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BOOK REVIEWS

IMMIGRATION LAW AND PROCEDURE. By Charles Gordon and Harry N. Rosenfield. Banks & Co., Albany, New York: 1959. Pp. 1180. $25.00.

In 1912 Byrne & Company published Clement R. Bouvé's fine treatise on the exclusion and expulsion of aliens. From 1912 to 1959, until Gordon and Rosenfield's *Immigration Law and Procedure* reached the press, Bouvé's book was the only treatise on the intricacies of American immigration statutes and procedures thereunder. There have been other books on immigration since 1912, but none have reached the literary accomplishment and scholarly standing of Gordon and Rosenfield's treatise.

Since 1912 our immigration statutes have introduced visa, passport, literacy, loyalty and quota requirements. From a statute of 23 pages in 1912 and regulations of 38 pages, our laws have expanded to 138 pages of statutes and over 239 pages of regulations. A multiplicity of immigration forms has been added; simplification of procedures is still only an aspiration of our legislators and immigration authorities.

The need for an immigration treatise has existed since Bouvé's work became antiquated. That need was accentuated with the enactment in 1952 of the complicated and abstruse Immigration and Nationality Act. Gordon and Rosenfield have now supplied that need. They take us from the history of our immigration laws to the enforcement agencies charged with immigration responsibilities, the requirements for admission of aliens, the exclusion process, the deportation proscriptions, and deportation procedures. They discuss the problems of alien crewmen, alien enemies, exchange visitors, agricultural workers, as well as alien registration requirements, wartime controls, American passports, reentry permits, immigration bonds, adjustment of status by temporary visitors, illegal entrants, private immigration bills in Congress, judicial review of immigration decisions, and finally civil liabilities and criminal offenses. These subjects and the chapters which contain this material provide the reader with an excellent and invaluable background, understanding and analysis of our immigration laws and procedures. The appendix is filled with 115 pages of extremely helpful forms, charts and lists which will be of special value to the immigration practitioner.

With rare exceptions, this treatise exhibits a high degree of thoroughness, scholarship and accuracy.

In some instances, however, the views of the Immigration Service are presented without revelation of contrary opinions. It is in this light that I take issue with the contention of the authors that judicial subpoenas cannot compel production of immigration records.[1] Subpoenas served on subordinates of the Attorney General may be defeated under Department of Justice Order No. 3229[2] which precludes such officials from producing files of the Justice Department.[3] The case is otherwise when the *Jencks* rule is applicable,[4] or when the subpoena is directed personally

1. Pp. 65, 537.

2. 11 Fed. Reg. 4920 (1946).

3. United States ex rel. Touhy v. Ragen, 340 U.S. 462 (1951).

4. Jencks v. United States, 353 U.S. 657 (1957); Communist Party of the United States v. Subversive Activities Control Bd., 254 F.2d 314 (D.C. Cir. 1958); Carlisle v. Rogers, 262 F.2d 19 (D.C. Cir. 1958); Petrowicz v. Holland, 142 F. Supp. 369 (E.D. Pa. 1956); United States ex rel. Schlueter v. Watkins, 67 F. Supp. 556 (S.D.N.Y.), aff'd, 158 F.2d 853 (2d Cir. 1946).

to the Attorney General.[5] Although the treatise take a contrary view,[6] this reviewer has brought habeas corpus proceedings for an alien on parole,[7] and a declaratory judgment action for an excluded alien.[8] The statement that there is no authority to withhold deportation while an alien applies for a pardon[9] does not take cognizance of *United States ex rel. McLeod v. Garfinkel*.[10] The claim that a declaratory judgment review of an immigration decision is just as restricted as habeas corpus[11] fails to reveal the opposing views which have beeen expressed on this subject.[12] Neither the text nor the forms[13] fully develop the problem faced by the practitioner in securing a preliminary injunction in his pursuit of a declaratory judgment action. In the District of Columbia, the grant or denial of injunctive relief often depends on the changing attitudes of the various motions judges. Some decisions merely require the statement in the complaint of a valid cause of action.[14] Under this view, injunctive relief is almost automatic upon application when filing the complaint. Others require proof of a substantial question.[15] Under this view, the alien must go beyond his complaint and prove to the satisfaction of the court that he has a meritorious cause of action.

