# THE TAKING OF PROPERTY BY THE STATE : RECENT DEVELOPMENTS IN INTERNATIONAL LAW

by

ROSALYN HIGGINS

THE HAGUE ACADEMY OF INTERNATIONAL

R. HIGGINS

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## BIOGRAPHICAL NOTE

*Rosalyn Higgins,* born on 2 June 1937 in London. Educated at Girton College, Cambridge (BA 1958, LLB 1959, MA 1961) and Yale (JSD 1962). United Kingdom Intern, Office of Legal Affairs, UN 1958; Visiting Fellow, Brookings Institution, Washington, DC 1960; Junior Fellow in International Studies, London School of Economics, 1961-1963; Staff Specialist in International Law, Royal Institute of International Affairs, 1963-1974; Visiting Fellow, London School of Economics, 1974-1978; Professor of International Law, University of Kent at Canterbury, 1978-1981.

Presently Professor of International Law in the University of London (London School of Economics). Board of Editors, *American Journal of International Law, British Year Book of International Law.* Vice-President, American Society of International Law, 1972-1974. International Bar Association, Committee on Energy and Natural Resources.

1980, *Docteur Honoris Causa* de l'Université de Paris Sud. Barrister-at-Law.

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## CHAPTER I

## INTRODUCTION: THE TAKING OF PROPERTY – LEGAL TASKS UNDERLYING THE LABELS

In these lectures I shall explore recent developments in international law as it relates to the taking of property by the State. In recent years there has been a very considerable debate about the question of compensation for the taking of the private property of foreigners – the circumstances in which property may be taken, whether compensation is due, and the international law requirements as to the speed, method of determining and amount of compensation. This important and interesting debate, which has many ramifications, has generated a very substantial literature[1]. It is not my intention, in these lectures, to concentrate on the compensation standard for the taking of the property of foreigners. But I shall have to make some brief comments in this area if the problems that I do wish to address myself to are to be seen in context. My observations on the method and standard of compensation may thus be seen as necessary steps on the path to a different vista. They do not purport to be a new scholarly contribution to this topic.

What I hope to do is to explore with you some of the less well-trodden areas relating to the taking of property, including the question of so-called "indirect takings" (by which I mean deprivation of property rights through acts of the State other than outright takings, whether in the form of nationalization, expropriation[2], confiscation, requisition or sequestration). I shall also examine property rights as human rights, and suggest that the growing jurisprudence in this area is developing along lines that are not wholly consistent with "regular" international law on the taking of property, in certain important respects. I am also interested to discover whether it is either realistic or intellectually viable to generalize about takings of property, or whether closer attention need not be given both to the nature of the property taken, and the status of the party losing his property.

These, then, will be our themes this week. But before we embark on them I have certain observations of a more theoretical

nature to make. The substantive debates about the taking of property are pursued with great intensity, and with an increasing articulation of the policy issues underlying the legal debate[3]. I think that is as it should be, because I belong to that school of international lawyers which does not believe that international law is, or ever could be, about the neutral application of immutable rules. Rather it is about the harnessing of authoritative decision-making to the achievement of certain values in international society[4]. But at the same time I am very struck by the almost total absence of any analysis of conceptual aspects of property. So far as the concept of property itself is concerned, it is as if we international lawyers say: property has been defined for us by municipal legal systems; and in any event, we *know* property when we see it. But how can we know if an individual has lost *property* rights unless we really understand what property *is*? Still less can we decide whether a particular deprivation is permissible, and if so on what grounds, and indeed whether it is a deprivation that does or does not entitle the former owner to compensation, unless we have some sense of the social function of property and what it is that judges and arbitrators are doing when they make these decisions. Otherwise our analysis, which clearly cannot rest on past trends alone but must also address the policy implications, will be limited to the anodyne observation that the sovereign rights of States must be balanced against the contract or other expectations of private persons or corporations.

The reality is that most municipal law systems have themselves developed doctrines on the taking of property that are at best "incoherent". Thus a leading commentator[5] on the "takings clause" of the United States Constitution (the Fifth Amendment, which provides that "nor shall private property be taken for public use, without just compensation") has pointed to the difficulty of predicting whether relief will be granted to a dispossessed plaintiff. In some cases of property deprivation he will be denied all relief, while "it is easy to find similar cases coming to the opposite result, where analogous [deprivatory] regulations were invalidated because compensation was not provided for".

The student of international law who is interested in property questions will find a wealth of source material. He or she will be faced with pronouncements of the Permanent and International Court of Justice, with old and recent arbitral awards, with resolutions of

the United Nations and other international bodies, with drafts of the International Law Commission and other organs interested in the codification of law, and with a vast amount of writing by jurists. Comparatively few of these international law source materials address themselves to what property *is*, at least in any explicit sense. But, looked at as a whole, certain patterns of issues emerge. There is, for example, much attention given to whether a State can in all circumstances take the property of foreigners; or whether this claimed concomitant of sovereignty is limited by requirements prescribed by international law, such as the need for a public purpose and non discrimination. There is debate about whether compensation is required for takings by the State. Again, does the absence of compensation act to make the taking itself invalid – (with perhaps the result that restitution may be ordered) or does it merely give rise to a claim for compensation?

A further range of questions addressed by the writings, or arising out of the case law, has related to what is meant by the traditional requirement of adequate, prompt and effective compensation; and whether these requirements still represent customary international law. And, increasingly, we see case law and writings on a somewhat newer theme: do interventions by the State that leave title untouched in the hands of the plaintiff, but nonetheless occasion him loss, give rise to a right of compensation?

The source materials to which I have referred deal with at least some of these issues in considerable depth[6]. But they deal with them disparately. The issues are not particularly regarded as forming a coherent whole – the international law of the reallocation of property rights. Still less is there any jurisprudential, philosophical or even economic analysis of the underlying conceptual issues. The discussion is too often in terms of mere invocation of State sovereignty on the one hand, and *pacta sunt servanda* and good faith on the other. But these legal concepts are not ends in themselves: they are methods by which authorized decision makers cause certain consequences to occur within society, and cause certain values to be promoted.

The lectures this week will explore a wide range of recent State practice and judicial and arbitral decisions. These source materials will often seem to contradict each other. But these underlying theoretical considerations should be in mind. I do not think that it will be much help in reconciling diverse views and judgments,

but it will assist you in looking behind the labels and in reaching your own coherent view of a preferred international law on the reallocation of property. Perhaps, if you are prepared to look at it this way, you may even finish the week holding somewhat different views on some of the substantive topics – expropriation, compensation, etc. – than you think you hold at this moment of time.

Let us begin by saying a few words about what is meant by "property". We necessarily draw on municipal law sources and on the general principles of law. The concept of "property" provides the owner thereof with the protection of the law in certain key respects. He may use it without requiring permission each time he does so. He may use it as he wishes. And others who wish to use it will have to get his permission first to do so. And, importantly, he has the sole right of alienating it[7]. If we attach that "bundle of rights" to something that we have frequently seen, the subject of contention in the case law -- a factory in State A, owned by Mr. B – the elements of the definition become apparent. He may open his factory daily without the permission of the local police. He may use it to make shoes, or watches, or bread. Non-use does not deprive him of these rights. If his friend, Mr. C, wishes to turn an empty corner of the factory to his own use, he will still have to ask Mr. B for permission, and perhaps pay some rent for that privilege. And only he – and not Mr. C or X, Y, or Z, may sell the factory or otherwise alienate it.

In spite of the profound disagreements that we face over the desirability of private property rights, or the State's right to interfere with them, there is virtual consensus on the *meaning* of property. This consensus stretches back through time, and across different political and philosophical viewpoints. Thus Katzarov, in his leading marxist study on *The Theory of Nationalization,* states that –

> "the content given to property by the law from remotest times down to the codes of the nineteenth and early twentieth centuries which are still in force, has a positive and a negative aspect:
>
> *(a)* it is a right of disposal which is both absolute and also unlimited in point of time; this is the positive aspect;
>
> *(b)* it is exclusive, which means that it confers upon its holder the power to forbid any other person to perform an act of disposal; this is the negative aspect[8]".

We will find echoes of this understanding of the essential attributes of property when we come to examine some of the case law on so-called "indirect takings" of property. International tribunals have in the main preferred to look and see whether various government interferences have left these essential rights intact at the end of the day, rather than to see whether they have occasioned a diminution in value. The tendency is for a diminution in value to remain uncompensated, so long as rights of use, exclusion and alienation remain.

It is apparent that both chattels and land fall within our definition of property (and of course, this is so even in the case of shared ownership, where several may share this bundle of rights, but the nature of the rights remains unchanged). But the notion of "property" is not restricted to chattels. Sometimes rights that might seem more naturally to fall under the category of contract rights are treated as property. Lawson and Rudden in their well-known monograph on the Law of Property explain it thus:

> "If the rights created by contract can be transferred from one person to another, the law regards them as a species of property. Indeed English law calls them 'things' though it uses the old French jargon *choses in action*[9]."

Thus alongside physical objects the law treats certain "abstract things" as property – for example, debts, shares in companies, intellectual property such as patents and copyright. Bruce Ackerman, in his immensely stimulating book *Private Property and the Constitution,* uses the colloquial terms "Layman's Things" and "Lawyer's Things" to make the same distinction[10]. He also offers a distinction between social property and legal property. Layman, as Ackerman puts it, knows that his right to control the use of his "thing" *(chose)* is generally recognized in his every day dealings with other individuals. They will seek his permission before using it and will not interfere with many of the ways in which he uses it. This is "social property". But if Layman does not believe himself justified in claiming something as his without appealing to the opinion of a legal specialist, then he has legal property. The international law cases of course all simply accept as an unwritten premise that property means both *choses* and *choses in action*; that it means tangibles and intangibles; that it means Layman's Things and Lawyer's Things; that it means social property and

legal property. But difficult problems do arise as to how particular bundles of rights should be classified, and this can be crucial, as only *property* deprivation will give rise to compensation. Furthermore, tribunals are faced with great difficulties in assessing compensation for the loss of *choses in action*: quantification obviously presents singular difficulties here[11]. In any event, the cases seem to go at it in a very pragmatic way, making very little use of theories of property as they have been developed on the municipal plane.

As we will see later this week, it is necessary for a variety of reasons for tribunals to analyse the legal nature of petroleum concessions. Whether they are property rights or mere contract rights is a critical issue affecting – at least on one view – the right of the State to interfere with such rights. The tendency in the international law cases, as we shall see, is for these distinctions to be made largely on the basis of what has been said in other cases, or by writers: the sources of international law as indicated in Article 38 of the Statute are preferred to property law analysis *de novo*. Thus in the recent arbitration between the Libyan American Oil Company (LIAMCO) and the Government of Libya[12] the sole Arbitrator spoke of property as covering corporeal and incorporeal property, with the latter being "those rights that have a money value"[13]. He found concession rights to be included under the class of incorporeal property:

> "this assertion is recognized by international precedents, as was held for instance by the Permanent Court of Arbitration in its Award delivered on 13 October 1922 in the dispute between the United States of America and the Kingdom of Norway".

He found further that this view was in harmony with the municipal law of most legal systems, including that of Libya, and with Islamic jurisprudence. The point is this: the attack on the inviolability of concession rights (of which we shall speak later) comes *not* from a rejection of concessions as property rights, but from changing views about permitted interferences with property rights. I shall say something about this shortly. For the moment, it should be noted that there are today certain jurists who seek to enlarge the matters covered as "property", in the sense that we have defined it. The so-called New Property Theorists have argued that the conception of property should be broadened to include

non-proprietary rights that fulfil the same economic and social functions as rights of property. They consider that the increased tolerance, even in western capitalist societies, or State interferences with property rights, means that such rights are becoming ever more relative; and that it is therefore timely to include other rights achieving comparable purposes. They mention, for example, the right to a social security payment[14].

Interestingly, the European Commission on Human Rights has been faced with the question of whether certain welfare rights of this sort are indeed property rights, and thus entitled to the protection of the property clause of the First Protocol. It is hard to see from the brief decision the basis of the Commission's thinking on this matter[15].

Turning from the concept of property to the very entitlement to hold private property, one notices again a wide measure of agreement. The right to hold private property[16] has a very long history, and indeed it may reflect a social instinct. Katzarov writes[17]:

> "A second fundamental instinct can be discerned in man, namely the instinct of appropriation, determined by the necessities of human existence, and manifesting itself in man's innate tendency to detain, appropriate and keep for his own use, to the exclusion of all others, the goods which are necessary to him . . . This instinct of appropriation depends on the natural supremacy of man over the physical objects which constitute the subject-matter of property, in his ability to subject them to his control."

The tendency to appropriate can be found in the earliest civilizations. No known group of people – whether Marxists, or Kibbutzniks, or tribes – have ever totally banished the notion of private property. Indeed, the right is referred to in virtually all constitutions, including those of Eastern Europe. There is considerable historical and anthropological evidence that the concept of property pre-dated the emergence of the nation-state[18].

There is some academic controversy however (which while interesting need not detain us here) as to whether property predated law as we know it[19]. Today, it is clear, they are intertwined.

Katzarov describes two fundamental instincts in man – the drive to appropriate, and the instinct which drives him to seek

the company of his fellows. He suggests that the two instincts have taken form in two social institutions –

> "which are the core of the entire legal system, namely property and the State – Yet these two instincts, inherent as they may be in human nature, contain the seeds of dissent from the moment that a more or less organized human society is established[20]."

For the marxist, the appropriating instinct, if not strongly checked, places the individual and self-centred interest above the general interest. For a lawyer committed to the capitalist view of the world there is an explanation of the need to exclude others, of the excluding function of appropriation. Thus Professor Hardin has advanced an economic analysis to describe what he terms "the tragedy of the Commons", viz., that the common use of resources inevitably leads to more use, more pollution, and a diminution of general value of the property[21]. Clearly, these are deeply controversial questions, that we cannot begin to resolve here. But we should at least be aware that these alternative views exist. They exist, of course, within a wide range of views on the function of property in society, and we should perhaps especially mention also utilitarian theories, elaborated in particular by the philosophers Hume and Bentham.

Whichever of these views we prefer, the innate tension between private property (given its attributes) and the State seems undeniable. It is the function of law to reconcile these: and it is the function of international law to reconcile these elements when they occur across State boundaries. The balance between owner and State has undoubtedly changed during this century. The impact of the revolution in the Soviet Union, the redrawing of the European political map after the Second World War, and the increased tendency of government intervention in capitalist societies, have all contributed to this change. To a certain extent this change in balance has been gradual, because the concept of property had never in modern law been an absolute right[22]. Wortley[23] points out that St. Thomas Aquinas, who strongly urged the merits of private property, nonetheless believed that property was subject to the claims of society. The merit of private property, as St. Thomas saw it, was that "Every man is more careful to procure what is for himself alone than that which is common to many or

to all" and because "a more peaceful state is endured to man if everyone is content with his own. Hence it is to be observed that quarrels arise more frequently when there is no division of thing possessed." But man must be ready to communicate things possessed to others in need[24]. While virtually all nations, as we have said, recognize a right to own property, these same constitutions also envisage that this established right may be limited by community interests[25]. Thus the French Declaration of the Rights of Man and of the Citizen of 1789 declared property to be an inviolable and sacred right in France. But it was already acknowledged that nationalization was permitted as a matter of public necessity. But by the time of the Code Napoleon (and notwithstanding the confirmation of the Declaration of 1789 in the subsequent post war constitutions), nationalization is permitted for reasons of public utility – a more flexible term. The German and French civil codes are similarly non-absolutist. This acknowledgement of the limitation placed upon the exercise of property rights is commonly spoken of as the recognition of the social function of property.

Some indeed have contended that acknowledgement of the social function, in this sense, is an *inherent aspect* of property, as much as the other essential attributes of property that we have described[26]. Thus Judge Hjerner of the Stockholm Court of Appeal, has written[27] "property is no absolute phenomenon, it is a short word for a certain freedom 'the owner' is enjoying in his activities . . . Property ultimately depends on the assistance which a claimant receives from the Community." The argument, then, is that at least since mediaeval times, property has been understood to have the attributes we have described above (powers of exclusion, free use, alienation) subject always to certain overriding powers of the State. Conservative, liberal and marxist lawyers have all written about the social function of the law[28]. It is the frontier between the State and private property rights that has been under such pressure in the last 70 years.

The international law cases seem to exist in a vacuum, and to reflect nothing of this. But the great debate that rages at the international law level about the proper line drawing between sovereignty and foreign property rights occurs against the background of comparable arguments in a variety of legal systems. International law, like municipal law, has come to affirm that property rights be exercised in a manner that is not dangerous and

does not harm others[29]. And in recent years, with the beginnings of international environmental law there has begun to grow the notion that property must not be used in such a way as to pollute or wantonly waste. As Ackerman has graphically put it, when writing about the same phenomenon of recognized property constraint within United States law, it is now accepted that we should desist from using our property when it causes harm to the property of our neighbours – but we are urged also "to refrain from causing undue damage to things like Nature or Tradition, conceived as entities demanding respect quite apart from the interests of persons and future generations"[30]. Again, it is accepted at both the municipal and international levels that private property may be used for authorized punitive purposes – it may be taken as a fine or a judgment execution. These "takings" are for purposes of State authority widely perceived as legitimate. They do not, except in a negative sense, enrich society as a whole. They are wholly different in kind from the sorts of takings of property that a marxist, for example, would find desirable – because it would lead to a *redistribution* of property. Marx and Engels contended that if the exploitation of man by man was to be abolished, the means of production must be controlled by the community rather than by the private user[31]. To Lenin the nationalization of the means of production was an essential pre-condition to the achievement of socialism. In Pashukanis' view[32]

> "[the] freedom of disposition inherent in capitalist property is inconceivable without the existence of propertyless individuals, in other words, of proleterians".

In non-socialist societies the increasing weight given by the law to the social function of property occurs, of course, within a very different framework. In some countries it is believed that certain public utilities should be in the hands of the State: the nationalized industries, existing within the mixed economies of western Europe, are cases in point. In the United States this view is not shared to any significant degree: but there has been a significant taking of, or major interference with, property though the use of that American constitutional lawyers would term police powers, or eminent domain[33]. Property is taken, or regulated, to promote the general welfare on an *ad hoc* basis. The Fifth Amendment to

the Constitution provides: "nor shall private property be taken for public use, without just compensation."

We have, as we have in international law, a requirement that taking only be for a public use, and that compensation be paid. The reference to "just" compensation reminds us of the phrase "appropriate" compensation which, as we shall see, is coming to be more and more used in international instruments. But even within the confines of one legal culture – that of the United States – a very conflicting jurisprudence has grown up. States have become more active in the fields of conservation and environmental control, and often, where the measure has been shown indeed to be in the public interest, it has been held that *no* compensation is due. In other words, "just" compensation has in some cases been treated as equal to zero when the purpose is clearly to promote the public good[34]. But this balancing test – between the social gain and the individual loss – surely is inappropriate as a method for distinguishing measures requiring compensation from those not requiring it. There are two related questions, as relevant to international law as to United States constitutional law: first, whether a given measure would be in order if it were accompanied by compensation measures; and second, whether the same measure (lawful if accompanied by compensation) should be enforced without payment of compensation. The balancing may be relevant to the first question, but it cannot be, in my view, to the second[35].

If a government takes private property in order to maximize the welfare of its citizens as a whole, it nonetheless remains true that some members of the society will be less well off after the reallocation of measures than they were before. Every time a judge decides whether compensation is not due, he is really deciding whether such losses shall be borne by the individuals on whom they happen to fall (in which case he will determine that no compensation is due) or whether they shall be socialized, i.e., borne by the common treasury, most usually through the allocation of these social expenses to the tax structure[36].

When one looks at the international law cases and arbitral awards, it is hard to discern any feeling on the part of the court or arbitrator that this is the function they are engaged in. The difficulties are, of course, enormous. But if the decision cannot be made with precision in each and every case, perhaps the compensation requirement should at least be interpreted in such a

way as to encourage the even distribution of benefits and burdens over the long run.

A tribunal can decide to let the loss fall where it lies by one of two ways: either it can decide that, notwithstanding the taking of property, no compensation is due. Or, alternatively, it can find that no "taking" has actually taken place. Thus it is that in many cases not involving outright nationalization or expropriation, the central question is whether the alteration to the bundle of rights that the corporation or individuals owns is in fact a "taking" of his rights. We will see, when I come later in the week to speak on recent developments in the question of "indirect" takings, that a variety of factors are alluded to: whether title is actually transferred; whether the property is physically occupied or taken over; whether it can still be used and disposed of. The tendency has been, if the essential property rights remain intact, to refuse compensation even if substantial loss can be shown. Diminution of value by itself appears to be insufficient to occasion a duty to compensate. The case law of the European Communities on Human Rights, seems even more prepared to make the social risk fall on the individual in these circumstances than have been some other tribunals.

But my point is that none of them are really decision-making with these underlying questions in mind. Decisions very much turn on the particular texts (for example, a clause in an arbitration agreement, or on Article 1 of the First Protocol to the European Convention and on precedents perceived as relevant and telling). The time has come to think about the difficult questions of property-taking less as of conflict between the developed and developing world, and more as a search for decision making about burden-sharing in an interdependent world.

## CHAPTER II

# TOLERATED TAKINGS

We start, I think, with a shared perception of a topic that has undergone profound change in the last quarter-century. To appraise those changes it will be necessary not simply to categorize departures from what we previously took to be the requirements of the law. It will be necessary to look at the entire problem contextually. By that, I mean that we shall need to examine rather carefully just what it was that the old "rules" (that is to say, the past trends of decisions, evidenced in the case law, State practice and writings of the leading monographs) told us[37]. It is necessary to examine current practice and evidences. The extent to which these represent an emergent new international legal order depends in part upon how we think law is made. That is partly a matter of the *method* of legal decision-making. And it is also a matter of seeking to identify what objectives the new practices are promoting. Practice that deviates from existing standards but promotes values supported by international law will more readily lay the foundation of a newly emergent body of international law[38].

We have become used to marshalling our thoughts into certain prestructured categories. It is useful to think of "international damages" and "nationalization of foreign property" and "State responsibility" (to give some obvious examples) in terms of distinct "topics" of international law. So far as questions of property are concerned, their interrelationship and overlapping is fundamental.

We live in a decentralized international legal system, in which States are still the most important actors. But international organizations, corporations and individuals are all affected by international law, too, and need to operate on the international level. We think of international law as providing a reconciliatory function for the competing claims of States against each other. But it also has to contribute towards a balancing of the contending interests of States and other actors (provided always that the claims of either are inherently compatible with the objectives that we seek to attain with the assistance of international law)[39].

Property, in the sense that we have discussed it in our previous lecture, can be owned by States, or organizations, or corporations, or individuals. By virtue of the law of jurisdiction (which concerns the allocation of competences between the actors on the international level, and especially between States, who above all possess the authority to prescribe and enforce laws) States have authority over persons, property and events within their own territory[40]. Does this fundamental attribute of territorial sovereignty give a State the authority to remove from the present ownership of another State, or corporation or individual, initially towards itself, property that is located within its territory? Or that is owned by persons located within its territory? To what extent does the answer depend upon *who* the other party owning the property is? And to what extent does it depend upon the very nature of the property concerned?

### *Relations between States in Respect of Property Matters*

Let us take the case of property owned by State B that is physically within the territory of State A. Assets held in banks in State A are perhaps a good example. We have in this example the uneasy co-existence of the principle of territorial jurisdiction and sovereign immunity. It has long been established that a foreign State or government is subjected to the jurisdiction of the State of the forum by an attempt to bring an action in relation to its property[41]. There has been a discernable trend in the last half-century towards a restrictive doctrine of sovereign immunity[42]. The absolute doctrine – which has variously been said to rest on the principle of dignity of princes, or *par in parem non habet imperium*, or comity[43] – is in retreat. A parallel retreat (though it is not fully comparable, nor yet so extensive) is under way in respect of attachment and execution of property of sovereign States. It is becoming more and more acceptable that a State, acting through its courts, may "take" the property situate on its own territory of a foreign State, if this is in fulfilment of a judgment or order against such State in respect of acts that were *jure gestionis*[44]. In some jurisdictions it will be necessary that both the initial act and the property itself are *gestionis* rather than *imperii*; in others not[45]. In some jurisdictions execution over foreign State property is limited to property actually connected with the *actus jure gestionis* complained

of and in respect of which judgment has been given; in others not[46]. And sometimes, but not always, attachment on an injunctive basis is allowed against the property of a foreign State[47]. Further, there is different practice in different jurisdictions about execution of funds held by a central bank[48].

In all these cases, however, we see the following phenomena at work: property of State B, situate in State A, is in principle beyond the authority of State A even though it is within its territory, because the law of the territory itself grants an exception[49] to its normal competence. But this exception has in recent years become more narrowly interpreted. While any "taking" of such property is carried out by the courts themselves, or by comparable institutions, it will not be the State of the forum that is itself becoming the new owner of the property. (A dispute between State A and State B would not be pursued in the courts of State A.) The execution of property that its legal system has made possible would operate in favour of the other party to the legal action against State B – and that could be a national of State A or a foreigner. It is quite possible, if a basis for jurisdiction exists over the dispute (perhaps because the contract was made in State A, or is governed by the law of State A, or because admiralty jurisdiction exists over the events at issue)[50], for State A to provide through its courts the mechanism for the taking of State B's property and the awarding of it to other persons, nationals or not.

All of this is regarded as commonplace, and we scarcely comment on it, save in the context of technical discussion about the scope of the current law on sovereign immunity. We do not readily perceive it as an issue of "taking", the principle of which is widely tolerated by the international law community, even if the precise delineation of which is still subject to diverse practice[51]. In this particular example the prime precept is that one actor (State A) should *not* take the property of another actor (State B), even if it is within the territory, *because of the nature of that latter actor*; but that the nature of the latter actor ceases to be the primary consideration when certain other factors come into play ("entering the market place", etc.). Certain thoughts may now occur to us. Are States *more entitled* to protection of their property abroad than other actors, simply by virtue of who they are? What are the policy considerations that justify this assumption? This question goes, of course, to the heart of the whole topic of State immunity

(of which the question of property appears, in this context, as an incidental element – incidental in the sense that it is a necessary corollary of the law on exposure to, and immunity from, legal process as a whole in the courts of another country).

Let us now imagine a slightly different scenario, but one still involving two States. State B has an account in a bank in State A in which it holds, *inter alia,* valuable jewels. State A decides that its economy is in such a parlous situation that a massive public sector rejuvenation of the economy is called for; and it expropriates all jewellery located within its territory as a contribution to that end. State B is here also better protected than a private citizen in the same position. There is, I think, an instinctive feeling that to take the jewellery held in the account of State B is impermissible: it is theft. Most western lawyers would feel that the taking of the jewellery of private foreign citizens was also unlawful, perhaps in any event, but certainly if not accompanied by just and fair compensation. (And if the jewels are in effect paid for by compensation, then it becomes, economically speaking, pointless to have taken them. To take natural resources more directly related to the economy and with long-term value even if compensation is paid, may well be a different matter.) All of that highlights that our unease is really because there is no connection between the property taken and the productive resources of the State. Why is there this difference in perception? The answer would seem to be that, as a matter of private international law, one State does not submit to the public legislation or enactments of another[52]: we are back to the question of the equality of States. Put another way, a government holding its property within the territory of another State does not do so with the expectation that it is submitting itself to subsequently enacted territorial law. A possible exception, as we have seen above, is if the property is executed or attached in connection with a judgment against State B for acts *jure gestionis* in an action brought by a private citizen.

Where States enter into agreements with each other for the protection of foreign property, this property is not the property of the States themselves, but of private persons whom they diplomatically represent. No treaty is needed for States to agree not to confiscate property held by one in the territory of the other: the expectations are still, for the reasons indicated above, that this cannot generally be done. I shall say something a little later about

the significance of a treaty so far as the protection of private property is concerned[53].

Does international law tolerate the interference by one State with the property of another in circumstances other than judgment execution or attachment? It would seem that in the area of reprisal and bilateral sanctions – always at the interstate level – this is permitted. Thus after the take-over of the United States Embassy in Iran, and the holding there of the United States diplomats as hostages, that country passed legislation freezing all assets held by Iranians in the United States[54]. The regulations prohibited the Government of Iran, Iran governmental entities and the Central Bank Markazi from transferring or withdrawing dollar deposits held with foreign branches and subsidiaries of United States commercial banks without United States Treasury authorization. The fact that these assets were to be "set against" any claims later advanced against Iran[55] arguably constituted a "taking" of property. The instruction issued to United States banks holding Iran governmental accounts not to allow payment for current transactions to be paid out from these accounts certainly was an "interference" with property, even if it was not a "taking of property"[56]; but was it permissible? The United States action was taken under the International Emergency Economic Powers Act[57] and the Presidential order issued stated that the action was taken in view of "an unusual and extraordinary threat to the national security, foreign policy and economy of the United States"[58]. Under Article VII 2 *(a)* of the Articles of Agreement of the International Monetary Fund, members must obtain Fund approval for the imposition of currency restrictions regarding current transactions[59]. As IMF practice has developed, it has been prepared to give approval for restrictions under Article VIII 2 *(a)* not only when these restrictions are imposed for economic and financial reasons, but also when they are imposed for security reasons[60]. In the event, while the United States regulations were initially explained in terms of protecting the stability of the dollar, it soon became publicly acknowledged that the United States regulations also served the purpose of economic sanctions designed to secure the release of the hostages[61]. The IMF approved (through its failure to object within the 30-day period) both the initial regulations and amendments thereto[62]. There was considerable controversy about the authority of the United States Government to seek to make its

legislation apply to branches of United States banks operating in other countries[63], but comparatively little controversy about the legal ability of the United States to freeze Iranian assets within its own territory in all the circumstances. Eventually it was agreed, as part of a package deal providing for the release of the hostages, that these funds should be unfrozen and outstanding disputes against government or governmental entities should be settled at the United States-Iran Claims Tribunal to be established in The Hague[64].

