

1959

## Sovereign Expropriation of Property and Abrogation of Concession Contracts

Leo T. Kissam

Edmond K. Leach

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

---

### Recommended Citation

Leo T. Kissam and Edmond K. Leach, *Sovereign Expropriation of Property and Abrogation of Concession Contracts*, 28 Fordham L. Rev. 177 (1959).

Available at: <https://ir.lawnet.fordham.edu/flr/vol28/iss2/1>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

---

## Sovereign Expropriation of Property and Abrogation of Concession Contracts

### Cover Page Footnote

Members of the New York Bar.

# SOVEREIGN EXPROPRIATION OF PROPERTY AND ABROGATION OF CONCESSION CONTRACTS

LEO T. KISSAM\*

EDMOND K. LEACH\*

## INTRODUCTION

**R**ECENT events which have taken place in various parts of the world have taken the words "nationalization," "expropriation" and "confiscation" from the exclusive possession of legal theorists and diplomats and have brought them to the breakfast table. Expropriations of land for the alleged purpose of agrarian reform and abrogation of concession contracts from avowed motives of social improvement have become occurrences of increasing frequency, accompanied by a corresponding increase in discussion and controversy as to the legality of these procedures.

Most of this discussion and controversy has been concerned with two basic questions, namely:

1. Can a sovereign State lawfully expropriate property within its jurisdiction belonging to a foreign national without the payment of compensation?
2. Can a sovereign State lawfully abrogate a concession contract it has entered into with a foreign national?

## I. LEGALITY OF EXPROPRIATION WITHOUT COMPENSATION BY A SOVEREIGN OF PROPERTY WITHIN ITS TERRITORIAL JURISDICTION BELONGING TO A FOREIGN NATIONAL

In the absence of an undertaking on the part of a State not to expropriate, there is little, if any, dispute as to its power and right to take for public use any private property within its borders. This is regarded as an essential attribute of sovereignty. Nor do any international problems arise with respect to any obligation to pay compensation insofar as the property of nationals of the expropriating State itself is concerned.

The area of controversy, from an international point of view, is entered when a State nationalizes, or otherwise expropriates, the property of a foreign national within its territorial jurisdiction. And this controversy centers about the question of the existence or non-existence of an international duty or obligation to pay compensation to the alien who has been thus deprived of his property by action of the State.

This fundamental problem was thoroughly aired some thirty years ago in a celebrated controversy between two eminent international law

---

\* Members of the New York Bar.

authorities which took place in the pages of the British Yearbook of International Law.

This debate began with an article by Alexander P. Fachiri, which appeared in that publication in 1925 under the title "Expropriation and International Law."<sup>1</sup> The author's stated purpose was to ascertain whether there was any remedy available under international law to a State whose subjects have suffered loss from legislation in a foreign State providing for redistribution of land on terms resulting in total or partial confiscation of private property.

Fachiri laid down two propositions which he regarded as forming part of the "law of nations"—(1) that a State is entitled to protect its subjects from injury to their property in another State where there has been *discrimination* between them and the subjects of such other State; and (2) that a State is further entitled to protect its subjects from *gross injustice* at the hands of another State, even if there has been no such discrimination.<sup>2</sup>

He cited several textual authorities<sup>3</sup> and several cases<sup>4</sup> which he felt supported these propositions, and concluded that there was "universal recognition" of certain legal principles, among which were the right of aliens to own property, including land, and the "inviolability" of such property in the sense that its expropriation was permissible only for public purposes and only upon payment of full compensation by the State. He further concluded that if a claim arising out of the expropriation of a foreigner's land under legislation resulting in total or partial confiscation of private property were referred to an international court for judicial settlement, the plaintiff State would have "a reasonable prospect of success" if either (a) there had been discrimination against its subjects as compared with the natives in the application of the legislation, or (b) no compensation was paid (or compensation so inadequate as to involve a substantial degree of confiscation), even though the law was applied equally to the subjects of the expropriating State.<sup>5</sup>

---

1. 6 Brit. Yb. Int'l L. 159 (1925). Fachiri, 1887-1939, was a barrister-at-law of the Inner Temple and a Member of the Editorial Committee of the British Yearbook of International Law.

2. Id. at 160.

3. Westlake, Collected Papers on Public International Law 1-2, 9-10, 103, 104-10 (1914); Hall, International Law § 87 (7th ed. 1917); 1 Oppenheim, International Law § 319 (3rd ed. 1920); Calvo, 15 Droit International §§ 1276, 1278 (1870-72); Bonfils, Droit International Public § 262 (5th ed. 1908). For authority as to the attitude of United States, Fachiri referred to 6 Moore, A Digest of International Law 247-324 (1906).

4. Sicilian Sulphur Monopoly (Great Britain v. Sicily, 1831-32); Jonas King (United States v. Greece, 1853); Delagoa Bay Ry. (United States and Great Britain v. Portugal, 1889-91); Italian Life Ins. Monopoly (Great Britain v. Italy, 1911-12); Portuguese Religious Properties (Great Britain, France, Spain v. Portugal, 1913).

5. 6 Brit. Yb. Int'l L., supra note 1, at 169-71.

That recognition of these legal principles was not as "universal" as Fachiri had assumed was indicated by an answering article which appeared three years later which took issue with the second of Fachiri's conclusions. The 1928 edition of the Yearbook contained an article by Sir John Fischer Williams entitled "International Law and the Property of Aliens,"<sup>6</sup> which posed the general question whether or not there existed (apart from any special terms imposed by a "concession" or a treaty) a general rule of international law to the effect that if a State expropriates the property of an alien without the payment of full compensation it commits a wrong of which the State of the alien affected is entitled to complain, even if the measure of expropriation applies indiscriminately to nationals and to aliens. Drawing upon the same sources as had Fachiri, the writer reached the opposite conclusion—namely, that this was *not* an accepted doctrine of international society, and, furthermore, that there were good reasons, in his opinion, why it *ought not* to be received into the body of international law.<sup>7</sup>

Williams discarded all of Fachiri's cases as "inconclusive,"<sup>8</sup> stating that none of them constituted satisfactory authority for the establishment of a general proposition of international law.<sup>9</sup> After citing a few additional authorities as equally indecisive of the question, he stated:

The precedents, then, are not decisive. The precise point at issue has never been settled by any tribunal or other authority of weight; the dicta are not always clear, and when clear are often conflicting.<sup>10</sup>

---

6. 9 Brit. Yb. Int'l L. 1 (1928). Williams, 1870-1947, was Assistant Legal Advisor for the British Home Office, 1918-20, British Member of the Permanent Court of Arbitration at the Hague, and a Member of the Institute on International Law.

7. Id. at 2.

8. Id. at 6.

9. 9 Brit. Yb. Int'l L. 2 (1928).

10. Id. at 14-15. Williams dismissed Fachiri's cases on the following grounds: Sicilian Sulphur Monopoly—"the British claim was based on a treaty provision and was never submitted to any judicial or arbitral decision." Id. at 2. Jonas King—"did not raise the issue of the international validity of confiscatory legislation applied to an alien equally with nationals and was not settled by arbitral or judicial decision." Id. at 3. Delagoa Bay Ry.—"main issue was the legitimacy or otherwise of the cancellation of a railway concession." Id. at 3. Portuguese Religious Properties—"it does not appear that the case was intended to be argued on the footing that the action taken applied equally to foreigners and nationals, and in any event the matter was compromised." Ibid. Italian Ins. Monopoly—since it revealed a "sharp conflict of opinion between eminent lawyers and the Government of a Great Power on a matter of international law," the doctrine can hardly be claimed as self-evident. Ibid.

The "Great Power," of course, was Italy, whose legislation gave rise to the dispute. If the agreement of the party charged with wrongful conduct must be obtained before a "universal" principle as to its wrongfulness can be laid down, there would be few such principles.

Having thus concluded that the issue could not be decided on the basis of precedent, Williams attacked the problem from the point of view of "principles," and concluded that where no treaty "or other contractual or quasi-contractual obligation" existed by which a State was bound in its relations to foreign owners of property, there was no general principle of international law prohibiting it from expropriation without compensation.<sup>11</sup>

Fachiri's rejoinder, which appeared in 1929 under the same title, "International Law and the Property of Aliens,"<sup>12</sup> indicated that Williams had had no more effect in convincing Fachiri of the soundness of his views than Fachiri had had in convincing Williams. Fachiri re-emphasized the cases he had originally cited, which Williams had dismissed as inconclusive,<sup>13</sup> referred to several additional authorities,<sup>14</sup> including those cited by Williams, and reiterated his main thesis. And there the matter rested. The "great debate" had ended in a stalemate, with neither side admitting that its position had in any way been breached.

Three decades have passed since this enlightening, if somewhat inconclusive, controversy was terminated, decades which have witnessed the Mexican oil expropriations of the 1930's; the post-World War II nationalizations of Eastern European nations in the 1940's; and the world-shaking seizures of the Anglo-Iranian Oil Company and the Universal Suez Canal Company of the 1950's. More recent headlines describing events in Cuba, Brazil, Chile and elsewhere indicate that the end is not yet in sight.

Since the Fachiri-Williams exchange of views there has also been

---

11. 9 Brit. Yb. Int'l L. 28 (1928).

12. 10 Br. Yb. Int'l L. 32 (1929).

13. Fachiri answered Williams' criticism of these cases as follows: Sicilian Sulphur Monopoly—the type of treaty provision relied on has "fallen into desuetude" because the safeguards provided for "have become a part of international common law." *Id.* at 34. Even though the case was not submitted to judicial decision, it still has value as precedent, since cases dealt with diplomatically "afford valuable evidence of the practice of states, upon which international law is so largely built. . . ." *Ibid.* Jonas King—no indication that claim was based on discrimination; fact that compensation was obtained after United States intervention "shows that confiscation of the property of aliens gives rise to a claim at international law." *Id.* at 36. Delagoa Bay Ry.—confiscation of line and materials was separate point, apart from legitimacy of cancellation of concession, as to which compensation was to be determined. Although not a case of general legislation, it is authority for the proposition that "confiscation of alien property is contrary to international law." *Id.* at 37. Portuguese Religious Properties—first part of Williams' criticism is "contrary to the available evidence"; and the compromise was on another issue. *Id.* at 38. Italian Ins. Monopoly—still feels that the case supports his views.

14. The Savage Claim (United States v. Salvador), 2 Moore, International Arbitrations 1855 (1852); George Finlay (Great Britain v. Greece), 39 British State Papers, 410-79, 904, 906 (1849-50); Norwegian Ships Arbitration (United States v. Norway), Proceedings of the Tribunal, the Hague (Perm. Ct. Arb. 1922).

more than a quarter century of decisions by the Permanent Court of International Justice, and by its successor, the present International Court of Justice, as well as by international arbitral tribunals of various kinds. During this period, too, numerous treaties have been concluded containing provisions relating to expropriation, most notably, of course, the various treaties which came into existence as a result of the end of World War II. Numerous diplomatic exchanges and conferences have contributed their share of material on this subject. Commissions, at the behest of both the League of Nations and the United Nations, have dealt with this problem. International law associations of various kinds have drawn up reports and presented recommendations, as have conferences of business men concerned with investment problems. Books, articles in legal, economic and historical periodicals, addresses and papers delivered at divers times and places—all dealing with this general problem—have appeared with seemingly increasing frequency.