It may well be that judicial challenges to the competency of immigration interpreters are difficult to sustain, as the authors state.[16] Nevertheless, there is judicial recognition that such interpreters are frequently inaccurate in their translations of foreign languages.[17]

An alien is not denied cross examination where statements of witnesses outside the United States are offered in evidence.[18] Cross examination may be accomplished

5. "That the documents are merely confidential does not protect them against compulsory disclosure. Of course this does not mean such documents must be produced upon every demand; good cause for intrusion into confidential files and materiality and relevancy must be shown. The law in that area is well settled." Communist Party of the United States v. Subversive Activities Control Bd., supra note 4, at 321.

In an alien enemy case, the court observed that there was a public policy that "a person should not be deprived of his liberty without giving him an opportunity to have access to material which might exculpate him . . . ." United States ex rel. Schleuter v. Watkins, 67 F. Supp. 556, 561 (S.D.N.Y. 1946). See also United States v. Coplon, 185 F.2d 629, 638 (2d Cir. 1950), cert. denied, 342 U.S. 920 (1952); United States v. Andolschek, 142 F.2d 503, 506 (2d Cir. 1944); Annots., Government's Privilege Against Disclosure, 97 L. Ed. 735 (1953); 95 L. Ed. 425 (1951).

6. Pp. 822, 824.

7. United States ex rel. Malaxa v. Savoretti, 139 F. Supp. 143 (S.D. Fla. 1956).

8. Forbes v. Brownell, 149 F. Supp. 848 (D.D.C. 1957).

9. Pp. 832, 867 n.13.

10. 129 F. Supp. 591 (W.D. Pa. 1955).

11. P. 848.

12. See, e.g., Heikkila v. Barber, 345 U.S. 229, 236 n.12 (1953).

13. Pp. 841, 1056.

14. See, e.g., Rubinstein v. Brownell, 206 F.2d 449 (D.C. Cir. 1953), aff'd per curiam, 346 U.S. 929 (1954); Lim Fong v. Brownell, 215 F.2d 683 (D.C. Cir. 1954).

15. See, e.g., Karayannis v. Brownell, 248 F.2d 80 (D.C. Cir.), approved per curiam, 251 F.2d 882 (D.C. Cir. 1957); Hatzistavrou v. Brownell, 225 F.2d 26 (D.C. Cir. 1955).

16. P. 548.

17. See, e.g., Nieto v. McGrath, 108 F. Supp. 150, 154 (S.D. Tex. 1951); Ponce v. McGrath, 91 F. Supp. 23 (S.D. Cal. 1950). The omission of helpful cases like these is the most serious defect in the book.

18. P. 568.

by deposition at an American consulate abroad.[19] Most lawyers and immigration officials are unaware of the procedures for the recordation of witnesses' testimony abroad. Hence, an outline of this process would have been helpful.

Aliens may secure administrative stays where it is established that their deportation would result in physical persecution.[20] Gordon and Rosenfield assert that such a stay is limited to cases where persecution is based upon political, religious or racial grounds.[21] The statutory language is not so restrictive, and the invalidity of of this limitation has been conceded by the Government.[22]

Criminal lawyers are well versed in the knowledge that the word "willful" generally connotes bad motive and evil intent.[23] Why should it mean less for one who falsely and willfully represents himself to be a citizen of the United States.[24]

Administrative procedures wherein penalties or fines are imposed against transportation lines produce, as the authors note, "personal interviews" when requested.[25] These interviews are not due process hearings, and cross examination is generally not accorded to the carrier, although the Supreme Court has commented upon the requisites which should be followed here.[26] The non-compliance of the Immigration Service with these due process requirements is not the subject of any comment by the authors.