Broadly comparative measures – but with certain key differences – were taken by the United Kingdom after the Argentine invasion of the Falkland Islands. The United Kingdom froze Argentine assets within the United Kingdom and banks were ordered not to make payments out of Argentine held accounts. The United Kingdom notified the IMF, as it was required to do under the terms of Article VIII 2 *(b)* of the Articles of Agreement; and received no negative rejoinder within the prescribed 30 days[65]. Learning from the Iran experience, the United Kingdom took the decision not to extend its freeze on Argentine property to banks outside of the jurisdiction. The instruction thus applied only to banks (foreign and British) located in the United Kingdom[66]. Transfer of assets from United Kingdom branches to overseas branches to comply with orders of Argentine residents was not permitted. The interference with Argentine property was widely tolerated as acceptable against the background of the military confrontation occurring. It is properly to be classified as an interference with property in the nature of a sanction, rather than as a normal concomitant of a state of war, because both parties (and especially the United Kingdom) sought to classify the conflict as other than war. The United Kingdom insisted that the conflict was solely "Falklands related", not affecting the mainlands of either country, and it was an action in self-defence under Article 51 of the United Nations Charter.

There are, of course, quite distinct rules dealing with permitted interferences with another State's property in times of war. Certain property, directly concerned with the hostilities, may be taken permanently in the form of prize[67]. Other alien private property may be interfered with for the duration of the conflict[68]. And of course the possibility of reparations arises as a separate issue[69]. Sometimes private property has been retained beyond the end of hostilities for use as reparations – a practice that is not in conformity with international law.

We have then, in the context of interstate relations, a basic prohibition on interference with each other's property. The State starts with an advantage that the private investor does not have – the assumption that he does *not* submit himself to the local jurisdiction. But there is also a widely tolerated range of exceptions to this normal requirement of non-interference.

Where a treaty exists between two States in respect of property, it will not be lawful to interfere with property even if it is located within one's territory. The principles of territorial jurisdiction give way to the precept of *pacta sunt servanda.* This is true even so far as the "normal" permitted exceptions to the prohibition on interference are concerned. For example, a treaty between State A and State B whereby the property of each would be immune from post-judgment attachment, would prevail over any existing or subsequent legislation by either State which purported to draw more narrowly the immunity from execution or attachment that a foreign State can claim. Domestic legislation cannot be called in aid to justify the violation of an international obligation[70]. The existence of a state of war between the parties might remove the protection of the treaty, but only by virtue of the international law rule that certain treaties become suspended or cancelled after the outbreak of a war. International law remains at all times the determining factor.

### *Relations between a State and a Private Party in Relation to Property Matters*

The range of considerations that apply here are not wholly identical with those that apply to interstate relations. Most importantly, it is generally accepted that an individual submits himself to the local jurisdiction of a foreign State when he chooses to reside or conduct his business there, or engage in transactions agreed to be governed by the local law[71]. The question is thus whether by virtue of its territorial sovereignty the State is entitled to interfere with foreign property rights. The answer will clearly not turn upon *who* the other party is, but rather upon the precise nature of the property right concerned, and a variety of attendant circumstances. The issue here is not (though we will look at this later) whether, when a State takes foreign property, it is bound to pay compensation, and if so, at what level and how promptly. Rather the issue is whether, provided that such compensation criteria as are presently

required by international law are met, and provided further that any existing requirements concerning public purpose and non-discrimination are met, a State is always then free to take foreign property? Are there circumstances in which it is *never* permissible to take foreign property? And how much does the answer depend on the nature of the property concerned?

There has been considerable support in the past for the view that *acquired rights* are specially protected by international law, in the sense that they may not be interfered with. Yet what is this notion of "acquired rights"? How does it differ from any other legal rights? The phrase has been used in a variety of contexts. It has been used, for example, to indicate both rights acquired under municipal law and those acquired by virtue of international law. Thus an economic concession granted by State A to Mr. B, a foreigner, will have been acquired by virtue of the domestic law of State A. (State A's duties thereafter to Mr. B may be significantly governed by international law, in the sense that international law will require for Mr. B a certain minimum standard of treatment.) But the United Kingdom's claim to historic fishing rights off the territorial waters of Iceland[72] lay in a grant by customary international law. In turn, both private international law and public international law will have their own perceptions of acquired rights, howsoever acquired[73].

The phrase has been used variously, in different contexts, as has been correctly pointed out by Dr. Ko Swan Sik[74]. Sometimes it has been used to describe what are commonly termed "historic rights" or "historic title": "The term historic title or historic right is also used where there is no reference to a pre-existing general rule or right, but solely to a background of longstanding, immemorial, practice or possession"[75]. But the phrase has also been used in the sense of an adverse right, which prevails contrary to the claimed rights of others[76]. The term "acquired right" has also come to have a particular significance in the context of intertemporal law: international tribunals have sought to identify whether at a critical time – because, as Judge Huber put it in the *Palmas Arbitration* – a juridical fact must be appreciated in the light of the law contemporary with it[77] – sovereignty has been acquired. The use of acquired rights in this sense, with the emphasis being on the inapplicability of the law as it stands at the time of the dispute, is well established in the case law[78].

The matter has also received especial attention in yet a different context – that of succession of States. The issue has been whether a successor State is bound to respect rights acquired by a foreigner through its predecessor. Traditional international law has been clear that, as the PCIJ put it in the *German Settlers'* case[79] "private rights acquired under existing law do not cease on a change of sovereignty". *A fortiori* do they not cease on a mere succession of government, rather than of State. This matter has arisen for study in the work of the International Law Commission on succession in respect of matters other than treaties, and the principle appears for the moment to be essentially unchanged[80]. The writings of jurists generally support the view that successor States must respect rights acquired under its predecessor[81].

But while the focus of the debate has not been on State succession as such, the movement that began in the early 1960s to revise the substantive law relating to the taking of foreign-owned property was undoubtedly triggered in part by a strong sense of dissatisfaction on the part of new States that they had inherited concession arrangements with overseas companies which had been made by the colonial government in their name, the terms of which they now found unsatisfactory. International law has resisted the suggestion that such rights were extinguished by State succession; but has developed in parallel doctrines that alleviate that legal position from the point of view of the State.

These "parallel doctrines" are, of course, those that emerged from a series of United Nations resolutions. There is by now a very large literature on what we may term "the new international economic order"[82] and it is not my intention to go over what is by now very well-trodden ground. My lectures will focus on rather different aspects of the taking of property. But in order to do so, some brief reference to these resolutions and their impact is necessary.

General Assembly resolution 1803 (XVII) was the departure point for a strategy that sought to turn the emphasis from *pacta sunt servanda* and respect for acquired rights (with the concomitant obligation of adequate, prompt and effective compensation for a "taking") towards the new notion of permanent sovereignty over natural resources[83]. Myres McDougal has presciently observed[84] that international law is not really about the neutral application of rules: it is about deciding which competing rules shall apply to

which circumstances. The point is well illustrated here. The invocation of *pacta sunt servanda* by the capital exporting countries has been met with the invocation of State sovereignty on the part of the capital importing countries. How was the balance to be struck?

General Assembly resolution 1803 (XVII) provides that where capital is imported to exploit and develop natural resources –

> "the capital imported and the earnings on that capital shall be governed by the terms thereof, by the natural legislation in force, and by international law. The profits derived must be shared in the proportions freely agreed upon, in each case, between the investors and recipient State, due care being taken to assure that there is no impairment, for any reason, of that State's sovereignty over its natural wealth and resources."

Paragraph 4 of resolution 1803 makes the following stipulations about requirements for the exercise of nationalization, and about compensation:

> "4. Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest, both domestic and foreign."

Pausing there, we may note that international law has always required that a taking be for a public purpose. A public purpose may indeed be for reasons of public utility, but it may readily be appreciated that not all public purposes necessarily entail the transfer of property to a public utility. Reference to the national interest is obviously much wider than public purpose, but perhaps it covers those public purpose reasons that do not lead to public utility. The reference to security goes further – but, as we have seen, it has been invoked by the United States in support of a possible taking of property. In that case, though, the property was not protected by prior contract with the government itself. Where issues of security are at stake, are the contract expectations of concessionnaires more worthy of protection than the expectations of the international banking system? The problem is not so much that the phrases "public utility, security, or the national interest" are unreasonable, but that in a decentralized legal system they are open to auto-interpretation and abuse. Only marginal comfort was

available to the capital exporting countries in the provision in paragraph 8 that "foreign investment agreements freely entered into by or between sovereign States shall be observed in good faith".

Paragraph 4 continues:

> "In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law. In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted. However, upon agreement by sovereign States and other parties concerned, settlement of the dispute shall be made through arbitration or international adjudication."

We have here the reference to "appropriate compensation", over the wishes of the western world for "adequate, prompt and effective compensation"[85]. Although there is continued reference to international law, the law of the expropriating State is also deemed an appropriate yardstick. No guidance is given on how these are to be reconciled.

This resolution was in terms limited to investment agreements freely entered into by independent States. The position on State succession and respect for "property acquired before the accession to complete sovereignty of countries formerly under colonial rule" was deliberately left for the International Law Commission[86].

It has become a commonplace to observe that this resolution, stoutly resisted by the West at the time, has now come to represent for capital exporting countries a no longer available standard that they would be pleased to secure[87]. Subsequent resolutions in the Assembly and elsewhere sought further revision of the traditional law. Thus in October 1972 the Trade and Development Board of the United Nations Conference on Trade and Development adopted a resolution on permanent sovereignty over natural resources: this provided that:

> "Such measures of nationalization as States may adopt in order to recover their natural resources are the expression of a sovereign power in virtue of which it is for each State to fix the amount of compensation and the procedure for these measures, and any dispute which may arise in that connection falls within the sole jurisdiction of its courts . . .[88]"

Although a later attempt to incorporate this into a General Assembly resolution failed, the resolution was evidence of the hardening position of the developing countries. The reference to an international law standard has virtually disappeared.

In December 1973 the Assembly adopted, by an overwhelming majority, resolution 3171 (XXVIII). Paragraph 3 affirmed that sovereignty over one's natural resources meant that –

> "each State is entitled to determine the amount of possible compensation and the mode of payment, and . . . any disputes which might arise should be settled in accordance with the national legislation of each State carrying out such measures[89]".

This resolution can only be read as a further move towards the view that the assessment of the quantum of compensation is a solely domestic matter. I cannot accept the view that as this resolution mentions in its preamble resolution 1803, the international law standard of "appropriate compensation" was retained[90]. Nor do I accept that paragraph 3 of resolution 3171 refers to procedural matters only, and that while national procedures are now to be preferred, the substantive standards which they must apply are still those of resolution 1803. It is particularly to be noticed that the earlier phrase "appropriate" compensation is replaced by "possible compensation".

The trend continued inexorably, with the General Assembly at its Sixth Special Session, on Raw Materials and Development, adopting a Declaration on the Establishment of a New International Economic Order. This for the first time omitted any reference at all to a duty to compensate for nationalization. The only reference to compensation was for compensation said to be due to the developing States for "the exploitation and depletion of, and damages to, their natural resources and all other resources"[91].

Finally, we must note that the Charter of Economic Rights and Duties of States, adopted in December 1974, provides that:

> "2. Each State has the right:
>
> *(a)* to regulate and exercise sovereignty over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities. No State shall be compelled to grant preferential treatment to foreign investment[92]."

Thus international legal standards are deemed irrelevant on the ground that they are "preferential". If domestic law chooses not to compensate nationals for a taking of property, then it is said that foreign investment also shall not be entitled to compensation. When in a later lecture we look at property rights as human rights, I shall suggest some reasons why this is an untenable and undesirable approach. The Charter of Economic Rights and Duties continues, referring to the right to:

> "*(c)* to nationalize, expropriate or transfer ownership of foreign property in which case appropriate compensation should be paid by the State adopting such measures taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all the States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means."

It will be noticed that in this resolution the requirement of "appropriate compensation" reappears – though, unlike resolution 1803, there is no reference to international law standards obtaining. The primacy of domestic law and tribunals is emphasized, and reference to international tribunals is on an agreed basis, operating as an attribute of equality as between sovereign States.

Importantly, there is no mention at all of the requirement of a public purpose for nationalization. Nor is there any reference to the prohibition on discrimination. It is probably correct that no international decision has in fact turned on the public purpose requirement alone[93], though the requirement has often been referred to along with other relevant criteria. Equally, it is true that there are no useful objective criteria by which a State's own assessment of its purpose as a public one can be challenged. Professor Burns Weston is led by these facts, citing Professor Baade to the effect that "the point is not that foreign wealth deprivations should not be taken in the public interest but in 'whose public interest, determined by whom'"[94], to believe that it is of no concern that

the requirement is omitted from Article 2 of the Charter on Economic Rights and Duties[95]. But international law is replete with normative requirements for behaviour which share this same shortcoming. But the standard-setting function of such norms is still relevant, notwithstanding the difficulties in applying them. Tribunals have not been overly officious in imposing on expropriating States their own view of where the public interest lies. Therefore the removal of the requirement can only encourage the possibility of takings that are for private gain.

What are we to make of these resolutions? To what extent do they change international law? To some jurists[96] the answer is apparent: General Assembly resolutions are not binding. Therefore these resolutions have no legal effect and are merely empty assertion or aspiration[97]. Others emphasize that resolution 1803 and the Charter on Economic Rights and Duties were each carefully prepared, and emerged after careful legal study and (in the case of the Charter) after protracted intergovernmental negotiations. This, it is said, gives the resolutions a heavier weight. Yet others draw the line in a different place, as did Sole Arbitrator Dupuy in the *Texaco-Libya* Arbitration[98]. In that case the Libyan Government notwithstanding that its own Deed of Concession contained an international arbitration clause, referred to resolutions 1803 and 3201 (S-VI) (the Declaration on the Establishment of a New International Economic Order) to contend that contemporary "provisions of international law do not permit a dispute with a State to be referred to any jurisdiction other than its national jurisdiction"[99]. Professor Dupuy consequently embarked upon an analysis of this series of resolutions. For him what was relevant was "the examination of voting conditions and the analysis of the provisions concerned". He found it significant that resolution 1803 was passed by 87 to 2, with 12 abstentions, and that several Western developed countries with market economies voted for the text, including the United States[100]. He therefore found that the principles in the resolution were assented to by a great many States representing all geographic regions and economic systems (notwithstanding the fact that the United States explanations of the vote sought effectively to explain all controversial aspects of the text as identical in meaning with traditional international law[101]. By contrast, Arbitrator Dupuy found that the voting conditions surrounding the later resolutions were "notably different"[102]. He

found, after reviewing the roll call votes, that in these there was striking opposition from the Western countries to the texts that finally emerged. This seems indisputable.

Professor Dupuy added that because Assembly resolutions are not binding "such resolutions must be accepted by the Members of the United Nations in order to be legally binding"[103].

In my view (though this goes beyond the proper scope of these lectures), even acceptance of these resolutions by some of the Western States (as in resolution 1803) would not make them binding. And in a sense it is not the binding quality of the individual resolutions that is at issue. For it can be, as I have endeavoured to explain elsewhere[104], that resolutions which are at times non-binding can, if they affirm principles of international law which overwhelming numbers of States adhere to *opinio juris*, evidence developing customary international law.

With this somewhat different analysis, I nonetheless reach a similar conclusion to that given in the *Texaco-Libya* case. I do so because the State practice does not evidence – not even among those who voted for resolution 3201 (S-VI) and for the New International Economic Order resolution – adherence to the principles proclaimed in these later resolutions.

The United States Supreme Court, giving judgment in the *Sabbatino* case in 1976, declared that it was unable to ascertain contemporary international law on the requirement of compensation[105]. But it never engaged in a systematic appraisal of the source materials of international law.

We have at our disposal a wealth of data: international treaties with clauses covering the possibility of nationalizations, lump-sum settlement provisions, diplomatic exchanges, international arbitrations. Professors Lillich and Weston, in their series of studies in expropriation practice[106], have performed signal service in gathering together in accessible form a great deal of this practice. Drawing on this, they advance the suggestion that reference to "adequate, prompt and effective" has, since the Second World War, been more by way of a standard than of actual attainment. In the great majority of cases compensation, something rather less than adequate, prompt and effective has been achieved[107]. Another way of putting it would be to note the relative imprecision of the terms, and to observe that tribunals have always been reluctant to insist on one particular method of valuation over another, or to specific time

periods which indicate the outer limits of "prompt". These matters have always been approached on a very case-by-case basis.

It is hard to disagree with Weston that –

> ". . . one finds in the great majority of cases the depriving countries ultimately have granted compensation in an amount and form not inconsistent with the 'partial' compensation and valuation standards prevalent since World War II, and often with express reference to international law . . . Furthermore, in each of the reported cases since the NIEO Charter, all of them 'expropriation' or 'nationalization' cases, the respondent countries have been the ones that voted for adoption of the Charter[108]."

The reality is that companies are reluctant to engage in overseas capital investment without the inclusion of an acceptable arbitration clause: and this will rarely be drafted to exclude all reference to international law in favour of the law of the host State. Again, most compensation claims are in fact settled by international lump-sum agreements[109].

The requirement of compensation is still, on all the evidence available, generally acknowledged. In determining the method for and scope of such compensation, reference is increasingly had to national law, general principles of law, and the Sharia, alongside international law. If more than one legal system is referred to, efforts are made to seek principles held in common by them.

While the battle of the rhetoric on compensation standards continues, with the practice not significantly changed, other less visible areas of the law impinge on our topic. Not all takings of property occur in the form of nationalizations or expropriations. As we shall see later this week, States increasingly exercise their regulatory powers in such a manner, and with such effect, that indirect takings of property occur. Nor are governments the only actors in the taking of property. Courts in third countries, through the operation of the act of State doctrine, often are the most immediate cause of a taking of property.

Thus if property is taken by State A, and then finds its way into State C, X may endeavour to recover it there. The attitude that the C courts take to State A's taking of the property will actually determine whether X is to be permanently, or only temporarily, deprived of such property. Do the courts of C seek to apply

contemporary international law in deciding to whom the property belongs? Or do they, for choice-of-law or other reasons, avoid the international law issue, thus necessarily confirming X's deprivation of property?

The courts of the United States have, since the celebrated Supreme Court decision of *Underhill* v. *Hernandez*[110], declared that they would not sit in judgment on the acts of a foreign sovereign within his own territory. Various threads have run through the reasoning of the courts. The policy has at times been dictated by notions of comity and reciprocity. At other times the courts have indicated that they seek to avoid embarrassment to the Executive in the pursuit of foreign policy and that this dictates deference to the acts of the government concerned[111]. In England a comparable doctrine has grown up[112]. Often the policy has been articulated in terms of the application of conflict of law rules. Thus in the celebrated case of *Luther* v. *Sagor*[113] the mill of the plaintiff, a Russian, was expropriated without compensation in the Soviet Union by the Soviet Government. When wood originating from his sawmill arrived in England he sought a declaration for recovery. Under English conflict of law rules property situate in a foreign country is subject to the laws of that country[114]; this, then, was held to be the law applied. The Court of Appeal was not prepared to depart from the normal application of this conflict of laws rule on the grounds that the Soviet decree of confiscation was immoral. It is at this point that the embarrassment doctrine enters. To postulate that foreign legislation might be unjust, said Scrutton L.J., was a matter not for the courts but for the sovereign's Ministers[115]. In the later case of the *Rose Mary*[116], the trial judge in the Aden court (Aden then being under British rule) held that *Luther* v. *Sagor* only required the act of State doctrine to be applied to acts affecting nationals of the country concerned; but that when the property of British nationals was taken in a manner contrary to international law, British courts were not required to give effect to this foreign act[117]. Consequently he would not honour the nationalization decree of the Iranian Government, under which the plaintiffs' oil had been taken without compensation. In *Helbert Wagg* Upjohn J., sitting as final court of appeal under the Distribution of German Enemy Property 1945 was faced with the difficult question of whether the courts should simply give effect to the German Moratorium Law of 1933. While agreeing with the *Rose*

*Mary* decision on its own facts, he declined to follow it in the present case. The courts had to recognize the right of every foreign State to protect its own economy and, unless a law purporting to protect the economy was "in reality [passed] with some object not in accordance with the usage of nations"[118], then the legislation was conclusive. The judgment does not, in my view, satisfactorily explain why the Nationalization Decree of the Mossadeq Government did not satisfy this test, while the discriminatory Moratorium Law of 1933 in Germany did. In the event, the limited English case law on the act of State doctrine[119] has contained *dicta* referring to the possibility of avoiding the normal operation of the conflict of laws rules where reasons of public policy dictate. In *Helbert Wagg* Upjohn J. declared that English courts would "not recognize the validity of foreign legislation aimed at confiscating the property of particular individuals or classes of individuals"[120]. But the reality is that the courts have been very reluctant indeed, sometimes for the most valid of reasons[121], to treat foreign legislation that unlawfully interfered with property as if it does not exist. Thus the House of Lords has even given effect to a German action whereby the Jewish plaintiff was only permitted to leave Czechoslovakia in 1939 under condition that he authorize a Czech bank to dispose of his assets. The House of Lords found the regulations not to be "a law of such penal or confiscatory nature that it should be disregarded by the courts of this country"[122]. Therefore the normal conflict of law rules were to be applied and the plaintiff did not regain possession of his property.

In the English case law the dicta more often qualify the act of State doctrine (in the conflicts of law sense) by *caveats* relating to public policy rather than to international law as such[123]; and it is rare indeed for these caveats actually to displace the application of the local law and restore property to the owner[124].

In the case of *Banco Nacional de Cuba* v. *Sabbatino*[125] the Supreme Court had, in respect of an act of State claim, doubted whether it was possible to identify an agreed standard of contemporary international law on the duty to pay compensation for foreign property taken by the State. This controversial judgment was widely criticized[126] and the powerful dissent of Justice White attracted considerable support. The criticism resulted in the passing of the Hickenlooper Amendment to the Foreign Assistance Act of 1964, requiring the Supreme Court not to apply the act of

State doctrine where property is taken in violation of international law. The District Court in *Banco Nacional de Cuba* v. *Farr*[127] applied the Amendment and held inapplicable a Cuban decree of confiscation found to have violated international law. This has been followed in other cases, though there has been some controversy about the scope of the amendment[128].

It is of interest also that the 1976 Foreign Sovereign Immunities Act requires immunity not to be granted where "rights in property taken in violation of international law are in issue"[129]. There is no comparable provision in the United Kingdom State Immunity Act of 1978: and indeed the House of Lords in 1º Congreso del Partido (a pre-Act case) declined to accept the argument of counsel that no immunity should be given to takings of property in violation of international law[130].

It may thus be that, applying the act of State doctrine in any of its alternative senses (judicial, deference, "embarrassment" doctrine, conflict of laws rules) the courts of the forum may be party to a deprivation of property that may or may not have been lawful. But what seems quite incorrect is for an *international* tribunal to offer as a reason for rejecting *restitutio* the fact that "nationalization is sometimes qualified as an 'Act of State', which is immune from control, judicial or otherwise"[131]. The deference given by some courts, in some circumstances, to nationalizations of foreign States is *not* to say, in any more general sense, that nationalization is immune from judicial or other control, certainly at the international level.

## CHAPTER III

# RECENT TRENDS IN THE INTERNATIONAL LAW OF PETROLEUM CONCESSIONS AND LICENCES

A State may in principle take the property of a foreign private person within its own jurisdiction, provided that it does so for a public purpose and in the absence of discrimination; and provided that compensation is paid. Property that has no connection whatever with the economy of the country is unlikely to be needed for a "public purpose": that is why we would regard, instinctively, the taking of, e.g., all foreigners' jewellery, simply as theft. But what of property that is protected by a concession or contract? The dilemma, and it is one to which we will return throughout these lectures, is that the property here is likely to be that most vitally connected with the State's public purpose needs – its natural resources. But the State has voluntarily fettered its freedom in dealing with it.

I begin with some observations on the legal nature of a concession. Legislation is clearly a matter within the sovereign authority of a State. Deeds of concession, by contrast, often have the appearance of a contract, in which there is an agreed identification of mutual benefits and obligations between the State on the one hand, and the concession holder on the other. Arrangements for foreign involvement in the exploration for, and exploitation of, natural resources frequently entail both elements – a Mining or Petroleum Act, and Regulations, for example, and a Concession or Licence issued thereunder, in contract form. The more that a concession had been assimilated to the civil law concept of "administrative contract", the more opportunity will there be for government to claim to reserve to itself powers to rectify and amend the arrangements entered into.

Concessions are varied in character and purpose, and, moreover, the legal nature of one type of concession is not necessarily the same in different systems of law. The essential feature of a concession is, however, twofold – a State act and the vesting of property rights in the concessionaire[132]. A public service concession is one by which the concessionaire undertakes a public service and obtains

his profit from the charges incurred by the users of the service. The extent to which such a concession is purely contractual or at least partly regulatory will depend upon the particular concession concerned. There are likely to be certain clauses that are regulatory, concerning the functioning of the public service and the protection of the users; while other clauses reflect the agreement *inter se* of the government and concessionaire. A variation is the public works concession, whereby the concessionaire undertakes to build and maintain a public work, such as a hydro-electric factory. It is apparent that mining concessions – whether for oil or minerals – are different in character from the public service concession in that they do not contain any provisions in favour of third party users[133]. Although a proportion of the revenues from the venture may be used by the State for public purposes, the mine itself is not destined to public use. As we shall see later, the technique of so-called "participation" comes close to achieving a destination of part of the resources themselves to State control, even if not to direct public use in the sense of a public service concession.

The status of a mining concession is viewed variously in different jurisdictions. In French law, for example[134], it is regarded as *sui generis*, having some of the characteristics of a unilateral act of State and some of a contract. Tribunals have in recent years dealt in very diverse ways with this question of the status of the particular concession with which they are concerned. In the *Aramco* case, for example, the Tribunal stated that the régime of mining and oil concessions "has remained embryonic in Moslem law and is not the same in the different schools"[135]. In the particular case, the concession was found to be contractual (the Saudi Government had submitted in its memorials that Aramco's concession was to be considered as an "unnominated contract *sui generis*"). The Tribunal was impressed by the constant use of the term "agreement" and by the requirement for the contract to be ratified not only by the King of Saudi Arabia but also by the competent organs of the company at its seat in the United States. The fact that the concession was ratified by a Royal Decree did not alter its status. In particular, the Tribunal rejected as without foundation in Moslem law the Saudi contention that the sovereignty of the State is a decisive factor in the determination of the legal nature of the concession.

In the case of *Texaco v. Libyan Arab Republic* the Arbitrator

found that it was now "generally accepted" that concessions are simply contracts[136]. But as Professor Dupuy pointed out, that did not dispose of the matter because under Libyan law there is a special category of contracts which are administrative contracts. Administrative contracts enable the State unilaterally to amend the provisions thereof, and even to abrogate it if the public interest requires. The Arbitration found, however, that the Texaco concession was not an administrative law contract – it was not for a public service, it was not entered into by an administrative authority, and it did not confer upon the administrative authority the unusual powers of alteration or abrogation. On the contrary, in the Texaco Concession Agreement there was a stabilization clause[137], which provided that:

> "The Government of Libya will take all steps necessary to ensure that the Company enjoys all the rights conferred by this concession. The contractual rights expressly created by this concession shall not be altered except by mutual consent of the parties.
>
> The concession shall throughout the period of its validity be construed in accordance with the Petroleum Law and Regulations in force on the date of execution of this agreement . . . Any amendment to or repeal of such Regulations shall not affect the contractual rights of the Company without its consent."

In the view of the Arbitrator, these were simple contracts which could not unilaterally be altered[138]. Interestingly, the Arbitrator accepted the view[139] that "if the clause were not in the contract, one would have to presume that the State had intended to conserve intact, in respect of its contracting partner, the full and free exercise of its privileges and usual powers"[140]. We will want to bear these observations in mind when we come to look at the legal nature of petroleum licences granted by the United Kingdom in the North Sea.

The Sole Arbitrator in the *Liamco-Libya* Arbitration[141] took a similar view of the legal nature of the concessions. He believed they were essentially contractual in nature, but were not administrative contracts. The stabilization clause emphasized, in his view, the contractual basis of the concession. He saw it as a guarantee against the possibility of arbitrary exercise by the State of its sovereign

power either to alter or to abrogate unilaterally their contractual rights. It was, he indicated, invoked "to strengthen this contractual character in Liamco's and similar other concession agreements as a precaution against the fact that one of the parties is a State"[142].

In the case of *BP* v. *Libya*[143] the Arbitrator dealt very briefly with the question of the legal nature of the concessions in question. In this case the expert in Libyan law[144] offered a somewhat more qualified view of administrative contracts. Although the Government could alter or terminate such contracts unilaterally, they could only do so "in pursuance of a true public interest", and the Tribunal could sit in judgment on whether that test was met. Be that as it may, Judge Lagregren, the Sole Arbitrator, satisfied himself with the brief statement that the BP concession constituted "a direct contractual link between the respondent and the claimant"[145].

