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A. General

1 The protection of private property under international law has various roots, including the customary international law rules concerning the treatment of aliens and the body of human rights norms that cover private property. More recently, it is primarily international investment law that has provided the background for international rules on the protection of private property (see also Investments, Bilateral Treaties; Investments, International Protection). A constantly growing body of case law has developed and clarified major issues, such as the conditions under which a State may lawfully expropriate private property, the scope of measures affecting the enjoyment of property rights amounting to an expropriation, and the question of compensation or damages arising from expropriation.

B. Historical Evolution

2 Numerous arbitral awards, frequently rendered by so-called Mixed Claims Commissions during the 19th and early 20th century, have confirmed that international State responsibility is incurred if a State expropriates the property of foreign nationals, unless such expropriation is for a public purpose, non-discriminatory, and accompanied by compensation. This high level of protection of foreign property was based on the underlying assumption that any uncompensated taking of property belonging to nationals of another State would lead to an unjustified transfer of wealth from that State to the expropriating State and was thus of international concern.

3 There was no doubt that the foreigners' right to property did not in principle exclude the right of States to expropriate. What became increasingly controversial was the question of compensation for expropriation, in particular, whether States owed full compensation or merely some form of appropriate compensation.

4 The first signs of an erosion of the consensus regarding the protection of private property at the level of customary international law came with the large-scale expropriations in the Soviet Union after the 1917 Revolution. These nationalizations, aimed at radically abolishing the system of private ownership, were directed against nationals and foreigners alike.

5 While many capital-exporting countries insisted on a high level of compensation, as formulated in the so-called Hull formula ('adequate, prompt and effective compensation', see para. 24 below), many developing countries supported by communist States insisted on a lower level of compensation which should be 'appropriate' under the circumstances.

6 During the 1950s, the efforts of the International Law Commission (ILC) to codify the customary international law rules on State responsibility focused to a large extent on the issue of expropriation under the title of injury to aliens (see Garcia-Amador, Sohn, and Baxter).

7 Moreover, after World War II, the body of human rights law laid down in a number of universal and regional instruments provided an additional legal basis for the international protection of property rights. While a right to property was contained in Art. 17 Universal Declaration of Human Rights (1948) ('UDHR'), neither the International Covenant on Economic, Social and Cultural Rights (1966) nor the International Covenant on Civil and Political Rights (1966) included a provision on the protection of property rights which had become a highly contested right by the mid-1960s. On a regional level, however, the right to property was included in a number of instruments. For example, the Additional Protocol I to the European Convention for the Protection of Human Rights and Fundamental Freedoms (1952) ('Protocol No 1 ECHR'), the American Convention on Human Rights (1969) ('ACHR'), and the African Charter on Human and Peoples' Rights (1981) all protect the right to property. United Nations General Assembly Resolution 45/98 of 14 December 1990 stresses the need 'to ensure respect for the right of everyone to own property...and the right not to be arbitrarily deprived of one's property...' Furthermore, States are requested to provide for an adequate procedural and institutional framework in this regard.

8 Finally, the second half of the 20th century also witnessed the evolution of a treaty-based body of international investment law, mainly in the form of bilateral investment treaties ('BIT'; Investments, Bilateral Treaties) but also through investment standards contained in multilateral agreements such as: Chapter 11 North American Free Trade Agreement (1992) ('NAFTA'), the Energy Charter Treaty ('EChT'), the General Agreement on Trade in Services (1994), and various other free trade agreements ('FTAs'). The first BIT was concluded in 1959 between Germany and Pakistan. As of 2005, more than 2,500 have been concluded and approximately 1,900 are in force. Although BITs are legally separate bilateral agreements with certain textual variations, they are largely standardized treaties, most of which contain express guarantees against uncompensated expropriations.

C. Current Legal Situation

9 Today, property rights in the form of foreign investments are primarily protected by a dense web of BITs. In practice, these treaties substitute for the traditional customary international law rules on the protection of foreign property. Property rights are also protected by regional human rights treaties.

1. Expropriation

10 BITs, as well as customary international law, protect against the expropriation of foreign property and investments. Expropriations may take various forms: nationalizations which affect entire industries; socializations which affect the entire system of private ownership; confiscations which involve a punitive element; creeping expropriations which are achieved by a series of measures; and indirect, de facto, disguised, or constructive expropriations which involve acts or omissions falling short of a direct transfer of ownership. Investment agreements usually aim at covering these various forms by stating that the contracting parties shall not expropriate 'directly or indirectly through measures equivalent to expropriation', 'measures having equivalent effect' (see Art. 5 (1) Agreement between the United Mexican States and the Republic of Austria on the Promotion and Protection of Investments; Art. 6 (1) US Model BIT; Art. 10.6 (1) United States-Morocco Free Trade Agreement; Art. 13 EChT) or 'measures tantamount to expropriations' (see Art. 3 (1) Treaty with the Czech and Slovak Federal Republic concerning the Reciprocal Encouragement and Protection of Investment; Art. 1110 NAFTA).

11 Recently, forms of indirect expropriation realized through regulatory measures have attracted considerable attention by scholars, arbitral tribunals, and law-makers alike, trying to delineate the borderline between compensable regulatory expropriations and non-compensable regulatory measures.