We are told that only Hungarians are entitled to notice before revocation of their parole status.[27] The basis for this discrimination is not too clear, nor can I agree with it. Discussion is too restricted on the constitutionality of summary deportation procedures sanctioning the removal of crewmen without hearings.[28] There is also no mention of the possible constitutional infirmity of requiring aliens to incriminate themselves under alien registration requirements.[29] An index of cases and a bibliography of source materials would improve the value of the book. These and other shortcomings will undoubtedly be improved in subsequent editions.

It is difficult and perhaps impossible to write an ideal errorless treatise on so complex a subject as immigration. Gordon and Rosenfield have nonetheless led the way toward a better understanding of this subject. In my daily work as an immigration practitioner, I have utilized this treatise and found it to be a reference guide of superior value. Other practitioners, whether immigration specialists or those in general practice, will arrive at the same conclusion.

JACK WASSERMAN†

19. This was done in Matter of Malaxa, Immigration File A-6421949.

20. 66 Stat. 214 (1952), 8 U.S.C. § 1253(h) (1958).

21. P. 597.

22. This concession was made during oral argument in Marcello v. Rogers, Civil No. 14,490, D.C. Cir., Oct. 10, 1958 (per curiam).

23. See, e.g., Spies v. United States, 317 U.S. 492, 498 (1943); United States v. Murdock, 290 U.S. 389 (1933); Frisone v. United States, 270 F.2d 401 (9th Cir. 1959); Chow Bing Kew v. United States, 248 F.2d 466, 471 (9th Cir.), cert. denied, 355 U.S. 889 (1957); United States v. Palermo, 157 F. Supp. 578 (E.D. Pa. 1957), rev'd, 259 F.2d 872 (3d Cir. 1958).

24. P. 960.

25. P. 928.

26. See, e.g., Lloyd Sabaudo Società Anonima v. Elting, 287 U.S. 329 (1932).

27. P. 292.

28. P. 632. This procedure is applicable only where a conditional landing permit is revoked while a crewman's vessel is in port. 66 Stat. 220 (1952), 8 U.S.C. § 1282(b) (1958).

29. See, e.g., United States v. Ginn, 222 F.2d 289 (3d Cir. 1955).

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THE EAVESDROPPERS. By Samuel S. Dash, Richard F. Schwartz, and Robert E. Knowlton. Rutgers University Press, New Brunswick, New Jersey: 1959. Pp. 476. $6.50.

In 1956 the Pennsylvania Bar Association Endowment, with the aid of a $50,000 grant from the Fund for the Republic, undertook a study of wiretapping practices, laws, devices and techniques. This book is the fruit of the study. Mr. Dash, director of the study, is described as one who, as a former prosecutor, had favored wiretapping. The associate director, Professor Knowlton, of Rutgers University Law School, is said in the introduction to be "an opponent of wiretapping." Mr. Schwartz, of the Moore School of Electrical Engineering of the University of Pennsylvania, was appointed to deal with the technical aspects of wiretapping.

Although the bulk of the work relates to wiretapping, the study is not so limited. As the authors recognized, a review of wiretapping must direct itself to the question of individual privacy, and it became clear that several other techniques of surreptitious fact-finding presented similar, if not the same, issues with regard to the right of a man to be left alone. Therefore, the book discusses, in addition to wiretapping, the use of a concealed microphone, commonly known as a "bug," a high-powered telescope, a concealed and automatic camera, and closed-circuit television. The word "eavesdropping" is used throughout to mean "surreptitious fact-collecting affecting individual privacy."

The volume is divided into three main parts. The first deals with "The Practice" and describes what the staff and its investigators discovered in seven states with respect to eavesdropping practices. The second deals with the technical aspects of eavesdropping and is denominated "The Tools." The third part deals with "The Law."