It must be of the greatest significance that in these three recent arbitral awards learned Arbitrators from Sweden, France and Iran, though differing markedly on certain questions, have all agreed that mining and petroleum concessions in Libya are contracts *simpliciter*, and neither unilateral acts nor administrative contracts.

The legal effect of stabilization clauses on the concept of permanent sovereignty over natural resources has been further examined in an arbitral award delivered on 24 March 1982 in respect of a dispute between the State of Kuwait and the American Independent Oil Company (Aminoil). The arbitration was the result of an Arbitration Agreement signed in June 1979 between the two parties. The members of the Tribunal were Professor Hamed Sultan, Sir Gerald Fitzmaurice and Professor Paul Reuter (President). Aminoil held since 1948 a concession for 60 years duration in Kuwait, granted by the Ruler but approved by the United Kingdom, which was then in special relations with the State of Kuwait. Article 17 of the concession provided that:

> "The Shaikh shall not by general or special legislation or by administrative measures or by any other act whatever annul this Agreement except as provided in Article 11. [Article 11 indicated three limited circumstances which could warrant termination before full term.] No alteration shall be made in the terms of this Agreement by either the Shaikh or the Company except in the event of the Shaikh and the Company jointly agreeing that it is desirable in the interest of both

> parties to make certain alterations, deletions or additions to this Agreement."

In 1961 the concession was revised and the stabilization clause affirmed.

In 1962 the special relationship with the United Kingdom having ended, the Ruler of Kuwait promulgated a Constitution, which guaranteed private ownership and stipulated that expropriation should only occur for the public benefit and upon compensation (Article 18). The Constitution further provided (Article 21) that "All of the natural wealth and resources are the property of the State".

Various new financial arrangements were in fact instituted by the Government of Kuwait, and extensive negotiations about their application, and other matters, ensued.

In September 1977 the Government of Kuwait issued a Decree terminating the concession agreement. By Article 3 of the Decree a Compensation Committee was to be set up to decide upon fair compensation and upon any outstanding obligations owed by the Company to Kuwait. Aminoil protested, declaring its intention to commence arbitration under the provisions therefor in the Concession Agreement of 1948. Eventually the two parties agreed by agreement in 1949 instead to proceed to *ad hoc* arbitration in Paris, putting many different legal questions to the Tribunal. We refer here only to the question of whether Kuwait was at liberty to decide upon nationalization when it was contrary to the contractual undertakings to which it was party.

The Tribunal noted that "a straightforward and direct reading" of the stabilization clauses (Award, paragraph 88) "can lead to the conclusion that they prohibit any nationalization". The Government contended that the clauses merely embodied general principles of contract law and added nothing to what would in any event be the legal position. The Tribunal rejected this argument as being inconsistent with the requirement that contractual instruments must be interpreted so as to give each clause a worthwhile meaning (Award, paragraph 89). Nor did the Tribunal accept that the 1962 Constitution effectively annulled the stabilization provisions.

In a further important pronouncement the Tribunal stated:

> ". . . it has been claimed that permanent sovereignty over natural resources has become an imperative rule of *jus cogens*

> prohibiting States from affording, by contract or treaty, guarantees of any kind against the exercise of the public authority in regard to all matters relating to natural riches. This contention lacks all foundation. Even if Assembly Resolution 1803 (XVII) adopted in 1962, is to be regarded, by reasons of the circumstances of its adoption, as reflecting the then state of international law, such is not the case with subsequent resolutions which have not had the same degree of authority. Even if some of their provisions can be regarded as codifying rules that reflect international practice, it would not be possible from this to deduce the existence of a rule of international law prohibiting a State from undertaking not to proceed to a nationalization during a limited period of time." (Award, paragraph 90.)

Nonetheless, the Tribunal found that the stabilization clauses did not prevent nationalization. It noted (paragraph 94) that "the case of nationalization is certainly not expressly provided against by the stabilization clauses of the Concession", and determined that a restraint on the right to nationalize "would be a particularly serious undertaking which would have to be expressly stipulated for". But, said the Tribunal in the present case:

> "the existence of such a stipulation would have to be presumed as being covered by the general language of the stabilization clauses, and over the whole period of an especially long concession since it extended 60 years. A limitation on the sovereign rights of the State is all the less to be presumed where the concessionaire is in any event in possession of important guarantees regarding its essential interests in the shape of a legal right to eventual compensation." (Award, paragraph 95.)

This interpretation of the stabilization clauses would seem to mean that they are not to be read literally; and that the greater the incompatibility of State action with the clause, the more it will be necessary for specific provisions to have been written in if they are to be found unlawful under the concession. The general provisions of a stabilization clause cannot provide any "*a fortiori*" arguments in respect of apparent major breaches, as these will be termed so based on State sovereignty that they will not be deemed covered by the clause in the absence of express provision to that effect.

While this perhaps represents an imaginative method of reconciling the right to nationalize with stabilization provisions freely entered into (and subsequently reaffirmed), the present writer confesses to finding it implausible as a matter of construction and unpersuasive as a matter of reasoning. Nor is it persuasive that, upon this limited reading, the stabilization clauses –

> "are far from having lost all their value and efficacity on that account since, by impliedly requiring that nationalization shall not have any confiscatory character, they reinforce the necessity for a proper indemnification as a condition of it". (Award, paragraph 96.)

But the obligations of non-confiscatory nature and of compensation are surely provided for by the requirements of international law itself.

If petroleum companies should now be studying their concession agreements to see if broadly worded stabilization agreements do indeed prohibit nationalizations, they will also have to consider another finding of the Tribunal that they will find disturbing.

It is a common phenomenon for governments to seek to introduce changes into the relationship, contending that such changes are for the public good, and are in the reserved domain of tax or other regulatory power, or are in fact compatible with obligations under the concession. The Tribunal found that stabilization clauses are to be interpreted within the context of "the régime of the undertaking, as it resulted from the sum total of the considerations relevant to its functioning" – and it is its functioning at the date of the dispute that is critical. The Tribunal emphasized that this was not a question of *rebus sic stantibus,* "but a change in the nature of the contract itself, brought about by time, and by the acquiescence or conduct of the parties". (Award, paragraphs 100-101.)

The lesson would seem to be that holders of concessions should resist and protest every change introduced by government – even if these are not themselves especially unacceptable – lest at a later date it be said that the protection of the stabilization clause has been lost because the "contemporary functioning" of the concession no longer permits it to be given a restrictive reading. The policy implications of this finding, which discourage a flexible and conciliatory response by companies to reasonable adjustments by government, seem to this writer to be disturbing and undesirable.

Further, it is hard to see how the Tribunal can speak of the changed régime as entailing that the stabilization clauses are "no longer possessed of their former absolute character" (Award, paragraph 100), when on the arguments on construction it has already held that they never had, in the absence of specific provisions restraining the right to nationalize, an absolute character.

The Award, which touches on many questions of the greatest interest, purports to be unanimous. Sir Gerald Fitzmaurice wrote a separate opinion. But it is very hard to see, upon reading the arguments advanced in that separate opinion, that he was really in agreement with the *dispositif* of the Award.

The problems that arise in balancing the legitimate expectations of a private party, which has invested on the basis of agreements which it expects to continue into the future, and of the legitimate needs of a government to protect the public interest against changed and unforeseen circumstances, is not peculiar to petroleum concessions in the developing world. The United Kingdom experience in the North Sea is witness to the fact that the same pressures operate upon all nations possessing important exploitable natural resources, regardless of their stage of development or their traditional commitment to the sanctity of contracts and the inviolability of international law obligations.

In the United Kingdom the involvement of foreign private parties in the exploring and exploiting of petroleum has not been through concessions *stricto sensu,* but through the granting of petroleum production licences. Importantly, these licences relate not to the land territory of the United Kingdom, but to large deposits on the continental shelf. All these deposits lie beyond the waters presently claimed by the United Kingdom as territorial waters. The domestic legal régime for the exploitation of North Sea oil thus exists side by side with the international law régime on the continental shelf. The Petroleum (Production) Act of 1934 had nationalized all onshore oil deposits, with the exception of any which might still be working under the few licences which had been granted under the earlier Petroleum (Production) Act of 1918. Prior to the 1934 Act the Petroleum Production licence was a mere administrative permit "of the same general nature as a liquor licence, a cinema licence, even a driving licence"[146]. It was part of a regulatory scheme in which control of an activity was secured by a general prohibition on that activity, save by licence. The licence was granted by

reference to numbers of applicants, quality of applicants, locations. They were made subject to the requirement of payment and the observance of certain government rules. But the licence still had then to deal with the owner of the land under which the deposits were thought to lie, and who was deemed to have title to the petroleum[147]. This Act was to prove – through its device of model clauses to be issued under regulations which Parliament could amend or annul – an important frame of reference for the licensing of offshore petroleum.

In 1964 the Continental Shelf Act[148] was passed, the preamble of which stated that it was "to make provision as to the exploration and exploitation of the Continental Shelf". It provided in Article 1 (1) that "Any rights exercisable by the United Kingdom outside territorial waters with respect to the sea-bed and subsoil and their natural resources, except so far as they are exercisable in relation to coal, are hereby vested in Her Majesty". The Act merely refers to the "natural resources of the sea-bed" and, unlike the 1958 Continental Shelf Convention[149], did not identify them. Further, the Act does not speak of rights on the shelf, but rather of rights outside of territorial waters. This flexible drafting means that in so far as international law – developing and changing through time – grants rights to the United Kingdom in the shelf, the continental margin, or indeed the deep sea bed, those rights as they arise are vested in the Crown. The "rights exercisable by the United Kingdom" (the phrase used in Article 1 (1)) are those rights permitted under international law – sovereign rights for the exploration and exploitation of the resources of the shelf[150]. While this is perhaps less than full legal ownership in the sense that petroleum *in situ* on land might be, it is a jurisdiction sufficient to found the grant of licences to search for, bore and get petroleum[151]. The 1964 Act also provided for the extension of the licensing provision of the 1934 Act to the designated areas. In pursuance of that, new licensing regulations and model clauses were introduced, and have been revised twice since[152].

Through its licence the licensee company obtains the right "to search and bore for, and get, petroleum in the seabed and subsoil". The resources of the shelf are not to be regarded as *res nullius*, and the rights of the Crown are rights akin in their effect to rights of qualified ownership. The licences which the Crown may grant are more than mere administrative regulations. They are contracts,

albeit contracts with a strong regulatory component. Under a concession, title to the petroleum *in situ* in the mine is passed. That is not the case with a United Kingdom Petroleum Production licence. The licence does however operate to pass on a property right in the nature of a *profit à prendre*[153]. A mere licence is an authorization to do an act which, save for the authorization, would be unlawful. By contrast, a *profit à prendre* is a right exercised over another's property and accompanied with participation in the profits thereof[154]. The licensee has no title to the petroleum *in situ* – it is only upon the taking of the *profit à prendre* that title in the petroleum passes to the licence owner. Thus early United States practice – with the surface owner having title to the deposits – has been of very limited assistance in developing a legal régime for the North Sea[155].

The licences are essentially contractual in nature – the Crown has granted certain rights in return for fees and royalties. But Model Clauses are an integral part of each licence, and these have a strong regulatory component. The administrative law elements appropriate to the Model Clauses have to operate within the general framework of a contract. The striking of the balance has not always been easy. The United Kingdom has tried to minimize the need unilaterally to alter the licence (contract) by subjecting the licensee to a panoply of on-going regulating controls. Important among these are the 1975 Petroleum and Submarine Pipelines Act, which requires the consent of the Minister in a wide variety of circumstances. For example, the consent of the Minister is required before any interests under the licence are assigned. Indeed, consent is required before arrangements are entered into whereby the licensee's rights become "exercisable by or for the benefit of or in accordance with the directions of another person"[156]. Various complex forms of transferring property rights (but not full title) are caught by this proviso[157]. Should the licensee wish to alter the Operating Agreement it has with other partners, including the operator of the field, Ministerial consent is required. Consent is also required for the carrying out of works and the getting of petroleum other than in the course of searching for petroleum and drilling wells[158], for drilling wells or abandoning or suspending work on them[159], for the appointment of operators[160]. Consent is required for flaring[161]. The licensee must submit to the Minister exploration programmes[162] for his approval and also development and production

programmes[163]. His approval may be made subject to conditions and in certain circumstances the Minister may direct that different development programmes be served on a licensee[164].

It will readily be seen that the ability of the government to continue to control matters relating to its natural resources (even though the licensee has a *profit à prendre* and title to the petroleum when it is reduced into possession) is very considerable. There are administrative law problems of the gravest significance, beyond the scope of these lectures, relating to the grounds on which the Minister exercises his consent[165]. The Act indicates in certain circumstances the grounds on which consent may be refused[166]. The question arises as to whether consent can ever be withheld on other grounds. Again, in the matter of consents needed for the assignment of property interests, the Act gives no indication as to permissible reasons for withholding consent. If a foreign licensee were constantly refused consents for his proposals, even though they were consistent with good oilfield practice, would this be a violation of his property rights under the licence? In pursuing its case in the English courts, the foreign company would be concerned primarily with the limits that administrative law places upon the exercise of Ministerial discretions in good faith[167]. But if the matter were to be taken up by his national government and pursued at an international level, the focus would surely change and the contractual régime within which these administrative discretions operate would surely assume greater importance.

But – unlike the Libya concessions – the United Kingdom petroleum licences have no "stabilization" clause, and the question of their subsequent alteration by later legislation always remains a possibility. The inherent problem that this presents has already arisen in relation to the 1975 Petroleum and Submarine Pipeline Act. Production licences that had been issued prior to 1975 incorporated certain model clauses (specifying the licensee's obligations) set out in the Petroleum (Production) Regulations of 1966. But the 1975 Act provided that these pre-1975 licences were henceforth to be read as if they incorporated the *new* model clauses set out in that Act[168]. In short, the Act was in that regard given retrospective impact[169]. As it has been put by one leading commentator[170]:

"The form of the production licence is contractual. It is

> executed as a deed . . . Its substance is also of the nature of a contract . . . The fact that this standard form, with its extensive Ministerial powers, is laid down by regulation at the insistence of Parliament certainly imbues the licence with a regulatory flavour . . . [but this] does not . . . displace the essentially contractual nature of the licence. All this must be qualified by one major reservation. Most licensees in the United Kingdom sector – all, indeed, save those operating under post-1975 licences – had the terms of their original licences changed unilaterally by the Petroleum and Submarine Pipelines Act. In form their revised licences are still contracts. In substance they cannot be: the essential feature of contract, *consensus as to terms, is missing.*"

I shall return later to consider whether this was an "indirect taking" of property rights. For the moment I limit myself to noting that the United Kingdom Government took the view that its sovereign right to legislate in respect of the natural resources on its shelf was in no way impeded by contracts that it had previously entered into with foreign licensees.

The United Kingdom constitutional law position on this issue is not without interest, because it has a similarity to the sort of argument that Saudi Arabia was advancing at the international level in the *Aramco* case (and which has often been advanced by developing countries): namely, that by the entering of a contract they are nonetheless not – because of their sovereign status – binding themselves forever.

The gloss on the English domestic position is the inability of Parliament to fetter the actions of a future government. This is because in the British constitutional system Parliament is supreme: there is no superior authority, no Supreme Court. Parliament in 1982 cannot instruct Parliament in 1992 what legislation to enact, or avoid. It is exactly for this reason that it has been hard, for example, to "entrench" into domestic law the provisions of the European Convention on Human Rights[171]; and there has been great controversy about whether Parliament could withdraw from the EEC Treaty, notwithstanding the absence of any withdrawal clause[172]. Added to this is a line of cases that affirms the concept of "executive necessity" as entitling a government to breach its contracts.

In the celebrated case of *The Amphitrite*[173] a Swedish ship had entered a British port during World War I in reliance upon an undertaking by the Government that the ship would be cleared if she carried 60 per cent approved goods. On the first sailing the vessel was cleared. The assurance was renewed in respect of a second proposed voyage. This time, however, the ship was refused a clearance when she arrived in Britain. The action was an action by a private foreign party (the shipowner) against the British Government for breach of a contract. The contract in question did not grant contract rights, but the constitutional principle is the same. Rowlatt J. in a celebrated dictum, stated:

> "It is not competent for the Government to fetter its executive actions, which must necessarily be determined by the needs of the community when the question arises. It cannot by contract hamper its freedom of action in matters which concern the welfare of the State[174]."

Had this contract been a treaty governed by international law, this dictum would have been altogether too wide. And it is arguable that where a State contract is governed by international law, the *Amphitrite* dictum is again too wide[175]. But it cannot be certain that an English court would take this view – the customary emphasis on the inability of government to fetter its executive action could well prevail over the acknowledgement of the obligations of international law as they are said to apply to others – namely, that the nationalization of property rights protected by a concession may be an exception to the general principle that a government may always nationalize upon payment of compensation and evidence of non-discrimination and public purpose[176]. The matter would largely turn upon whether international law, or English law, was treated as the applicable law of the contract concerned.

In *The Amphitrite* case the claim for damages failed, because, as Rowlatt J. put it, the government "purported to give an assurance as to what its executive actions would be in the future" in relation to certain events. In a well-noted dictum, however, the judge observed that this was not a commercial contract, adding "No doubt the Government can bind itself through its offers by a commercial contract, and if it does so it must perform it like anybody else or pay damages for the breach"[177]. *The Amphitrite* was a case where there was an express undertaking by the Crown: it

would seem impossible in those circumstances to read into the contract the implied term that the agreement should not fetter the discrimination of the Crown in the exercise of its public duty[178]. Later cases – albeit ones not involving foreign plaintiffs – have turned upon the existence of such an implied term. The underlying rationale of these cases was that where the Crown departs from the terms of its undertaking by virtue of the exercise of its powers for the public good, damages will not be due because Crown contracts must be understood as having an implied term that the undertaking will not fetter the exercise of the Crown's executive authority: and therefore there has been no breach[179].

Whatever one may make of this as a matter of English law, the application of such a doctrine in the international context would clearly present the gravest problems. It is well established that a treaty commitment to arbitrate is not regarded as an abandonment of sovereignty: see *Aramco Award*[180] and *Exchange of Greek and Turkish Populations*[181]. The Permanent Court stated in the *Wimbledon* case[182]:

> "The Court declines to see in the conclusion of any treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of a State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty."

While of course it cannot be claimed that the act of entering into international contracts is an act of State sovereignty, the entering into agreements in whatever form for the disposition of mineral resource rights clearly is an attribute of sovereignty. In exercising that sovereignty a State can build in qualifications and review-clauses. If it fails to do so it can learn from its lessons in further licence rounds or concessions to be entered into. But the invocation of sovereignty, or the need to leave sovereign powers unfettered, cannot regard as nugatory the concept of *pacta sunt servanda*.

United Kingdom Petroleum Licences provide for the possibility of arbitration only in respect of certain matters (those decisions and consents of the Minister that are subject to his discretion by reference to "the national interest" are treated as non-arbitrable).

Where arbitration is provided for, then it is to be arbitration under either English or Scottish law[183]. A foreign licensee thus finds itself without recourse to international law (unless of course the matter becomes elevated to an interstate dispute, where principles of international law relating to the taking of property would become generally applicable, quite distinct from the terms of the licence). The licensee must operate within the framework of the English law principles of executive necessity and Parliament's inability to bind a successor Parliament. The petroleum licensing system is thus localized to a greater extent than that in, e.g., Saudi Arabia or Libya, so far as the applicable law is concerned. In the *Aramco* case[184] the Arbitration Agreement provided that the Tribunal should decide –

> "*(a)* in accordance with the Saudi Arabian law . . . in so far as matters within the jurisdiction of Saudi Arabia are concerned;
> *(b)* in accordance with the law deemed by the Arbitration Tribunal to be applicable, in so far as matters beyond the jurisdiction of Saudi Arabia are concerned . . .[185]"

The Tribunal declined to find that the law of the country of its seat (Geneva) should be applied to the arbitration[186], because it thought it impossible that a sovereign State should subject itself to the laws of another State[187]. "It follows that the arbitration, as such, can only be governed by international law[188]."

In the *BP-Libya* case[189] Clause 28 of the Concession provided that –

> "This Concession shall be governed by and interpreted in accordance with the principles of law of Libya common to the principles of international law and in the absence of such common principles then by and in accordance with the general principles of law, including such of those principles as may have been applied by international tribunals."

The Arbitrator rejected the claimant's contention that international law alone was applicable, but rested on the wording of Clause 28, applying general principles of law in the absence of principles common to the law of Libya and international law[190].

In the *Texaco-Libya* case[191], the same clause appeared in the claimant's concession: but the Sole Arbitrator took a strikingly

different view of it from that taken by the Arbitrator in the *BP-Libya* case, finding that the envisaged possibility of referring to the President of the International Court to appoint an arbitrator, and the authority given in the concession to the Arbitrator to "modify and complete" the present Rules of Procedure[192] meant that the arbitration was subjected directly to international law. While this view of the applicable law is perhaps, with respect, controversial, it is clear that on either view of Article 28 of the Concession there is some room for the application of international law; while under the United Kingdom petroleum licences there is none provided for.

Looking at the same applicable law clause, the Sole Arbitrator in the *Liamco-Libya* arbitration felt that Libyan law – including Libyan legislation, and the Civil Code – was applicable so long as it was not inconsistent with international law. After an analysis of leading Libyan and Moslem rules and principles, he found that Libyan law in general and Islamic law in particular indeed had common rules and principles with international law; and could thus be applied[193].

In the United Kingdom, as we have said, were the matter to be pursued as an interstate diplomatic claim (with the national government of company X claiming that, because of the taking of company X's licence rights through, e.g., subsequent legislation), then the matter would become one of a wrong under international law, and to that extent international law would again be a relevant applicable law. But it must be explained that there is a further problem about this, the significance of which is as yet untested. The issuing of licences is carried out in Licensing "Rounds". Article 33 (2) *(g)* of the Model Clauses, Petroleum (Production) Regulations 1966, introduced a requirement for local incorporation. This provided that a company's ceasing to have its central management and control in the United Kingdom could have its licence revoked. Paragraph 4 of the Regulations also stipulated that applications for licences could be made by "bodies incorporate in the United Kingdom". The original reasons for this requirement (which is entirely common in the oil industry) were in this case related to taxation[194]. The practice has been for the oil majors to establish locally incorporated subsidiaries as the licence holders, who received investment finance from the parent (overseas) company and pass the benefits of their petroleum entitlement along

to it. Technically, the loss of any licence rights through, e.g., nationalization, would be a loss by a British company. The reality, of course, is otherwise. It is unclear whether the principle of nationality of claims affirmed in the *Barcelona Traction* case[195], whereby an international claim by a corporation can only be brought by the country of incorporation, would be applied in these circumstances. Would it be a fatal stumbling block to international litigation that the company which had sustained the loss was technically not, e.g., a United States or French company, but a United Kingdom company? And that therefore these Governments could not act on behalf of such company? Had the *Murphyores* case in Australia (to which I shall refer later)[196] proceeded to international litigation, this issue would have required resolution (unless it could have been disposed of by the prior agreement of the putative parties – namely, Australia and the United States). The issue has also been raised recently in connection with certain controversial aspects of the 1982 Canada Oil and Gas Act, which entail deprivations of property interests held, *inter alia,* by foreign controlled companies which are nonetheless locally incorporated[197].

In *BP* v. *Libya*[198], *Texaco* v. *Libya*[199] and *Liamco* v. *Libya*[200] it has been affirmed that takings of property in violation of concession agreements entitles a claimant to compensation under international law. Such findings would undoubtedly command the sympathy of western national governments of oil companies. But as recent legislation in some of those western countries[201] who also are oil producing countries shows, techniques are now in place for avoiding the impact of these principles of international law. New mining rights in developing countries are entirely likely to follow the model offered by such western example.

### *Restitutio in Integrum*

What is the appropriate remedy for a deprivation of property that is unlawful under international law? The nature of the remedy turns in significant measure upon the precise identification of the legal wrong. We have seen that there has been recent controversy about the ability of States unilaterally to alter or rescind concessions. At issue has been the legal status of a concession agreement and the significance of recent resolutions of the United Nations. If the nationalization of a concession is unlawful under the governing

law, then does it follow that the act must be treated as null and void? Or is the correct view that nationalization of concessions is unlawful, but damages alone is the available remedy? Or is there a third contemporary legal possibility – that a State may, by virtue of its sovereignty over natural resources, always nationalize a concession, but must be prepared to pay compensation for those contract rights that it has infringed? It is these issues that I now explore, and it will be readily seen that one's view of *restitutio in integrum* is necessarily heavily coloured by one's prior views about the limitations that a concession places upon a State's freedom of action.

The starting point of our discussion necessarily has to be the celebrated dictum of the Permanent Court of International Justice in the *Chorzów Factory* case[202]. In that case the Court said:

> "The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear . . ."

In the *Aramco* case[203] the question of restitution or indeed damages did not arise, because the Onassis Agreement had not been implemented, owing to Aramco's objections. Saudi Arabia and Aramco jointly submitted to arbitration questions on the relationship of the Onassis Agreement to the concessions held by Aramco.

In many cases, of course, *restitutio* is not sought. Among those leading cases in which it was not sought may be mentioned the *Lena Goldfields* case[204]; *Losinger et Cie. S.A.* v. *Government of Yugoslavia*[205]; and the *Sapphire* case[206]. There can be a variety of reasons for this. It can be because restitution is indeed impossible – for example, if the nationalized assets have already passed into the hands of *bona fide* third party purchasers. National courts may have jurisdiction over such persons, and may or may not recognize the title that they claim (and I shall say something more about this below); but international tribunals have no jurisdiction to require them to return to the nationalized party the assets or petroleum

which they now hold. Again, the nationalized property may no longer exist in the same form: thus in the dispute between Poland and Germany over the factory at Chorzów, Germany demanded "the restoration of the factory as an industrial enterprise to the Bayerische". Poland indicated that not only was this claim baseless in law, but that it could not comply "for reasons of fact"[207]. Prior to the Judgments Nos. 8 and 13 the German Government indicated that it had abandoned its claim for restitution, because it now believed that "the Chorzów factory, in its present condition, no longer corresponded to the factory as it was before the taking over in 1922 .-. ."[208]. Such circumstances are, in my view, what the Permanent Court had in mind in its *dictum* in the *Chorzów* case, when it spoke of restitution being required, unless "this is not possible". But certain writers, such as Friedmann[209], and certain recent Awards, treat impossibility in a different sense – that is, in the sense that if a State is unwilling to yield up what it has taken by nationalization, and cannot be compelled to do so, then *restitutio* is "impossible" and should not be ordered against a State. Thus in the recent Arbitration between the *Libyan American Oil Company (Liamco) and the Government of the Libyan Arab Republic*[210], the Sole Arbitrator Dr. Mahmassani spoke of restitution as being a general principle of the Islamic Sharia and of international law, but said that it was "hindered" by the impossibility of performance[211].

There are, of course, other reasons for claimants not to seek restitution: they may feel that damages represent a compensation that is satisfactory in all the circumstances. To certain jurists the fact that restitution is comparatively rarely requested is of itself evidence that restitution is not generally regarded as a remedy provided by international law. This is the position taken by Judge Lagergren, Sole Arbitrator in *BP Exploration Company (Libya) Ltd.* v. *Government of the Libyan Arab Republic*[212] in his Award of 10 October 1973.

Problems of effectiveness in relation to restitution are of course closely related to the difficulty of ordering specific performance against a State. Arbitration Tribunals feel that once States have given their consent (whether *ad hoc*, or in an arbitration clause), they can pronounce upon the law as it affects a dispute before them; but they cannot order specific performance. This is less true of international courts, but the reality of State sovereignty,

and the need for continuing consent if the jurisdictional basis of the International Court is to continue to exist, is still a constraining factor. Of course, ordering that damages be paid is *still* directing a State to perform – but perform a less resented task; one less immediately tied up with notions of State sovereignty. On the domestic level, it is frequently stipulated in relevant national legislation (for example, in legislation on sovereign immunities) that specific performance may not be ordered against a State, even when it is not immune from process[213]. This reflects the reality that the courts of one State have no authority to compel a foreign sovereign State to carry out a certain course of conduct.

These factors have led to the emergence of a certain parallelism – that is to say, a request from private parties seeking redress for nationalization that the Award be in the form of a Declaration of the invalidity of the act in question. In the *BP* v. *Libya* case the claimants argued in favour of *restitutio,* but requested a Declaration (rather than an order) of its right to be restored to the full enjoyment of its rights under the BP Concession[214]. The Tribunal found this a distinction without a difference:

> "It may be argued that the claimant does not in fact ask for an order of *restitutio in integrum,* but merely for a declaratory statement as to its legal position under the BP Concession and with respect to certain property and that the issue of whether restitution in kind is an available remedy therefore is not presented . . . The Tribunal holds, however, that no such distinction should be made. If it is found that the claimant is entitled to be restored to the full enjoyment of its rights under the BP Concession, and is the owner of the oil and assets referred to, then the claimant is entitled to an order for specific performance or, alternatively, a declaratory award of entitlement to specific performance."

With great respect, it is difficult to understand this observation. Neither an order for specific performance nor a Declaratory Order could be indicated if the claimant was not entitled to continued ownership of the assets: but there still remains the question (which is unanswered by these lines in the Tribunal's Award) of whether considerations of the status of the defendant make one remedy more appropriate than the other. Certainly in certain national jurisdictions an ability to grant declaratory relief exists side by

side with an inability of the domestic courts to order specific performance against a government.