Has history resolved these issues debated so vigorously thirty years ago? And if so, in whose favor? Have the "universal" principles of Fachiri been generally adopted, or have the more skeptical conclusions of Sir John Fischer Williams found greater acceptance?<sup>15</sup>

A. *The Principle of Equality of Treatment and the Principle of an International Standard of Justice*

Both Fachiri and Williams were apparently in agreement that it would be a violation of international law for a State, in the passing of expropriatory legislation, or in the carrying out of such legislation, to discriminate against aliens in favor of its own nationals. This is the well-known principle of "equality of treatment," a principle advanced by Fachiri as one of his two propositions forming part of the "law of nations."

Where they disagreed was as to Fachiri's second proposition—viz., whether or not there also existed an international standard of treatment to which foreign nationals were always entitled, irrespective of whether this standard of treatment was accorded to the subjects of the expropriating State or not—a standard of treatment which, if not accorded to an alien, would constitute a "gross injustice" from which a State was entitled to protect its subjects. Fachiri maintained that such principle did exist in international law; Williams, that it did not.

The positions of Fachiri and Williams, respectively, on this issue were subsequently advanced by the opposing sides in the lengthy diplomatic exchange between the Governments of the United States and Mexico during the years 1938-1940, which arose out of the dispute relative to the

15. In 1950, the status as of that date of the Fachiri-Williams debate was examined in Fawcett, *Some Foreign Effects of Foreign Nationalization of Property*, 27 Br. Yb. Int'l L. 355 (1950). Fawcett's conclusions favored the position of Williams.

payment of compensation to American citizens for the Mexican agrarian expropriation of American-owned properties.

Mexico, adopting the Williams position, argued that its agrarian legislation affected Mexicans and foreigners equally, and that a payment only to the latter to the exclusion of her own nationals would be inequitable. She referred to Article 9 of the Convention signed at the Seventh Pan American Conference to the effect that nationals and foreigners are under the same protection of the law within a given national territory, and that foreigners cannot claim rights more extensive than those of the nationals.<sup>16</sup>

The United States dissented sharply from these views and strongly pressed Fachiri's argument that there was a minimum international standard of treatment below which a State was not permitted to fall in its treatment of aliens, irrespective of how its own subjects were treated.

In a note of August 22, 1938, Secretary of State Cordell Hull expressed the views of the Government of the United States in the following language:

The fundamental issues raised by this communication from the Mexican Government are therefore, first, whether or not universally recognized principles of the law of nations require, in the exercise of the admitted right of all sovereign nations to expropriate private property, that such expropriation be accompanied by provision on the part of such government for adequate, effective, and prompt payment for the properties seized . . . .<sup>17</sup>

In response to the argument that the measure affected Mexicans and foreigners equally, Hull said:

[The doctrine of equality of treatment] has invariably referred to equality in lawful rights of the person and to protection in exercising such lawful rights. There is now announced by your Government the astonishing theory that this treasured and cherished principle of equality, designed to protect both human and property rights, is to be invoked, not in the protection of personal rights and liberties, but as a chief ground of depriving and stripping individuals of their conceded rights. It is contended, in a word, that it is wholly justifiable to deprive an individual of his rights if all other persons are equally deprived, and if no victim is allowed to escape. In the instant case it is contended that confiscation is so justified. The proposition scarcely requires answer.<sup>18</sup>

He then strongly asserted the principle of the existence of an international standard of justice as follows:

The statement in your Government's note to the effect that foreigners who voluntarily move to a country not their own assume, along with the advantages which they may seek to enjoy, the risks to which they may be exposed and are not entitled to better treatment than nationals of the country, presupposes the maintenance of law and

---

16. [1938] 5 Foreign Rel. U.S. 679 (1956) [hereinafter cited as 5 Foreign Rel.].

17. Id. at 687.

18. Id. at 692-93.



order consistent with principles of international law; that is to say, when aliens are admitted into a country the country is obligated to accord them that degree of protection of life and property consistent with the standards of justice recognized by the law of nations.<sup>19</sup>

In an earlier note of July 21, 1938, Hull had said:

We cannot question the right of a foreign government to treat its own nationals in this fashion if it so desires. This is a matter of domestic concern. But we cannot admit that a foreign government may take the property of American nationals in disregard of the rule of compensation under international law.<sup>20</sup>

These two principles of "equality of treatment" and "international standard of justice" are not, of course, necessarily mutually exclusive principles. The reconciliation of the two principles is achieved by the more inclusive proposition that foreign nationals are entitled both to equality of treatment *and* to a minimum international standard, whichever is more favorable. Thus, the foreign national would always be entitled to the minimum international standard, but at the same time would also be entitled to equality of treatment with the subjects of the expropriating State, if such treatment was more favorable than this minimum standard.<sup>21</sup>

---

19. Ibid. Probably the classic statement of the principle of an international standard of justice was given by Elihu Root in his address before the American Society of International Law in 1910:

"There is a standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world. The condition upon which any country is entitled to measure the justice due from it to an alien by the justice which it accords to its own citizens is that its system of law and administration shall conform to this general standard. If any country's system of law and administration does not conform to that standard, although the people of the country may be content or compelled to live under it, no other country can be compelled to accept it as furnishing a satisfactory measure of treatment to its citizens." 4 Am. Soc'y Int'l L. 21 (1910).

20. 5 Foreign Rel. at 677.

21. The recently completed Harvard Law School Preliminary Draft of the Convention on the International Responsibility of States for Injuries to Aliens (1959) [hereinafter cited as Harvard Preliminary Draft] adopts this principle in the following language:

"Neither this Convention nor any rule of international law shall be deemed to affect any right which an alien enjoys under the municipal law of the State against which the claim is made if that law is more favorable to him than this Convention or a rule of international law." Harvard Preliminary Draft art. 2, at 35.

"If the international standard is higher than that provided by municipal law, it is beyond doubt that the former should prevail. It is not, however, a necessary consequence of the paramountcy of international law . . . that the alien is entitled to the benefit of the international standard alone when the municipal standard is higher than the international one. . . . To give an alien less favorable treatment than nationals or the generality of persons found within the jurisdiction would constitute discrimination against the alien, which is itself an international wrong under a number of circumstances . . . . It seems

In this connection, it has been suggested that the two principles which originally had the same end in view have become opposing principles, and hence have become outmoded in contemporary international law. And that what was formerly the object of both of these principles—the protection of the person and his property—can now be accomplished by the one all-embracing principle of the international recognition of the essential rights of man.<sup>22</sup>

One of the most basic of these essential rights is the right to possess, enjoy and dispose of private property, and to be secure in the ownership thereof against the assaults of those who would unjustly appropriate it, whether these be public or private in origin.

### B. *General Expropriation v. Individual Expropriation*

Attempts have often been made to draw a distinction between the obligation of a State to pay compensation to foreign nationals in cases of general expropriations which affect a whole society and cases of *ad hoc* expropriations which affect only individual enterprises and properties. There is in fact little, if any, disagreement with the proposition that in the latter situation compensation must be paid. (Both Fachiri and Williams were clearly talking about the former.) But the argument is made that when States are engaged in nation-wide reforms of their economic, political or social structure, in the course of which large-scale expropriations (usually of land) are made, they are under no obligation to pay compensation. It is asserted that, subject to limitations imposed by treaty provisions, States are at liberty to carry out such expropriations in the manner and form they consider best; that they are free to operate their municipal system of property according to their own national genius, unaffected by international judicial decisions or legal principles.<sup>23</sup>

---

desirable, however, to include . . . a general clause ensuring that in no circumstances a higher national standard will be impaired by resort to any provision of this Convention or some general rule of international law." Id. at 38 (explanatory note).

The same principle is adopted in article 10 which provides that compensation for expropriation of an alien's property is wrongful if not "in accordance with the higher of the following standards:

(a) compensation which is no less favorable than that granted to nationals of such State; or

(b) just compensation in terms of the fair market value of the property unaffected by this or other takings or, if no market value exists, in terms of the fair value of such property." Id. at 64.

Item (a) expresses the principle of equality of treatment; item (b) the principle of an international standard of justice.

22. Garcia-Amador, Second Report to International Law Commission on International Responsibility, U.N. Doc. No. A/CN.4/106 (1957).

23. See, e.g., Friedman, Expropriation in International Law 207, 220 (1953); Delson,

Thus, the Mexican Government, in the diplomatic correspondence referred to above, maintained in a note of August 3, 1938, to the American Government that:

[T]here is in international law no rule universally accepted in theory nor carried out in practice, which makes obligatory the payment of immediate compensation nor even of deferred compensation, for expropriations of a general and impersonal character like those which Mexico has carried out for the purpose of redistribution of the land.<sup>24</sup>

The communication further pointed out that the agrarian reform was for purposes of "social betterment"; spoke of a "transformation of the country"; and asserted that "the political, social and economic stability, and the peace of Mexico" depended upon the measures taken.<sup>25</sup>

Later, on September 1, 1938, the Mexican Government asserted that if such acts of general expropriation "were inspired by legitimate causes and the aspirations of social justice, they have not been considered unusual or contrary to international law"; and that it was indispensable, in speaking of expropriations, "to distinguish between those which are the result of a modification of the juridical organization and which affect equally all the inhabitants of the country, and those others decreed in specific cases and which affect interests known in advance and individually determined."<sup>26</sup>

The contention that social progress justifies total or partial confiscation was, it is submitted, definitively answered in another portion of Secretary of State Hull's note of July 21, 1938. While expressing the sympathy of the Government of the United States with the desires of the Mexican Government for the social betterment of its people, he stated that the United States could not accept the idea that these plans should be carried out at the expense of its citizens. Hull sharply delineated the real issue by emphasizing that:

The purposes of this program, however desirable they may be, are entirely unrelated to and apart from the real issue under discussion between our two Governments. The issue is not whether Mexico should pursue social and economic policies designed to improve the standard of living of its people. The issue is whether in pursuing them the property of American nationals may be taken by the Mexican Government without making prompt payment of just compensation to the owner in accordance with the universally recognized rules of law and equity.<sup>27</sup>

---

Nationalization of the Suez Canal Co.: *Issues of Public and Private International Law*, 57 *Colum. L. Rev.* 755 (1957); Herz, *Expropriation of Foreign Property*, 35 *Am. J. Int'l L.* 243, 249, 258 n.55, 259 (1941). This, of course, was also Williams' position in his debate with Fachiri.

24. 5 *Foreign Rel.* at 679.

25. *Id.* at 680.

26. *Id.* at 698.

27. *Id.* at 674.

The position advanced by Mexico is not without its supporters today. Thus, Friedman<sup>28</sup> states that in the case of a general expropriation, no legally binding rule can be deduced from the practice of States requiring compensation to the owners, whether national or foreign, of property expropriated as a result of such reforms. He states, however, that the bases on which he formed this conclusion as to general expropriation have no application to individual expropriation.<sup>29</sup> Professor Bishop<sup>30</sup> states that there is no agreement today as to whether or not a State is obligated by international law to pay adequate compensation to aliens, whose property is taken for public purposes deemed of importance to the national welfare, when no discrimination exists between aliens and nationals of the expropriating State. Those favoring this view take comfort from the United Nations General Assembly Resolution of December 21, 1952, which declared that "the right of peoples freely to use and exploit their natural wealth and resources is inherent in their sovereignty . . . ."<sup>31</sup> The resolution did not refer to any obligation, either express or implied, to compensate foreign investors.