The factual section of the book deals with three types of jurisdictions. First, the practices in the so-called "permissive jurisdictions," namely, New York, Louisiana and Massachusetts, are described. In all of these there are laws permitting wiretapping by law enforcement officers. Second, the prohibiting jurisdictions, *i.e.*, Illinois and California, are studied, where the law purports to forbid wiretapping. Third, the book deals with so-called "virgin jurisdictions," namely, Nevada and Pennsylvania, where recent laws have been adopted, in the case of Pennsylvania prohibiting wiretapping, and in the case of Nevada permitting it with restrictions. The study describes the activity prior to such laws.

The differences between the permissive jurisdictions are interesting. Massachusetts requires only the written consent of the District Attorney or Attorney General before a person may wiretap. New York requires a court order made on application by a police officer above the rank of sergeant. Louisiana permits police wiretapping without any regulations or authorization whatsoever. Nevada's recently enacted law is similar to the New York law.

In substance, the book asserts that there has been a great deal more wiretapping than is commonly known. Indeed, it is said that little heed is paid by law enforcement agencies to the laws prohibiting wiretapping or other eavesdropping. Business firms and private investigators are alleged to engage in wiretapping practices on a broad scale, with the connivance or assistance of telephone company employees. In New York, for example, it is asserted that for every ten legal wiretaps installed by plainclothesmen with court orders there are ninety illegal taps by plainclothesmen without orders. The authors think that the New York police have been making in the neighborhood of 29,000 wiretaps a year, while the orders obtained pursuant to statute for wiretapping are less than 400. The same pattern is said to exist in other

jurisdictions where authorization is required. Indeed, both in California and Illinois, where wiretapping is purportedly prohibited by law, the police are said to have engaged in the practice extensively.

The second part, relating to the tools of eavesdropping and the technical explanation of their workings, demonstrates the relative simplicity and ease with which a wiretap or other eavesdropping instrument can be obtained and installed. The section would seem to be of more value to those actively engaged in wiretapping or in its detection than to the general reader.

The third part relates to the law of wiretapping and eavesdropping. It discusses federal law, both under the fourth amendment, and under section 605 of the Federal Communications Act. It also contains a brief review of the state laws. This part is well written, concise and interesting, even to the general practitioner.

The book furnishes food for thought on two problems which trouble society. One is the means of enforcing any prohibition against wiretapping, and the second is the extent to which wiretapping should be permitted as a matter of policy.

The authors suggest that prosecuting officials will not be apt to prosecute law enforcement officers or their agents who have engaged illegally in wiretapping activity for purposes of detecting crime. Even private investigators and business firms are not, on the basis of past history, likely to be proceeded against criminally. If this is so, it would seem that the only deterrent against illegal wiretapping would be to permit the person whose rights have been violated to collect a penalty against the offender in a private suit. This and other matters will doubtless be considered by the congressional committee presently engaged in studying the entire matter of wiretapping.

The second question, namely, the extent to which wiretapping should be allowed at all, seems to be readily answerable in the case of private persons. In the light of the high value our society purports to place on personal privacy, there would appear to be no great countervailing policy in favor of allowing a private investigator to wiretap, especially when one considers the potential use to which he may put his information.

Whether government may wiretap, and if so, to what extent, is more controversial. The answer to that question must be determined by the values which are placed on the sometimes competing considerations of individual privacy and crime prevention or government security. This perennial process of balancing conflicting values is present here as in most branches of the law. The weight in the government's scale may vary according to the nature of the crime and the opportunity for detection in other ways. On the other hand, there is no method whereby a wiretapper can hear only conversation which gives information as to criminal activities. He must listen to all or nothing. It is thus almost inevitable that one's interest in privacy will be invaded to some extent in an area in which there is no legitimate governmental concern. The justification for doing so must rest on some overriding desirability for law enforcement officers to hear what does properly concern society. One would suppose that only a very serious crime would give such a justification.

This book is hardly one which the ordinary lawyer or the general public will consider required reading, particularly because of the inevitable repetition in the descriptions of the factual aspects of wiretapping in different jurisdictions. Nonetheless only such a factual study can focus attention on a subject about which there has been little organized published material, and which has generated more heat than light. The book contains important source material for those concerned with crime prevention and personal liberty to consider. While this volume does not answer the question of what relative values are to be placed on these conflicting interests, the

facts set forth in the study are certainly useful to anyone who seeks to resolve the question.