In the *Liamco-Libya* Arbitration the claimant did not press for restitution (a decision characterized by the arbitration as an implied admission of the impossibility of restitution in kind)[215], but instead requested the issue of a Declaratory Award that Libya's acts were unlawful and not entitled to international recognition, and that Libya does not have title to oil extracted from Liamco's concessions[216]. Liamco claimed that there was international authority in support of this alternative, including Article 10 of the German-Swiss Arbitration Treaty of 1921 and Article 32 of the General Act for the Pacific Settlement of Disputes[217]. It cited also the maxims of "*ex injuria jus non oritur*" and "*nemo plus jure transferre potest quam ipse habet*". Dr. Mahmassani, like Judge Lagergren answers this request negatively; but on rather different grounds. He refers first of all to the sovereignty of States and the Act of State doctrine and then to the practical unenforceability of a Declaration. We have explained in an earlier lecture why the comments on the Act of State doctrine seem wholly out of place in this arbitration[218]; and thus we are left with the proposition that a Declaration will not be granted in lieu of an order for specific performance because it, too, will be impossible to enforce. But when declaratory awards are made by international courts in contexts other than as an alternative to specific performance, they do not normally greatly concern themselves with the likelihood of enforcement; and I see no reason why the principle should differ in the present circumstances.

We are still left with a fundamental question: whether international law does indeed recognize in principle the remedy of *restitutio in integrum*. In the *BP-Libya* case Arbitrator Lagergren argues strongly that the dictum in the *Chorzów Factory* case is *obiter*, because in the event the German Government did not claim *restitutio in integrum*. Such comments as the Court made were in reality to identify the principles by which to determine the amount due in compensation for an unlawful taking. It is undoubtedly true that the Court, after the two passages in which reparations are mentioned as the preferred way of "wiping out the consequences of the illegal Act"[219], adds that these are "the principles to be followed in fixing the compensation due"[220]. But it is hard to resist the alternative view put by Professor Dupuy, Sole Arbitrator

in *Texaco* v. *Libyan Arab Republic*[221] that "the principle was expressed in such general terms that it is difficult not to view it as a principle of reasoning having the value of a precedent"[222]. For Professor Dupuy the "very numerous quotations of this part of the opinion in doctoral writings confirm, if this were necessary, that all authors see in it a declaration of principle". For Judge Lagergren the views of the writers are of no value, repeating as they do the quotation of the *Chorzów* case and failing to appreciate its limited significance[223].

Judge Lagergren is certainly able to show that there is no clear case, of an authoritative international tribunal, in which *restitutio* has been awarded pursuant to the nationalization of a concession. Where a court settles a boundary dispute it is in one sense disposing of the property of the unsuccessful party. Indeed, in the *Temple of Preah Vehear* case[224] the Court ordered the restitution to Cambodia of all objects taken from the Temple and its surroundings by the Thai authorities since they occupied the site in 1954. But, this does present different problems from restitution in the context of concessions, because the latter involve the natural resources of the expropriating country. We are thus back to asking whether there is something special about concession contracts that makes restitution of rights under them to private parties peculiarly difficult (or, as the private parties might put it, particularly important because of the vast capital investments that they will already have made). And there are very few such cases, even outside of the area of concessions[225]. There are, of course, examples to be found of restitution provisions being agreed in treaties – and especially in peace treaties[226], but these too form a separate category.

So far as State practice on the matter is concerned, views expressed in diplomatic exchanges are difficult to ascertain[227]. But Judge Lagergren nonetheless placed emphasis on the fact that the Hickenlooper Amendment[228] to the *Sabbatino*[229] judgment of the United States Supreme Court referred to compensation, but not to restitution; and the United Kingdom's own protest note to the Libyan authorities over the nationalization in question spoke of restitution and compensation as alternatives, either of which would serve to make an otherwise unlawful act lawful. The Note of Protest handed to the Libyan Ambassador in London on 23 December 1971 stated that certain requirements had to be met before a nationalization was lawful under international law:

> "Her Majesty's Government must, therefore, call upon the Libyan Government to act in accordance with the established rules of international law and make reparation to British Petroleum Exploration (Libya) Limited, either by restoring the Company to its original position in accordance with the concession No. 65 or by payment of full damages for the wrong done to the company."

The implication of this curiously worded paragraph is that it was not necessarily unlawful for a concession to have been nationalized, and that damages might suffice. (The United Kingdom's criticism was directed primarily to allegations of discrimination and political motivation.) This does not seem compatible with the arguments invoked some 20 years earlier in the *Anglo-Iranian Oil Co.* case where the United Kingdom insisted that abrogation of a concession was unlawful and that full restitution was required[230]. In the *BP-Libya* case the Umpire looks at the evidence and finds that the notion of restitution has largely been erected on a dictum in the *Chorzów Factory* case, and is in fact unsustained in case law relating to concessions. In the *Texaco-Libya* case the Arbitrator regards the dictum in *Chorzów* as a general application, and finds of weighty legal significance the fact that in both the *Anglo-Iranian Oil Co.* case[231] and in the *Barcelona Traction* case[232] the applicants sought restitution: "It is remarkable that in these two cases *restitutio in integrum* was what was requested in the first instance: if this was the case, it is precisely because the plaintiffs were convinced that this was the solution accepted and confirmed by international law[233]". But of course the plaintiffs' convictions can hardly themselves be proof as to the law; and no doubt the defendants held equally strong convictions that restitution was inappropriate. In any event, in neither case did the Court reach the issue of restitution. These cases are in my view neutral. Looking at the accepted sources of international law, the case law properly read shows that restitution is in general terms a recognized remedy, but that it has not been an established remedy in the field of concessions. State practice seems to support this view. There is undoubtedly a considerable body of support in the writings of leading jurists to support the idea of *restitutio,* but I find persuasive Judge Lagergren's view that they most usually are based on the *Chorzów* dictum (though certain writers have emphasized other important points related to

restitution – for example, Professor Schwebel, as he then was, has observed that when an expropriating State has not the means to pay adequate, prompt and effective compensation, restitution remains the only hope for the concessionaire)[234]. As in all things, our perception of this problem will depend upon our views of international law itself. If we view it not simply as the application of past rules, but as the authoritative application of norms derived from past trends of practice, which command continuing expectation of compliance and which are compatible with certain values, then we look at the problem in a somewhat different way. The past trend of practice is fraught with uncertainty and qualification. There are firmly balanced arguments about the community values that restitution can be said to serve: on the one hand, it is a protection against arbitrariness and the undercutting of *pacta sunt servanda*. On the other hand, it acts as an obstacle to the securing by a State of control over its own resources. My own feeling is that States cannot expect to be free, even in respect of their own resources, from obligations that they themselves voluntarily enter. On balance restitution promotes values of importance to the international community as a whole. But when we turn to what I may term "community expectation" – a vital element in our identification of what is law I find very little evidence that restitution is perceived as a required remedy or that it is anticipated as being likely to be granted.

## CHAPTER IV

## INDIRECT TAKINGS

So far we have been addressing ourselves to the circumstances in which a State is entitled to, or must refrain from, taking the property of foreigners; and what conditions are attached by international law to such takings, particularly with regard to compensation. These questions are difficult enough, but sometimes there is an additional major problem: what acts of the State *are* "takings" of property? Can property only be "taken" by outright nationalization, or confiscation, or perhaps requisition? Or are there other governmental actions which in effect amount to a taking of property? In other words, what sort of government interferences with privately held property amount to a "taking" under international law?

This question has been with us for some time, but in recent years has become even more important as government intervention in the industrial and commercial life of the nation becomes ever more common. The leading text books[235] do indeed make it clear that it is not only nationalization that constitutes a taking by the State, and that sequestration, confiscation, expropriation and requisition are all relevant. Some of them, of course, use these terms in different senses – for example, some writers speak of confiscation to mean a taking without statutory or other specific legislative authority; or expropriation as meaning any type of taking for which compensation of the international law standard is not made[236]. But there is a much smaller literature on the phenomenon of "indirect takings" or what some[237] have referred to as "creeping expropriation".

The phenomenon itself has been with us for some considerable time, even if its importance and incidence has greatly grown in recent years. And the Permanent Court has recognized that interferences with property, while still short of nationalization, may still amount to a "taking" even if no such intention is asserted (or even if, indeed, such an intention is denied). In the case of *German Interests in Polish Upper Silesia*[238] Poland had seized a nitrate factory located in Chorzów. The factory was being operated

by a German company under a management contract with another German company that held title to the property. The managing company was, under its contract, to make use of certain patents and commercial contracts which it held. One of the issues before the Permanent Court was whether the seizure by the Polish Government of the factory and the factory plant and machinery was also an expropriation of the patents and contracts of the management company. Although the Polish Government at no time claimed to expropriate these, it was held by the Permanent Court that they were so closely interrelated with the factory itself that they had in fact been expropriated, and compensation was due to the management company for them.

Again, in the *Norwegian Claims*[239] case, between Norway and the United States, an international tribunal set up by special agreement of the parties on 30 June 1921, also found a taking of rights ancillary to those formally taken had occurred. The matter arose out of a dispute over compensation to be paid to Norwegians who held shipbuilding contracts with American firms. When the United States entered the Great War in 1917, it had issued certain orders of requisition, whereby ships under construction and related materials, etc., were to be completed on its behalf. The Norwegian shipbuilders claimed that they were entitled to compensation for their shipbuilding contracts (in the circumstances of the time, shipping was in short supply and shipbuilding contracts thus very valuable). The United States, by contrast, took the view that it had requisitioned only partly-built ships, but had not requisitioned the underlying contracts, and that the compensation should reflect this and be limited accordingly. The Tribunal found that the Norwegian shipowners had had their contracts taken, as well as the vessels, and were to be compensated for at fair market value. One can imagine that similar considerations must be of concern to those shipping companies negotiating with the United Kingdom compensation for vessels requisitioned for service in the Falkland Islands against Argentina[240]. In so far as some of these vessels were normally carrying commercial passengers and commercial cargo, and were permanently lost, is the compensation due for the vessel itself or for the contracts which it was to have undertaken?

On their facts, these two cases certainly indicate that an expropriation of a given property may in fact – regardless of stated intention – involve a taking of closely connected ancillary rights.

But it also seems clear that the principle is wider than this. In the *De Sabla* case[241] a United States-Panama Commission had to deal with a somewhat different issue. The Panama Government granted cultivation licences to Panama citizens in respect of land owned by a United States citizen in Panama. The Commission awarded compensation of one-half of its value for this land. Noting that the compensation included not only payments for the use and deprivation of the land, but also for the difficulties encountered in dispossessing the licensee, one commentator[242] notes that: "This suggests that, had it proved impossible to dispossess the so-called licensees, Panama would have been held to have wrongly taken the land, however much it protested that it no longer regarded the licences as valid."

Where physical property has been concerned, the issue has been fairly clear: interferences which significantly deprive the owner of the use of his property amount to a taking of that property. This will be so even if he remains in physical possession of that property[243]. The United States Foreign Claims Settlement Commission has followed this view fairly consistently: thus the Hungarian Government was not successful in one such case in pleading that title to the real property concerned had never passed into State ownership. What mattered – and gave rise to compensation – was that use was being made of the claimant's property for which he was not being paid, and, conversely, he was not free to use the property himself as he wished, or to alienate it[244].

Government interference with property can, of course, take a wide variety of forms. We shall see in the next lecture that the organs of the European Convention on Human Rights have been faced with comparable questions to those discussed above, relating to measures short of formal nationalization or expropriation. These will be analysed more fully in the context of our discussion on property and human rights, but we note at this juncture that in an important case, *Sporrong and Lönnroth* v. *Sweden*[245], the Commission found that "expropriation permits" (which envisaged the possibility of a later full taking of the property by the State, and an immediate prohibition on construction) were *not* of themselves an interference with the peaceful enjoyment of the applicants' possessions[246]. It will be seen both that interference with the peaceful enjoyment of one's possessions is a lesser act than a "taking"; and that the Commission's finding on this point was not fully in

accordance with the line of jurisprudence we have been discussing. The European Commission on Human Rights acknowledged that the applicants could not sell on the open market, that investments in the property became hazardous, and that they were impeded from obtaining mortgages. But:

> ". . . the Commission accepts that expropriation permits had in practice negative consequences for the applications on the property market in the manner explained by them. However, the Commission does not consider that such consequences *in themselves* amount to an interference with the peaceful enjoyment of possessions . . ."

Where the European Commission appeared to rejoin the philosophy of the Mixed Commissions and the United States Foreign Claims Commission was when it nonetheless found that the existence of these factors for *very long periods of time* (23 years and 8 respectively for each of the applicants) *did* amount to an interference with the property rights protected by the protocol to the European Convention. In other words, the Commission thought it was the situation as a whole, rather than the individual measures, that had to be judged. And on this test, it thought that –

> "the effects caused by the joint measures imposed on the applicants' properties must understandably have become so severe by the lapse of time that they constituted a substantial interference with the applicants' right to peaceful enjoyment of possessions . . .[247]".

The European Court on Human Rights, in a judgment which is with respect open to criticism on other grounds[248], offered a more acceptable view on this point. It found that there was indeed, from the outset and not just because of the length of time for which the permits had existed, an interference with the applicants' right of property, because:

> "Although the expropriation permits left intact in law the owners' right to use and dispose of their possessions, they nevertheless in practice significantly reduced the possibility of its exercise. They also affected the very substance of ownership in that they recognized before the event that any expropriation would be lawful and authorized the City of Stockholm

> to expropriate wherever it found it expedient to do so. *The applicant's right of property thus became precarious* and defeasible[249]." (Italics added.)

An individual may be deprived of his property not only by the transfer of the title thereto to the State, but by the requirements of forced sale. Sometimes this occurs as a result of sheer physical power – property is seized, threats are made, and what amounts to a forced sale is insisted upon. The case law in this area turns very much on the particular facts and it is not easy to extrapolate general principles. A very useful analysis of some of the cases in this category (within the context of a conceptually original and thoughtful article on the general questions of what he terms "creeping expropriation") is given by Burns Weston[250]. In the case of *Gower and Copeland* decided by the United States-Venezuelan Claims Commission of 1885[251] some compensation was awarded against the Venezuelan Government in the sorts of circumstances envisaged above. Although the Commission referred to a "forced sale" the compensation awarded was modest in amount (probably because of lack of proof of the value of what was speculative property – iguano deposits on islands 20 miles off the coast of Venezuela). As Weston correctly observes, it is uncertain how much turned upon the failure of Venezuela to give prior notice of its claimed ownership of the islands, or upon the physically forcible dispossession to which the applicants were subjected.

Certain other "forced sale" cases have, of course, arisen out of the Second World War, perhaps the most famous being the two *Bernstein* cases[252]. These United States cases are most directly concerned with questions relating to act of State. But they do seem to affirm that forced sales at unrealistic values properly give rise to claims that there has been a property deprivation, for which a claim for reparation is appropriate[253], or in respect of which the foreign act of State would not be given domestic recognition. As we have seen above, it is far from clear, however, that any taking of property (whether indirectly by forced sale, or through other methods) without compensation, will not *per se* in all jurisdictions be given the protection of act of State: what is distinctive is that in many of the forced sale cases the indirect taking was for racial motives (property deprivation of the Jews under Nazi laws) and thus particularly offend the public policy of the forum.

Another type of alleged indirect taking of property arose – but was never answered – in the case of *Barcelona Traction, Light and Power Company, Limited* before the International Court of Justice. In that case, as several commentators have observed[254], property was allegedly taken through the improper action of the domestic courts. In 1936, because of the Spanish Civil War, interest payments were suspended on sterling bonds issued by Barcelona Traction (a Canadian company) and serviced through funds passed to the parent company by its Spanish subsidiaries. After the war exchange control provisions were in force, and the Spanish authorities refused to allow funds to be transferred out, stating that Barcelona Traction was unable to prove that the foreign currency was for the purpose of repaying debts arising from the *bona fide* importing of foreign capital into Spain. For technical reasons beyond the control of Barcelona Traction, interest on the bonds was thus never resumed. An action was brought against Barcelona Traction by certain Spanish holders of the bonds. Although Barcelona Traction was not properly notified of the proceedings, the company was declared bankrupt and its assets and those of 15 subsidiaries seized. Spanish directors were appointed to replace foreign managers. Eventually, after further legal proceedings, its shares were annulled and new ones issued, and sold to a Spanish company which now took full control of Barcelona Traction. Clearly, there was no question of formal nationalization here. The question was whether Spain had international responsibility for the events (including the conduct of the proceedings of its courts) which culminated in the undoubted loss of its property by Barcelona Traction. As is well known, the Court did not in the event proceed to these issues, finding in favour of a preliminary objection by Spain that Belgium lacked standing to bring the action on behalf of the company. Some dicta nonetheless emerged in three of the judgments. Judge Fitzmaurice indicated that the acts complained of did appear "to have had the character of a disguised expropriation of the undertaking"[255]. Judge Gros indicated that he too viewed the events as a confiscation:

> "One cannot but observe how an industrial undertaking which nobody claimed to be Spanish before 1948 became Spanish, against the will of the corporate organs of Barcelona Traction, as a result of acts characterized as a denial of justice

> both overall and in detail. In fact, the undertaking is today incorporated into the economy of Spain by a sort of 'nationalization' which, if it was effected by a misuse of legal procedure, constitutes a breach of international law as between the parties[256]."

He further indicated that a total loss of assets could well amount to confiscation, and if it was done by unlawful methods and unindemnified, it gives rise to international responsibility. Weston has pointed to the fact that Judge Tanaka, who moved on to the merits by finding in favour of Belgium in each of Spain's preliminary objections, nonetheless did not think the acts showed a clear violation of international law. He cites this as evidence that, in analysing the complex fact-patterns surrounding alleged indirect takings

> "judgments . . . commonly depend on highly subjective responses to the fact patterns discerned . . . [We lack] anything remotely approaching a systematic appraisal of the many ways in which aliens, not the targets of 'confiscation', 'expropriation', 'nationalization' or 'requisition' *stricto sensu,* can be and have been effectively deprived, in whole or in part, of the 'use or enjoyment' of their foreign based wealth . . .[257]"

This writer is very sympathetic to Professor Weston's observation, and appreciative of his own efforts to contribute to that analysis. At the same time, Judge Tanaka seemed not so much even to address himself to *whether the cumulative acts* did indeed constitute a "taking of property", but rather to whether there was proof that the "taking" was unlawful. In his judgment and indeed, in the very different judgment of Judge Gros, there seems to be a tendency to define "taking" in terms not of the amount or quality of interference with those rights normally associated with property, but in terms of whether the *methods* were unlawful and whether compensation was paid. This is, with the greatest respect, to confuse the question of a definition with the question of a legal justification.

It is to be expected that extremely interesting questions concerning indirect takings of property, and State responsibility, will arise in the claims being brought before the United States-Iran Tribunal in The Hague. Under the Declaration of the Government

of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran[258], this Tribunal was given jurisdiction to hear claims and directly related counter-claims by nationals of Iran against the United States and nationals of the United States against Iran, if such claims and counter-claims arise, *inter alia,* out of "expropriations or other measures affecting property rights" (Article II (1)). This is broadly worded, and does not say, for example, "other measures affecting property rights that are in violation of international law" or "other measures affecting property rights that amount to a taking of such rights by the Government". There will obviously have to be argument about the extent to which such qualifications are or are not to be read in to the rather imprecise wording of the Declaration. An essential backdrop to this clause is the pre-existence of the Treaty of Amity of 1954[259] between Iran and the United States. Article IV of that Treaty provided:

> "Each High Contracting Party . . . shall refrain from applying unreasonable or discriminatory measures that would impair [the] legally acquired rights and interests [of nationals and companies of the other High Contracting Party]; and shall assure that their lawful contractual rights are afforded effective means of enforcement, in conformity with the applicable law.
>
> Property of nationals and companies of either High Contracting Party, including interests in property, shall receive the most constant protection and security within the territories of the other High Contracting Party, in no case less than that required by international law. Such property shall not be taken except for a public purpose, nor shall it be taken without the prompt payment of just compensation . . .
>
> [N]ationals and companies [of either High Contracting Party] shall enjoy the right to continued control and management of such enterprises."

One thus has general principles of international law overlaid by specific treaty arrangements. Naturally, it is to be expected that there will be legal argument by Iran over the continuing status of the Treaty of Amity after the revolution; but our interest at this point is in noting the very wide respect for foreign property rights

envisaged in this accord. Very many acts short of nationalization are clearly prohibited by the treaty, and are in effect assimilated to "indirect takings" under general international law. An area of the keenest interest will be the extent and nature of governmental responsibility for acts *prima facie* in contravention of treaty or general international law obligations on "indirect takings", which are carried out by those who are not themselves governmental officials. The jurisdiction of the Iran-United States Tribunal is limited to acts against the two States – by which is meant their Governments, "any political subdivision . . ., any agency, instrumentality or entity controlled by the government . . . or any political subdivision thereof"[260].

Issues will inevitably arise over the Iran Government's responsibility for acts by persons falling outside of these groupings, but which allegedly were instigated, or encouraged, or permitted, or condoned, or ratified. We will see in these cases not only claims of "indirect takings", i.e., significant interferences other than nationalization, sequestration or confiscation, but indeed indirect taking attributable to the States by the law of State responsibility, being carried out by those who would normally have lacked the authority to engage in interferences on behalf of the State with the property rights of foreigners.

It is perhaps not surprising that the constitution of the United States, with its great emphasis on the entitlement to private property, should have generated some profoundly interesting case law in certain areas of the problem that is before us. The Fifth Amendment of the Constitution prohibits the taking of private property for public use without just compensation. It is clear that the so-called "taking clause" of the Fifth Amendment imposes a distinct substantive standard – that of just compensation[261] – when private property is diverted to public use. This is so even, for example, if the diversion from private to public use occurs as part of bankruptcy proceedings[262]. That rule applies to State as well as to federal takings[263]. But recent case law has made it clear that this is not to be regarded as on all fours with a taking of property in pursuance of the so-called "police power", i.e., for regulatory purposes. It would seem to be the case that while it is acknowledged that property may be indirectly "taken" through regulation, this does *not* attract the duty to compensate. The position seems to be (and the present writer finds the underlying policy difference hard to appreciate)

that a taking for public user requires just compensation to be paid; whereas an indirect taking for regulatory purposes does not. The distinction seems to lie not between formal and indirect taking, but rather in the *purposes* of the taking. As the United States Court of Appeals for the Third Circuit recently put it: "[t]he consequences of classifying a law as an economic regulation rather than a taking for a public purpose are clear. Only if a taking for public use is found does the just compensation standard apply[264]. At the same time, the Court of Appeals readily conceded that the line between government regulation and taking for public use is often a very thin one[265]. (Interestingly, as we shall see in the next lecture, a not dissimilar distinction is drawn in the two parts of the property protection clause of the First Protocol to the European Convention on Human Rights.)

Is this distinction intellectually viable? Is not the State in both cases (that is, either by a taking for a public purpose, or by regulating) purporting to act in the common good? And in each case has the owner of the property not suffered loss? Under international law standards, a regulation that amounted (by virtue of its scope and effect) to a taking, would need to be "for a public purpose" (in the sense of in the general, rather than for a private, interest). And just compensation would be due.

At the same time, interferences with property for economic and financial regulatory purposes are tolerated to a significant degree.

Interesting and difficult problems arise when there is a combination of two or more of the following factors: (1) government prior involvement in the subject-matter claimed to be expropriated, whether through contract or licensing arrangements; (2) government undertaking by international contract, to refrain from exercising certain regulatory rights that would otherwise be considered normal appurtenances of government; (3) the exercise of regulatory rights that are of such dimensions and effect that they are said to amount to an "indirect taking" of the property. The interplay of these factors is well illustrated by the case of *Revere Copper* v. *Opic*[266]. A substantial investment had been made between 1967 and 1975 by Revere Copper and Brass Incorporated in its wholly owned subsidiary, Revere Jamaica Alumina Ltd. (RJA), to finance the construction and operation by the latter of a bauxite mining venture in Jamaica. A guarantee contract (essentially to "insure" the venture) had been entered into between Revere and the United

States Government Agency for International Development (AID). AID's obligations were eventually succeeded to by another agency, the Overseas Private Investment Corporation (OPIC).

An Agreement of 1967 between RJA (the subsidiary) and the Jamaica Government prescribed the amount of taxes and royalties which were to be payable to the Government by RJA. It also provided that no further taxes or financial burdens would be imposed on RJA and that the government would do nothing to derogate from RJA's rights concerning the project. These tax and royalties arrangements were to remain in place for 25 years, which was also the duration of the bauxite mining lease granted. There was the possibility of renewal for a further 25 years. However, in 1972 there was a change of government in Jamaica. It instituted a review of the bauxite industry, and then announced a programme for a drastic increase in revenues from the bauxite industry; the recovery of bauxite ore leased to mining companies; the reacquisition of all lands owned by such companies; and national majority ownership and control of the bauxite industry. Legislation in 1974 provided for the increase in revenues, notwithstanding the provisions in the contract with RJA to fix those revenues at agreed limits. The Prime Minister of Jamaica stated that this new legislation was in "exercise of our rights as a sovereign and independent State"[267]. Referring also to the energy crisis, he noted that the contracts for bauxite had been settled when oil was $ 2.00 per barrel rather than $ 14.00, and invoking the theme of *rebus sic stantibus,* even if not the language that international lawyers might have used, he said: "All of the fundamental equations have changed and such contracts have been abrogated by history as the factors that made them relevant no longer exist[268]." Bringing in sharp relief the Government's duty to its people on the one hand, and to respect international obligations on the other, he stated:

> "The renegotiation of contracts with the aluminium companies [whose position was under comparable review] is not only a necessity and the right of a sovereign nation, but an obligation to the people. These considerations outweigh the sanctity of contractual agreements[269]."

At the same time the Government explained that it did not seek nationalization as such. Negotiations to revise the 1967 Agreement failed. In 1974 the mining law was amended and royalties on

bauxite were increased. As a result, the RJA plant began to make considerable losses and ceased operating in August 1975. RJA now sought to recover under its guarantee contract with OPIC. This contract protected RJA from "expropriatory action". This term was defined to mean –

> ". . . any action which is taken, authorized, ratified or condoned by the Government of the project country, commencing during the Guaranty period, with or without compensation therefor, and which for a period of one year directly results in preventing:
>
> *(b)* the Investor from effectively exercising its fundamental rights with respect to the Foreign Enterprise either as shareholder or creditor, as the case may be, acquired as a result of the Investment;
>
> *(c)* the Investor from disposing of the securities or any rights accruing therefrom; or
>
> *(d)* the Foreign Enterprise from exercising effective control over the use or disposition of substantial portion of its property or from constructing the project or operating the same[270]".

Interestingly, excluded from the definition of "expropriatory action" was –

> "(1) any law, decree, regulation, or administrative action of the Government of the Project Country which is not by its express terms for the purpose of nationalization, confiscation, or expropriation (including but not limited to intervention, condemnation, or other taking), is reasonably related to constitutionally sanctioned governmental objectives, is not arbitrary, is based upon a reasonable classification of entities to which it applies and does not violate generally accepted international law principles."

This clause seems to infer the tests of regulatory or police powers, exercised *bona fide,* are what is critical. There is no mention of whether or not the exercise of these powers in effect removes the normal appurtenances of property rights from the owners. What is of course unclear, is whether the violation of an international contract by the *bona fide* exercise of such governmental powers *is*

an action that "violate(s) generally accepted international law principles".

Interestingly, the OPIC contract also addressed, in section 1.15, to the problem of pre-existing specific governmental undertakings:

> "The abrogation, impairment, repudiation or breach of the Government of the Project Country of any undertaking, agreement or contract relating to the project shall be considered an Expropriatory Action only if it constitutes Expropriatory Action in accordance with the criteria set forth in this section."

The strong implication of this clause was that the *bona fide* exercise of regulatory or police powers, without discrimination is not expropriatory even if in violation of a pre-existing agreement to the contrary. But, as we shall see, this was not the view taken by the Arbitration Tribunal set up under the American Arbitration Association.

In looking to see whether, notwithstanding the absence of any formal nationalization, expropriatory action under the OPIC Agreement had taken place, the Tribunal majority had some interesting things to say. The Tribunal rejected the relevance of any formal distinction between concession agreements *stricto sensu* and guaranty agreements[271]. The RJA Agreement did not itself grant rights to the mine, but it did commit the Government to providing adequate reserves of commercial bauxite. This was implemented by a mining lease. The Tribunal noted that the Government had decided to revoke all existing mining leases – but in fact had not yet actually enacted any such revocation. Did all of this – the great increase in revenues to the Government, the declared intention to revoke the licence – amount to what the OPIC Agreement describes as expropriatory action and what we have termed an Indirect Taking of Property? The Tribunal stated:

> "In our view the effects on the Jamaican Government's actions in repudiating its long-term commitments to RJA have substantially the same impact on effective control over use and operation as if the properties were themselves conceded by a concession contract that was repudiated . . . OPIC argues that RJA still has all the rights and property that it had before the events of 1974: it is in possession of the plans and other facilities; it has its mining lease; it can operate as

> it did before. This may be true in a normal sense but for the reasons stated below we do not regard RJA's 'control' of the use and operation of its properties as any longer 'effective' in view of the destruction by government actions of its contract rights[272]."