However, as one authority has observed, the power of a State to use and exploit its natural wealth and resources includes the power "to enter into binding agreements for the development" of its natural wealth and resources.<sup>32</sup> And, in exercising this power, the State has the obligation "to act in accordance with recognized principles of international law . . . and with due regard for existing . . . rights . . . with adequate, prompt and effective compensation . . . ."<sup>33</sup>

If the theoretical justification for nonpayment of compensation in the case of a general expropriation is that such action is for the social betterment<sup>34</sup> of the entire nation and that the common good (from which all

---

28. Friedman, *op. cit.* supra note 23, at 206.

29. *Id.* at 211. It is not always easy to distinguish a general expropriation from an individual expropriation, since the language of the expropriation law may speak in general terms, but have only specific application.

Thus, the Nationalization Law of Iran which went into effect on May 1, 1951, provided that the oil industry throughout all parts of the country without exception be nationalized, but only the Anglo-Iranian Oil Corporation was affected by the sweeping language of the law.

30. Bishop, *International Law* 485-86 (1953).

31. See Press Release G.A. 939, U.N. Dept. of Pub. Information, Dec. 1, 1952, pp. 8-12. See also Re, *Nationalization and the Investment of Capital Abroad*, 42 *Geo. L.J.* 44, 51 (1953), for text of resolution.

32. Hyde, *Permanent Sovereignty Over Natural Wealth and Resources*, 50 *Am. J. Int'l L.* 854, 867 (1956).

33. *Ibid.*

34. An interesting comment on the "social" justification of general expropriations without compensation appears in the Harvard Preliminary Draft at 67: "In terms of social justice, the taking of the property of aliens may create greater hardships to the aliens whose property it is than it brings benefits to the State seizing the property."

will presumably benefit) demands a common sacrifice, there would seem to be little basis for demanding such sacrifice from foreign nationals who are not a part of the nation whose well-being is being improved.

### C. *Municipal Law as an Excuse for Nonpayment of Compensation*

It has been argued that the municipal law of the expropriating State can nullify the requirement that adequate, prompt and effective compensation be paid to foreign owners of expropriated property.

Thus, for example, in the arbitration proceeding arising out of the *Shufeldt Claim* (1930), between Guatemala and the United States, Guatemala contended that its decree nullifying a concession contract was the constitutional act of a sovereign State which was "not subject to review by any judicial authority."<sup>35</sup> In answer to this contention, the arbitrator held:

This may be quite true from a national point of view but not from an international point of view for 'it is a settled principle of international law that a sovereign can not be permitted to set up one of his own municipal laws as a bar to a claim by a foreign sovereign for a wrong done to the latter's subject.'<sup>36</sup>

Mexico, too, while denying the existence of any principle of international law requiring the payment of compensation for expropriations of a general character, admitted that she was required under her own municipal laws to pay compensation, but that the time and manner must be determined by those laws,<sup>37</sup> which, it need hardly be said, did not conform to the understanding of the United States Government as to the meaning of prompt, adequate and effective compensation. The United States maintained that no government can nullify principles of international law through contradictory municipal legislation of its own.<sup>38</sup>

The general agreement today that municipal law affords no excuse for the avoidance of international obligations is reflected in article 1 of the Second Report on the International Responsibility of States to the International Law Commission of the United Nations, which reads as follows:

The State may not plead any provision of its municipal law for the purpose of repudiating the responsibility which arises out of the breach or non-observance of an international obligation.<sup>39</sup>

In commenting on this article, the Report continues:

This principle, generally recognized by the learned authorities, has been affirmed in previous draft codes and in the recorded decisions of the former Permanent Court

35. U.S. Dept. of State Arb. Series No. 3, at 876 (1930).

36. Id. at 876-77. The full text of the arbitrator's report is also found in 24 Am. & Int'l L. 799 (1930).

37. 5 Foreign Rel. at 680.

38. Id. at 686.

39. Garcia-Amador, *supra* note 22, at 105.

of International Justice. It is now therefore accepted that the State cannot appeal to any provision of its municipal law in order to escape a responsibility arising out of the non-observance of its international obligations.<sup>40</sup>

The contention that municipal law can override international law is, in essence, a denial of the very existence of international law itself. If international law is only valid until it is attempted to be applied to a specific situation, at which time it may be nullified by the municipal law of any State at will, then it is a futile thing indeed. It seems almost self-evident that it is to the interest of all States to have predictable international rules of law which will be applied in similar situations, even if those rules must at times be invoked against a State, rather than to have no rules of international law at all, which of course would be the case if such rules could be nullified at any time by municipal legislation.

#### D. *Financial Impossibility as an Excuse for Nonpayment of Compensation*

The novel argument has also been advanced that the financial inability of a nationalizing State to pay compensation itself justifies its being excused from this obligation, either in whole or in part, or delaying its performance for an indeterminate period of time.

Thus, the Mexican Government asserted that when a nation re-organized its economy, the expropriation of private property did not "call for immediate compensation and, in many cases, not even subsequent compensation,"<sup>41</sup> and that the future of a nation "could not be halted by the impossibility of paying immediately the value of the properties belonging to a small number of foreigners who seek only a lucrative end."<sup>42</sup>

The Government of the United States, in reply to the Mexican argument, refused to admit that any government could abandon the recognized principles of international law requiring just compensation "by pleading economic inability"<sup>43</sup> merely because its financial or economic situation made compliance difficult. If this principle were adopted, the American Government asserted, "governments would be free to take private prop-

---

40. Id. at 107. This principle is adopted in the Harvard Preliminary Draft, art. 2, para. 2, at 35: "A State cannot avoid international responsibility by invoking its municipal law." An explanatory note refers to this principle as "one of the foundation stones of the law of nations." Id. at 38.

41. 5 Foreign Rel. at 679.

42. Id. at 680. If having an interest in being paid for one's property when it has been taken for the economic benefit of others is properly described as seeking "only a lucrative end," then there are few whose motives would be exempt from such characterization.

43. Id. at 688-89.

erty far beyond, or regardless of, their ability or willingness to pay, and the owners thereof would be without recourse."<sup>44</sup>

That the Mexican position still commands support is illustrated by a recent assertion that a demand for adequate, prompt and effective compensation in a situation similar to the expropriation of the Anglo-Iranian Oil Company would be "absurd," since it implies that a State which lacks the economic possibilities to make such compensation payments should refrain from nationalization.<sup>45</sup>

To others, including the authors of this article, this alleged "absurdity" is not so apparent. They feel, with Justice Holmes, that:

In general, it is not plain that a man's misfortunes or necessities will justify shifting the damages to his neighbor's shoulders.<sup>46</sup>

Financial difficulties or straitened economic circumstances offer no justification for the repudiation of obligations, either by individuals or by nations. If a State is unable to pay for what it takes, then it has no legal or moral right to take from those who are not nationals of the State. Beneficial as nationalization may ultimately prove to be to a State and to 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. In short, poverty is no more an excuse for unjust enrichment in the case of a State than it is in the case of an individual.<sup>47</sup>

#### E. *Public Utility as a Prerequisite to Nationalization*

Those who assert the existence of an obligation to pay compensation to foreigners deprived of their property by expropriation, and those who deny such obligation, generally agree that when private property is taken for public use, it can be taken only for reasons of "public utility."<sup>48</sup>

---

44. Id. at 688.

45. Foighel, *Nationalization* 76 (1957).

46. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

47. "The poverty of a country or its asserted inability to pay may not be set up as a defense to international responsibility." Harvard Preliminary Draft at 79.

"The payment of adequate compensation, including reasonably anticipated profits, would serve as a useful deterrent to nationalizations as there would be no financial gain to the State, and therefore less incentive to nationalize." Olmstead, *Nationalization of Foreign Property Interests, Particularly Those Subject to Agreements with the State*, 32 N.Y.U. L. Rev. 1122, 1134 (1957).

48. "The first of the conditions, laid down by international law, which must be fulfilled to render a taking in the exercise of eminent domain an internationally legal expropriation, as contradistinguished from an internationally illegal confiscation, is that the expropriation must be for reasons of public utility." Kunz, *The Mexican Expropriations*, 17 N.Y.U.L. Rev. 327, 351 (1940). (Italics omitted.)

Recent treaties entered into by the United States (such as those with the Netherlands and with Korea) have incorporated such a requirement with provisions to the effect that property of the other's nationals shall not be taken "except for a public interest (purpose)."<sup>49</sup>

Some have attempted to minimize the value of this concept. Herz, for example, has asserted that there is no relevant distinction between cases of real public utility and mere arbitrary acts; that international law does not contain its own definition of "public use," but leaves it to the expropriating State to judge what it considers useful for the welfare of its people.<sup>50</sup>

However, the fact that a concept lacks precise definition does not necessarily result in its becoming completely meaningless or without value. If, for example, an expropriation were submitted to an international tribunal for a determination of the question as to whether the property expropriated was taken for reasons of public utility, the tribunal would not be prevented from resolving the issue merely because no ideally satisfactory definition of "public utility" exists. An exact definition is neither possible nor necessary. Municipal tribunals throughout the world daily interpret and apply such seemingly amorphous concepts as "good faith," "reasonable man," "due process," and the like, although it would be difficult to define these phrases with any absolute degree of finality.

Furthermore, States, like individuals, are not influenced in their conduct solely by the threatened possibility of judicial sanctions. Public opinion is also a powerful factor influencing the conduct of sovereigns as well as subjects. And the common judgment of mankind would have little difficulty in distinguishing a bona fide expropriation *pro bono publico*, arising out of a real social necessity, from a naked, arbitrary seizure of private property with no justification other than the power to do so—an instance of what has been called "imperialism in reverse."<sup>51</sup>

#### F. *Obligation to Pay Compensation as Condition Precedent or as Condition Subsequent*

It has been pointed out that there is a difference between the statement that international law requires a State *which has expropriated* foreign property to pay compensation, and the statement that international law

---

49. [1956 Part 2] Treaty of Friendship, Commerce and Navigation with The Netherlands, 8 U.S.T. & O.I.A. 2043, 2051; [1956 Part 2] Treaty of Friendship, Commerce and Navigation with The Republic of Korea, 8 U.S.T. & O.I.A. 2217, 2221.

50. Herz, Expropriation of Foreign Property, 35 Am. J. Int'l L. 243, 253 (1941).

51. Carlston, Concession Agreements and Nationalization, 52 Am. J. Int'l L. 200, 275 (1958).



renders a State *incompetent* to expropriate *unless* compensation is paid.<sup>52</sup>

Proponents of the former view hold that expropriations are not per se in violation of international law solely on the ground that they are not accompanied by provision for adequate compensation. They feel that the validity and justification of the nationalization are not conditioned upon the fact that compensation is provided for, but rather by the fact of its being the exercise of a power which the State is recognized as possessing under international law.<sup>53</sup> Foighel, for example, refers to the possibility that nationalization without compensation may possibly be "a legitimate step justified by international law,"<sup>54</sup> even though payment may be required by international law and failure to pay may therefore be "an independent breach of the law."<sup>55</sup>

Those of the opposite view assert that nationalization without provision for adequate compensation is confiscation, and that as such it is always unlawful and contrary to international law.<sup>56</sup>

Thus, in the Mexican oil expropriation situation, the United States *conditioned* the exercise of the admitted right to expropriate on the ability and willingness of the expropriating government to pay, and insisted that the legality of the expropriation depended on it. In Secretary of State Hull's note of April 3, 1940, this point was made very emphatically:

The Government of the United States readily recognizes the right of a sovereign state to expropriate property for public purposes. . . . however . . . the right to expropriate property is coupled with and conditioned on the obligation to make adequate, effective and prompt compensation. The legality of an expropriation is in fact dependent upon the observance of this requirement.