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EXPROPRIATION IN PUBLIC INTERNATIONAL LAW. By B. A. Wortley. Cambridge, University Press, New York: 1959. Pp. xviii, 169. $5.50.

This sixth volume of The Cambridge Studies in International and Comparative Law deals with the protection of foreign interests against expropriations. Since the first World War, the inviolability of private property rights has hardly been recognized in fact; a consequence ensuing from social and economic reforms effected in many countries, commencing with the Soviet Union in 1918. There followed Eastern European agrarian measures in the twenties, the Mexican oil expropriation (1938), nationalization in the Baltic States (1940) and the Eastern European countries after the Second World War (1945), measures against Germans expelled from Czechoslovakia and Poland (1946), nationalization in the Eastern Zone of Germany (1948), the Iranian oil conflict (1951), the Suez Canal crisis (1956), seizure of Dutch properties in Indonesia (1958), and the recent Cuban agrarian reform (1959).

More lately, taking of foreign property by the State—with or without adequate compensation—has been carried out in forms and by devices of "creeping" and "cloaked" confiscation. The new practice requires a reappraisal of the many approaches which international law customarily afforded the damaged individual or corporation and States in the protection of their nationals' interests.

Professor Wortley wisely does not attempt to deal with all of these questions. He eliminates intentionally history and the laws of war, and most of the conflict-of-laws problems usually connected with the discussion of court decisions in this field. Emphasis is put instead on public international law aspects, and here the author shows his mastery over the material in reviewing the basic principles which prevail today in the laws of many countries. After considering the various forms of taking property by the State, their alleged misuse, and the manifold measures of compensation available, the problems of restitution are dealt with as they appear in customary law and treaties, especially those concluded after the Second World War. Procedural considerations, which play a decisive role in the diplomatic protection of claims arising out of expropriation measures, are by no means neglected: the exhaustion of local remedies, the nationality of claims, the protection of shareholders, and the effect of global settlements.

It is gratifying to know that Professor Wortley will subsequently deal with the problems of private international law arising from expropriation in a separate work following his 1959 lectures at the Hague Academy of International Law. The work with which the legal practitioner and adviser in foreign offices is mostly concerned will be greatly facilitated by an elucidation of the general principles of public international law as afforded in the monograph under review. References to abundant source material invite further consideration of the viewpoints which are concisely, though sometimes only briefly, stated.

Professor Wortley has made a remarkable contribution to a segment of international law which becomes of ever-increasing importance: the international law of "taking of foreign property."

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LEGAL ASPECTS OF FOREIGN INVESTMENT. Edited by Wolfgang G. Friedmann and Richard C. Pugh. Little, Brown & Co., Boston. Pp. xiii, 812. $20.00.

This book constitutes a significant contribution to the literature dealing with foreign investment, a literature which grows in direct (if not geometric) proportion to the increase in such investment. The chief editor, Professor Friedmann, has for many years worked and written intensively in the field of international and comparative law, and is manifestly well-qualified to undertake this work.

The present volume, which deals primarily with the legal conditions of business investment, is an outgrowth of a wider study[1] of the relations between capital-exporting and capital-importing countries, as expressed in joint ventures.

The need for this book arises naturally from the feverish acceleration, within the past fifteen years, in the pace of scientific and technical innovations, and the irresistible sweep of the nationalist revolution. These have combined to produce an expanding universe of international business relations, which in turn has been mirrored in a proliferation of legal concepts governing foreign investments. New governments have imposed various restrictions which they deemed necessary to properly safeguard their control over their resources, a concern well exemplified by the debates in the United Nations, which resulted in the establishment of a Commission on Permanent Sovereignty Over Natural Resources.[2] Parallel to and countering this tendency, there has been an extremely vigorous attempt to extend the area of protection in international law for private investment in the developing countries. As will be seen, this attempt has tended to ignore the understandable desire of the newer nations at least to reaffirm, if not to extend, those presently recognized principles which seem to them essential to provide a minimum degree of control over their natural resources. This attempt to change the law is all the more unfortunate since these nations have accepted other principles of international law which they found already in being in a legal "world they never made."