And in an interesting phrase, the Tribunal indicated that in a large industrial complex, it was the overall "decision making process that must be examined before deciding whether effective control exists and can be exercised in the absence of a stabilization agreement with the government"[273]. The Tribunal, by a 2-1 majority, reached the conclusion that effective control of the entire operation has been lost.

Essentially, it took the view that – in this particular industry at least – effective control was inseparably linked with a stabilization agreement. The explanation was offered that without it the risks could not be calculated, because "what the government did yesterday it can do tomorrow or next week or next month"[274]. That comes very close to saying that all international contracts for the exploitation of resources are inherently immutable, and that any alteration of them (because it warns that further alterations *could* in principle occur again) takes away effective control; because effective control equals rational decision making based on an ability to calculate the risks.

The Tribunal specifically rejected the need for "physical impact on a substantial portion or all of the property"[275] for a taking to have occurred. It must be remembered that this arbitration occurred in the context of a dispute over the applicability of a contract of insurance. It was not an arbitration over the liability of Jamaica under international law. A compensatable event under an insurance contract is not necessarily fully co-terminus with a violation of international law, though obviously a significant overlap is to be expected. At least in the context of the realities of insurance contracts, it was clear to the Tribunal that control had been lost even in the absence of physical intervention. The Tribunal was reinforced in this view by noting that the OPIC Revised Handbook of 1975 itself stated:

> "OPIC insurance contracts define the insurable event of 'expropriatory action' to include not only classic nationalizations of an enterprise or the taking of property, but also a

> variety of situations which might be described as 'creeping expropriation'. An action 'taken, authorized, ratified or condoned' by the project country government is considered to be expropriatory if it has a specified impact on either the properties or operations of the foreign enterprise, or on the rights and financial interests of the insured investor[276]."

The dissenting Arbitrator, Mr. Bergan, took a different view, voting for an award in favour of OPIC to dismiss the Revere Claim. He stated that Revere had not shown (as it was required to do by the OPIC contract) that the acts of the Jamaican Government had "directly resulted in preventing" Revere "from exercising effective control over the use or disposition of a substantial portion of its property". He believed that this phraseology most immediately signified "the Government's taking over the enterprise and ousting the investor from it"[277]; but conceded that it also went wider than that. He thought that many governmental acts which might threaten the enterprise nonetheless would not come within the OPIC clause. He listed among those published measures to interfere with control and use which were not in fact carried out. Arbitrator Bergan carefully distinguished the Jamaica-RJA Agreement (the interpretation of which related to Jamaica's liabilities under international law) and the OPIC-Revere insurance contract, which was governed by United States law. The matter in his view was therefore not one of international law, but the interpretation of a contract clause by the normal United States canons of construction. He ruled out, in terms, any relevance of general principles of international law relating to expropriation. He thus left open whether the enactment by the Government of Jamaica of the bauxite levy in breach of its contract with RJA, and Government statements disavowing the contract between Jamaica and RJA, were expropriations under international law, saying they "may well be"[278]. (Arbitrator Bergan does not in his dissent address the possibility that United States law, in interpreting an ambiguous provision on expropriation, would apply international law principles as part of the law of the land.) Instead he focussed on whether they were expropriatory actions within the meaning of the OPIC contract, and found they were not. He emphasized that RJA continued to be able to manage its plant, operate its business and export aluminium. The language of the OPIC contract was designed to guard against generalizations;

and Revere could not show to any precise sense that the governmental action had prevented it from control of its property:

> ". . . nothing has actually happened to RJA in respect of its property except that it has been required to pay a tax which the Government had contracted not to impose[279]".

This Arbitration Award raises issues of the greatest importance (which it only deals with in a very incidental way). What is the relationship between the principle of *pacta sunt servanda* and the exercise of governmental regulatory powers? Does it make any difference, in answering whether a contract may be broken for regulatory reasons, that the government is indeed acting for a public purpose, without discrimination and intention to retaliate for political reasons? And how crucial, in seeing whether a "taking" has occurred, is the question of physical interference?

What protection does international law provide for contract rights rather than physical property? There is certainly – leaving aside for the moment these difficult questions about regulating activities by governments – considerable authority for the view that international contract rights are vested rights entitled to the protection of international law: see for example *The Norwegian Shipowners' Claims*[280]; the *Tinoco* case[281]; and the *Shufeldt Claim*[282]. It would seem that it is not necessary for tangible property to be taken by the government for there to be a taking contrary to international law. Commissioner Neilsen, in a dictum in *International Fisheries Co. (USA)* v. *United Mexican States*[283], commented:

> ". . . an international tribunal in a case grounded on a complaint of a breach of contract can properly give effect to principles of law with respect to confiscation . . . International law . . . is . . . concerned with the action authorities of a State may take with respect to contractual rights . . . [A claim may be based on] the confiscation of valuable contractual rights growing out of an arbitrary cancellation of a contract."

(The majority in this case confined itself to a finding that, in the circumstances, the cancellation was not arbitrary.) In the *Serbian and Brazilian Loans* case[284] breaches of contract between governments and private individuals were held to be breaches of international law (which is not, of course, entirely the same as classifying the contract rights as property rights).

If a contract has specially agreed provisions for termination, the question arises as to whether it may be terminated on grounds other than those specified in the contract. May the government, in the exercise of its regulatory powers, terminate contract rights even though the private party is not at fault and even though the contract itself envisages termination only in other circumstances which have not arisen? It has to be said that opinion is deeply divided on this question[285]. The relevance of this enquiry to the concept of acquired rights (which we have looked at in an earlier lecture) is apparent. But here our focus is on the question of indirect taking of property. In the *Martini* case the Government of Venezuela granted a concession of fixed duration to an Italian company but during the civil war of 1902 (which clearly placed strong pressure on the Government, which manifestly had duties *jure imperii* to its own community) placed an embargo on the export of the product concerned. The Umpire was nonetheless unsympathetic to the Government's power indirectly to breach the concession even in these difficult circumstances – and even in circumstances not directly specifically against the private company or its national government. He stated:

> "It is not to be supposed that Lanzoni, Martini and Co. received the contract with the idea that the Government retained the power . . . to change its provisions, destroying or impairing the usefulness of the points of ingress to and from the railways or mines. To allow the existence of such a power in the Government as a contracting party would be to give one of the parties to the contract the right to destroy all the interest of the other party in it[286]."

Interestingly, Umpire Ralston found that the action of the Government might be legal vis-à-vis the world at large, but involved international responsibility to those under special contractual relationships with it. Compensation was awarded, including compensation for loss of future profits in so far as they were not speculative. In my view the right distinctions are here being drawn: governments may indeed need to be able to act *qua* government and in the public interest. That fact will prevent specific performance (including restitution) from being granted against them. But that is not to liberate them from the obligation to compensate those with whom it has entered into specific arrangements. That is

the reasonable place to strike the balance between the expectations of foreign investors and the *bona fide* needs of governments to act in the public interest.

It should be emphasized that the dilemma of regulatory control against contract expectations is not at all peculiar to the developing countries. It is a dilemma faced in every country that possesses natural resources – including those who, as major capital exporters, have placed great emphasis on the notion of acquired rights and the sanctity of contracts. A brief examination of some relevant Australian and British practice will illustrate the point.

The Australian case of *Murphyores Incorporated Pty. Ltd.* and *Another* v. *The Commonwealth of Australia*[287] raises, to the international lawyer, many of the issues underlying *Revere Copper* about indirect takings when the government itself has granted the initial contract or concession rights. In the Australian High Court the issue arose essentially as a domestic law matter. Two plaintiff companies were engaged in a joint venture to explore and develop Fraser Island, in the State of Queensland, for mineral sands. Zircon and rutile were produced from the sands for export. These activities were carried out under the Mining Act of 1968. By virtue of Regulation 9 of the Customs (Prohibited Exports) Regulations, the export of these substances required the approval of the Minister for Minerals and Energy. The business of the plaintiff companies on Fraser Island depended on their ability to export zircon and rutile. In 1974 they sought the Minister's approval for exports and were informed that this would be granted, provided that certain environmental requirements were met. The applicant companies believed that they had met, and agreed to continue to meet, these requirements. In 1974 a new Environment Protection Act came into effect, and in July 1975, acting under this Act, the Minister ordered an enquiry into the export of minerals from Fraser Island. Essentially, the possibility of obtaining an export licence now disappeared. It is of interest that the stated purpose of the export controls at their time of introduction was to maintain export prices at an appropriate level in relation to export prices from abroad, and to pursue a balanced development of mineral production. The introduction of environmental factors into export licensing occurred subsequent to the application for and granting of the mining licences that were held by the plaintiff companies. Further, the plaintiff companies acted on the reply that export

licences would be forthcoming, and made substantial investments. Thus a Minister had, acting *intra vires,* approved a course of action, which the plaintiffs relied on; but that course of action was resiled from when formal confirmation of the licences was sought.

Difficult questions obviously arise: first, was the withholding of the export licence a "taking" of property, though the mining leases themselves remained untouched and there had been no government nationalization or other direct interference? The impact of the government's acts, just as much as the revocation of the stabilization agreement in the *Revere* case[288] had a direct impact on the property rights concerned. Applying the tests suggested in that case, the plaintiffs were clearly prevented from exercising effective control over the use or disposition of a substantial proportion of their property. The only real market was an export market. Without access to that, there was no real possibility of disposing commercially of the property. Even on the test of the dissenting member of the *Revere* Tribunal there would seem to have been an indirect taking of property. In *Revere,* it will be recalled, he had said that all that had happened was that the company was required to pay an unexpected tax. Even if one accepts that somewhat formalistic proposition, it is quite clear in *Murphy-ores* that disposition of property (even if not ore) is directly interfered with; even if by indirect means.

Second, nothing would seem to turn on the distinction between contract rights and property rights *stricto sensu.* The interest of a foreign corporation in a concession does not differ, so far as the government's obligations in respect to events are concerned, from its interest in any other form of property right. Where rights are protected by contract, any nationalization, termination or significant alteration otherwise than as envisaged in the contract itself, will give rise to a claim for compensation. In the *Shufeldt* case[289] the arbitrator affirmed that Shufeldt's rights were indeed of a proprietary nature, despite the fact that they were restricted to the right to extract and export chicle – and even though the government had expressly reserved title over the area. Further, in the *Rudloff* case[290] it was stated that "the taking away or destruction of rights acquired, transmitted and defined by a contract is as much a wrong, entitling the sufferer to redress, as the taking away or destruction of tangible property".

Third, was the government entitled to engage in an indirect taking

(if such it was) by exercise of ministerial powers to regulate environmental factors? In the *Aramco* Arbitration[291] (which we may fairly describe as the high water mark of the concept of acquired rights) Aramco's concession was held to be an acquired right and not subject to any modification by the granting State without the company's consent. In that case the issue was not sharply posed as to whether a property right had been "taken": the emphasis was on interference with an acquired right. Among the arguments advanced by Saudi Arabia was the claim that international law does not exempt the grantee of a concession from the regulatory powers of the granting government. Aramco held a concession and certain supplemental agreements, which it claimed granted it the right, *inter alia,* to choose the means of transportation necessary for the petroleum it produced, including transportation overseas. It did not itself own or charter tankers, preferring instead to conclude appropriate contracts for carriage, for the most part on f.o.b. terms. In 1954 the Saudi Government entered into a contract with Mr. A. Onassis, giving him a right of priority for the transport of oil for a 30-year period. Aramco claimed that this contract was in conflict with the terms of its own concession, and had the effect of taking away an acquired right.

The Saudi Government took the view that the Onassis agreement had been ratified by Royal Decree and was now the law of the land, which was binding upon Aramco. It denied that the concession granted the company exclusive rights of transportation, and insisted that Aramco was required in any event to submit to regulatory restrictions that provided for a preferential right of transportation in favour of tankers flying the Saudi flag.

The Tribunal, relying on its analysis of the legal nature of a petroleum concession (on which see below)[292] rather than on the text of the concession, concluded that the concession – even in the absence of an express clause to that effect – gave Aramco the right to dispose of the oil. That entailed, in the Tribunal's view, the right to transport, deal with, carry away and export[293]. The Award so heavily emphasizes the rights that are to be deduced from the legal nature of an oil concession, and from the established practice of the oil industry, that it never really addresses the question of whether regulatory powers would warrant abrogation. Having satisfied itself that Aramco's interpretation of its rights under the concession is correct, the Tribunal goes no further. That

is treated as disposing of the issue, and there is no suggestion that a State's sovereign right to engage in regulatory action might lead to the abrogation of contract rights with a private party.

The *Murphyores* case did not address these issues in the international law terms with which we are familiar. In the Australian High Court the matter was dealt with solely as a question of Australian constitutional law – though one of the plaintiffs in that case was in fact a subsidiary of a United States company[294]. There was thus the possibility of international law issues being invoked while local remedies were being exhausted, and of the internationalizing of the issue by the pursuit of a claim by the United States, on behalf of the United States parent company, before an international tribunal. This was not in fact to materialize.

The case law of the European Convention on Human Rights, which we will explore in detail in our final lecture, is of interest both with regard to the notion of "indirect taking" and with regard to interferences in property rights through regulatory practices. The relevant clause[295] dealing with property rights distinguishes deprivations of property and control of use of property. The State is given very wide powers indeed in respect of the latter, in marked contrast to the *Aramco* Award. No case concerning a concession or "acquired right" in the international contract sense, has yet arisen. It is other property rights that have been at issue. But with regard to these the permitted scope of regulatory interference is very wide indeed.

The Commission has interpreted property rights fairly generously. Thus it has held that the duty to contribute to a social security scheme may give rise to a property right over certain assets thus constituted[296]. The Commission has also been prepared to concede in principle that taxation – a widely recognized sovereign power of the State – could be so high and penal as to amount to a violation of the property protection clause[297]. It tested the tax in question (which was alleged to be an indirect taking of property, as it was of an amount that could not be paid out of income, and was said to be politically motivated and discriminatory) against certain requirements[298]: and found that they were introduced to achieve monetary and economic stability within the State, and for a public purpose. Looking at the onerous incidence of the tax in question, the Commission stated:

". . . It is true that this tax took the form of a levy on capital assets; whereas, however, under Law No. 44, the maximum incidence of the tax could not exceed 25 per cent of the real value of the taxable assets and, further, it was permitted to pay the tax claim by installments over a period of ten years; whereas, in view of the general purpose of the law, the maximum percentage and terms of payment affecting the particular category of taxpayers were not such, even in combination with other applicable fiscal legislation, as could deprive Law No. 44 of the character of a tax imposed with the view of furthering the public interest."

The case of *Sporrong and Lönnroth* v. *Sweden*[299] is particularly instructive on how the institutions of the European Convention deal with the difficult questions of indirect takings and regulatory controls. In this case before the European Commission on Human Rights long-term expropriation permits had been granted in respect of the applicants' properties. These did not of themselves expropriate the property, but gave local authorities the power to do so, should they so decide, in the future. There were also constraints placed upon construction on the properties. (The City of Stockholm envisaged the building of a new viaduct which would entail the demolition of the applicant's building.) The two expropriation permits had been in force for 23 and 8 years respectively. Sporrong and Lönnroth complained that it was impossible for them to sell these properties, which were "blighted"; that investment in the properties had become unacceptably hazardous; that the uncertainty hindered them in obtaining mortgages; and that they could not build on their sites[300]. Cumulatively, this amounted to an interference with their right to peaceful enjoyment of possessions (the phraseology used in Article 1 of the First Protocol). The Swedish Government, by contrast, emphasized the public purpose of the permits system and the intentions of the City of Stockholm to make improvements for the general good. The Government also claimed –

"If the owner was prevented from exercising any of the functions which are normally inherent in the concept of property, this might constitute interference with his right to peaceful enjoyment of his possessions . . . However, as long as the owner kept all his legal rights arising from his right to

property, there was no interference with the right to peaceful enjoyment of possessions[301]."

On 5 March 1979 (after the applicants had initiated the case before the Commission) the Government decided to cancel the expropriation permits. The Commission in its Report therefore found the question of whether the permits and the prohibition on building amounted to a *de facto* expropriation "a question of terminology of little legal significance for the present cases"[302]. The reasoning of the Commission is not clear. If there had been a loss of property rights during a certain period, notwithstanding the subsequent restoration of those rights, there would still seem an issue to be answered. Alternatively, the Commission could have taken the view – but did not – that the fact the property was restored to free use by the applicants indicated that their property rights were never really lost. The Commission did, however, look to see whether there was an interference with the right to peaceful enjoyment of possessions, and if so, whether it could be justified by reference to the second paragraph of Article 1 of the First Protocol, which refers to "laws deemed necessary to control the use of property in accordance with the general interest". The Commission did not believe that the constraints upon normal property-use which the applicants identified in themselves amounted to an interference with the peaceful enjoyment of possessions within the meaning of Article 1[303]. Again, the present writer finds this hard to understand: it seems clear that there *was* an interference with entirely normal property rights, and that the real issue was whether this interference was justifiable for regulatory reasons. However, the Commission did find significant the length of time for which the measures imposed on the properties were in effect: the effects "must undoubtedly have become so severe by the lapse of time that they constituted a substantial interference with the applicants' right to peaceful enjoyment of possessions"[304]. The Commission found the measures enforced "in the general interest" and thus in principle justifiable: but queried whether the length of time made them unjustified as being disproportionate to their legitimate purpose[305]. The Commission wondered also if the length of time was really necessary, but noted that under the terms of paragraph 2 of Article 1, it had only limited competence to supervise the necessity of lawful measures imposed in the general interest.

It found there had been no violation of the right to peaceful enjoyment to property guaranteed by the Convention. The European Court of Human Rights approached the issue rather differently. Article 1 of the First Protocol reads:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

Prior to the case it had been generally assumed that claims relating to the peaceful enjoyment of one's possessions had to fall either under the second sentence in paragraph 1 of Article 1 (deprivation of possessions); or under paragraph 2 (control of use of property). The Court, however, found that a violation of the right to peaceful enjoyment of one's possessions can exist quite separately from these two provisions in that there can be prohibited interferences with the right to peaceful enjoyment of one's property, even if the government has not deprived one of it nor sought to control it for the public interest.

The Court found that the second sentence of the first paragraph was inapplicable. It found that the applicants were not "formally 'deprived of their possessions' at any time: they were entitled to use, sell, devise, donate or mortgage their properties"[306]. However, the Court also acknowledged that it must look to "the realities of the situation complained of"[307]. It did this in reliance on Convention jurisprudence[308], but in effect it amounted to seeing whether there was a *de facto* expropriation or an indirect taking. Although the Court itself had found that "the applicants' right of property thus became precarious and defeasible"[309] and that there was a long term interference with the applicants' property rights[310], it nonetheless held that this did not amount even to an indirect deprivation of possessions. This finding is in sharp contrast to the approach of the Tribunal in the *Revere* case, discussed above. It

is also difficult to reconcile with the "bundle of rights" approach to the analysis of property advanced in Chapter I.

Still more difficult is the Court's remarkably brief reasoning on the second paragraph of Article 1. In a mere eight lines the Court rejects the possibility that the applicant's property fell to be justified as a control of property for the general interest. The Court stated:

> ". . . the expropriation permits were not intended to limit or control such use. Since they were an initial step in a procedure to deprivation of possessions they did not fall within the ambit of the second paragraph[311]".

Why should – especially as the Court is enjoined to look at "the realities of the situation complained of"[312] – *intention* be relevant? Further, why should public-interest control (for such it seemed to be, if there was indeed no indirect taking of property) be ignored simply because it was an initial "step in a procedure leading to deprivation of possessions"? If an interference lasting over 20 years is not to be said to have crystallized into an indirect taking, can it properly be classified as a "first step" to a deprivation, and beyond the reach of the criteria required for control of property in the public interest? The Court's judgment does, with respect, seem extremely artificial.

However, because it found that there was a separate rule in Article 1 of the Protocol requiring peaceful enjoyment of possessions (even outside of the second sentence of paragraph 1 and of paragraph 2) it found by 10 votes to 9 that there was a violation of Article 1.

The main joint dissenters on Article 1[313] deal in equally cursory manner with arguments relating to indirect takings, providing no more analysis than the assertion:

> "The judgment then goes on to find that there was no room for the application of the second sentence of the first paragraph in the present case. On this too we agree[314]."

These dissenting judges did however find that the matter fell to be determined in relation to a control of property within the meaning of paragraph 2 of Article 1. Notwithstanding the length of time the expropriation permits and building restrictions were in effect, the dissenting judges found the measures adopted by the Swedish

authorities as compatible with the second paragraph of Article 1 of the Protocol. Again, *bona fide* intention seemed to be regarded not only as relevant (which the present writer concedes) but as determinative:

> ". . . we cannot conclude that the measures adopted by the Swedish authorities, particularly as regards their duration, went beyond the legitimate aim permitted by the terms of the second paragraph of Article 1, even if their adverse effects for the owners can hardly be denied[315]".

Is "legitimate aim" the sole test of either the general interest or of the compatibility of public control with the underlying requirement of Article 1? The present writer, while respectfully disagreeing with the judgment of the Court itself, finds difficulties too with the grounds of the joint dissent.

* * *

In this chapter we have sought to examine the problem of indirect takings of property, and its relationship with the right of the State to engage in regulatory control. Very diverse factual situations have formed the basis of our analysis. We must now see what light is thrown on this problem by a very specific legal régime – that of petroleum licences and concessions.

### *Petroleum Concessions and Licences*

To focus on the principle of *pacta sunt servanda* and on acquired rights, is to emphasize the protection that the private party has been given against either a later change of mind by the State or against the exercise of the State's regulatory powers. In the *Aramco* case the Tribunal rejected Saudi Arabia's argument that an ambiguous concession should always be interpreted in favour of the State[316]. In so far as it is exercising its regulatory powers in the public interest, a State is perceived as less constrained when it takes action against a party with whom it has not itself engaged in solemn form. To nationalize, for example, a particular industry (which may be owned in part by foreigners) is accepted as entirely lawful, provided that compensation is paid at any appropriate level and with reasonable promptness. But when the focus turns instead to the concept of permanent sovereignty over natural

resources, a very different conclusion is reached: namely, that if the principle of *pacta sunt servanda* is to be given due weight, it pales into relative insignificance when set against a State's entitlement to have access to its own resources and to use them for its own economy in the way that it thinks best. Thus one legal precept makes agreements about resources the most sacrosanct (because they are likely to be in the form of concessions); while another legal concept makes petroleum concessions almost the most vulnerable to change, because they relate so directly to natural resources.

We are here concerned not with outright nationalizations, but with what we have termed "indirect takings". Do alterations to the terms of agreements for the exploitation of petroleum amount to an indirect taking of property? We have already seen that the *Aramco* case (which undoubtedly has the flavour of an earlier era, such has been the pace of change since 1958) found that a right that was not even explicit was held to be breached by a subsequent decree and agreement with another party. But the Award was not directed to property rights or compensation for the loss thereof.

The Award does contain a detailed analysis of the legal nature of a petroleum concession[317], and we have explored this in an earlier chapter. Clearly a concession is not an ordinary contract, because, as the Tribunal put it "Any mining 'exploitation' implies an authorization by the State; as the resources of the subsoil affect the public interest, the State is anxious to prevent them from being misused or wasted"[318]. The State can try to look after this public interest in various ways, of which the two most usual alternatives would be either taking all minerals and petroleum rights into public ownership; or by providing for a system of administrative controls. When the latter route is taken the initial contract terms provide for subsequent controls. And sometimes further controls are imposed *de novo*. As the Aramco Tribunal pointed out, the question of ownership is dealt with differently in different legal systems. It used to be in French law that mining concessions transferred perpetual ownership in the mine[319]. That is no longer so: the concessionaire becomes the owner of the minerals extracted until the end of the concession period. And property rights in the mine remain with the State. We have seen from our earlier discussion that in part the government's freedom to alter concession or licence terms will turn upon the precise legal nature of the concession or

licence in question. But it is also true that there is scope for debate as to what governmental actions, taken *jure imperii,* do or do not diminish the property rights of the concessionaire or licensee.

This point is well illustrated by recent practice relating to United Kingdom licensing in the North Sea. Pre-1975 petroleum production licences were granted in consideration of payments and royalties. They incorporated the relevant model clauses set out in the Petroleum (Production) Regulations of 1966. These model clauses specified a fixed term for each licence, subject to renewal. They detailed the licensee's working obligations. The Minister had power to revoke the licence in case of listed events occurring[320]. The clear implication was that revocation would not take place for any other reason. The licences were essentially contractual in nature, and these were the terms on which the licensees entered the agreement.

In 1975 the Petroleum and Submarine Pipelines Act was passed. Articles 17 and 18 of Part II of the Act provided that the 1966 model clauses should now be read subject to the provisions of the 1975 Act. Pre-1975 licences were now to read as if they incorporated all the clauses set out in Part II of Schedule 2 of the 1975 Act. The Act introduced for the first time sweeping ministerial powers to control the rate of production. No reservation as to production rates had been made in the pre-1975 licences. The Act also provided that regulations as to interim determination of royalties should have retrospective application. An important new provision was for the payment of royalty in kind – i.e., an entitlement on the government's part to call for its royalties in oil rather than in cash[321]. The licensees' marketing arrangements with third parties had clearly not been entered with this possibility in mind. A major change was the ministerial powers concerning the agreed exploration programme, accompanied by new powers of revocation or forced surrender to be taken in respect thereof. Revocation or forced surrender in this context was not envisaged in the original licence, because the requirements that might give rise to this action also did not then exist. There was now the possibility of total revocation of the licence in circumstances not envisaged when the contracts for the licence were entered into[322]. And a whole new range of ministerial consents (i.e., approvals for actions that could previously be undertaken at the commercial and technical discretion of the licensee) were introduced.

The 1975 Act thus changed in a fundamental manner the balance

of interests between State and licensee – not only in respect of future licensing rounds, which clearly the State was entitled to do, but also retrospectively in respect of prior licences. As well as new constraints there were new additional burdens placed upon existing licensees. During the passage of the Act the retrospective character of the legislation was vigorously opposed[323]. It was claimed that the new model clauses[324] operated to deprive the licensee of rights held under contract, thus giving rise to an entitlement for compensation. (A difficult issue to resolve was whether any such deprivation of property rights occurred by virtue of the Act itself, or would be inchoate until such time as the Minister exercised his powers of, e.g., direction, refusal, revocation.)

The response of the Government was not, it is fair to say, couched in legal terms; and the issue was muddied by constant reference to Parliament's inability to fetter its future actions[325]. (That does not, of course, dispose of the issue of whether liability cannot still be incurred even in the exercise of a constitutional right: this is an issue of considerable complexity, but the English courts have in general taken the view that an implied term as to non-fettering of executive action, or an entitlement to breach a contract for reasons of executive necessity, obviates the need for compensation for loss of acquired rights[326].) Rejecting the argument that these retrospective alterations of contract rights required compensation, the Secretary of State for Energy said:

> ". . . the change in the legal framework that is available to governments and is regularly used by a whole host of environmental, health, tax and other measures, does not include the provision to compensation as a result[327]".

In another communication[328], the Energy Minister again stated that "new taxation, exchange control, safety or other requirements also modify government profits but it is everywhere accepted that these measures do not necessitate the payment of compensation". Regulatory measures of the sort indicated may indeed affect anticipated profits. But a distinction is properly to be made between a government's right to alter tax rates or to pass legislation of general application which may be financially disadvantageous to some, and measures directed against a specific party with whom it has itself entered into a contract, and which damage the very rights protected by that contract.

The Secretary of State also insisted that action taken by the government "did not impact upon the basic property rights" embedded in the contracts and therefore could not be a nationalization which gave rise to compensation[329]. There is, however, ample international authority that measures other than nationalization can effectively deprive a party of its property rights: the test is whether there is loss of effective control over the use and disposition of property. Commercial use was still possible (though more costly) and alteration of licence rights, though now subject to ministerial consent, would normally be given for an assignee of good standing. These would seem to have been more relevant and appropriate governmental responses.

The Petroleum and Submarine Pipelines Act 1975 provided not only for a new package of non-fiscal regulatory procedures, but for majority State participation in existing and future licences. This was to be achieved through the establishment of a new British National Oil Corporation, which was given powers to search for and get petroleum, and buying and dealing in petroleum[330]. The precise manner in which BNOC was to obtain 51 per cent of all North Sea licences was left for individual negotiation. Thus legislation provided the framework for the acquisition of the 51 per cent; but the precise manner was left to a company-by-company negotiation. (The provisions applied to British and foreign licensees alike, so no issue of discrimination arose.) At first sight it would seem that the acquisition of 51 per cent of petroleum produced in the North Sea would have entailed enormous compensation being paid. This the Government avoided by insisting that the arrangements were being voluntarily entered into by the petroleum companies: it was acknowledged that the 1975 Act did not itself provide statutory authority for divesting them of 51 per cent of their licence petroleum. (While this was technically true, and while negotiations proceeded at differing paces with each of the companies, the knowledge that ministerial consents were now required for many oilfield activities, and that legislation for full nationalization *could* be introduced, operated as powerful factors in inducing "voluntary" co-operation.) The Government further introduced the cardinal principle of "no win, no loss", explaining that any variety of arrangements were possible, so long as each licensee would finish up no better and no worse off[331] than if BNOC were not securing 51 per cent. The overall pattern was for

memoranda of Principles to be agreed between BNOC and individual companies, and then for prolonged negotiations to ensue to convert these into Participation Agreements. In an unusual formula, BNOC has become a co-licensee in every licence comprising a commercial oil field; but it has been usual for the oil company to retain the obligations and benefits of the licence. Thus BNOC's 51 per cent. entitlement has been not as a percentage interest owner of the licence, but rather through a guaranteed option to purchase 51 per cent. of petroleum as it became produced. This avoided paying compensation to the companies for the loss of vast property rights: BNOC became entitled to purchase 51 per cent of *their* oil – oil to which they continued to have title as it was produced and reduced into possession[332]. A variety of devices were introduced – which we need not explore here – to ensure that BNOC's right to purchase was indeed secure, i.e., virtually as secure as owning the oil itself at the moment of production[333]. In this innovative manner the State acquired secure access to vast quantities of petroleum without depriving the licensees of the essential attributes of property rights. The right of alienation of property *did* become curtailed as to 51 per cent, BNOC paid the market price and, in certain cases at least, the Participation Agreements entailed "buy back" arrangements, whereby BNOC would sell back to the company such amount of petroleum as was needed for its United Kingdom commercial requirements.