\* \* \* \*

As above stated, in the opinion of the Government of the United States the legality of an expropriation is contingent upon adequate, effective and prompt compensation.<sup>57</sup>

The importance of the distinction between these two positions is indicated by the fact that if international law comes into operation only after the expropriation, then only an *in personam* right to compensation would exist. On the other hand, if the nationalization is of no effect unless accompanied by adequate compensation, then an *in rem* right

52. O'Connell, *A Critique of the Iranian Oil Litigation*, 4 Int'l & Comp. L.Q. 267, 277 (1955).

53. Friedman, *op. cit.* supra note 23, at 204.

54. Foighel, *op. cit.* supra note 45, at 40-41.

55. *Ibid.*

56. See, e.g., Brander, *Legal Aspects of Foreign Investments*, 18 Fed. B.J. 298, 305 (1958). See also Secretary of State Hull's note of July 21, 1938: "The taking of property without compensation is not expropriation. It is confiscation. It is no less confiscation because there may be an expressed intent to pay at some time in the future." 5 Foreign Rel. at 676.

57. Quoted in 3 Hackworth, *Digest of International Law* 662 (1942).

to the property itself would continue to exist. In result, the distinction would be analogous to that between a claim for damages and a claim for specific performance.

A leading authority on international law has declared that there is substantial support for the proposition that since payment of full compensation within a reasonable time is a condition which must be satisfied by a requisitioning State on account of its actions in time of war, "the expropriation of alien-owned property in time of peace cannot lawfully be effected on lighter terms";<sup>58</sup> that the right to expropriate should be conditioned upon the power to pay; and that "if it be sought to exercise that right when evidence of the possession of such power and the disposition to use it are not evident, there is reason to demand that there be restored to the owners what may have been taken from them."<sup>59</sup>

The logic and justice of this position seem irrefutable.

### G. *Obligation to Pay Compensation*

There is substantially unanimous agreement among the authorities that a duty exists to pay full compensation in the case of an individual expropriation. And in the case of general expropriation, the majority of authorities also support the obligation to pay full compensation and not merely to treat foreign nationals in the same manner as citizens of the expropriating State.

The recent response of the Committee on the Study of Nationalization of the American Branch of the International Law Association to a questionnaire of the International Committee on Nationalization strongly asserted as one of three basic principles governing the treatment of alien interests in property and contract that:

The taking of alien interests must be accompanied by full compensation.<sup>60</sup>

In commenting on this principle, the Committee stated:

This basic requirement—full compensation, promptly and effectively paid—has received repeated expression in legal principle and in positive law. . . . In substance, it equates with 'the principle of respect for vested rights' to which the Permanent Court of International Justice repeatedly lent its authority.<sup>61</sup>

The Chairman of the Committee on Protection of Investments Abroad in Time of Peace of the International Bar Association recently set forth several principles in his report submitted to the Seventh Conference

---

58. 1 Hyde, *International Law* 711-12 (1945).

59. Hyde, *Compensation for Expropriation*, 33 *Am. J. Int'l L.* 108, 112 (1939).

60. Committee on the Study of Nationalization of the American Branch of the International Law Association, *Nationalization of the Property of Aliens*, 13 *Record of N.Y.C.B.A.* 367, 369 (1958) [hereinafter referred to as 13 *Record*].

61. *Id.* at 371.

held in Cologne, Germany, in July 1958, including one (principle 2) which declared that "alien private property may only be expropriated on the grounds of public interest and against adequate compensation."<sup>62</sup> Principle 5 provided that "expropriations . . . which are not in accordance with the conditions of principles 1-4 are contrary to international law."<sup>63</sup> Thus, the two principles taken together stand for the proposition that in the absence of adequate compensation, an expropriation of alien property is a violation of international law. Article 9 of the Second Report of Garcia-Amador to the International Law Commission, dated February 15, 1957, reads as follows:

The State is responsible for the injury caused to an alien by the expropriation of his property, save in so far as the measure in question is justified on grounds of public interest and the alien receives adequate compensation.<sup>64</sup>

Even Foighel,<sup>65</sup> who is a strong defender of an unlimited right to nationalize, concludes that recent developments in international law seem to tend toward a rule that nationalization entails an obligation to pay compensation. He points out that municipal legislation of some countries (e.g., France) provides "presumably to comply with a legal obligation—that foreigners have a claim to a special legal position with regard to compensation for nationalized property, irrespective of the fact that the country's own nationals receive different and less favorable treatment."<sup>66</sup> He further observes that "practical considerations"—determined by the international interests of all countries—support an unqualified liability to pay compensation in the case of the nationalization of foreign property. Foighel also suggests that the present policy of incorporating into treaties provisions providing for compensation to foreign nations by States which nationalize the property of their own citizens without compensation must be accepted as "conducting to the creation—or the confirmation of—the international legal maxim that the nationalization of foreign property involves liability for the nationalizing state to pay compensation."<sup>67</sup> He concludes that a rule to this effect that nationalization of foreign property involves a liability to pay compensation would be "in the mutual interests of all states,"<sup>68</sup> a proposition with which, at least from a practical point of view, it is difficult to disagree.

---

62. Ehlers, Report, Protection of Investments Abroad in Time of Peace, International Bar Association, Seventh Conference 17 (1958).

63. *Ibid.*

64. Garcia-Amador, *supra* note 22, at English Annex 5.

65. Foighel, *op. cit.* *supra* note 45, at 85-87.

66. *Id.* at 85.

67. *Ibid.*

68. *Id.* at 87.

It is worth noting, in this connection, that in the two nationalizations of recent years which have caused the greatest international reverberations, those of the Anglo-Iranian Oil Company and the Universal Suez Canal Company, provisions for compensation, inadequate though they may have proved to be, were nevertheless included in the nationalization legislation in both instances, indicating at least token admission of what seems to be the generally accepted rule of present international law.

## II. LEGALITY OF ABROGATION BY A SOVEREIGN OF A CONCESSION CONTRACT WITH A FOREIGN NATIONAL

Whatever the status of the law or of informed opinion may be as to the obligation of a State to pay compensation to a foreign national whose property has been expropriated, there is substantially unanimous agreement with the proposition that *if* adequate compensation is paid, and *if* there are no treaty or other restrictions to the contrary, the State has the power and the right under international law to expropriate, for reasons of public utility, any property within its territorial jurisdiction.

But what if a State, by granting a concession to a foreign national, has either expressly or impliedly contracted *not* to expropriate? Do the same principles that govern the legality of the expropriation of property by a State also govern the legality of its abrogation of a concession agreement? In other words, does a sovereign's right to expropriate property within its jurisdiction include the right to expropriate property which by contract or concession it has, either expressly or by implication, covenanted not to expropriate?

### A. *Nature of a Concession*

The nature, character and legal status of a concession agreement have never been clearly determined nor its definition agreed upon. It is not in fact a treaty, since one of the parties is a private individual or corporation. Nor is it simply a private contractual agreement, since the other party is a sovereign State. The State of the individual or corporate party to the agreement is also frequently involved directly or indirectly. In addition to its purely contractual aspects, the agreement moreover has attributes which make it similar to an interest in land.

Most concessions have certain basic elements in common: the parties to the concession agreement are a State on the one hand, and a foreign national (either individual or corporate) on the other; the concession is usually granted for a specified term of years; the agreements are generally entered into by a corporation of a nation having capital, skilled labor, and technical knowledge, with the government of a nation having natural resources needing development. These agreements are ordinarily

entered into for the purpose of developing these resources to the mutual profit of the State and the concessionaire. They have been aptly described as "economic development agreements."<sup>69</sup>

### B. *What Law Governs a Concession Agreement?*

The question of what law governs a concession agreement has been answered in various ways.

Some argue that concessions are governed strictly by municipal law. They contend that there are only two kinds of law, international law and municipal law; that international law governs relationships between sovereign States only; and that all other relationships are governed by municipal law. Since a concession agreement is not an agreement between two sovereign States, under this theory it can only be a private contract and hence can only be governed by municipal law.<sup>70</sup>

It has been said that unless a contrary intention appears, a concession is *prima facie* subject to municipal law, and the presumption "is in favor of the municipal law of the grantor."<sup>71</sup>

Foighel contends that a concession must be regarded as giving title to a status only in municipal law, and the obligation of the State to maintain that status "must be based on municipal law and not on international law."<sup>72</sup>

The Second Report by Garcia-Amador, Special Rapporteur on International Responsibility, to the International Law Commission, states:

Learned opinion and practice are agreed that contracts made between the Government of a State and an alien are governed, so far as their conclusion and performance are concerned, by the municipal law of that State and not by (public) international law, for a private person who enters into a contract with a foreign government *ipso facto* agrees to be bound by the local law with respect to all the legal consequences which may flow from that contract.<sup>73</sup>

It has also been asserted that contracts cannot be the subject of international dispute since international law contains no rule respecting their form and legal effect.<sup>74</sup>

69. McNair, *The General Principles of Law Recognized by Civilized Nations*, 33 *Brit. Yb. Int'l L.* 1 (1957).

70. "Any contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country." *Serbian Loans*, P.C.I.J., ser. A, Nos. 20/21, at 41 (1929). "Every contract which is not an international agreement—i.e., a treaty between States—is subject (as matters now stand) to municipal law. . . ." Report of the League of Nations Commission for Study of International Loan Contracts, IIA 10, at 21 (1939).

71. Schwarzenberger, *The Protection of British Property Abroad*, 5 *Current Legal Problems* 295, 312 (1952).

72. Foighel, *op. cit. supra* note 45, at 74.

73. Garcia-Amador, *supra* note 22, at 36.

74. Friedman, *Expropriation in International Law* 156 (1953).

Others, however, take the position that concession agreements in all essential respects are analogous to treaties and, therefore, like treaties, are governed primarily by international law.

Even though a dispute arising under a concession agreement may begin as a dispute between a private person and a State, when the individual's government takes up his case, it then becomes a dispute between two States and thus enters the domain of international law:

By taking up a case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on its behalf, a State is in reality asserting its own rights—its right to ensure, in the person of its subjects, respect for the rules of international law.

The question, therefore, whether the present dispute originates in an injury to a private interest, which in point of fact is the case of many international disputes, is irrelevant from this standpoint. Once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the State is sole claimant.<sup>75</sup>

There is a third view to the effect that concession contracts fall neither completely under the rules of international law nor under the rules of private municipal law but somewhere in between, being governed in part by both, and exclusively by neither.