The work is divided into three parts. The first, which may be called the "foreign law" portion, digests the legal materials concerning the conditions of foreign investment in forty selected countries. The second part, which may be called the "public international law" portion, deals with the effect of such domestic laws under international law, including the extent of domestic protection afforded by international law. The third, or "comparative law" section, makes a comparative analysis of the laws of the countries concerned, and summarizes the applicable international law principles.

The first is by far the largest part of the book. The editors have obviously prescribed a uniform treatment by all forty contributors, so that all the reports treat more or less the same problems.

These problems include questions of both private and public law. The private law questions are mainly concerned with the establishment of companies or branch offices in foreign countries, with the advantages and disadvantages of the various forms of business organization available for foreign investment, including the various types of corporations and of shares and bonds, and with management control, voting rights, and provisions for the protection of minority shareholders.

The most important questions of public law treated are those relating to currency regulations, taxation, labor law, and conditions of doing business. Provisions which are intended to encourage or restrict foreign investments are particularly emphasized.

1. Columbia University Research Project on "Joint International Business Ventures."

2. See The Status of Permanent Sovereignty Over Natural Wealth and Resources—Preliminary Study by the Secretariat, U.N. Doc. No. A/AC.97/5 (1959), for an excellent survey of this question.

Such restrictions may completely prohibit or seriously curtail foreign participation in ownership or control in special fields of endeavor, or they may restrict transfer of profits or repatriation of capital. Encouragement may be given in the form of tax inducements or exemption from exchange control regulations or import restrictions.

Most of the country reports are written by eminent lawyers practicing in the country on which they are reporting. The average length of each article is about seventeen pages, obviously too short a space for a full description of the investment laws of any country. The American lawyer whose client is interested in investment abroad will therefore wish to enlist the cooperation of local counsel to obtain detailed answers to his problems. This is especially true in such fields as currency laws or taxation which, in many countries, are subject to frequent changes. The value of the book consists therefore not so much in providing answers to detailed questions as in raising problems of which the American lawyer may otherwise not even be aware. The book will help American lawyers in asking the correct questions of local counsel and in arriving at a better comprehension of the answers.

Much of the material found in the country reports is also to be found in Martindale-Hubbell's *Law Directory* (Vol. IV). However, reports on the following countries which appear in this book are not found in Martindale-Hubbell (1959 edition): Burma, India, Indonesia, Iran, Korea, Pakistan, Thailand and the United Arab Republic.

Excellent surveys of economic as well as legal problems may be found in the series of country studies issued by the United States Department of Commerce entitled either "Investment in [the country concerned]," or "Doing Business with [the country concerned]," as the later studies in this series are called.

Communist countries other than Yugoslavia are not reported on, for the obvious reason that in such countries normally foreign investment is not welcomed, just as private domestic investment is not permitted.

The book also does not deal with regional institutions such as the European Economic Community, which has had a profound bearing on private investment.

Also omitted, by hypothesis, is the treatment of subjects affecting foreign trade, such as tariff laws, quotas, and antidumping provisions.

The country reports also contain no reference to the laws governing expropriation, except for the laws relating to guarantees against expropriation, such as those in India.[3] Since expropriation may well occur in certain countries, it might have been useful to set forth the terms of the governing law relating to procedure, compensation, and other questions. The authors also do not refer to certain laws which affect domestic as well as foreign investors, such as mining laws, whereas such laws are found in the above-mentioned Commerce Department series, and with respect to certain countries, such as the Latin American, also in Martindale-Hubbell.

The great variety of answers to legal and economic problems in the countries concerned will help to dispel a widespread misconception, namely, the assumption that the laws of other countries are more or less the same as our laws.

The third part of the book, entitled "Comparative Analysis," is written by the editors and seems to be the most valuable section.