The issues in Canada are in some ways comparable to those in the United Kingdom sector of the North Sea. The Government is seeking to remove what it sees as the foreign domination of the Canadian oil and gas industry and to provide Canadians with energy security[334]. The Government has announced its intention to acquire Canadian control of a significant number of the larger oil and gas firms, leading to 50 per cent Canadian ownership of the natural resource sector by 1990. Specifically, the State-owned oil company, Petro Canada, would be entitled to a 25 per cent interest in every right on Canadian lands. The mechanism would be carried interest, i.e., with the Crown not paying for any past or present exploration costs. The carried interest approach (which was also used for BNOC and for STATOIL in Norway) has been justified by Canada on the grounds that it has already provided generous incentive grants to Canadian controlled companies and has contributed to existing exploration through generous tax policies, including depletion

allowances. But "opponents of the plan regard it as retroactive confiscation without compensation, or at least as a retroactive change in the rights and liabilities arising between the Government and the exploration companies"[335].

Again, in a remarkable parallel to the British situation, foreign firms in Canada claim that the National Energy Program constitutes what they term "creeping expropriation". United States officials have contended that the requirements of 50 per cent Canadian ownership, the granting of export licences based on Canadian ownership, and the obligation to buy Canadian goods and services, will amount to a creeping take over of United States property rights. "Creeping" expropriation is short of "indirect" expropriation, for the control over property rights is not yet lost. But to some it has an even greater danger, because the indirect erosion of property rights is so gradual, indeed insidious, that the foreign holder of property rights may be unable to identify the precise moment at which his rights effectively passed from him, and will therefore be unable to tell when he should exercise his remedy.

In the Middle East participation agreements have not been in lieu of nationalization, but have been imposed on companies after they have been brought under national control and partial nationalization[336]. This has been the case in Algeria and in Libya in the period 1968-1974[337]. The companies, including Mobil, Exxon, ENI and Occidental faced with the realities of the situation, agreed to the new form of management applicable to the concessions formerly owned by them. There was introduced a General Agreement setting forth the basic structure of participation (very similar to the United Kingdom Memorandum of Understanding), followed by Implementation Agreements to be concluded between the State and each individual company. (In the event these have not been concluded, and the General Agreement[338] is the operative one[339].) Fifty-one per cent State participation was required by 1973, but by 1974 bilateral agreements had increased the State "take" to 60 per cent. Qatar, Kuwait, Nigeria and Ecuador have similar participation requirements[340].

Unlike the United Kingdom model, where management remains essentially unchanged and beneficial title remains with the oil companies, in these participation arrangements the intention is for management participation, as well, to take part in determining crude production programmes. (Under the United Kingdom system,

BNOC gets 51 per cent of what is produced, but cannot itself determine how much is produced.) The agreements vary considerably in detail[341]. Some contain buy-back arrangements, and some have "put" arrangements, i.e., obligations upon the companies to purchase from the State, at its request, such amounts of crude as it feels it cannot sell itself[342]. The Algerian, Saudi and Libyan participation agreements compensation for the rights and assets transferred to the State are calculated on the basis of their net book value as at the date of the agreement[343]. Saudi Arabia and Abu Dhabi have paid compensation based on update book value – i.e., a sum equal to the yearly value, updated in dollars, of the capitalized expenditures calculated for 1945-1972. (Certain deductions for tax saved as a consequence are then made[344].) Payment is reasonably prompt – and indeed very much more so than is usually the case in lump-sum compensation[345] – and in agreed currency. Notwithstanding the fact that both the participation itself and the compensation arrangements have, despite their contract form, been imposed, compensation has in the views of well-placed commentators not only been "appropriate in all the circumstances", but within the range of what could be deemed "adequate, prompt and effective".

Finally, we may note that the partial compensation which paved the way for State participation has in certain cases – those of Liamco and Texaco, for example – led to the nationalization of its remaining 49 per cent interest.

## CHAPTER V

# THE TAKING OF PROPERTY AND HUMAN RIGHTS

In recent years the evolving international law on the rights of States over property located within their jurisdictions has become overlaid with parallel, but distinct, legal considerations: those that arise from the notion of property rights as human rights.

What does it mean that a right should be provided for not only by international law, but as a human right also? To answer this would take us deep into the great debate about the conceptual and philosophical underpinnings of human rights, which is clearly beyond the scope of these lectures[346]. I simply note that there are those who believe human rights to be inherent, stemming from natural law notions. Yet others believe them to be culturally based, and not always to have universal application. Are some rights "western" rights, or rights relevant only to privileged, economically developed countries? Some contend that they are hierarchical, with certain rights being basic[347]. These rights are often said to be those that are to be found in the various human rights conventions as non-derogable rights: they are absolute[348]. Certain writers take the view that these rights are essentially *jus cogens*[349] (and indeed, others have contended that all human rights are *jus cogens*[350]). Another view held is that the most basic rights are those related to survival – the right to food, for example. This view leads those holding it to give greater emphasis to at least some of the so-called economic and social rights, rejecting the view that only civil and political rights are "real" rights[351]. It may be, however, that there is no special magic in the phrase "human rights": it simply represents a set of widely shared demands, expressed with a high level of intensity, about the rights of individuals or groups vis-à-vis the State[352]. The interesting debate on these questions is for another occasion and another place, and an ample literature on it already exists[353]. But we must have it in mind when we discuss property in this context.

It is apparent that the marxist does not share the view that property rights fall within any of the alternative definitions of human rights that I have just mentioned. But nonetheless there has grown

up in the last 30 years a powerful trend, at least as a matter of treaty-based human rights law, to accord this special status to the entitlement to property.

The Universal Declaration on Human Rights, formulated in 1948, included without significant discussion a clause on property rights. Article 17 provided:

> "(1) Everyone has the right to own property alone as well as in association with others.
> (2) No one shall be arbitrarily deprived of his property."

The Declaration was not, of course, a binding instrument, even if subsequently it has assumed a legal significance beyond its status as a mere declaration[354]. The controversy between marxists and others over the designation of property rights as human rights continued. And by the early 1960s, as we have seen, the concept of permanent sovereignty over natural resources was emerging and being pressed as a legal obligation. To a significant degree it ran counter to the notions of property entitlement as a human right. It was therefore not surprising that neither the International Covenant on Economic, Social and Cultural Rights nor the International Covenant on Civil and Political Rights (both opened for signature in 1966) had private property protection clauses. The changed emphasis is underlined by Article 1 of both Covenants, which provides:

> "(1) All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
> (2) All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence."

There had been a vigorous attempt to elaborate and refine the provisions of Article 17 of the Universal Declaration, to include a binding obligation in respect of property in the Covenants, but these efforts were narrowly defeated. Eventually the consideration of the matter was ajourned *sine die*[355].

The European Convention on Human Rights was closely modelled

on the Universal Declaration of 1948. It was opened for signature in 1950 and was closer in time to the ethos of the Declaration than to the Covenants (which it preceded and which were in turn modelled on the European Convention in certain important regards). The Western European democracies selected from the Universal Declaration those rights that they deemed basic, and which they felt confident already existed in full measure in their own countries. By conforming these (sometimes in slightly revised form) in the new European Convention, they were affirming their commitment to these rights in the context of a regional treaty with very considerable teeth. The teeth lay in the inter-state procedure (Article 24) and in the potential right of an individual applicant to bring a complaint to the Commission (Article 25). Although the Article 25 procedure is optional, it has been widely accepted by the States parties to the Convention, and has been the starting point for a very considerable jurisprudence built up by the Commission and the Court. Initially, it was intended by the countries participating in the preparation of the European Convention that there should be a property protection clause. That proved, even in Western European democracies committed to mixed economies, extraordinarily difficult to achieve.

The *travaux préparatoires* reveal a variety of reasons for this. The meetings of the First Plenary Session of the Consultative Assembly in 1949 and of the Legal Affairs Committee reveal that sharply divergent opinions were expressed. Some expressed the view that in essence the right to property was an economic right, while the decision had been taken to limit the Convention to civil rights. Others conceded that a right to property existed, but thought that the machinery of the Convention was inappropriate for the protection and enforcement of such a right. The Legal Affairs Committee proposed, by 10 votes to 8, with one abstention, that "there should be a right of property in accordance with Article 17 of the Declaration of the United Nations"[356]. This proposal went to the Consultative Assembly, but met with further problems in that body. Most of those who favoured the inclusion of such a clause thought the wording of Article 17 of the Universal Declaration too uncertain and imprecise. Others objected to the recommendation of the Legal Affairs Committee, believing that property rights were no more significant than other important social rights which were not to be included. And certain governments were

engaged upon vast post-war programmes of nationalization, and were uneasy at the suggestion that the organs of the Convention might be given any possibility of reviewing any element of these. Sweden and the United Kingdom were in this position, and preferred the right to property not to be included at all[357].

The matter was referred back to the Legal Committee, which in turn set up a drafting subcommittee. By August 1950 two texts had been drafted for submission to the second session of the Consultative Assembly. Revisions were produced during the course of August. It is striking that none of these versions (including the one adopted)[358] actually stipulated the payment of compensation for the taking of property in a manner deemed unacceptable by the text. The text finally adopted by the Consultative Committee provided:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. Such possessions cannot be subjected to arbitrary confiscation. The present provisions shall not however be considered as infringing in any way the right of a State to pass necessary legislation to ensure that the said possessions are utilized in accordance with the general interest."

This text had now to secure the approval of the Council of Ministers in November 1950; but instead, it once again met with the disapproval of the United Kingdom in that organ. This lack of agreement meant that it was impossible to include a clause on property rights in the Convention, the text of which was waiting approval and the opening for signature.

The matter was now referred by the Committee of Ministers to a Committee of Experts, to see if its inclusion in a separate subsequent Protocol would be possible. The argument about compensation continued. Did the phrase "such possessions cannot be subject to arbitrary confiscation" of itself imply a right to compensation? The majority of the Committee of Experts clearly thought not[359]; and the United Kingdom Labour Government continued to oppose any specific reference to compensation[360]. It took the view that it was not possible to formulate a compensation formula in such a way that it would be appropriate to all the different types of cases that might arise. It also – in a view that was to presage views expressed a decade and more later by the newly developing countries – did not accept that it was appropriate for competent national

authorities to have their decisions on nationalization subjected to revision by international organs[361].

The United Kingdom submitted its own text:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. This provision, however, shall not be considered as infringing in any way the right of a State to enforce such laws as it deems necessary either to serve the ends of justice or to secure the payment of monies due whether by way of taxes or otherwise, or to ensure the acquisition or use of property in accordance with the general interest."

There is no doubt that the majority of delegations wanted some express reference to compensation, while the United Kingdom did not. Eventually, at the June 1951 session of the Committee of Experts, a compromise was struck: a formula was evolved in which there continued to be no reference either to arbitrary takings of property or to the duty to compensate. Instead, there was for the first time introduced reference to the general principles of international law. What did this signify? Was this the introduction of a reference to compensation by the back door? And if so, why was it accepted by the United Kingdom Government[362]? To examine this and other questions we must now turn to the text as it finally emerged in Article 1 of the First Protocol to the European Convention:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

The provision thus begins with a statement of entitlement to legal as well as natural persons to the peaceful enjoyment of possessions. There is no entitlement to ownership as such (i.e., entitlement to hold private title of goods); but an affirmation of peaceful

enjoyment of that which one possesses. This covers goods lawfully in one's possession as well as those which one owns. The entitlement is to peaceful use of that which one owns or possesses – but not a guarantee of entitlement to secure ownership of that which one does not presently own, and which in the view of the State should remain in public ownership only.

The clause then continues with a prohibition against *deprivation* of possessions (not just a prohibition on interference with peaceful enjoyment short of deprivation) save for certain specified conditions. Among those conditions are those "provided for . . . by the general principles of international law". The parties to the European Convention have, in the event, accepted that this phrase does incorporate an obligation to pay compensation for a taking of property that does not fall within the second paragraph. The second paragraph deals with what we have in the previous lecture called regulatory or police powers, and I shall return to it shortly.

Returning for a moment to the drafting history of the clause, the States concerned thought that a prohibition against arbitrary confiscation was satisfactorily implied by the requirement that any deprivation be "subject to conditions provided for by law". This also fitted well with a general drafting technique used elsewhere in the European Convention as a bulwark against arbitrariness. When exceptions are allowed to guaranteed human rights, these exceptions are invariably required[363] to be "subject to conditions provided for by law" – by which is meant, as the case law of the Convention has made clear[364], the dual requirements that the government action occasioning the violation of the guaranteed right is by duly authorized constitutional form (legislation, decree, order-in-council, common law)[365]; and that the domestic law concerned is itself compatible with the Convention and its essential purposes.

It is clear, however, that the founding States believed that it was not so much the reference to "general principles of international law" which incorporated by implication a prohibition against arbitrary confiscation, as the phrase "subject to conditions provided for by law"[366]. As for the controversy over the requirement to pay compensation, it would seem right that all the parties to the European Convention accept that a taking of the property of foreigners entails a requirement to pay compensation. Thus when Portugal ratified the First Protocol in 1978 it did so with an observation that:

> "expropriation of large landowners, big property owners and entrepreneurs or shareholders may be subject to no compensation under the conditions to be laid down by the law".

The United Kingdom entered a comment on the reservation, noting that:

> "The general principles of international law require the payment of prompt, adequate and effective compensation in respect of the expropriation of foreign property[367]."

This was supported in identical terms by France and the Federal Republic of Germany[368].

What exactly does the introduction of the phrase ". . . except . . . subject to the conditions provided for by general principles of international law" achieve? There is virtually unanimous agreement that it achieves the requirement to pay compensation to expropriated foreigners who are deprived of their property save under the circumstances of the second paragraph of Article 1 of Protocol I. Certain countries clearly also believe that the continuing standard of compensation to such foreign property owners is that of "adequate, prompt and effective": the United Kingdom, for example, has made this clear in its international pleadings, in its statements and votes at the United Nations, in its observations under the European Convention on Human Rights. The organs of the European Convention have not themselves had occasion to pronounce upon the very controversial issue of whether the general principles of international law do today require compensation that is "adequate, prompt and effective"; and/or on whether the failure to use this precise term in Article 1 of the Protocol was a deliberate attempt to leave flexible the precise standards of international law at any given moment of time.

This leads us to a related, and crucial, issue: if compensation is due, is it (under the terms of the Convention and Protocol I thereto) due only to foreigners, or to foreigners and nationals alike? In his Commentary on the then draft Protocol in September 1951, the Secretary-General of the Council of Europe indicated that:

> "the phrase 'subject to the conditions provided for by law' would normally require the payment of compensation; since it is normally provided for in legislation on the nationalization or expropriation of property[369]".

But, with respect, this does not answer the question of whether legislation to nationalize that *failed* to provide for any compensation for one's own nationals would be "conditions provided for by law" that were incompatible with the Convention. This question also remains unanswered, because the Secretary-General was certainly right in anticipating that relevant legislation in Western Europe would in fact provide for compensation: this has been true of all the post-war nationalizations in States parties to the European Convention and the First Protocol[370]. There have been very substantial variations in the compensation provided for, and in the methods of valuation, in the identification of the relevant period for measuring such valuation, and in the time over which payment is made: but there has always been provision for compensation.

Does the Convention *require* that compensation is paid to dispossessed nationals, or only to foreigners? What is the significance in this context of the introduction of the phrase in Article 1 of Protocol I "Subject to . . . the general principles of international law"? And are there other factors in the Convention and Protocol that assist in answering this problem?

We start again with the Commentary by the Secretary-General of 18 September 1951 on the then draft Protocol. Having explained that there was much unresolved discussion as to whether or not the Protocol should stipulate that "no-one should be deprived of his property except subject to compensation", he noted, as we have indicated, that the phrase "subject to conditions provided for by law" would normally entail the payment of compensation. He then continued:

> "Further, the phrase 'subject to the conditions provided for . . . by the general principles of international law' would guarantee compensation to foreigners, even if it were not paid to nationals."

The proposition may be restated thus: the silence on compensation in the Protocol entails, through the use of language, the result that as a matter of practice all persons whose property is nationalized or taken is likely to be compensated; and that there is an *obligation* to make such payment in the case of foreigners. (The precise standard of compensation depends upon one's appraisal of the requirements of contemporary general principles of international law.) This understanding was affirmed by the Committee of

Ministers in a resolution passed prior to the signing of the agreed text of Protocol I:

> ". . . that, as regards Article 1, the general principles of international law in their present connotation entail the obligation to pay compensation to non-nationals in the case of expropriation[371]".

There is evidence also, both in communications from governments and in their ratification procedures, that they understood the compensation obligation to be applicable, as a legal requirement, only to non-nationals[372].

This interpretation was in turn confirmed in the case of *Gudmundsson* v. *Iceland* before the European Commission on Human Rights[373]. In this case the Applicant, an Icelandic citizen, complained about the effect of Law No. 44 of 3 June 1957, which provided for taxation on large properties and imposed a special tax on the properties of individuals exceeding one million dronur. Mr. Gudmundsson complained that because these tax provisions were excessive and discriminatory, they amounted to confiscation. The questions that arose about whether a State can exercise its undoubted right to raise taxes in such a manner that it amounts to a taking of property have been dealt with elsewhere[374]. The Commission did find that the taxes imposed under Law No. 44 were permissible interferences with a person's right to the peaceful enjoyment of his possessions as envisaged in paragraph 1 of Article 1 of the Protocol. It also found that the taxes also fell within the provisions of paragraph 2 of Article 1. The Commission also offered this important finding:

> "Whereas, the general principles of international law, referred to in Article 1, are the principles which have been established in general international law concerning the confiscation of the property of foreigners; whereas it follows that measures taken by a State with respect to the property of its own nationals are not subject to these general principles of international law in the absence of a particular treaty clause specifically so providing; whereas, moreover, in the present instance, the records of the preparatory work concerning the drafting and adoption of Article 1 of the Protocol confirm that the High Contracting Parties had no intention of extending the application of these principles to the case of the

> taking of the property of nationals; and whereas the first Applicant is an Icelandic national and the second Applicant is an Icelandic company[375]."

This clear statement might have been thought to have disposed of the matter, but it has been suggested that there are other factors which militate against the view of the Commission in the *Gudmundsson* case, and that in subsequent case law the Commission has in fact retreated from its earlier view. The issue is now before the Commission more sharply than ever before, in a series of complaints arising out of the nationalization of the Shipbuilding and Aerospace Industries in 1977 in the United Kingdom. The Applicants in those nine cases[376], nearly all of which are British nationals, claim that the provisions of the Aircraft and Shipbuilding Industries Act 1977 fail to provide for compensation that meets the requirements of the general principles of international law within paragraph 1 of Article 1 of the First Protocol. The United Kingdom Government insists that it has in fact paid adequate, prompt and effective compensation in each case – but it also takes the prior point that the Commission in fact has no authority to review in reference to international law the taking of property of a member State's own nationals. We may therefore expect significant clarification before too long on this point.

In the meantime, we examine whether in fact there has been any discernable retreat from the clear statement in the *Gudmundsson* case, as has been alleged by certain commentators[377]. In the case of *X* v. *Federal Republic of Germany*[378] the applicant, a limited partnership of German nationality had lost certain assets in the Soviet Zone and Sudetenland in the Second World War. He claimed that subsequent domestic legislation (the General Act on the Sequels of War) prevented him from securing compensation for such losses, and was thus incompatible with Article 1 of the First Protocol. The Commission affirmed *Gudmundsson* in specific terms, making it absolutely clear that Article 1 provided no basis for a claim for compensation by a national, as a claim to compensation could only arise as a general principle of international law:

> "Whereas Article 1 of the Protocol does not require a State which deprives its nationals of their possessions in the public interest and subject to the conditions provided for by law to make compensation therefor."

It continued by citing its finding in the *Gudmundsson* case. In my view, none of the subsequent case law on Article 1 of the Protocol indicates a change of heart. Certain of the cases are simply about a government's entitlement to deprive a national of his property in the public interest, subject always to conditions provided for by law. The Commission's affirmative finding on this point has meant that it has not felt it necessary to go any further: no requirement of compensation for nationals arises in these circumstances[379]. In the case of *Muller* v. *Austria*[380] the Applicant had claimed that the effects of a social security convention, whereby he partially lost his right to a full pension and to the payment of relevant contributions, amounted to expropriation. The Commission declared that it could not without further study of the merits know whether there was indeed a property right that arose from the particular pension scheme in which the applicant was involved. The case was therefore found admissible – but no question arose of duties to compensate the Applicant by virtue of the reference in Article 1 of the Protocol to the general principles of international law.

In the case of *X* v. *Austria*[381] the Applicant claimed that rent control legislation was an expropriation, and that he was entitled to compensation in respect thereof. It is true that the Commission did not reject the case on grounds that a national has no entitlement to compensation for a deprivation in the public interest – but this was because it found that rent control legislation was not a deprivation of possessions within the meaning of the second sentence of Article 1 of the Protocol. Therefore the Commission did not have to consider whether there was a taking "in the public interest"; and still less whether compensation was due to a national.

Rather surprisingly, it was contended by the Advocate-General in the EEC Treaty case of *Hauer* v. *Land Rheinland-Pfalz*[382] that the case law of the European Convention on Human Rights was internally contradictory on whether compensation was due to nationals who were deprived of their property. In my view the cases, when properly read, are consistent. The Advocate-General suggested, however, that the *Handyside* case indicated that the *Gudmundsson* principle was now in decline, and that the Commission's decision in *Handyside* leads to "the result that nationals too must be accorded the right of compensation". With respect, I believe this is to misread the *Handyside* case[383]. That case was

brought under Article 10 of the European Convention on Human Rights, which guarantees freedom of expression: the "property" issue in that case arose out of the seizure, and subsequent destruction (pursuant upon a decision of a magistrates' court) of a book aimed at school children and alleged to be obscene. The destruction of the book was a deprivation of property (though the seizure was an interference with property that fell to be considered under the second paragraph of Article 1 of the First Protocol). Mr. Handyside, the publisher of the book, was a national of the Government which he claimed had illegally deprived him of his property. Was compensation due to the Applicant, and did the first paragraph of Article 1 require it, notwithstanding *Gudmundsson*? The Commission referred to its own findings in the *Gudmundsson* case (that a national was not entitled to the compensation that international law requires for the taking of property of foreigners) and continued:

> "In the Commission's opinion, Article 1 of Protocol No. I requires member States to respect the property of 'every natural or legal person' within their jurisdiction, which of necessity includes nationals. To decide otherwise would be to render the Article meaningless. Article 1 'se dirige essentiellement contre la confiscation arbitraire de la propriété' . . .[384]."

This delphic utterance seems to me not at all to lead in the direction that the Advocate-General supposes – there is no statement that *Gudmundsson* is now being departed from, but rather an affirmation that national and non-national alike are entitled to protection from arbitrary confiscation of their property. The *travaux* have already shown us that protection against *arbitrariness* was guaranteed by the introduction of the phrase "according to conditions provided for by law" and not by the introduction of the reference to general principles of international law. The requirements of public interest and conditions provided for by law are the means of protecting the rights of nationals under Article 1 of the Protocol. Certainly in the *Handyside* case the Commission at no time appeared to be applying the tests of international law on the destruction of the Little Red Schoolbook. (The case went on to the Court, but this issue then ceased to be sharply in focus[385].) The remarks of the Advocate-General in the *Hauer* case were in any event technically obiter, in that he did not consider Article 1,

paragraph 1, of the First Protocol as applicable to the facts of the *Hauer* case; and nor did the European Court of Justice – which itself offered no view on the question of compensation in relation to nationals.

The recent important case of *Sporrong and Lönnroth* v. *Sweden*[386] establishes significant new principles for the protection of property under Article 1 of the First Protocol. In that case the Applicants claimed that the effects on their property caused by so-called long-term "expropriation permits" amounted to a taking of property. Under the 1972 Expropriation Act, the Swedish Government is entitled to issue an expropriation permit to a public authority. This does not make certain that an expropriation of the property in question will take place, but it gives the potential authorization. The property in question was also subjected to certain laws prohibiting construction. We have examined the facts of this case in more detail in the chapter on "indirect takings", but here simply note that Sweden contended that a country's own nationals were not entitled to compensation under the second sentence of the first paragraph of Article 1. The Commission never had to reach this question, as it found that there had been no deprivation of property under Article 1, paragraph 1.

The Court approached the issue rather differently. It, too, found that there was no deprivation of property under Article 1, paragraph 1, as the applicants "were entitled to use, sell, devise, donate or mortgage their properties"[387]. The Court was prepared to proceed to see if there was a *de facto* expropriation. Although it acknowledged that limitations had been placed on the right to property, which right had itself "lost some of its substance"[388], there was still no deprivation. Questions of compensation thus again did not arise.

But other aspects of the case are of great interest, too. In a very cursory analysis of those provisions, the Court found that the expropriation permits equally did not fall under the second paragraph of Article 1 of the Protocol – i.e., "control [of] the use of property in accordance with the general interest . . .". This was said to be because "the expropriation permits were not intended to limit or control such use. Since they were an initial step in a procedure leading to deprivation of possessions, they did not fall within the ambit of the second paragraph[389]." I have offered my views on this finding in the preceding chapter[390].

In a novel interpretation of Article 1 of the Protocol, the Court now held that although the permits fell neither within the second sentence of the first paragraph ("deprivation") nor the second paragraph ("control"), there was *still* an obligation to ensure compliance with the rule contained in the first sentence of the first paragraph. Thus interferences with property may occur, apparently, that are neither deprivations nor control for a public purpose; but a separate test exists to see whether such an interference violates "the right to property". This test consists of a determination by the Court of whether "a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights"[391]. The Court's judgment leads to the view that the balance is *not* just to be struck by seeing if an interference with the right falls within a permitted exception, but by a separate "balancing test" – in which in this case the failure to provide a modifying procedure for the permits was critical.

This judgment seems to the present writer unfortunate: the recoiling from the task of identifying "indirect takings", coupled with a singular interpretation on the facts of paragraph 2 of Article 1, has led to a State being permitted to interfere with property rights beyond the broad limitations already expressed in the Article, contingent upon a further "balancing test" of uncertain content.

We have looked at the text, the *travaux* and the case law in relation to this point on the compensation standards due to a national, *qua* human right, for deprivation of his property. There are obviously questions of interpretation and of principle that we must also consider.

It is true that Article 1 speaks of "every" in the first sentence and of "no-one" ("nul") in the second sentence. Do these inclusive words lead one to believe that the compensation standards of general international law apply to nationals and non-nationals alike? "Every . . . person" in the first sentence of Article 1 simply affirms that nationals and non-nationals alike are entitled in principle to the peaceful enjoyment of their possessions. It tells us nothing on the question of compensation. As for "no-one" in the second sentence, that tells us that no-one shall be denied the rights guaranteed by Article 1. But it does *not* define those rights for us. And it does not tell us whether the text itself distinguishes between rights of compensation for foreigners and for nationals (which the present

lecturer believes it does). To say that no-one shall be denied his rights does not of itself enlarge or alter the right specified.

By the same token, the fact that Article 1 of the Convention requires the parties to secure to everyone within that jurisdiction the rights and freedoms in the Convention, and, by extension, in the Protocols, is neutral in this regard. Again, it does not tell us what those rights and freedoms *are*, and whether the Protocol *does* require compensation to be paid to nationals.

A comparable problem concerns the question of discrimination. Article 14 of the European Convention provides that –

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

This provision applies equally to the protocols of the Convention. Can it be said that acknowledgement of an international law duty to compensate aliens for the taking of their property, while denying compensation to a person on the grounds of his nationality, viz. that he is a national of the expropriating State, is a discrimination under Article 14 of the Convention? I think not, because the reference is to non-discrimination in respect of the rights and freedoms set forth in the Convention and its Protocols. And if Protocol I itself does *not* provide a right of compensation for non-nationals, then there is no discrimination in not according them rights that the Protocol makes available to others. We are driven, once again, back to the meaning of Article 1 of the Protocol; the non-discrimination provision is consequent upon an answer to that, but does not, of itself identify the right.

(We may note at this juncture that the Convention itself does on occasion differentiate between nationals and aliens: thus Article 16 stipulates that the provisions of the Convention shall not prevent the High Contracting Parties from imposing restrictions on the political activities of others[392].)