Thus, O'Connell<sup>76</sup> states that the rights of the concessionaire are neither exclusively public nor private in character, but a mixture of both. Since a concession is not a treaty, it cannot be confined "within the ambit of public law."<sup>77</sup> On the other hand, since one of the parties to the contract is the State, it "cannot be exclusively [a matter] . . . of private law."<sup>78</sup>

McNair<sup>79</sup> also maintains that concession contracts are governed in part by public, and in part by private, law; that the system of law which governs them cannot be international law in the strict sense since the contracts are not interstate and do not deal with interstate relations. He suggests that the system of law most likely to be suitable for the regulation of these contracts and the adjudication of disputes arising under them is "the general principles of law recognized by civilized nations."<sup>80</sup>

Huang reaches a similar conclusion in a recent article<sup>81</sup> in which he states his belief that a rule *sui generis* should be adopted applicable to

---

75. The Mavrommatis Palestine Concessions, P.C.I.J. ser. A, No. 2, at 12 (1924).

76. O'Connell, *supra* note 52, at 270.

77. *Ibid.*

78. *Ibid.*

79. McNair, *supra* note 69, at 19.

80. *Ibid.*

81. Huang, Some International and Legal Aspects of the Suez Canal Question, 51 *Am. J. Int'l L.* 277 (1957).

concessions, based upon the same "general principles of law recognized by civilized nations" but applying public international law.<sup>82</sup>

Concession agreements often contain no provisions as to which law shall govern disputes arising under them. Frequently, however, such agreements contain provisions of a very general nature as to the law which shall govern their operation, such as "the principle of goodwill and good faith as well as a reasonable interpretation . . . of the Agreement,"<sup>83</sup> or "goodwill and sincerity of belief and . . . the interpretation of this Agreement in a fashion consistent with reason."<sup>84</sup>

Still others provide that they shall be governed by general principles of law, as for example, that the agreement shall be governed by "legal principles familiar to civilized nations";<sup>85</sup> or by the law of the granting State "and such principles and rules of international law as may be relevant";<sup>86</sup> or by such law and by the "principles of law recognized by civilized nations."<sup>87</sup>

Both the Anglo-Iranian Concession Agreement of 1933 and the Consortium Agreement of 1954, which arose out of the settlement of the Anglo-Iranian dispute, contained typical provisions illustrating the customary intent of the parties to this type of agreement to be governed otherwise than solely by the law of the granting State.

Thus, article 22(f) of the Concession Agreement of April 29, 1933, between Iran and the Anglo-Iranian Oil Company, stipulated that all differences between the parties were to be settled by an arbitral tribunal provided for in the agreement and further stated:

The award shall be based on the judicial principles contained in Article 38 of the Statutes of the Permanent Court of International Justice.<sup>88</sup>

Article 46 of the Consortium Agreement of 1954 between Iran, the National Iranian Oil Company and certain other American, British, Dutch and French corporations, provided as follows:

In view of the diverse nationalities of the parties of this Agreement it shall be governed by and interpreted and applied in accordance with the principles of law

---

82. *Id.* at 307. "Municipal law determines whether a property right has been acquired and whether it is vested in the claimant. International law must decide whether the defendant state is liable for the violation of a property right so acquired, whether the claimant state is entitled to maintain the action in an international court and finally it must determine the measure of damages." Lipstein, *Conflict of Laws Before International Tribunals*, 29 *Transact. Grot. Soc'y* 51, 61 (1944).

83. *McNair*, *supra* note 69, at 8.

84. *Ibid.*

85. *Ibid.*

86. Schwebel, *International Protection of Contractual Arrangements* 6 n.6, paper to be published in 53 *Am. Soc'y Int'l L.* (1959).

87. *McNair*, *supra* note 69, at 8-9.

88. *Anglo-Iranian Oil Co. Case (United Kingdom v. Iran)*—Pleadings 32 (I.C.J. 1952).

common to Iran and the several nations in which the other parties to this agreement are incorporated, and in the absence of such common principles then by and in accordance with the principles of law recognized by civilized nations in general, including such of these principles as may have been applied by international tribunals.<sup>89</sup>

Both of these agreements, made almost a quarter of a century apart, clearly indicate that the parties were looking beyond the local law of either party for a settlement of their disputes. It seems safe to assert that these are typical examples of the usual intent of the parties to such agreements not to rely upon the municipal law of either party as the sole standard by which disputes arising under these agreements are to be judged.

The fact that many, if not most, of these agreements often contain provisions for the arbitration of disputes on an international level is further evidence of the fact that the parties are not thinking exclusively in terms of municipal law, and that, at least insofar as any major alteration or modification of the mutual rights and obligations thereunder is concerned, the parties are relying on something more universal and impartial than the local municipal law of either party, which is subject to unilateral change without notice.

C. *Does a Sovereign State Have the Power to Limit by Contract Its Future Action?*

It may be argued, in defense of the alleged right of a sovereign to abrogate a concession which the sovereign has previously voluntarily granted, that a government cannot fetter nor hamper its future action by contract, and that therefore it has the inherent power and right to repudiate its contractual obligations at will. One may contend that since the State is concerned with the moral and economic welfare of its citizens, it cannot bind itself to relationships with individuals that might in time derogate from that welfare; that by reason of the fundamental importance of self-preservation, a State is presumed not to have undertaken obligations toward private individuals in derogation of this vital interest. An organ of the State which acts otherwise is considered to have violated the fundamental law of the State, and its act is consequently void. Furthermore, the alien who voluntarily contracts with a foreign government is chargeable with knowledge of these things, and he accordingly subjects himself to the local law, and takes into account the probabilities of performance by the foreign government and the available local remedies, if any.<sup>90</sup>

---

89. Quoted in McNair, *supra* note 69, at 9.

90. See, e.g., Cheng, *General Principles of Law as Applied by International Courts and Tribunals* 55, 67 (1953); O'Connell, *supra* note 52, at 271. Another alleged justification for



On the other hand, it may be argued with equal force and conviction that there is no inherent impossibility in a government committing its successor to abide by the terms of a concessionary contract. The advocates of this view point out that in principle it is no different from the unlimited treaty-making power of sovereign States in international law,<sup>91</sup> whereby they can, and do, limit their future freedom of action, and under which they are held to account for violation of the agreements made therein; that such limitation in the exercise of sovereignty is an affirmation, rather than a negation, of national sovereignty.<sup>92</sup>

A recent paper by Frank Hendryx<sup>93</sup> delivered to the Arab Oil Congress held in Cairo, Egypt, from April 16 to April 23, 1959, presented the argument upholding the right of a government to abrogate a concession, despite its promise not to do so, in perhaps its boldest and most uncompromising form.

A few excerpts from that address will give the tenor of his argument:<sup>94</sup>

[T]he purpose for which governments exist, the service of their peoples, requires that on proper occasion those governments must be released from or be able to override, their contractual obligations. So strong is this requirement that it will override Constitutional provisions which would apparently deny the possibility of release.

\* \* \* \*

[Hendryx refers to] the practical consideration of protecting the basic interests of the state and its citizens from its own abilities to contract contrary to those interests.

\* \* \* \*

Thus it seems clear that the sovereign state may by the accepted law of civilized nations, act through legislative or administrative decree, at its will, in ways which directly or in effect alter or nullify part or all of one of its existing concession agreements, so long as these actions are taken in good faith, that is, on behalf of a substantial public interest and not merely because it repents of a former bargain.

\* \* \* \*

---

the right of a State to abrogate a contract is based upon a sort of contractual assumption of risk. Thus, Fenwick explains the reluctance of governments to intervene in these contract cases on the consideration "that persons entering into such contracts do so with a knowledge of the risks involved and with expectation of correspondingly large returns upon their investment . . ." Fenwick, *International Law* 292 (3d ed. 1948).

However, it seems almost self-evident that parties normally contract in the expectation of performance. "If States were to be deemed to have reserved a legal right to violate their international contracts, the foreign investor would conclude no such contracts at all." Schwebel, *supra* note 86, at 10-11.

91. "[A]s States may even renounce their political existence, international tribunals are agreed that a specific treaty provision, intended by the parties to apply even in exceptional circumstances, must always be respected." Cheng, *op. cit. supra* note 90, at 67.

92. Schwarzenberger, *supra* note 71, at 313.

93. Hendryx, *A Sovereign Nation's Legal Ability to Make and Abide by a Petroleum Concession Contract*, printed in Platt's Oilgram News Service (N.Y. ed.), April 28, 1959, pp. 2-3. Hendryx is described as "Legal Advisor to Saudi-Arabian Directorate General of Petroleum and Mineral Affairs."

94. *Id.* at 3.

[A]n oil producing nation by the law of civilized nations may clearly, in a proper case, modify or eliminate provisions of an existing petroleum concession which have become substantially contrary to the best interests of its citizens. Financial interest must certainly be included in the classification of matters of vital interest to a nation's citizens.

The above thesis, unqualified as it may appear to be, nevertheless leaves certain fundamental questions unanswered.

For example, what are the "basic interests of the state" contrary to which a State should be protected from its own ability to contract?

Is it contrary to those "basic interests" for a State to enter into a contract for the exploitation of its hitherto undeveloped natural resources whereby large investments of foreign capital, skilled labor, and technical knowledge are introduced into an industrially backward State?

And, if it is, how does one distinguish the case of a government cancelling such a concession contract "in good faith," which Hendryx says is permissible, from the case of such cancellation by a State "merely because it repents of a former bargain"?

Furthermore, Hendryx states that the provisions of an existing petroleum concession can be modified or eliminated "in a proper case" when it has become "substantially contrary to the best interests of its citizens," which include "financial interests." If a government "repents of a former bargain" which has become "contrary to the best [financial] interests of its citizens," which of Hendryx's principles would apply—the principle that would allow the concession to be cancelled because it has become financially advantageous to the State to do so, or the opposing principle that would forbid it on the ground that the government is merely repenting of a former bargain?

Although Hendryx asserts that the legal systems of the United States, England and France "establish beyond question the general legal rules"<sup>95</sup> set forth in his paper, the authorities cited by him are not persuasive. On the contrary, they fail completely to support his assertion.

In fact, of the six United States Supreme Court cases<sup>96</sup> cited by

---

95. *Ibid.*

96. Hendryx cites the three following decisions of the United States Supreme Court in support of the proposition that "the service of their peoples . . . requires that on proper occasion . . . governments must be released from or be able to override, their contractual obligations." Hendryx, *supra* note 93, at 3.

B. Worthen Co. v. Thomas, 292 U.S. 426 (1934), held that an Arkansas statute exempting certain insurance proceeds from claims of creditors violated the constitutional provision against impairment of the obligation of contracts. The case is thus not only inapplicable since it concerns what a state of the United States can do under a specific constitutional provision, but, even if it were applicable, it would be authority against Hendryx's position rather than supporting it.

Pierce v. New Hampshire, 46 U.S. (5 How.) 504 (1847), held that a New Hampshire statute making it a crime to sell liquor without a license did not violate the commerce

Hendryx, in only two<sup>97</sup> was anything like a contract between a state

clause of the Constitution. Although the six opinions in the case base their decision on various grounds—including police power—the case contains no discussion of, much less authority for, the right of a sovereign to violate a contract.

Marcus Brown Holding Co. v. Feldman, 256 U.S. 170 (1921), held that a New York statute suspending the right to recover possession of real property occupied for dwelling purposes was a valid exercise of the police power and was not a violation of the contract clause or the fourteenth amendment of the Constitution. No contractual obligation of a sovereign—either State or national—was involved.

Hendryx cites two additional cases in which, he states, the Supreme Court “has indicated that states exist for the purposes of their subjects and hence must remain free to fulfill those purposes.” Hendryx, *supra* note 93, at 3.