The editors point out that economic and political considerations must in the first instance be the basis of any decision concerning investment in foreign countries.[4] Legal considerations will, however, come into play in making the final decision.

3. P. 260.

4. As to economic considerations, the above-mentioned U.S. Commerce Department series, "Investment in [specified countries]," will be found especially helpful.

The authors also very properly note:

The focus of this Symposium is upon the laws, regulations, and procedures of the capital-importing country which bear on the investment of foreign capital. It should be noted, however, that often the laws and regulations of the capital-exporting country, particularly those relating to taxation and, in some cases, to exchange control and antitrust, are of equal or greater importance in influencing foreign investment.[5]

With respect to the legal factors in the capital-importing country, the authors compare the major elements in the various countries and point out the significance thereof in making an investment decision. The weight which an investor attaches to particular restrictions or incentives will help to determine whether a given investment is suitable for a given country. My own experience indicates also that the facility with which information as to legal (or business) factors is obtainable, or with which governmental approvals or consents may be obtained, may often be as important as the substantive provisions.

The editors display an unusually full comprehension of the need for mutual understanding and cooperation between private investors and foreign governments in a world where unrestricted private enterprise has almost ceased to exist even in the West. The following reference to government participation in a foreign undertaking is indicative of their generally enlightened approach:

The great majority of United States industrialists and businessmen are apt to look at any possibility of government participation in foreign ventures with an antipathy sometimes born of experience, but equally often born of initial prejudice. In the contemporary world, where the majority of underdeveloped States have philosophies and policies vastly different from those of the nineteenth century, such an uncompromising attitude will not stop economic development. It is, however, likely to divert a major share of foreign investment from the Western world to the less inhibited Soviet Union, which will readily furnish capital, machines, and engineers. The experiences of partnership by Western private enterprises with foreign governments have been varied, but they have by no means been uniformly bad. Their success is, in fact, in large measure dependent upon the readiness of both parties to work for a common purpose.[6]

The second part of the book is entitled, "Legal Security for International Investment." The author, Mr. A. A. Fatouros, has compressed into brief compass an excellent survey of a difficult subject.

He discusses the variety of forms which legal guarantees to foreign investors may assume, and assesses their practical value. He considers first two types of such assurances, multilateral and bilateral.

With respect to guarantees in multilateral agreements, he refers to the multiplicity of proposed international investment codes, and observes that their adoption is hardly possible under present conditions.

There are two chief factors which in his opinion militate against their adoption. First, the proposals are one-sided, since the capital-importing states assume obligations without any undertaking on the part of the capital-exporting states which cannot give assurances that any specific amounts are to be invested. Second, the practical usefulness of an investment code is limited by the very general terms in which it would have to be drawn.

With respect to guarantees in bilateral treaties, he points out that the main instrument of American foreign economic policy in this respect has been the Treaties of

5. P. 735.
6. P. 753.

Friendship, Commerce and Navigation. These treaties provide for national treatment with respect to most areas of the economy, thus prohibiting discrimination against American investors, including discriminatory expropriation. The current treaties, unlike the earliest one, contain no prohibition against the screening of foreign capital.

These treaties also provide against the use of exchange restrictions for discriminatory purposes, and that in the event exchange restrictions are imposed, foreign investors are allowed to transfer profits, capital, and in some cases, compensation for expropriated property.

The disregard of the guarantee provisions of treaties, bilateral or multilateral, would constitute a violation of international law and provide the investor with the machinery normally available in case of any violation of treaty agreements.

There is a third class of guarantees, namely, those provided through municipal law of either the capital-exporting or capital-importing state. Typical of the former is the ICA program in the United States which insures against inconvertibility of currency, expropriation of property, and war risks, and which provides that in case of expropriation there may be a submission to international arbitration without prior exhaustion of remedies.