Academic opinion is divided on this interesting question. Certain writers who have addressed the issue in some depth take a contrary view to the one here expressed: see for example the writings in this area of Schwelb, Bockstiegel and Partsch[393]. I have endeavoured, in my observations above, to address myself to the points

that they make. Other leading commentators on the European Convention, admittedly addressing the issue in less specialized detail, nonetheless take a different view. Such commentators include Fawcett and Robertson[394]. It is to be expected that the forthcoming cases being brought in relation to the United Kingdom Shipbuilding cases will greatly clarify the issue. The organs of the Convention are likely to be greatly concerned, as they always are, with promoting the objectives and purposes of the Convention. This will be a major consideration in the techniques they employ to interpret the Protocol, and in the use they make of the *travaux*. But it must be borne in mind that the right guaranteed is the "entitlement to the peaceful enjoyment of [one's] possession". The intellectual issue is therefore whether the payment of compensation, at the international law standard, to a national is necessary to guarantee the peaceful enjoyment of his possessions; or whether this can be achieved by reference to the public interest and conditions provided for by law.

It was important for the Convention not to derogate from those rights already available to foreigners under general international law. In so far as Article 1 of the Protocol provides limited (and heavily qualified) support for the notion of property rights as human rights, the alien's position is improved in that he no longer needs to seek the diplomatic protection of his own government in order to bring an international claim. The nationality of claims rule – with all its attendant disadvantages so far as the individual is concerned – ceases to be applicable, and the individual can seek himself to claim legal rights attributable directly to him by virtue of Article 25 of the European Convention. But although both the foreigner and national benefit from having their right to peaceful enjoyment of their possessions confirmed as a human right, they do remain in different positions vis-à-vis the State that decides to take their property. As it has been put[395]:

> "Beneficial as nationalization may ultimately prove to be to a State and its citizens, there is little to justify placing the burden of a State's economic experimentation upon the shoulders of the foreign investor, who has neither any voice in the decision to indulge in such experimentation, nor any status to enjoy whatever benefits may ultimately be derived therefrom."

This, of itself, is reason enough for international law to require compensation to be paid to foreigners; but not necessarily to nationals.

I turn now to a different set of questions. First, what is meant by the provision in the second sentence of Article 1 of the first Protocol that "No-one shall be deprived of his possessions *except in the public interest*"? The more familiar phraseology of general international law has been that a taking must be "for a public purpose". A public purpose is an objective test, and the requirement has generally been understood as a means of differentiating takings for purely private gain on the part of the ruler from those for reasons related to the economic preferences of the country concerned. Such controversy as there has been over the international law phrase "public purpose" has centred on whether retaliatory takings may be deemed takings for a public purpose[396]. In the Protocol the somewhat different phrase of "in the public interest" is used. This appears at first sight to be a more subjective phrase, requiring an assessment by the Commission or Court as to whether measures purporting to be for a public purpose are in fact in the public interest. In fact, the organs of the Convention have shied away from such an interventionist interpretation. The European Convention is definitionally only open to the democracies of Western Europe, and the Commission appears to have taken the view asserted by the democratic organs of the parliaments of a member that a measure serves a public purpose, is very compelling. Thus in a case brought against the United Kingdom in respect of its nationalization of the Iron and Steel Industry in 1967, the Commission said that the Iron and Steel Act of 1967 was enacted "by the legislature for the purpose of serving a public interest, namely the establishment of a sound economic base for the British Iron and Steel Industry"[397]. Furthermore –

> "The reversal by the House of Commons of the House of Lords amendments on the very measure in issue shows that it was the view of the legislature that this measure was essential for the implementation of the policy of the Act and therefore in the public interest."

This seems to come very close to saying that that which a democratically elected Parliament decides is needed is definitionally in the public interest. When a Parliament elected by the people,

operating within democratic principles of accountability, decides after careful debate on certain measures, it is very difficult for an international tribunal to offer a contrary view that the proposals are *not* in the public interest. Of course, the Commission will have a more significant task in making its own appraisal of whether measures are "in the public interest" when the measures are not in legislative form, but arise, e.g., from court judgments or administrative decisions. Thus in the *Handyside* case the taking of property arose as a result of a magistrate's decision about the obscene nature of a book being circulated among schoolchildren. The Commission has stated in terms, governments will be accorded a "margin of appreciation"[398] when the Commission assesses whether measures taken were in the public interest.

The first paragraph of Article 1 of the Protocol also provides that the guaranteed rights may only be interfered with by the State "subject to the conditions provided for by law". We have seen that this is intended as a guarantee against arbitrariness on the part of the State. More precise interpretation still awaits clarification in the case law. Other clauses in the Convention contain similar, but not identical, phrases. Thus Article 5 of the European Convention, which guarantees the liberty of the person, stipulates that no-one shall be deprived of his liberty save in accordance with "a procedure prescribed by law". Articles 9 (freedom of religion), 10 (freedom of expression) and 11 (freedom of association) allow such limitations "as are prescribed by law". And Article 8 (right to family life) prohibits interference with the right there guaranteed "save such as in accordance with the law". In the *Winterwerp* case[399], where the Court was concerned with issues arising under Article 5, it indicated that the phrase "a procedure prescribed by law" required procedures that were of themselves in conformity with the Convention. Whether the phrase "subject to the conditions provided for by law" in Article 1 of Protocol I carries overtones beyond the requirement of non-arbitrariness remains to be elucidated.

We have concentrated so far on deprivations of possessions within the first paragraph of Article 1 of the Protocol. But paragraph 2, it will be recalled, stipulates that "the preceding provisions" shall not "impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties". It is important that the non-impairment

clause refers not just to the basic enunciation of the property right in paragraph 1, i.e., not just to the entitlement to peaceful enjoyment of one's possessions. It refers equally to all the qualifications so carefully built in to the second sentence of paragraph 1 also. Thus the entitlements to what we may broadly term "State regulatory powers" in paragraph 2 are apparently exempt from the requirements even of "public interest" and "conditions provided for by law". That may however be too broad a reading, because paragraph 1 is not to "impair" the regulatory powers; the qualifications upon State interference perhaps remain intact in so far as they can be shown not to "impair" these powers.

The matter is certainly not clear from the case law, and indeed one may say that the relationship between the two paragraphs is often, in the jurisprudence of the Commission and Court, very difficult to follow.

The first paragraph is about the taking of property (including, arguably, indirect takings of property). The second paragraph is about *the control of the use of property,* where the State is given wide powers. The difficulty, as we have seen in the previous lecture, is that a point can occur at which the control of property (unprotected by the provisos of paragraph 1) is so substantial that it amounts to a taking of property.

In the case of *X* v. *FDR*[400] the applicant owned a house. New legislative measures were introduced in Germany in 1948 whereby the Reichmark was to be replaced by a Deutschmark and there was to be a reduction by 90 per cent of all capital, including in the form of mortgage deeds or bank accounts. The applicant held mortgages to the value of RM 8,000, secured in part by bank deposits of RM 3,000. All the assets held by the applicant were reduced to 10 per cent of their previous value: at the same time claims on him (such as his liability for the mortgage on his own house) were also reduced to 10 per cent of their previous value. The Applicant complained that his assets had been reduced to 10 per cent of their previous value whereas his liabilities had *not* been comparably reduced. The capital owed by him exceeded the mortgage on his house; and his newly devalued capital covered only a small amount of the mortgage held by the State. The Commission stated that the applicant was claiming that his "right to use of property [has] been infringed"; whereas in my opinion the applicant was claiming a deprivation of property. In any event, in its findings on the law,

the Commission says that the legislation in question was in the public interest and subject to the conditions provided by the relevant law, and was therefore "not inconsistent with the right to peaceful enjoyment of possessions" and was consistent with the requirements of paragraph 1. But the Commission continues by stating that the measures were of the character indicated as permissible under paragraph 2. The reasoning is, with respect, confused and unclear. The Commission could have taken the opportunity (if such was its thinking) to say that these measures were justified by virtue of their paragraph 2 nature; and that even if they were not, they would succeed under the permitted exceptions of paragraph 1. But its decision was not formulated in this way.

In the *Handyside* case, to which we have already referred, the Commission and later the Court were concerned both with an interference with property (the withdrawing of the Little Red Schoolbook) – and with deprivation of property (its destruction). We have already explained that in that case the Court did not feel it necessary to deal with any claims for compensation, because it found the measures to be authorized under the *second* paragraph of Article 1 of the Protocol. But the Court had itself conceded that forfeiture and destruction were a permanent deprivation, thus seeming to make the *first* paragraph applicable. In fusing the two paragraphs in this way the Court is giving an extremely wide meaning to "control the use of property", and is in effect acknowledging the arguments of the previous lecture – that extensive controls can equal permanent deprivation. But what is disconcerting in the context of the European Convention is that the more that permanent deprivations are assimilated to controls over property for regulatory purposes, the more the State will be able to argue that it owes no duty to compensate a foreigner. It is true that in the *X* v. *FDR* and *Handyside* cases the Applicant was a national where – in my view – compensation would in any event not have been applicable. But this was not the point on which these findings turned.

The second paragraph of Article 1 refers to the control of the use of property "in accordance with the general interest". This is a provision that stands on its own ("in accordance with the general interest *or* to secure the payment of taxes or other contributions or penalties") and would seem to be very wide reaching. Again, the distinction to be drawn between "the general interest" in

paragraph 2 and "the public interest" in paragraph 1 still awaits authoritative pronouncement. But the plausible suggestion has been made by a distinguished commentator[401] that "the public interest" contrasts with private, personal interests; whereas "the general interest" is used in contradistinction with sectional, group interests. But here, too, matters are for the moment unclear, and there is unexplained cross-referring in the case law. For example, in the *Gudmundsson* case, the question of whether a tax on capital assets was compatible with Article 1 of the Protocol was tested by reference to "the public interest" rather than by reference to "the general interest", though tax measures are among those that fall to be determined under paragraph 2 of Article 1.

It is thus clear that property rights as human rights are still in a very formative stage. The European Convention is likely to provide the major focus for developments – the right is not contained in the Covenants, and although it is to be found in the American Convention, other human rights needs in that continent will surely prove more desperately pressing[402].

* * *

What I hope nonetheless to have shown in these lectures is that questions relating to property in international law need to be looked at as a coherent whole. Questions of permanent sovereignty over natural resources, compensation, public interest, concessions, regulatory controls, human rights, are all intertwined. If we isolate them we exclude relevant factors from our consideration. These lectures represent an attempt to mark out a more comprehensive approach to the contemporary international law of property.

## NOTES

1. See, *inter alia,* G. White, *Nationalisation of Foreign Property,* Stevens 1961 ; I. Foighel, *Nationalisation and Compensation,* London 1964 ; B. Wortley, *Expropriation in Public International Law,* Manchester, 1959; D. Lapres, "Principles of Compensation for Nationalized Property", 26 *ICLQ* (1977), 97-109 ; F. Francioni, "Compensation for Nationalisation of Foreign Property : the Borderland between Law and Equity", 24 *ICLQ* (1975), 255-283 ; A. Akinsanya, *The Expropriation of Multinational Property in the Third World,* New York, NY (1980); M. Sornarajah, "Compensation for Expropriation: the Emergence of New Standards", 13 *Journal W. Trade Law* (1979), 108.

2. "Expropriation" is variously used in the literature and the case law, but its most generally accepted meaning is of a taxing by the State which does not result in the direct management or control of the property by public bodies. It may affect an entire industry or individuals. Nationalization by contrast entails large-scale takings by virtue of a legislative or executive act for the purpose of transferring the interests into public-sector use. See F. Francioni, *supra,* note 1, at 257 ; G. White, *ibid.,* 41-50.

3. E.g., D. Weigel and B. Weston, "Valuation upon the Deprivation of Foreign Enterprise : a Policy-Oriented Approach to the Problem of Compensation Under International Law" in *The Valuation of Nationalized Property in International Law,* ed. R. Lillich, 1972, Charlottesville, Va, Vol. 1, p. 3 ; N. Girvan, "Expropriating the Expropriators : Compensation Criteria from a Third World Viewpoint", *ibid.,* Vol. 3, p. 149 ; F. Dawson and B. Weston, "'Prompt, Adequate and Effective' : a Universal Standard of Compensation?", 30 *Fordham Law Review* (1962), pp. 727-753.

4. M. McDougal, H. Lasswell, W. M. Reisman, "Theories about International Law : Prologue to a Configurative Jurisprudence", 8 *Virginia J. Int. Law* (1968), pp. 189-299.

5. B. Ackerman, *Private Property and the Constitution,* Yale UP, 1977, at p. 3 and note 6.

6. Especially R. Lillich, *Valuation, etc., supra,* note 3, and contributions contained therein ; R. Dolzer, "New Foundations of the Law of Expropriation of Alien Property", 75 *AJIL* (1981), 553-589 ; D. Vagts, "Coercion and Foreign Investment Rearrangements", 72 *AJIL* (1978), 35 ; O. Schachter, "The Evolving Law of International Development", 15 *Columbia J. Transnational Law* (1976), 1.

7. See F. H. Lawson and B. Rudden, *The Law of Property,* 2nd ed., OUP, 1982, pp. 110-113.

8. K. Katzarov, *The Theory of Nationalisation,* London (1964), at p. 103.

9. F. H. Lawson and B. Rudden, *op. cit.,* note 8, at p. 4. But cf. K. Renner, *The Institutions of Private Law and Their Social Functions,* London, 1949, p. 19.

10. B. Ackerman, *op. cit.,* note 5, at pp. 113-150.

11. For helpful analysis, see Weigel and Weston, *supra,* note 3 ; Amerasinghe, "The Quantum of Compensation for Nationalized Property" in *Valuation, etc.,* ed. Lillich, *supra,* note 3, at p. 91 ; H. Hu, "Compensation in Expropriations : a Preliminary Economic Analysis", 20 *Virginia J. Int. Law* (1979), 61.

12. *Liamco* v. *Libya,* 20 *ILM* (1981), 1 ; 62 *ILR,* 140.

13. 20 *ILM,* 1 at 53.

14. Charles Reich, "The New Property", 73 *Yale Law Journal* (1964), pp. 738-787.

15. See 14 *Yearbook* of the ECHR, p. 224.

16. The protection of which was guaranteed even as early as the Ten Commandments.

17. Katzarov, note 8, *supra,* at p. 3.

18. W. Nippold, *Die Anfänge des Eigentums bei den Naturvölern und die Entstenhung des privateigentums* (1954), Mouton.

19. Cf. E. B. Pashukanis, *Law and Marxism,* London, 1978, p. 122 and I. Seidl-Hohenveldern, "The Social Function of Property and Property Protection in Present-Day International Law" in *Melanges in Memoriam Prof. van Panhuys,* The Hague, 1980, p. 79, note 9.

20. Katzarov, *supra,* note 9, at p. 4.

21. G. Hardin, "The Tragedy of the Commons", in B. Ackerman, *Economic Foundations of Property Law,* Boston, 1975.

22. B. Ackerman, in Ackerman, *Economic Foundations, etc.,* p. 121. For an examination of this question under Roman law, see Seidl-Hohenveldern, *op. cit., supra,* note 10, at p. 80.

23. B. Wortley, "Some Early but Basic Theories of Expropriation", 20 *German YBIL* (1977), pp. 236-245 at pp. 236-237; and see *The Summa Theologica,* 1929, trans. by Fathers of the English Dominican Province, cited by Wortley, note 25, at p. 237.

24. Seidl-Hohenveldern, *op. cit., supra,* note 10, at p. 79.

25. Katzarov, *supra,* note 9, pp. 291 ff.

26. And see, e.g., Gierke, *Deutsches Privatrecht,* Vol. II, p. 349, Leipzig (1917), who states that a rigid concept of property was alien to medieval law.

27. L. Hjerner, *The General Approach to Foreign Confiscations,* Studia Juridica Stockholmiensia 5, 1959, p. 183.

28. Pashukanis however thinks this is a "mere liberal sop". See Katzarov, *supra,* at p. 107.

29. For an elaboration of municipal law significance of this concept, see Ackerman, *Private Property and the Constitution,* at p. 154.

30. *Ibid.,* p. 155.

31. K. Marx, *Critique of Political Economy,* at p. 140.

32. E. Pashukanis, *Law and Marxism,* at p. 127.

33. See, e.g., J. Sax, "Takings and the Police Power", 75 *Yale LJ* (1964), 36.

34. B. Ackerman, *Private Property and the Constitution,* pp. 2-5.

35. The present writer here agrees with the point made – in the context of United States constitutional law, by F. Michelman, "Property, Utility and Fairness", in B. Ackerman, *Economic Foundations of Property Law,* note 21, at p. 113.

36. *Ibid.,* 102. See also Lars Hjerner, *op. cit.,* at p. 194, who speaks of the distribution of confiscation risk; and I. Brownlie, "Treatment of Aliens: Assumption of Risk and the International Standard", in *Festschrift für F. A. Mann* (1977), 3-9, Munich.

37. Leading scholarly guides to this source material include I. Foighel, *Nationalisation,* 1959; G. Fouilloux, *La Nationalisation et le droit international public,* 1962; G. White, *Nationalisation of Foreign Property,* 1961; B. Wortley, *Expropriation in Public International Law,* 1959; I. Seidl-Hohenveldern, *Internationales Konfiscations und Enteignungsrecht,* 1952.

38. M. McDougal and M. Reisman, "The Prescribing Function: How International Law is Made", 6 *Yale Studies in World Public Order* (1980), 249.

39. International law is necessarily concerned with the promotion of certain values, and a mere "holding of the ring" between alternative values (some of which may be deemed repugnant and contrary to notions of universality or human rights, is unacceptable.

40. For a clear statement of territorial jurisdiction see Marshall CJ in *The Schooner Exchange* v. *McFaddon* (1812) 7 Cranch 116; *Compania Naviera Vascongado* v. *SS Christina* [1938] AC 485, per Lord Macmillan at pp. 496-497.

41. E.g., *U.S.A. and France* v. *Dollfus Mieg et Cie and Bank of England* [1952] 1 AER 572; *Vavasseur* v. *Krupp* (1878) 9 Ch D 351.
42. S. Sucharitkul, *State Immunities and Trading Activities,* Stevens, 1959, Ch. 5; R. Higgins, "Recent Developments in the Law of Sovereign Immunity in the United Kingdom", 71 *AJIL* (1977), 423.
43. See Oppenheim, *International Law,* 8th ed., Vol. 1, p. 34; the *Parlement Belge* (1880) 5 PD 197, 214, 217, per Brett LJ.
44. See, e.g., United Kingdom State Immunity Act 1978, s. 13 (4).
45. See US Foreign Immunities Act 1976, s. 1602; cf. s. 13 UK State Immunity Act.
46. *Ibid.* See also G. R. Delaume, 71 *AJIL* (1977), 399-422; R. B. von Mehren (1978), 17 *Col. J. Trans. Law* (1978) 33-66; R. Higgins, "Execution of State Property: UK Practice", XXIX *Neth. Int. Law Review* (1982), 265; J. Crawford, "Execution of Judgments and Foreign Sovereign Immunity", 75 *AJIL* (1981), 820.
47. See Crawford, *supra,* note 46, at pp. 867-869.
48. Cf. s. 14 (4) UK State Immunity Act and s. 1611 *(b)* (1) US Foreign Sovereign Immunities Act.
49. Thus State immunity is properly to be regarded as an exception to the fundamental rule of territorial jurisdiction.
50. As in the case of *1° Congreso del Partido* [1978] 3 WLR 328 HL.
51. An attempt at codification is now being attempted by the International Law Commission under the rapporteurship of Ambassador Sucharitkul.
52. See Cheshire, *Private International Law,* 9th ed., Ch. VI.
53. Below, pp. 284-285.
54. 44 Fed. Reg. 65,956 (1979), consolidated and amended on 1 July 1980, 31 CFR Pt. 535 (1980). See also 46 Fed. Reg. 141,330 (1981).
55. See Exec. Order 12,205, 7 April 1980 and consequent Treasury Amendments to the original orders, reprinted in 74 *AJIL* (1980), 668.
56. "Interference" being the term used in respect of property rights under the European Convention on Human Rights: see Art. 1, Protocol 1.
57. 50 USC, s. 1701 (Supp. 111, 1979).
58. *Ibid.* See also R. Edwards, "Extraterritorial Application of the US Iranian Assets Control Regulations", 75 *AJIL* (1981), 870.
59. "Current transactions" are broadly defined in IMF, Art. XXX *(d).*
60. Executive Board Decision No. 144, 1976.
61. See note 57 above.
62. The US notified the IMF of the initial restrictions on 29 November 1979, as of the amendments thereto on 28 April 1980.
63. Major litigation commenced over this matter in both London and Paris: see Hoffman, "The Iranian Assets Litigation", in *Private Investors Abroad – Problems and Solutions in International Business in 1980* (ed. M. Landwehr, 1980); Edwards, *op. cit., supra,* note 58, at pp. 876 ff.
64. For texts, see *ILM* (1981).
65. I.e., by 28 May 1980.
66. See Statutory Instrument 1982 No. 512; and Emergency Laws (Re-Enactments and Repeals) Act 1964.
67. A. McNair and A. Watts, *The Legal Effects of War,* Cambridge, 4th ed., 1966, pp. 355-356.
68. For example, through Trading with the Enemy Legislation, commonly employed in all jurisdictions. See McNair and Watts, pp. 343-365.
69. G. Schwarzenberger, *The Law of Armed Conflict,* Vol. 11, pp. 767-782, Stevens, 1968.
70. *Shufeldt Claim,* US Dept. of State *Arb. Series* No. 3 (1930), at pp. 876-877.
71. See, e.g., F. A. Mann, "The Doctrine of Jurisdiction in International Law", 111 *Recueil des cours,* Vol. 111 (1964).

72. *UK* v. *Iceland Fisheries Jurisdiction* case, *ICJ Reports 1951.*
73. See Kaeckenbeeck, "La Protection Internationale des Droits Acquis", 59 *Recueil des cours* (1937), 341; D. O'Connell, *The Law of State Succession,* pp. 263 ff. (1956), Cambridge.
74. Ko Swan Sik, "The Concept of Acquired Rights in International Law", XXIV *Neth. Int. Law Review* (1977), 120.
75. *Ibid.*, p. 134.
76. Y. Blum, *Historic Titles in International Law,* 1965, pp. 52-53, The Hague.
77. *Island of Palmas* case (*Netherlands* v. *US*) (1928), 2 *UNRIAA* 829.
78. See *Minquiers and Ecrehos* case, *ICJ Reports 1953,* p. 47 and p. 56.
79. *German Settlers'* case, *PCIJ, Ser. B, No. 6,* p. 36.
80. Ko Swan Sik, *op. cit., supra,* note 74, at note 40.
81. *Ibid.*, p. 129.
82. Including: G. White, "A New International Economic Order?", 16 *Virginia J. Int. Law* (1975-1976), p. 331; A. Rozenthal, "The Charter of the Economic Rights and Duties of States and the New International Economic Order", *ibid.*, p. 312; B. Weston, "The Charter of Economic Rights and Duties of States and the Deprivation of Foreign Owned Wealth", 75 *AJIL* (1981), 437; F. V. Garcia-Amador, "The Proposed New International Economic Order: a New Approach to the Law Governing Nationalization and Compensation", 12 *Univ. Miami J. Int. Law* (1980), 1; H. J. Geiser, "A New International Economic Order: its Impact on the Evolution of International Law", 9 *Annals of Int. Studies* (1978), 97; C. Brower and J. Tepe, "The Charter of Economic Rights and Duties of States", *Int. Lawyer* (1975), 295.
83. K. Hossain, "Permanent Sovereignty over Natural Resources", in Hossain (ed.), *Legal Aspects of the New International Economic Order* (1980), London, pp. 33-45; M. Sornarajah, "Compensation for Expropriation: the Emergence of New Standards", 13 *JWTL* (1979), 108.
84. M. McDougal, "Law as a Process of Decision: A Policy-Oriented Approach to Legal Study", 1 *Natural Law Forum* (1956), 53.
85. See F. Dawson and B. Weston, "'Prompt, Adequate and Effective': a Universal Standard of Compensation?", 30 *Fordham L.R.* (1962), 751.
86. Preambular paras. 6-7.
87. For a detailed analysis of United States' reservations at the time, see S. Schwebel, "The Story of the UN's Declaration on Permanent Sovereignty over Natural Resources", 49 *ABAJ* (1963).
88. 88 (XII) 12 *UNTD* OR Supp. 1, Art. 1. doc. B/423, adopted by 39 votes to 2, with 23 abstentions.
89. GA res. 3171 (XXVIII), *GAOR* 1973.
90. For pertinent discussion, see 1975 *Proceedings American Society of International Law,* pp. 225-243.
91. GA res. 3201 (S-VI), *GAOR* 1974.
92. GA res. 3281 (XXIX), *GAOR* 1975.
93. B. Weston, 75 *AJIL* (1981), at 445, for some interesting comments. See also H. Baade, "Permanent Sovereignty over Natural Wealth and Resources", in *Essays on Expropriations* (eds. R. Miller and R. Stanger, Ohio 1967), p. 3 at p. 23.
94. 75 *AJIL* (1981).
95. *Op. cit., supra,* note 93.
96. E.g., G. W. Haight, "The New International Economic Order and the Charter of Economic Rights and Duties of States", 9 *Int. Lawyer* (1975), 591, 595-597; and see the list of authorities cited by the Sole Arbitrator to the effect that General Assembly resolutions carry no obligations for member States: *Texaco* v. *Libyan Arab Republic,* 53 *ILR* 389 at 487.
97. See F. Vallat, "The Competence of the UN General Assembly", 97

*RCADI* (1959), 203; D. Johnson, "The Effect of Resolutions of the General Assembly of the UN", 32 *BYIL* (1955), 97.

98. 53 *ILR* 389.

99. *Ibid.*, at p. 484.

100. *Ibid.*, at p. 487.

101. Cf. Schwebel, *op. cit., supra,* note 87.

102. 53 *ILR* at p. 488.

103. *Ibid.*, p. 491.

104. R. Higgins, "The UN and Lawmaking: the Political Organs", 64 *Proc. ASIL* (1970), 37-48.

105. *Banco Nacional de Cuba* v. *Sabbatino,* 376 US 398 (1954). For trenchant criticism, see F. A. Mann, "The Legal Consequences of Sabbatino", 51 *Virginia LR* (1965), 604. Cf. Rabinowitz, "Viva *Sabbatino*", *17 Virginia J. Int. Law* (1977), 697. See further F. Abbott, "*Alfred Dunhill of London* v. *Republic of Cuba*: International Law Redivivus", 10 *Int. Lawyer* (1976), 471; M. Leigh and M. Sandler, "Dunhill: Towards a Reconsideration of Sabbatino", 16 *Virginia J. Int. Law* (1976), 685. The Hickenlooper Amendment, passed by Congress in the wake of the *Sabbatino* judgment, directed the courts of the United States not to "decline on the ground of federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted . . . based on . . . a confiscation . . . in violation of the principles of international law", 22 USC, s. 2370 *(e)* (2).

106. R. Lillich, ed., *The Valuation of Nationalized Property in International Law,* 3 vols. 1972-1975, Charlottesville, Va; B. Weston, "International Claims: Post War French Practice", 1971, Syracuse, NY.

107. See R. Lillich, *The Protection of Foreign Investment,* 1965, pp. 167-188, Syracuse, NY, and materials there cited. Also, G. White, *op. cit., supra,* at pp. 193-243; M. Whiteman, *Digest of International Law,* Vol. viii, pp. 1107-1129, 1963-1973, Washington, DC.

108. "NIEO Charter and Foreign Wealth Deprivation", 75 *AJIL* (1981), 437 at pp. 453-454.

109. R. Lillich and B. Weston, *International Claims: Their Settlement by Lump Sum Agreements,* 1975, Charlottesville, Va.

110. 168 US 250 (1887).

111. *Hunt* v. *Mobil Oil Corporation,* 550 F. 2d 68 (2d. Cir. 1977).

112. See, for example, the analysis of the English act of State doctrine offered by Mustill J. in *Industria Azucarera Nacional S.A. (Iansa)* v. *Empresa Exportadora de Azucar (Cubazucar),* 29 February 1980, unreported, affirmed by the Court of Appeal, 2 December 1982 (reported in *The Times,* 13 Dec. 1982).

113. [1921] 3 KB 532.

114. *British South Africa Co.* v. *Compania de Mocambique* [1893] AC 602; *Deschamps* v. *Miller* [1908] 1 Ch. 856.

115. [1921] 3 KB at pp. 558-559.

116. *Anglo-Iranian Oil Co.* v. *Jaffrate [The Rose Mary]* [1953] 1 WLR 246.

117. *Ibid.*, p. 248.

118. [1956] 1 Ch. 323 at pp. 351-352.

119. *The Rose Mary, supra,* note 116; *Oppenheimer* v. *Cattermole* [1975] 1 AER 539 HL.

120. [1956] 1 Ch. at 346.

121. In the case of *Oppenheimer* v. *Cattermole, supra,* note 119, the minority in the House of Lords noted that to declare invalid a German decree depriving the plaintiff of property and nationality would in effect be to declare him still a German national – not a result that in 1975 others in a comparable position might find desirable.

122. *Kahler* v. *Midland Bank* [1950] AC 24 at p. 27.