Mugler v. Kansas, 123 U.S. 623 (1887), held that the Kansas prohibition statutes did not violate the fourteenth amendment. They were held to be a proper exercise of the police power of the state in the interests of protecting public health, safety and morals. The Court stated that they did “not involve the power of eminent domain, in the exercise of which property may not be taken for public use without compensation,” and that a prohibition of the use of the property for purposes injurious to the health, morals or safety of the community could not “in any just sense, be deemed a taking or an appropriation of property for the public benefit.” 123 U.S. at 668-69.

Douglas v. Kentucky, 168 U.S. 488 (1897), held that a Kentucky statute revoking lottery privileges was not a violation of the contract clause of the Constitution on the ground that a lottery grant was not a contract within the meaning of the Constitution, but merely a gratuity or license which could be revoked at any time under the police power of the state to protect public morals. The Court said: “No legislature can bargain away the public health or the public morals.” 168 U.S. at 497.

Both of these cases were decided under the police power of the state under which the right to protect the health, safety and morals of its citizens is always reserved.

Hendryx also quotes the statement, “A governmental power of self-protection cannot be contracted away,” from *New York & N.E. Ry. v. Bristol*, 151 U.S. 556, 567 (1894). Hendryx, *supra* at 3. This case held that a Connecticut statute regulating grade crossings was not a violation of the Constitution and was decided both on the ground of police power and on the further ground that in the contract itself provisions were contained providing for its alteration or repeal. *Id.* at 568. The Court said that: “[I]nhibitions of the Constitution of the United States upon the impairment of the obligation of contracts, or the deprivation of property without due process or of the equal protection of the laws, by the States, are not violated by the legitimate exercise of legislative power in securing the public safety, health, and morals. The governmental power of self-protection cannot be contracted away, nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied liability to governmental regulation in particulars essential to the preservation of the community from injury. . . . And also that ‘a power reserved to the legislature to alter, amend or repeal a charter authorizes it to make any alteration or amendment of a charter granted subject to it, which will not defeat or substantially impair the object of the grant, or any rights vested under it, and which the legislature may deem necessary to secure either that object or any public right.’ . . .

“The charter of this company was subject to the legislative power over it of amendment, alteration or repeal, specifically and under general law.” 151 U.S. at 567-68.

97. *Douglas v. Kentucky*, *supra* note 96; *New York & New England Ry. Co. v. Bristol*, *supra* note 96.

and a private individual involved. And both of these cases were decided on the basis of police power.<sup>98</sup>

None of Hendryx's authorities<sup>99</sup> would seem to offer any support for his blanket assertion that the government's being released from its contractual obligations "will override Constitutional provisions."<sup>100</sup> The basic proposition established by the cases cited by Hendryx is that a government under its police power always has the power to protect the health, safety and morals of its citizens, a proposition which can scarcely be denied. No conclusion, however, can be drawn from these authorities that, as Hendryx implies, whenever it becomes financially profitable to do so, a government can repudiate contracts, validly entered into, on some theory analogous to the theory of "might makes right."

For some reason not apparent, Hendryx makes no reference to the one case decided by the United States Supreme Court which seems most clearly in point on the issue presented by his paper. This is the well-known case of *Perry v. United States*<sup>101</sup> which held that a government *can* bind itself by contract. In the course of its opinion holding invalid, so far as it applied to obligations of the United States, the Joint Resolution of June 5, 1933, abrogating the "gold clause," the Court, through Chief Justice Hughes, said:<sup>102</sup>

When the United States, with constitutional authority, makes contracts, it has rights and incurs responsibilities similar to those of individuals who are parties to such instruments.

\* \* \* \*

The argument in favor of the Joint Resolution . . . is in substance that the Government cannot by contract restrict the exercise of a sovereign power. But the right to make binding obligations is a competence attaching to sovereignty.

---

98. In addition, a further ground of decision in the Bristol case was that the contract provided for its own modification or annulment. See 151 U.S. at 568.

99. It is only fair to include Hendryx's statement that his paper was "not intended as a legal brief." Hendryx, *supra* note 93, at 3. Nevertheless, he does assert that the legal systems of England, France and the United States "have ample expressions in their decisions which establish beyond question the general legal rules here after expressed." *Id.* at 2. He declares that it is "apparent beyond reasonable contradiction that founding the final conclusion of each of the above legal jurisdictions is the practical consideration of protecting the basic interests of the state and its citizens from its own abilities to contract contrary to those interests." *Id.* at 3. He refers to the "practical necessity of balancing conflicting interests, here the basic responsibilities of the sovereign or State and the validity—even sanctity of existing contractual obligations" and states that "the lesser interest must, as always, give way to the greater, and the courts of the United States, England and France are unanimous in agreeing which are legally the greater and which the lesser interests." *Ibid.* The clear, although we submit unwarranted, implication seems to be that the principles advanced by Hendryx are so well-settled that no legal brief is needed.

100. See p. 199.

101. 294 U.S. 330 (1935).

102. *Id.* at 352-53.

The Court continued in a footnote as follows:

This is recognized in the field of international engagements. Although there may be no judicial procedure by which such contracts may be enforced in the absence of the consent of the sovereign to be sued, the engagement validly made by a sovereign state is not without legal force, as readily appears if the jurisdiction to entertain a controversy with respect to the performance of the engagement is conferred upon an international tribunal.<sup>103</sup>

Nor is the English authority cited by Hendryx on this question any more impressive. He cites only *Rederiaktiebolaget Amphitrite v. The King*<sup>104</sup> as authority for the proposition that a government cannot by contract fetter its future executive action.

However, twenty-seven years later, the same court in *Robertson v. Minister of Pensions*<sup>105</sup> had this to say concerning that decision:

Nor can the Crown escape by praying in aid the doctrine of executive necessity, i.e., the doctrine that the Crown cannot bind itself so as to fetter its future executive action. That doctrine was propounded by ROWLAT, J., in *Rederiaktiebolaget Amphitrite v. R.* (4), but it was unnecessary for the decision because the statement there was not a promise which was intended to be binding but only an expression of intention.<sup>106</sup>

The Court then concluded as follows:

In my opinion, the defence of executive necessity is of limited scope. It only avails the Crown where there is an implied term to that effect, or that is the true meaning of the contract.<sup>107</sup>

With respect to French law, Hendryx cites neither any cases nor any provisions of its Civil Code. He simply asserts that in France a contract between a State and an individual falls within the classification of "administrative contracts," and that the rules applied to these cases are based on the fundamental principles of the predominance of the public interest involved.<sup>108</sup> He further states that where the public interest intervenes, the interest of the contractor is accorded secondary importance.<sup>109</sup>

However, in a recent paper presented before the American Society of International Law, it was stated that:

French law, often seized upon to illustrate the State's breadth of legal power, distinguishes between concessions where there are public users, between "administrative

103. *Id.* at 353, n.3.

104. [1921] 3 K.B. 500.

105. [1948] 2 All E.R. 767.

106. *Id.* at 770.

107. *Ibid.*

108. Hendryx, *supra* note 93, at 3.

109. *Ibid.*

contracts," where the State reserves great power, and other State contracts, *like mining concessions*, which are *not* subject to the State's unilateral revision.<sup>110</sup>

As a final comment on Hendryx's authorities, one might point out that although he concedes that "international law" should govern the problem, none of the cases cited by him have any international aspects whatsoever. They do not concern agreements between States and foreign nationals, nor do the courts in any of the cases even purport to be applying international law principles in a municipal court.

In a recent arbitral award which has been called "perhaps the most important arbitral award interpretive of international concessions ever rendered,"<sup>111</sup> it was held:

By reason of its very sovereignty within its territorial domain, the State possesses the legal power to grant rights which it forbids itself to withdraw before the end of the Concession. . . . Nothing can prevent a State, in the exercise of its sovereignty, from binding itself irrevocably by the provisions of a concession and from granting to the concessionaire irrevocable rights.<sup>112</sup>

A concession agreement is entered into by a nation, which—for reasons of lack of capital, skilled labor, technical knowledge, or access to markets—is unable to develop its natural resources in a profitable manner, with a foreign corporation or individual able to supply those needs. Both parties voluntarily agree to the terms of the contract and both parties naturally hope that it will be profitable. The fact that the expectations of the State may not be fully realized in obtaining as large a profit or benefit as anticipated is no justification for the repudiation of its obligations freely undertaken. The expectations of the concessionaire also may be, and often are, unrealized. Large investments of time and capital may have to be made before success is achieved, and of course there is no guarantee that the venture will ever be successful or profitable. But the concessionaire is nevertheless bound by the terms of the contract, and the State should be equally bound.

There is no legal or moral justification for a State, after solemnly committing itself to a contract with a foreign national, seeking to avoid its responsibilities thereunder on some outworn theory that sovereignty embraces privileges only, without correlative obligations. Nothing inherent in sovereignty prevents the performance of contracts and the granting of irrevocable rights.

---

110. Schwebel, *supra* note 86, at 16. (Emphasis added.)

111. *Id.* at 17.

112. *Id.* at 17-18. The quotation is cited in Schwebel's paper as being taken from page 61 of the Arbitration between Saudi Arabia and the Arabian American Oil Company, Award of August 23, 1958 (unpublished). The writer cites the arbitration award as authority for the statement that: "In the law of Switzerland and Germany, and in Moslem law, a concessionaire's rights apparently are irrevocable." (Footnotes omitted.) *Id.* at 17.

D. *International Responsibility of a Sovereign for Abrogation of a Concession*

Dunn<sup>113</sup> wrote in 1932 that the question of international responsibility for losses arising out of contractual relations between private individuals and foreign governments presented a diversity of views among legal authorities and a confusion of precedents "as great if not greater than any subject previously considered"<sup>114</sup> and that it was quite possible "to make out a good logical case both for and against responsibility, and to support each of them by an imposing array of precedents."<sup>115</sup> One well-known Claims Commission,<sup>116</sup> in the same vein, held that it was impossible to say whether or not there was a rule of international law entailing responsibility for breaches of contract.

There are some who argue that nationalization in defiance of a contractual obligation is not contrary to international law, since the same rules that apply to the nationalization of property should apply to contracts. Thus, Foighel, in his recent study, reasons that:

The fact that nationalization is not a breach of international law cannot be altered by the fact that nationalization destroys contract rights, for example, a concession which the nationalizing state has granted to a foreign company . . . .

There is no rule in international law that gives a greater degree of protection to rights secured by contract than to other rights of property.<sup>117</sup>

And O'Connell, referring to concessions, declares that "abrogation is legitimate because the State is concerned with the moral and economic welfare of its citizens, and it cannot bind itself to relationships with individuals that might in time derogate from that welfare."<sup>118</sup>

The arguments against the right of a State to abrogate a concession contract have been put on several grounds. One such argument is based on the principle of acquired or vested rights. Thus, a concession which has duly come into force has been called a "vested private right"<sup>119</sup> and considered to be under the protection of international law against unlawful seizure on the part of the grantor. O'Connell states that there is little doubt that the respect for acquired rights is a principle well-established in international law;<sup>120</sup> that it is one of the few principles firmly

113. Dunn, *The Protection of Nationals* 163 (1932).

114. *Ibid.*

115. *Id.* at 164.

116. See decision of the United States-Mexican General Claims Commission of 1923 in the Illinois Centr. R.R. case, 1 Opinions of Comm'r 15, 16.

117. Foighel, *Nationalization* 74 (1957).

118. O'Connell, *A Critique of the Iranian Oil Litigation*, 4 *Int'l & Comp. L.Q.* 267, 270 (1955). It is difficult to understand how the breach by a sovereign of a contractual commitment can contribute to the "moral" welfare of its people.