Guarantees by capital-importing states are offered to investors by statutes or policy statements which are couched in general terms. The actual grant frequently is in the form of a special instrument of approval, concession agreement, or special contract of guarantee. An example of the latter is the agreement between the Indian Government and the Standard Vacuum Oil Company in which the Government gave twenty-one assurances, including an undertaking not to expropriate the refinery to be established for at least twenty-five years, and to pay reasonable compensation for any expropriation thereafter.

The author then discusses the fundamental question raised by these types of instruments or agreements, namely, the effect in international law of a contractual commitment of a state to an alien. The author accepts what is generally regarded as the traditional view, namely, that such instruments, being contracts between states and private persons, are not international instruments, and that normally a violation by the state of such contracts with aliens (unlike the violation of a treaty, as mentioned above) is not a violation of international law. This is based on the fact that the principle *pacta sunt servanda* as a rule of international law[7] is not applicable to contractual relations between states and aliens, but is restricted to relations which states establish between themselves by treaty or other international agreements,[8] and that consequently where a state's nonperformance does not take the form of unjustifiable discrimination or is not accompanied by a denial of justice, no international delinquency occurs.[9]

The position of the author in this respect is to be commended, especially in the light of the vigorous campaign to change the traditional view which has been carried on in recent years. Certainly, it is highly desirable to make changes in the law

7. There will, of course, be a corresponding rule in the municipal law which governs the contract; but its violation is not, per se, a violation of international law.

8. Garcia Amador, Second Report on International Responsibility, U.N. Doc. No. A/CN.4/106, at 36 (1957); Fourth Report on International Responsibility, U.N. Doc. No. A/CN.4/119, at 37 (1959).

9. Fatouros suggests that there are three exceptional circumstances under which nonperformance of a contract by a state would be internationally illegal, namely, estoppel, unjust enrichment, and abuse of rights. Whether these circumstances merely affect the duty of compensation or in fact make the state action illegal may be open to some doubt.

to keep pace with economic and social developments. But if any change is necessary it should certainly not lessen the control of the newer states over their natural resources and over foreign investments in their countries. The desire of potential investors to achieve greater legal security is more likely to be met by bilateral treaties or by establishing machinery for international arbitration of differences which may arise. Most states, whether or not they have newly achieved their independence, are likely to take vigorous exception to any attempt to curtail their right to exercise a sovereign power as significant as the right of eminent domain.

In this connection it might have been useful if the author had made reference to the long line of cases in the United States Supreme Court which have established two sets of principles applicable to this type of situation:

1. That any undertaking on the part of a state not to exercise its power of expropriation is not binding since it attempts to bargain away a basic and inalienable right. Since the undertaking is not binding, it is obvious that it is not breached when the state expropriates.[10]

2. Where the state has granted a concession or franchise to an alien, it has the right to expropriate such contractual rights to the same extent as if they were tangible property. The concession or franchise is valid and binding, but since the state has the right to terminate it, such termination does not constitute a violation of the contract. The state is under obligation to make compensation, which is in itself a recognition of the validity of the contract.[11]

In general, however, Mr. Fatouros' article is an excellent survey of the broad range of foreign investment problems arising under international law.

It may also be noted in passing that the work as a whole provides a convenient means of access to foreign laws otherwise not always easily obtainable, and that the bibliographies at the end of each chapter provide a basis for further study.

This carefully prepared and scholarly work should be in the library of all lawyers dealing with foreign investment.

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10. See, e.g., Galveston Wharf Co. v. City of Galveston, 260 U.S. 473 (1923); Pennsylvania Hosp. v. City of Philadelphia, 245 U.S. 20 (1917); State v. Adirondack Ry., 160 N.Y. 225, 54 N.E. 689 (1899), aff'd, 176 U.S. 335 (1900).

11. See, e.g., Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 435 (1934); City of Cincinnati v. Louisville & N.R.R., 223 U.S. 390 (1911); Long Island Water Supply Co. v. City of Brooklyn, 166 U.S. 685, 692 (1897); New Orleans Gas Light Co. v. Louisiana Light Co., 115 U.S. 673 (1885); West River Bridge v. Dix, 47 U.S. (6 How.) 507 (1848).

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