123. See *In Re Helbert Wagg, supra,* note 118.

124. See M. Singer, "The UK Act of State Doctrine", 75 *AJIL* (1981), 283 at pp. 306-308.
125. 376 US 398.
126. *Supra*, note 105.
127. *Banco Nacional de Cuba* v. *Farr*, 383 F. 2d. 166 (2d. Cir. 1967).
128. *First National City Bank* v. *Banco Nacional de Cuba*, 406 US 759 (1972).
129. 28 USC 1605 *(a)* (3). See also M. Singer, *op. cit., supra*, note 124. "The legislative history of this section of the FSIA includes a further effort by Congress in its continuing endeavours to instruct the Supreme Court in the rudiments of international law. The term 'taken in violation of international law' would include the nationalization or expropriation of property without payment of the prompt, adequate and effective compensation required by international law" [1976] *US CODE CONG. AND AD. NEWS* 6618.
130. [1981] 3 WLR 328, HL.
131. *Liamco* v. *Libya*, 62 *ILR* 140.
132. See *Saudi Arabia* v. *Aramco*, 27 *ILR* 117 at p. 158.
133. *Ibid.*, p. 161.
134. *Ibid.*, p. 163.
135. *Ibid.*
136. 53 *ILR* 389 at pp. 440-441, citing F. A. Mann, "Contrats entre Etats et personnes privées étrangères: the Theoretical Approach Towards the Law Governing Contracts between States and Private Persons", *Rev. Belge Droit Int.* (1975), 562 at p. 564.
137. Clause 16.
138. Here the Arbitration rejects the view of Professor Cohen-Jonathan, *Les Concessions en Droit Int. Public*, Paris, 1966 at p. 214, that the promise not to exercise essential powers goes "beyond the ambit of ordinary law".
139. Cf. Professor Morcos, in an opinion prepared for the case.
140. See 53 *ILR* 389 at 466.
141. *Liamco* v. *Libya*, 62 *ILR* 140.
142. *Ibid.*, p. 170.
143. 53 *ILR* 297.
144. Professor Omar: see 53 *ILR* at p. 324.
145. *Ibid.*, p. 327.
146. T. Daintith, "Petroleum Licences: a Comparative Introduction", in Daintith (ed.), *The Legal Character of Petroleum Licences*, London-Dundee 1981, p. 1.
147. *Ibid.*
148. Continental Shelf Act 1964.
149. Convention on the Continental Shelf, 1964 *UKTS* 39.
150. See T. Daintith and G. Willoughby, *A Manual of United Kingdom Oil and Gas Law*, London 1977, esp. at pp. 167-183 (annotated by J. P. Grant).
151. For an analysis see R. Higgins, "Ten Years of State Involvement in the Offshore Petroleum Industry", in *Int. Bar Assoc. Energy Law Seminar*, Cambridge II, 1979, at p. 3.
152. 1976 and 1980.
153. Confirmed in a dictum in *Saudi Arabia* v. *Aramco*, 27 *ILR* 117 at 161.
154. See H. Coulson and U. Forbes, *Waters and Land Drainage*, 1952, 6th ed., London, p. 242.
155. Although UK licences authorize exploration and exploitation of petroleum in closely defined seaward areas, the fact remains that petroleum is of a fugacious nature. And even where title to petroleum *in situ* is vested in a licence owner – which is not under UK licences – he has legal entitlement to percolating substances only to the extent that he can "capture" them in production. See, e.g., R. Hardwicke, "The Rule of Capture and its Implications as Applied to Oil and Gas", 13 *Texas LR* (1935), 391.
156. Clause 38 (3) of Schedule 2 and also Clause 38 (1).

157. For example, a percentage carried interest in the licensee's own interest; or the alteration of percentage carried interests, or the introduction of a net profit interest.
158. Model Clause 15, Sch. 2, 1975 Act.
159. Model Clause 19, *ibid.*
160. Model Clause 22, *ibid.*
161. Model Clause 21 (3), *ibid.*
162. Model Clause 14, *ibid.*
163. Model Clause 15, *ibid.*
164. Model Clauses 14 (5) and 15 (3).
165. But see Higgins, *op. cit., supra,* note 151, p. 8; and Daintith, *op. cit.,* note 146, at pp. 25-33.
166. Consent for the appointment of an operator may be refused on grounds that the operator is not regarded as competent. So far as development programmes are concerned, the Secretary of State may refuse his consent to a programme either on the grounds that it is contrary to good oilfield practice or on the grounds that it is contrary to the national interest.
167. See for example, *Laker* v. *Department of Trade* [1977] 2 WLR 234; *Schmidt* v. *Home Secretary* [1969] 2 Ch. 149; *Customs and Excise Commissioners* v. *Cure and Dealey Ltd.* [1962] 1 QB 340.
168. Clauses 17 and 18 of Part II of the 1975 Act.
169. See Higgins, *op. cit., supra,* note 151, at pp. 8-9.
170. Daintith, *op. cit., supra,* note 146, pp. 200-224.
171. See P. Duffy, "English Law and the ECHR", 29 *ICLQ* (1980) 585.
172. See generally F. Kirgis, *International Organisations in Their Legal Setting,* "Voluntary Withdrawal", West Pub. Co. (1977), pp. 191-199.
173. *Rederiaktiebolaget* v. *The King* [1921] 3 KB 500.
174. *Ibid.,* at p. 503.
175. See R. Higgins, "The Availability of Damages for Reliance by Government on Executive Necessity", in *International Law and Economic Order, Festschrift für F. A. Mann,* Munich 1977, ed. H. Hahn et al., at p. 22.
176. G. White, *Nationalization of Foreign Property,* 1961, at pp. 32-35.
177. [1921] 3 KB 500 at p. 501.
178. R. Higgins, note 175, *supra,* at p. 23.
179. See *Board of Trade* v. *Temperley Steamship Co. Ltd.* [1926] LL LR 230; *Commissioners of Crown Lands* v. *Page* [1960] 2 QB 274; and R. Higgins, note 175, *supra,* at p. 25.
180. 27 *ILR* 153.
181. *PCIJ, Series B, No. 10.*
182. *PCIJ, Series A, No. 1.*
183. This is implicit in the 1975 Act, Sch. 3, clause 36.
184. 27 *ILR* 117.
185. *Ibid.,* pp. 153-154.
186. *Ibid.,* p. 155.
187. Cf. *Sapphire Int. Petroleum Ltd.* v. *National Iranian Oil Co.,* 35 *ILR* 136.
188. 27 *ILR* at p. 156.
189. 53 *ILR* 297.
190. *Ibid.,* p. 329.
191. 53 *ILR* 389.
192. *Ibid.,* at p. 435.
193. 62 *ILR* 146 at p. 173.
194. See Daintith and Willoughby, *op. cit., supra,* note 150 at pp. 151-153.
195. *ICJ Reports 1970.*
196. Below, p. 339.
197. See A. Saunders and I. Gault, "The National Energy Program and the Pursuit of Claims under International Law", *Resources,* May 1982.

198. 53 *ILR* 297.
199. 53 *ILR* 389.
200. 62 *ILR* 146.
201. For example, in Norway: Act No. 21, 4 May 1973. See M. Krohn et al., *Norwegian Petroleum Law* (1978), Oslo.
202. *PCIJ, Series A, No. 17,* p. 47.
203. 27 *ILR* 117.
204. *Annual Digest 1929-1930,* No. 1.
205. *PCIJ, Series C, No. 78,* p. 32.
206. 35 *ILR* 136.
207. *Case Concerning the Factory at Chorzów (Claim for Indemnity) (Jurisdiction), PCIJ, Series A, No. 19,* p. 16 (1927).
208. *Ibid.,* at p. 17.
209. S. Friedmann, *Expropriation in International Law,* London 1953, p. 214.
210. 62 *ILR* 146.
211. *Ibid.,* at p. 198. He also had other reservations about restitution.
212. 53 *ILR* 297.
213. UK State Immunity Act 1978, s. 13.
214. 53 *ILR* 297 at p. 330.
215. 62 *ILR* 140 at p. 199.
216. *Ibid.,* at p. 200.
217. In which it is provided that failing *restitutio in integrum,* equitable satisfaction of another kind shall be awarded to the injured party.
218. Above, p. 297.
219. *PCIJ, Series A, No. 17* (1928), at p. 47.
220. *Ibid.,* p. 48.
221. 53 *ILR* 389.
222. *Ibid.,* at p. 498.
223. 53 *ILR* at pp. 338 ff.
224. *Case concerning the Temple of Preah Vihear (Merits), ICJ Reports 1962,* pp. 36-37.
225. Cf. in this connection the treatment of the *Martini* case in the two Awards: 53 *ILR* at pp. 340 and 500.
226. See *ILR* at pp. 340-342 for examples.
227. See Judge Lagregren at p. 336.
228. 22 USC, s. 2370 *(e)* (2).
229. 376 US 398 (1964).
230. *ICJ Pleadings* (1952) *Anglo-Iranian Oil Co.* case, pp. 116-117.
231. *ICJ Pleadings* (1952), p. 124.
232. *ICJ Pleadings* (1962) I, New Application, at p. 183.
233. 53 *ILR* at p. 501.
234. S. Schwebel, "Speculations on Specific Performance of a Contract between a State and a Foreign National", in *Rights and Duties of Private Investors Abroad,* South Western Legal Foundation, 1965, p. 201.
235. E.g., G. White, *Nationalisation of Foreign Property,* Stevens 1961; I. Foighel, *Nationalisation and Compensation,* London 1964; B. Wortley, *Expropriation in Public International Law,* Manchester 1959; A. Akinsanya, *The Expropriation of Multinational Property in the Third World,* New York 1980; R. Lillich, ed., *The Valuation of Nationalized Property in International Law,* Charlottesville, Virginia, 1962.
236. Cf. G. White and B. Wortley, *op. cit., supra,* note 235 at pp. 41 and 1 respectively.
237. Outstanding exceptions have been G. C. Christie, "What Constitutes a Taking of Property under International Law?", 38 *BYIL* (1962), 307; and B. Weston, "Constructive Takings under International Law: a Modest Foray into the Problem of Creeping Expropriation", 16 *Virginia J. Int. Law* (1975), 103.

238. *PCIJ, Series A, No. 7.*
239. UN *Arb. Rep. 1* (1922), 307.
240. For example, the Cunard Line, whose requisitioned vessels were an important part of the United Kingdom "task-force" in the South Atlantic.
241. *De Sabla Claim,* US-Panama Claims Commission, 7 *ILR,* 241.
242. G. C. Christie, *op. cit., supra,* note 237, at p. 31.
243. *King* case: see M. Whiteman, *Damages in International Law* (1937), Vol. 2, pp. 1387-1391; and G. C. Christie, *supra,* note 237, at p. 312.
244. *Jeno Hartmann* case, cited in Christie, *op. cit., supra,* at p. 313. See also *Albert Reet* case, *ibid.*
245. Report of the Commission, 8 October 1980.
246. Article 1 of the First Protocol to the European Convention on Human Rights.
247. Para. 103, Report of 8 October 1980.
248. See below, p. 367.
249. Case of Sporrong and Lönnroth, *Judgment of the European Court of Human Rights,* 23 September 1982 at para. 60.
250. 16 *Virginia J. Int. Law* (1975), at pp. 134 ff.
251. 4 Moore, *International Arbitrations,* 1898.
252. *Bernstein* v. *Van Heyghen Frères Société Anonyme,* 163 F. 2d. 246 (2d. Cir.), *cert. denied,* 332 US 772 (1947); *Bernstein* v. *Nederlandsche-Amerikaansche Stoomvaart-Maatschappij,* 210 F. 2d. 375 (2d. Cir. 1954). See also the so-called "Bernstein Letter" issued by the State Department, 20 *Dept. State Bull.* (1949), 592-593.
253. B. Weston, and G. C. Christie, *op. cit., supra,* at note 237, draw our attention in particular to the following cases, at pp. 141 and 324 respectively: *Osthoff* v. *Hofele,* 1 US Ct. Rest. App. (1950) 111; *Poehlmann* v. *Kulmbacher Spinnerei A.G.,* 3 US Ct. Rest. App. (1952) 701; *Stadt Wuerzburg* v. *Institut der Englischen Fraulein, B.M.V.,* 3 US Ct. Rest. App. (1952) 753.
254. B. Weston, 16 *Virg. J. Int. Law* (1975), at pp. 103-107.
255. *ICJ Reports 1970,* at p. 106.
256. *Ibid.,* p. 274.
257. B. Weston, *supra,* note 254, at p. 106.
258. Of 19 January 1981. For text, see 20 *ILM* (1981).
259. Treaty of Amity, Economic Relations, and Consular Rights, 284 *UNTS,* 93.
260. Article VIII.
261. Which is not a defined term, and the content of which is uncertain. In particular, it is not clear whether it significantly differs from compensation which is adequate, prompt and effective.
262. See *Regional Rail Reorganization Act Cases,* 419 US 102 (1974); *New Haven Inclusion Cases,* 399 US 392 (1970); *In re Penn Central Transportation Company,* 494 F. 270, 278-279 (3d. Cir. 1974).
263. See *Brooks-Scanlon Co.* v. *Railroad Commission of Louisiana,* 251 US 396 (1920).
264. *In re Ashe and Ashe* v. *The Commonwealth National Bank,* Judgment of 6 January 1982.
265. *Ibid.,* at p. 9.
266. 56 *ILR* 258.
267. *Ibid.,* at p. 264.
268. *Ibid.,* at p. 265.
269. Press Release 15 May 1974: 56 *ILR* 265.
270. S. 1.15 of the General Terms and Conditions of OPIC Contract.
271. OPIC had argued that only the former, and not the latter, was covered by s. 15 *(d)* of the OPIC contract.
272. 56 *ILR,* at p. 292.
273. *Ibid.*

274. *Ibid.*
275. 56 *ILR*, at p. 293.
276. 56 *ILR*, at p. 294.
277. 56 *ILR*, at p. 313.
278. 56 *ILR*, at p. 317.
279. 56 *ILR*, at p. 320.
280. 1 *UNRIAA*, pp. 324-325, 328-334.
281. 1 *UNRIAA*, pp. 395-399.
282. 2 *UNRIAA*, p. 1101.
283. 4 *UNRIAA*, pp. 714-715.
284. *PCIJ, Series A, Nos. 20 and 21.*
285. Cf. I. Foighel, *Nationalisation* (1957), at p. 74; D. P. O'Connell, 4 *ICLQ* (1955), p. 267, at 270; A. McNair, 33 *BYIL* (1951), 1; T. Meron, 6 *ICLQ* (1957), 273 at 288. Arbitral opinion seems equally divided.
286. *Law and Procedure of International Tribunals*, California 1926, p. 306.
287. 50 *ALJR* (1976), 570.
288. *Op. cit., supra*, note 266.
289. 2 *UNRIAA*, p. 1079.
290. 9 *UNRIAA*, p. 250.
291. *Saudi Arabia* v. *Arabian American Oil Company* (Aramco), 27 *ILR*, 117.
292. *Infra*, p. 347.
293. 27 *ILR*, 117 at pp. 175-177. Article 22 of the Concession provided "It is understood, of course, that the company has the right to use all means and facilities it may deem necessary or advisable in order to exercise the rights granted under the contract, so as to carry out the purpose of this enterprise . . .".
294. See note 287, above.
295. Article 1 of the First Protocol.
296. Appl. 4130/69 and Coll. 38, p. 9; Appl. 5763/72 and Coll. 45, p. 76.
297. *Gudmundsson* v. *Iceland*, Appl. 511/59, 3 *Yearbook* 394.
298. But these were the requirements of paragraph 1 of Article 1, which do *not* apply to tax. For text of Article 1 of First Protocol, see text on p. 359.
299. Appls. 7151/75 and 7152/72; Commission Report 8 October 1980; Judgment of European Court of Human Rights, 23 September 1982.
300. Commission Report, para. 31.
301. *Ibid.*, para. 56.
302. *Ibid.*, para. 94.
303. *Ibid.*, para. 100.
304. *Ibid.*, para. 103.
305. *Ibid.*, para. 111.
306. Judgment of European Court of Human Rights, 23 September 1982, para. 62.
307. *Ibid.*, para. 63.
308. By reference both to the need to look to the "realities" (*Van Droogenbroeck Judgment* of 24 June 1982, para. 38) and to the requirement that the Convention guarantee rights that are "practical and effective" (*Airey Judgment*, 7 October 1979, para. 24).
309. Judgment of 23 September 1982, para. 60.
310. *Ibid.*
311. *Ibid.*, para. 65.
312. See note 308 above.
313. Judges Zekia, Cremona, Thor Vilhjalmsson, Lagergren, Sir Vincent Evans, Macdonald, Bernhardt and Gersing.
314. Joint dissenting opinion, para. 2.
315. *Ibid.*, para. 3.
316. 27 *ILR*, 117.
317. *Ibid.*, pp. 157 ff.

318. *Ibid.*, p. 158.
319. *Ibid.*
320. Article 33 of the Model Clauses in Schedule 4 of the 1966 Regulations.
321. See Article 11 of Schedule 2 of 1975 Act.
322. Model Clause 39 of the 1975 Act specifies the power of revocation. This includes "any breach or non-observance by the licensee of the terms and conditions of a development scheme" – but the ability by the Minister to impose a development scheme under Model Clause 26 (2) *(f)* was itself applied retrospectively in respect of licences taken out when new Model Clause 15 did not apply.
323. Among the other ways in which the Act unilaterally altered rights previously agreed in contract form were: controls over the rate of production; interim determination of royalty; applying the 1971 regulations to pre-1971 licences; and the provision and release of information.
324. And particularly new Model Clause 15.
325. See above, Chapter III, p. 309.
326. See R. Higgins, "The Availability of Damages for Reliance by Government on Executive Necessity", in *International Law and Economic Order, Festschrift für F. A. Mann,* Munich 1977, ed. H. Hahn et al. at p. 29.
327. Hansard, House of Commons Standing Committee D, 3 July, cols. 1146-1172.
328. To the Confederation of British Industry.
329. See Hansard, House of Commons Standing Committee D, cols. 1439-1440, 28 July 1975.
330. Under the Oil and Gas Enterprise Act 1982 these powers have now been divided up. BNOC now retains only its trading functions, while a new entry, Britoil, has taken over the oil producing business of BNOC.
331. It rapidly became clear that the "no-win, no-loss" formula was to be restricted to fiscal matters. See R. Higgins, "Ten Years of State Involvement in the Offshore Petroleum Industry", in *International Bar Association Energy Law Seminar,* Cambridge II, 1979, p. 10.
332. R. Higgins, *supra,* note 331, para. 12.
333. These included the provision of powers of attorney, and the grant of "buyback" rights: Higgins, *ibid.,* paras. 13-14.
334. E. Mendes, "The Canadian National Energy Program: An Example of Assertion of Economic Sovereignty or Creeping Expropriation in International Law", 14 *Vanderbilt J. Trans. Law* (1981), 475.
335. Mendes, *op. cit.,* at p. 480.
336. For a very useful survey see B. Constantino, "State Participation in Oil Concessions: A New Kind of Taking of Foreign Property", *Italian Y. B. Int. Law* (1975), 150.
337. Full details are recounted in Constantino, *op. cit.,* pp. 152 ff.
338. Concluded at Riyadh on 20 December 1972 between Saudi Arabia and Abu Dhabi, on the one hand, and the oil companies operating in their territories, on the other. For text see *OPEC Selected Documents of the International Petroleum Industry 1972,* pp. 107 ff. And see also M. Khalil, *The General Agreement on Participation in Respect of Crude Oil Concessions* (Beirut 1973).
339. Constantino, *op. cit., supra,* p. 153.
340. See *Keesing's* (1974), pp. 26619, and *Middle East Economic Survey* (1974), No. 17, Suppl., pp. 1 ff.
341. Constantino, *op. cit., supra,* pp. 156 ff.
342. *Ibid.*, pp. 158-159.
343. *Ibid.*, pp. 160-164.
344. *Ibid.*, p. 160.
345. *Ibid.*, pp. 162-163. For further study of these and related questions, see also "From concession to participation: restructuring the Middle East Oil

Industry", 48 *NYU Law Rev.* (1973), 790 (Anon); El Kosheri, "Le régime juridique créé par les accords de participations dans le domaine pétrolier", *Recueil des cours* (1975), 256.

346. But see, for example, L. Henkin, *The Rights of Man Today*, London 1979, Ch. 1; A. Milne, "The Idea of Human Rights, A Critical Enquiry", in *Human Rights, Problems, Perspectives and Texts*, ex. F. Dowrick, Ch. 2, London 1979; R. Bilder, "Rethinking International Human Rights: Some Basic Questions", 11 *Human Rights Journal* (1969), 557-607; R. Higgins, *Human Rights – Prospects and Problems*, Leeds Univ. Press, 1979; M. McDougal, "Human Rights and World Public Order; Principles of Content and Procedure for Clarifying General Community Policies", 14 *Virginia J. Int. Law* (1974), 387-421.

347. See O. Eze, "Les Droits de l'Homme et le sous-développement", XII *Human Rights Journal* (1979), 5; A. Mastow, *The Farther Reaches of Human Nature* (1971), 299-340, 370-390; cf. M. McDougal, H. Lasswell and Lung-Chu Chen, *Human Rights and World Public Order*, Yale 1980, pp. 6-7, fn. 7.

348. Under the International Covenant on Civil and Political Rights the non-derogable rights are Article 6 (right to life), Article 7 (prohibition of torture), Article 8 (1) and 8 (2) (prohibition of slavery and servitude), Article 11 (prohibition of imprisonment for non-fulfilment of contractual obligations), Article 15 (prohibition against retroactive criminal laws and penalties), Article 16 (the right to be recognized as a person before the law) and Article 18 (freedom of thought, conscience and religion). Cf. the non-derogable rights in the European Convention on Human Rights: Article 2 (right to life, save in respect of death resulting from lawful acts of war), Article 3 (torture), Article 4 (slavery and servitude) and Article 7 (prohibition against retroactive criminal law and penalties).

349. E. Schwelb, "Some International Aspects of *Jus Cogens*", 61 *AJIL* (1967), 946.

350. See, e.g., Judge Tanaka, dissenting opinion, *South West Africa* cases (2nd phase), *ICJ Reports 1966*, at p. 298. Cf. G. Schwarzenberger, "International *Jus Cogens*", 43 *Texas LR* (1965), 455. For an excellent survey of *jus cogens* in the context of human rights, see M. McDougal et al., *op. cit.*, note 347, pp. 339-350.

351. See Keba M'Baye, "Le droit au développement comme un droit de l'homme", V *Human Rights Journal* (1964), 505; Dobbert, "Right to Food", in *The Right to Health as a Human Right*, Hague Academy of International Law (1979), 184; Linton, "World Development, Change and the Challenge of Human Rights", *New Zealand LJ* (1978), 242; B. Ramcharan, "Implementation of the International Covenant on Economic, Social and Cultural Rights", *Netherlands International Law Rev.* (1976), 151.

352. McDougal et al., *op. cit., supra*, Ch. 1.

353. Including authors already cited in notes 346-352; R. Falk, *Human Rights and State Sovereignty*, NY 1981; R. Lillich and F. Newman, *International Human Rights*, Boston 1979; B. Weston, R. Falk, A. Amato, *International Law and World Order*, Ch. 6, St. Paul, Minn. 1980; A. Cassesse (ed.), *U.N. Law/Fundamental Rights*, Sijthoff & Nordhoff 1979; and many others.

354. B. Ramcharan (ed.), *Human Rights: Thirty Years after the Universal Declaration*, The Hague 1979; E. Schwelb, "The Influence of the Universal Declaration of Human Rights on International and National Law", 1959 *Proc. Am. Soc. Int. Law*, 21; E. Schwelb, *Human Rights and the International Community: The Roots and Growth of the Universal Declaration of Human Rights* (1964).

355. UN doc. E/2573, Annex I, Rep. 10th Sess. HR, esp. at paras. 40-71.

356. *Coll. Ed. Travaux Préparatoires*, 1975, Vols. I-V, Vol. 1, p. 182.

357. *T.P.*, Vol. 11, pp. 60-80.

358. Rec. No. 24, Consultative Assembly, 25 Aug. 1956.

359. Report of Committee of Experts, 24 Feb. 1951.
360. *T.P.*, Vol. V, pp. 1083-1084.
361. CM/WP1/(51)40, Report of Committee on its meetings of 21, 23 and 24 Feb. 1951.
362. Which was at that time still a Labour government.
363. See comparable phrases in, e.g., Arts. 5, 8 and 11 of the European Convention.
364. E.g., *Winterwerp* v. *Netherlands*, 2 Eur. Human Rights Rep., 387.
365. See *Sunday Times* v. *U.K.*, 2 Eur. Human Rights Rep. 245, para. 47.
366. The report of the Secretariat-General notes "This change was made principally because the phrase 'arbitrary confiscation' was thought to be too unprecise in a legal text, as it is capable of varying interpretations. The phrase 'subject to the conditions provided for by law' was believed to be more precise and to cover adequately the object in mind."
367. Doc. DH(79)2, 7 Feb. 1979.
368. Doc. DH(79)7, 12 May 1980, p. 24 and DH(79)6, 31 Oct. 1980.
369. Committee on Legal and Administrative Matters, Commentary by the SG on the Draft Protocol, 18 Sep. 1951.
370. E.g., Austrian Nationalization Law of 26 July 1946; French Gas and Electricity Nationalization Law of 8 April 1946; Italian "ENEL" Law No. 163 of 6 Dec. 1962; and French Nationalization Law, 11 Feb. 1982.
371. Res. 52 (1), 20 Mar. 1952.
372. See TP, Vol. V, pp. 1150, 1158.
373. Appl. 511/59.
374. Ch. IV, above.
375. 3 *Yearbook* 394.
376. Appls. 9262/81, 9006/81, 9263/81, 9265/81, 9266/81, 9313/81, 9405/81, 9599/81, 9482/81.
377. See W. Peukert, "Protection of Ownership under Article 1 of the First Protocol to the European Convention on Human Rights", 2 *HRLJ* (1981), 37.
378. 8 *Yearbook* (1965), 218, Appl. 1870/63.
379. E.g., *X* v. *F.D.R.*, 3 *Yearbook* (1960), 244, Appl. 551/59.
380. 1 D. and R. 26, Appl. 5849/72.
381. 17 D. and R. 80, Appl. 8003/77.
382. [1980] 3 *CMLR* 42.
383. *Handyside* v. *U.K.*, Report of the European Commission, 30 Sep. 1975.
384. *Ibid.*, para. 163.
385. *Handyside* v. *U.K.*, Judgment of the Court, 7 Dec. 1976.
386. Appls. 7151/75 and 7152/75; Report of Commission, 8 October 1980; Judgment of Court, 23 Sep. 1982.
387. Judgment of the Court, para. 62.
388. *Ibid.*, para. 63.
389. *Ibid.*
390. *Supra*, p. 343.
391. Judgment of the Court, para. 69.
392. Thus Article 16 in effect contains a permitted discrimination *against* aliens, and may thus be contrasted with Article 1 of the First Protocol, which by reference to the principles of international law arguably emphasises and affirms the special treatment that international law has afforded foreigners in respect of the treatment of their property.

Article 4 of Protocol IV also makes a distinction between aliens and nationals, in that it provides that "the collective prohibition of aliens is prohibited". This confirms a requirement of international law as a human right. But the position of nationals is already protected by Article 3; "No one shall be expelled, by means either of an individual or of a collective measure, from the territory of a State of which he is a national."

393. E. Schwelb, "The Protection of the Right of Property of Nationals under the First Protocol to the European Convention on Human Rights", 13 *Am. J. Comp. Law* (1964), 518; cf. K. Böckstiegel, "Is the Provision on Protection of Property in the European Convention on Human Rights Valid Also for One's Own Nationals?", 20 *Neue Juristische Wochenschrift* (1967), 905; K. Partsch, "Die Rechte und Freiheiten der E.M.R.K.", in *Die Grundrechte,* ed. Bettermann, Neumann, Nipperdey, Vol. I/1, Berlin 1966, pp. 452 ff.

394. J. Fawcett, *The Application of the European Convention on Human Rights,* Oxford 1969, pp. 346-352; A. H. Robertson, *Human Rights in Europe,* Manchester 1977, 2nd ed., pp. 120-129.

395. Kissam and Leach, 28 *Fordham LR* (1959), 179 at 214.

396. For an interesting discussion, see I. Seidl-Hohenveldern, "Counter Nationalization", 33 *Yearbook of World Affairs* (1979), 257.

397. *A, B, C* and *D* v. *United Kingdom,* Appl. 3039/67.

398. For an early, but seminal analysis of this concept, see C. Morrison, "Margin of Appreciation in Human Rights Law", 6 *HRJ* (1973), 263.

399. Judgment of 24 Oct. 1979, para. 45.

400. 3 *Yearbook* (1960), 244, Appl. 551/59.

401. Fawcett, *op. cit., supra,* note 394, at p. 351.

402. Article 21 of the American Convention provides: "(1) Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment in the interests of society. (2) No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law. (3) Usury and any other form of exploitation of man shall be prohibited by law." The Convention entered into effect on 18 July 1978. For text see 9 *ILM* (1970), 673.

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L'index qui était habituellement publié à la fin de chaque tome est supprimé. Les délais de publication ne permettaient pas en effet de donner un index suffisamment détaillé et, de ce fait, son utilité était douteuse.

Un index général et complet portant sur les tomes 125 à 151 a paru en août 1980. Le prochain index général couvrira les vingt-cinq tomes suivants et sera annoncé en temps utile.

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The index, which until now has always been included at the end of each volume, will not be continued. Delays in publication do not allow a sufficiently detailed index to be produced and too short an index would be of doubtful value.

A complete general index covering Volumes 125-151 appeared in August 1980. The next general index will cover the 25 following volumes and will be announced in good time.