in Argentina—“Then your troubles would be my troubles. Wage demands, social security, no rate increases—I don't need more troubles.”

4. Another possible way of minimizing risks is the joint venture. A dozen reasons can be given based on experience, why joint ventures won't work. But a number of other cases can also be given in which they have worked very well, and the reason is usually obvious. To think that the joint venture is the universal solution to all our problems, or for either the Latin American countries or the United States Government to insist on joint ventures as an invariable rule, is theoretical balderdash. But, when it is feasible, it may very well be a practical solution, and it may possibly avoid expropriation. Then again, it may not.

5. A fifth possibility of minimizing risks is to accept a minority interest in

a Latin American company, or to confine one's commitment to patent or process licensing, or to a combination of the two. ITT has been most successful in its Japanese operations with only a small minority interest, plus a licensing contract. Westinghouse has been highly successful with its patent and process licensing, and there are dozens of well-known names in the apparel field where the products are manufactured in Latin America by local companies under license and advisory contracts.

6. A sixth possibility is one suggested a good many years ago to an American company interested in opening a new factory in a Latin American country. The risk was not expropriation, but the possibility of price-fixing and certain other dangers that rather exceeded a normal business risk. Yet profit potentialities were certainly there.

The company was formed with \$1 million in capital stock and \$9 million in debentures, most of the money to be invested in second-hand machinery from the company's U.S. plants. This was done, and by the second year the company had proved so profitable that it was able to pay off the debentures in five more years. Meanwhile, interest payments were remitted regularly in dollars, with obvious income tax advantages. The common stock has been revalued from time to time—stock of no par value is not permitted in that country—and if the company should ever be expropriated, which is not likely, they have already recovered their original investment many times over.

7. Then, as a seventh possible protection against expropriation, there is the insurance offered by the United States Government. Although it is wrong in principle for our Government to have to indemnify our investors against the confiscatory acts of another government, when it is the host country that should offer the incentives to attract investment, yet, so long as such insurance is available, we should generally advise our clients to take advantage of it. True, it may not be worth a tinker's damn—it cannot protect existing investments; it is futile to receive a guaranty of convertibility when the value of the foreign currency may be only one-hundredth of what it was at the time of the investment; and the guaranty against expropriation is useless against the piecemeal confiscation of price-fixing, unfair labor practices, and other day-to-day risks—yet if a company does not take out insurance, and should come to grief, it may have a hard time explaining to its stockholders why it failed to do so. And then again, so long as we have courageous Senators in Washington, the insurance might even have some value.

8. Finally, it must be conceded that the best means of minimizing the risk of expropriation is the constant maintenance of good public relations, good labor relations, good customer and supplier relations, and good gov-

ernment relations. This should be the invariable aim of all American enterprise, abroad as well as at home.

But do not be deceived into thinking that this is a universal solution. It certainly did not work in Cuba. And, not many years ago, Sears-Roebuck had bombs set off in half a dozen of their stores in Colombia although if there is any company that has really done a splendid job in public relations, based on fair dealing all around, it is Sears. W. R. Grace & Co. is in the same category, yet their Peruvian properties were expropriated, and no one questions that they were one of the best-managed firms in all Latin America.

It might be added that Standard Oil Co. (N.J.) and United Fruit Company, despite all the ugly rumors and O'Henry tales of their early operations, have, for at least the past forty years, maintained exemplary establishments, with fine hospitals, schools, sanitary improvements, paying the highest wages and certainly the highest taxes, and contributing in every way to the sound economic development of the countries in which they operate. Yet this fine record did not prevent confiscation of their properties, the revocation of their concessions, and pressures which compelled them to rid themselves of their operations in more than one country.

In brief, there is no one sure way of avoiding expropriation, but there are many ways in which we as lawyers can so advise our clients as to minimize the risk. Furthermore, there are many companies whose operations are not affected with a public interest, in which expropriation is practically out of the question. So, if our own Government does not abandon us, we can face the future in Latin America with perhaps some degree of realistic optimism.