119. Schwarzenberger, *The Protection of British Property Abroad*, 5 *Current Legal Problems* 295, 313 (1952).

120. O'Connell, *The Law of State Succession* 99 (1956). O'Connell does not argue,

established in the law of State succession, and the one which admits of least dispute.<sup>121</sup>

However, with reference to this principle of acquired rights, the Secretary General of the United Nations in his memorandum submitted to the International Law Commission stated that there was "no adequate measure of certainty with regard to its application to the various categories of private rights such as those grounded in . . . concessionary contracts . . . ."<sup>122</sup>

McNair<sup>123</sup> maintains that concessions should be governed by the "general principles of law recognized by civilized nations,"<sup>124</sup> and that one of these is the principle of respect for vested (or acquired) rights, citing *Certain German Interests in Polish Upper Silesia*<sup>125</sup> as support for this position.

Jenks<sup>126</sup> refers to the principle of respect for acquired rights as one of the "three broad principles around which much of the developing law of international economic relationships appears to revolve."<sup>127</sup> He states that this principle has a long history in international law and that the protection of acquired rights "is an essential function of every legal system."<sup>128</sup>

Closely related to the principle of acquired rights is the principle of unjust enrichment, which is characterized as basic in all European legal systems, and hence in international law, and as underlying the doctrine of acquired rights.<sup>129</sup>

---

however, that a contract cannot be abrogated, but that such abrogation cannot destroy the interest of the foreign investor in the works constructed by him.

121. *Id.* at 104.

122. U.N. Doc. No. A/CN.4/1 Rev. 1, at 28 (1949).

123. McNair, *The General Principles of Law Recognized by Civilized Nations*, 33 *Brit. Yb. Int'l L.* 1 (1957).

124. *Id.* at 19.

125. P.C.I.J., ser. A, No. 7 at 22, 24 (1926).

126. Jenks, *The Common Law of Mankind* (1958).

127. *Id.* at 152.

128. *Id.* at 153.

129. O'Connell, *supra* note 118, at 270-71; O'Connell, *op. cit.* *supra* note 120, at 103. However, Friedman asserts that the concept of acquired rights is obscure, ambiguous and undefinable; that it finds no support in international judicial decisions; that it cannot, therefore, be raised to the dignity of a principle of international law; that acquired rights are nothing more than those proprietary rights which have come into being by virtue of municipal law and as such are completely subject to its provisions; that having created them, municipal law may modify or annul them at will. Friedman, *Expropriation in International Law* 126 (1953). Meron, on the contrary, states that: "It is sometimes said that contracts affecting attributes of national sovereignty such as . . . granting concessions of national importance . . . do not create vested rights, and that there is no responsibility for their repudiation by the contracting State. . . . It is submitted that practice of international arbitration does not support the proposition that there is no responsibility for the repudiation of contracts involving such subjects. . . . Whatever the position of contracts affecting the national sovereignty may have been under the domestic law, States



Other principles which have been advanced in support of the international responsibility of a State for the abrogation of a concession include: the principle of good faith;<sup>130</sup> the principle of the responsibility of States;<sup>131</sup> the principle of consultation with others before affecting their rights;<sup>132</sup> the principle of broad liability for legally recognized harm to others;<sup>133</sup> the principle of respect for private property and the sanctity of contracts.<sup>134</sup>

The most cogent and persuasive argument for holding sovereigns internationally responsible for nationalization in breach of a contract, or otherwise abrogating a concession agreement, is that based on the proposition of *pacta sunt servanda*. In accordance with this principle, it is universally agreed that under international law States are bound to perform their treaties with other States and to carry out in good faith the obligations assumed thereunder.<sup>135</sup>

The principle of *pacta sunt servanda* is supported both by logic and by morals. There is no logical or ethical principle why States, any less than individuals, should not be bound by their agreements.

There is strong support for the proposition that this principle of international law also applies to contracts between States and foreign nationals. Sir John Fischer Williams, it will be recalled, regarded treaty obligations and contract obligations as being in the same category, and excluded from his rule of no compensation cases where a "contractual or quasi-contractual obligation" bound a State in its relations to foreign owners of property, or special terms were imposed by a concession or treaty.<sup>136</sup>

---

have been held responsible for their repudiation under international law. . . ." Meron, Repudiation of Ultra Vires State Contracts and the International Responsibility of States, 6 Int'l Comp. L.Q. 273, 288 (1957).

130. O'Connell, *op. cit.* supra note 120, at 103.

131. Cheng, *op. cit.* supra note 90, at 163.

132. Jenks, *op. cit.* supra note 126, at 152.

133. *Ibid.*

134. Wadmond, The Sanctity of Contracts between a Sovereign and a Foreign National, Section of Mineral and Natural Resources Law, 1957 A.B.A. Proceedings 177.

135. This principle would also undoubtedly apply to an agreement of a State with another State to carry out the terms of a particular contract between itself and a private individual or company of the latter: "[T]here is in principle nothing to prevent a position arising in which one government may be bound towards another government on the international plane to observe the terms of a contract or agreement entered into by it with a private person or entity, in particular a national, or national company, of the latter government. There can, for instance, be no doubt that a direct promise or undertaking given by one government to another to observe or carry out the terms of such a contract would constitute an international obligation, the detailed terms of which would be those of the contract." Fitzmaurice, The Law and Procedure of the International Court of Justice 1951-1954: Treaty Interpretations and Other Treaty Points, 33 Brit. Yb Int'l L. 203, 241 (1957).

136. See note 11 supra and accompanying text.

The problem was squarely presented to the International Court of Justice as a result of the Anglo-Iranian oil expropriation but remained unanswered because the court, in a split decision, found that it did not have jurisdiction over the dispute.<sup>137</sup>

In recent years, this proposition has received increasing support:

The right of a state to nationalize property under its jurisdiction is unquestioned, regardless of whether the owners be citizens or aliens. By treaty, concession or other agreement a state may, however, surrender or limit its right to nationalize.<sup>138</sup>

\* \* \* \*

The right of a state to nationalize any private property situated within its territorial jurisdiction is not generally disputed. This is an essential attribute of sovereignty. However, states may limit this right by entering into a treaty or international agreement, or, as will be submitted below, into a mere contract with an alien. Nationalization which is contrary to such undertakings is inherently unlawful and contrary to international law.<sup>139</sup>

In the case of *Losinger & Co.*,<sup>140</sup> Switzerland contended that: "The principle *pacta sunt servanda* . . . applies not only to contracts directly concluded between States, but also to those between a State and foreigners. . . ." <sup>141</sup> The Committee on the Study of Nationalization of the American Branch of the International Law Association has characterized the Swiss view as "unassailable," on the ground that "as a matter [sic] of principle, there is no difference whatsoever in this respect between treaties and contracts,"<sup>142</sup> while at the same time admitting that "no

---

137. The Committee on the Study of Nationalization of the American Branch of the International Law Association states that the fact that the International Court of Justice has been "denied" an opportunity to adjudicate this question "suggests that the States which have breached their contracts with foreigners lack confidence in the legality of their actions." 13 Record at 376.

Wholly apart from the merits of the Anglo-Iranian dispute, there would seem to be no reason why any defendant, whether State or individual, should not be entitled to raise any defenses available, including those relating to the jurisdiction of the court. The criticism should be directed to the procedural methods for enforcing international law rather than to the actions of the parties in availing themselves of whatever defenses are available to them under present procedures. In this connection, it is worth noting that Lord McNair, the British member of the International Court of Justice, voted with the majority in holding that the court had no jurisdiction over the Anglo-Iranian dispute.

138. Joseph, *International Aspects of Nationalization*, International Bar Association, Fifth Conference 2 (1954).

139. Brander, *Legal Aspects of Foreign Investments*, 18 Fed. B.J. 298, 304 (1958).

140. P.C.I.J., ser. C, No. 78 (1936).

141. Id. at 32. Quoted in 13 Record at 373 (translation supplied by Record).

142. 13 Record at 373 n.12. Delson, disagreeing, refers to the "fundamental distinction between contracts and treaties, since the latter, unlike the former, is a source of international law. . . ." Delson, *Protection of Investments Abroad in Time of Peace*, Commentary on Report of Committee, Voluntary Patron's Paper Submitted to International Bar Association, Seventh Conference 5 (1958). See, however, Wortley, *Expropriation in Public International Law* 36 (1959): "[T]reaties are not the sole basis of international law."

conclusive international judgment on the question exists."<sup>143</sup> They assert as a basic principle that States must perform their contracts with aliens (just as they must perform their treaties) in good faith, and that nationalization is not a valid excuse for breach of such contractual obligations.

In principle, it appears that the proposition that contracts between a State and a foreign national should be regarded in the same manner as treaties between two States, and hence governed by international law, is both logical and desirable. In both cases, promises with an international scope, or of an international flavor, are made; in both cases, reliance is placed on those promises; in both cases, the obligation to perform those promises should be the same.

Agreements between individuals must be performed under the rules of municipal law. Agreements between States must be performed under the rules of international law. Agreements between States and individuals of other States should also be performed under the only rules that can insure predictability of result—and those are the rules of international law.

A Committee of the International Bar Association at its 1958 meeting proposed the following resolution:

International law recognizes that the principle *pacta sunt servanda* applies to the specific engagements of States towards other States or the Nationals of other States and that in consequence a taking of private property in violation of a specific state contract is contrary to international law.<sup>144</sup>

The resolution was recorded as one of the principles forming "an undoubted part of the rule of international law as at present accepted by civilised countries."<sup>145</sup>

And this principle applies irrespective of what the agreement provides as to what law is to govern.

---

If the Anglo-Iranian case had not been dismissed on jurisdictional grounds, but had been decided on the merits, it is difficult to see how this decision would not have been a source of future international law.

143. 13 Record at 373.

144. Proposed Resolution of the Open Committee Meeting on Protection of Investments Abroad in Time of Peace, International Bar Association, Seventh Conference 485 (1958).

145. *Ibid.* "It would be inequitable that a government should at one and the same time seek the economic benefits which foreign trade and investment carry with them, and at the same time call for the adoption of a rule placing such foreign activities at the mercy of the very government which seeks this economic assistance." Harvard Preliminary Draft at 67. "To provide that obligations under concessions and contracts may be terminated against the payment of compensation is to embrace the theory, now discredited, that a promisor has an option of performing his contract or paying the stipulated price for non-performance in the form of damages. Such a view suggests that compliance with contracts, including concessions, is a matter of expediency, and that no moral opprobrium attaches to the violation of the promisor's pledged word." *Id.* at 76.

In the case where the agreement specifically provides that international law, or the general principles of law of civilized nations, which is one of the sources of international law,<sup>146</sup> is to govern, then abrogation would clearly be a violation of such basic principles as, for example, the principles of acquired rights, unjust enrichment, *pacta sunt servanda*, and the simple but fundamental principles of respect for private property and the sanctity of contracts.

Even if the agreement provides that the law of a particular State, either alone or in conjunction with more universal principles, is to govern, or contains no provision as to the governing law, the result would be no different. The unilateral and unjustified abrogation of such an agreement would be a violation of international law irrespective of the provisions of the contract, for it would deprive the concessionaire of that international standard of justice to which all aliens are entitled. There would seem to be no clearer case of a violation of this international standard and a "denial of justice" in the broadest and most basic sense, from which all States are entitled under international law to protect their subjects,<sup>147</sup> than for a State to enter into a solemn contract with a foreign national and then subsequently enact legislation which, while complying with all the internal procedural requirements of the State itself, arbitrarily abrogates the contract and permits the government unilaterally to repudiate its obligations.<sup>148</sup>

---

146. Article 38 of the Statute of the International Court of Justice provides in part that the Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

"1. international conventions, whether general or particular, establishing rules expressly recognized by the contending states;

"2. international custom, as evidence of a general practice accepted as law;

"3. the general principles of law recognized by civilized nations;

"4. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

147. Even in Calvo Clause cases, where the foreign contractor agrees that he will not appeal to his own government for diplomatic protection, or submit a claim to an international tribunal, it is generally conceded that he is not bound by the clause in cases where he has suffered a denial of justice at the hands of the foreign government. And his own government is never barred from presenting a claim based on a violation of international law. Freeman, *The International Responsibility of States for the Denial of Justice* 265 (1938). See also *North Am. Dredging Co. of Texas (United States v. Mexico)*, [1926-1927] *Opinions of Comm'rs Under the Convention Concluded Sept. 8, 1923, Between the United States and Mexico* 33 (1927).

148. It has been argued that expropriation without compensation could be lawfully accomplished by means of taxation, and that concession contracts could be substantially modified or even nullified by this method without incurring international responsibility. See Williams, *International Law and the Property of Aliens*, 9 *Brit. Yb. Int'l L.* 1, 28 (1928). Generally speaking, the power of governments to tax aliens as well as citizens, if

No State can avoid the obligations of international law by enacting municipal laws inconsistent therewith. As previously noted,<sup>149</sup> such action

not unduly discriminatory, is universally conceded. However, if the tax is imposed at such a rate as to be confiscatory, then it should be regarded as any other form of confiscation, and so treated.

The Harvard Preliminary Draft supports this view:

"An uncompensated taking of property of an alien or a deprivation of the use or enjoyment of property of an alien which results from the execution of the tax laws . . . or from the exercise of the police power of the State . . . shall not be considered wrongful, provided:

\* \* \*

"(e) it is not an abuse of the powers specified in this paragraph for the purpose of depriving an alien of his property." Harvard Preliminary Draft art. 10, at 4.

The explanatory note to subparagraph 4(e) reads as follows:

"Finally, subparagraph 4(e) requires that the judicial, fiscal, and police powers of the State not be used to cloak an uncompensated seizure of an alien's property. This paragraph would preclude taxes raised to confiscatory levels from being used as means of securing the property of an alien without paying him for it. . . ." Harvard Preliminary Draft 64-65, 71.

Furthermore, if there is an agreement contained in the concession contract limiting the government's authority to levy taxes on the concessionaire, then this agreement should be as binding on the sovereign as any other.

The power of a state legislature to make a valid contract exempting a corporation or its property from taxation has been frequently upheld by the United States Supreme Court:

"It is unnecessary at this time to discuss the question of power on the part of a State legislature to make a contract exempting certain property from taxation. Such a power has been frequently asserted and sustained by the decisions of this court." *East Saginaw v. Salt Mfg. Co.*, 80 U.S. (13 Wall.) 373, 376 (1872).

"It has nevertheless been held by this court, not, however, without occasional earnest dissent from a minority, that the power of taxation over particular parcels of property, or over property of particular persons or corporations, may be surrendered by one legislative body, so as to bind its successors and the State." *Tomlinson v. Jessup*, 82 U.S. (15 Wall.) 454, 458 (1873).

"It has been held many times in this court that a State may make a valid contract that a corporation or its property within its territory shall be exempt from taxation, or shall be subject to a limited and specified taxation." *Erie Ry. Co. v. Pennsylvania*, 88 U.S. (21 Wall.) 492, 498 (1875).

This principle was apparently not violated in the recent tax increase in Venezuela, since there was no contract involved limiting the government's authority to raise taxes, and it was conceded that Venezuela was within her rights.

"As no contract limiting the government's authority to raise taxes existed, Venezuela was within her rights to do this, although from a business standpoint, this action will undoubtedly reduce the attractiveness of that country as a place for foreign investment. As Middle East concessions have firm contractual agreements limiting the government's take to 50%, the Venezuela situation has no parallel in the Middle East. There, an increase in taxes beyond that point would amount to an abrogation of the concession contract." Address by R. G. Follis, Annual Meeting of Standard Oil Company of California, May 7, 1959, in a Report to Stockholders, 1st Quarter of 1959.

149. See p. 188.

in effect denies the very existence of international law. And one of the obligations laid down by international law is the obligation to abide by agreements solemnly entered into, whether these agreements are with other States and are embodied in treaties, or are with the citizens of other States and are embodied in concession agreements voluntarily made. In some respects there is even less justification for violating a concession agreement than for violating a treaty. Treaties, although universally recognized as binding, are not always completely voluntary. However, concession agreements customarily are actively sought and negotiated in the ordinary course of business by the nations concerned, for the purpose of developing their natural resources through the skill and capital of the concessionaire.

### E. *Compensation*

The question of compensation in the event of abrogation of a concession has been a source of some discussion. In the first place, there are two distinct claims involved, one arising from the taking of the physical properties installed by the concessionaire, and the other from the wrongful breach of the concession contract itself. Few would argue with the proposition that insofar as physical properties are concerned—refineries, factories, wharves and the like—prompt, adequate and effective compensation should be paid, as in the case of any other expropriated property.

But what about the loss arising from the cancellation of the contract rights of the concessionaire? On any equitable basis such damages for violation of the concession contract would include the loss of profits caused by the breach (*lucrum cessans*), as well as other measurable losses to which the concessionaire had been put by the failure of the State to perform (*damnum emergens*). However, the difficulty of computing damages in the case of the abrogation of a long term concession is a strong argument for the principle of restitution or specific performance.

For example, in the case of Anglo-Iranian Oil Company, what valuation could be put upon exploitation rights to areas where it was unknown whether or not deposits of oil existed, and if they did, in what quantity. Furthermore, as Ford has pointed out:

[H]ow could damages be estimated for the disruption which the expulsion of AIOC caused to the company's world-wide marketing system? Or how could damages be estimated for the dollar drain on sterling area reserves caused by AIOC purchases from American companies after shipments from Iran were stopped, which purchases were necessary to fulfill AIOC's long-term marketing contracts?<sup>150</sup>

---

150. Ford, *The Anglo-Iranian Dispute of 1951-1952*, at 299 n.5 (1954). The Harvard Preliminary Draft recommends a "conservative" computation of damages in the case of the cancellation of a concession with many years to run, on the ground that "it could not be predicted with any certainty that profits would remain at the same level" for the remaining years of the concession. Harvard Preliminary Draft at 144.

Although by no means unanimous, there appears to be mounting support among the authorities for restitution, or specific performance, where the taking is unlawful, as in an unjustified abrogation of a concession agreement.<sup>151</sup>

The Committee on the Study of Nationalization of the American Branch of the International Law Association adopts the reasoning of the Permanent Court of International Justice in the *Chorzow Factory* case,<sup>152</sup> in advocating that where an illegal taking is involved, restitution should be made, if possible. While the *Chorzow* case dealt with a taking in violation of a treaty, it is strong support for the principle that a taking or abrogation in violation of a concession contract should be treated in the same manner and that the remedy for such illegal abrogation should be "in the nature of specific performance."<sup>153</sup>

Wortley supports the view that occasionally "specific restitution of property may be claimed . . . in those cases where adequate compensation is not, or cannot be, provided. . . ."<sup>154</sup> He states that the opposing view is unacceptable because "it postulates that what is acquired by national legislation on confiscation or expropriation is an international title that other States must recognize, and not a national title that other States may review in the light of public international law."<sup>155</sup>

---

On the other hand, and by the same reasoning, it cannot be predicted that profits will not increase during the remaining years. Moreover, in view of the fact that the State has committed the wrongful act, there seems no reason why the innocent party should have to suffer by accepting a "conservative" computation of its damages. Such computation would tend to encourage rather than discourage wrongful conduct, since any doubt as to the damages caused by such conduct would, under this proposal, be resolved in favor of the party at fault.

151. "[I]t has been suggested that a territorial sovereign may find its very right to expropriate conditioned upon its power to pay and that if it be sought to exercise that right when evidence of the possession of such power and the disposition to use it are not evident, there is reason to demand that there be restored to the owners what may have been taken from them." Hyde, *Compensation for Expropriations*, 33 Am. J. Int'l Law 108, 112 (1939). Schwarzenberger seems to support restitution in the case where the granting state has promised the grantee immunity from future legislation, and then violates that promise. See Schwarzenberger, *supra* note 119, at 313-15.

Cheng, although he does not agree that taking in violation of a contract is unlawful, agrees in principle with the proposition that if the taking is unlawful, the state may be called upon to return the property. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* 50 (1953).

152. *Case Concerning the Factory at Chorzow (Claim for Indemnity, Merits)*, P.C.I.J., ser. A, No. 17 (1928).

153. 13 Record at 377. However, Friedman, *op. cit. supra* note 129, at 214, argues that specific restitution would constitute an "intolerable interference in the internal sovereignty of States." On the other hand, illegal confiscation in violation of a contract could as well be described as an intolerable interference with private property\* and the sanctity of contracts.

154. Wortley, *op. cit. supra* note 143, at 23.

155. *Id.* at 17.

If an aim of international law is to discourage the unlawful violation of agreements, then a requirement of restitution or specific performance would be the most effective means of attaining that objective. If contract performance is no longer possible, then all measurable damages should be paid.

#### CONCLUSIONS

Unless restricted by treaty or other agreement, a State has the right under international law to expropriate property of foreign nationals within its territorial jurisdiction, but only if the expropriation is made for reasons of public utility, and only upon the payment of prompt, adequate and effective compensation. The requirement of compensation is equally applicable in cases of both general and individual expropriation. Municipal law affords no excuse for nonpayment of compensation, since the expropriation of the private property of aliens involves the international responsibility of the State, and its international responsibility is governed by international law. Economic difficulties of the expropriating State likewise do not justify the taking of property without payment, since poverty is no excuse for unlawful conduct, whether by individuals or by States. The validity of the expropriation depends upon the ability and willingness of the expropriating State to pay for what it has taken. Any action taken in defiance of these principles should not be accorded recognition by other States.

In the area of concession agreements, States are bound to observe these agreements with citizens of other States just as they are bound to observe their treaties with other States. The principle of *pacta sunt servanda* should apply. Principles of acquired rights and the sanctity of contracts, as well as common justice, support this conclusion. If such an agreement is nevertheless abrogated, the legality of the action should not be recognized by other States. Restitution of the contract rights and any property unlawfully taken should be required or, if this is not possible, the payment of all measurable damages.

Any necessary reformation of the contract due to unforeseen circumstances should be effected only as it is in the case of other negotiated contracts—by the voluntary and uncoerced consent of both parties. It is one thing to revise the terms of a concession by mutual consent when unanticipated conditions arise; it is quite another for a government, once it has granted a concession of its own free will, to have the power and right to repudiate it at will and arbitrarily whenever it appears financially or otherwise advantageous for it to do so. The power it may have; the right should not be conceded. The “public seizure of private rights . . . in essence does not differ from . . . private seizure of private rights that the legal systems of all civilized societies prohibit.”<sup>156</sup>