12 What exactly constitutes an indirect expropriation remains controversial. Many international judicial and arbitral bodies have attempted to clarify the notion of indirect expropriation. For instance, the Iran-United States Claims Tribunal has frequently focused on the intensity of interference with property rights in order to establish whether a de facto expropriation had occurred. In the case of *Starrett Housing Corp v Government of the Islamic Republic of Iran*, it was held that:

[I]t is recognized in international law that measures taken by a State can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the State does not purport to have expropriated them and the legal title to the property formally remains with the original owner. (At 154.)

13 Also ICSID panels International Centre for Settlement of Investment Disputes (ICSID) have

adhered to this view, regarding instances of 'substantial deprivation' as de facto or indirect expropriations. In *Metalclad Corp v United Mexican States*, the ICSID tribunal held that:

expropriation...includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favor of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be expected economic benefit of property even if not necessarily to the obvious benefit of the host State (at para. 103).

In a similar way, the ICSID panel in *CMS Gas Transmission Company v The Argentine Republic* thought that the crucial question for a finding of an indirect expropriation was 'to establish whether the enjoyment of the property has been effectively neutralized' (at para. 262).

14 International investment tribunals have deemed the following acts as amounting to expropriations: a) serious interference with the management of a company, eg by imprisoning managers (see *Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana*—UNCITRAL ad hoc tribunal), by subjecting them to criminal prosecution (see *SARL Benvenuti & Bonfant v People's Republic of the Congo*—ICSID tribunal), or by the imposition of State-appointed managers (see *Tippetts, Abbett, McCarthy, Stratton v TAMS-AFFA Consulting Engineers of Iran; Starrett Housing Corp v Government of the Islamic Republic of Iran*—Iran-US Claims Tribunal); b) the revocation of concessions or privileges, such as tax or tariff privileges (see *Arbitration in the Matter of Revere Copper and Brass, Inc. and Overseas Private Investment Corporation*—American Arbitration Association tribunal; *Antoine Goetz and others v Republic of Burundi*; *Middle East Cement Shipping and Handling Co SA v Arab Republic of Egypt*—ICSID Additional Facility tribunal), or general operating licences (see *Técnicas Medioambientales Tecmed SA v The United Mexican States*—ICSID Additional Facility tribunal); and c) the denial of a construction permit contrary to prior assurances (see *Metalclad Corp v United Mexican States*).

15 Regulatory measures that may be qualified as regulatory expropriations if they transgress a certain intensity are particularly problematic. While some tribunals would also apply the 'intensity of interference' test to regulatory measures, the tribunal in *Saluka Investments BV (The Netherlands) v The Czech Republic* held that 'States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner bona fide regulations that are aimed at the general welfare' (at para. 255; see also *Methanex Corporation v United States of America*, at IV D para. 7). Whether the criteria for the lawfulness of expropriations may indeed be relied upon in order to ascertain whether States merely engaged in regulatory measures and not in a regulatory expropriation remains to be seen (see para. 20 below).

16 As a quasi-legislative response to the difficult task of differentiating between the two tasks, some recent BITs have expressed a shared understanding of the contracting parties. For example, Annex B 13 (1) Canadian Model Foreign Investment Protection Agreement states the following:

Except in rare circumstances, such as when a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation.

Moreover, Annex B 4(b) US Model BIT expresses something similar. Taken to extremes this approach could lead to a major loophole with regard to protection against expropriation without compensation in international investment law since the concept of indirect expropriation would be largely eroded.

2. Scope of Protected Property Rights

17 Under customary international law, the type of foreign property protected against expropriation is not limited to movable and immovable property. Intangible rights, including contractual rights, have been protected as 'acquired' or 'vested rights' in a number of arbitral decisions (see *Rudloff Case*; *Norwegian Shipowners' Claims Arbitration*). The fact that contractual rights can be expropriated has also been confirmed by the Permanent Court of International Justice (PCIJ) (see *German Interests in Polish Upper Silesia, Cases concerning the*; see also *Oscar Chinn Case*). The Iran-US Claims Tribunal in *Amoco International Finance Corp v Iran* very broadly asserted that '[e]xpropriation, which can be defined as a compulsory transfer of property rights, may extend to any right which can be the object of a commercial transaction...' (at para. 108).

18 Also ICSID tribunals have found that 'expropriation is not limited to tangible property rights' (*Wena Hotels Ltd v Arab Republic of Egypt* (*Wena v Egypt Case* at para. 98). In investment law the broad scope of property protection results from the usually rather extensive definition of the term 'investment' in BITs and other investment agreements. They typically define investment as 'every kind of asset' and include illustrative lists of rights endowed with economic value.

3. Lawfulness of Expropriations

19 The question of lawfulness has dominated the expropriation debate for a long time. It can now be regarded as settled that international law permits States to expropriate foreign property if it is in the public interest or for a public purpose, accomplished in a non-discriminatory fashion, and in conformity with due process. The final legality criterion of compensation remains more controversial and will be addressed below. Many BITs and other international investment agreements have incorporated these requirements (see Art. 6 US Model BIT; Art. 1110 NAFTA; Art.13 EChT, Art. 5 Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic; Art. 4 Agreement between the Government of the Kingdom of Sweden and the Government of the Republic of Albania on the Promotion and Reciprocal Protection of Investments).

20 The requirement of public purpose has been repeatedly affirmed in arbitral practice both by claims commissions, as for instance in the *Norwegian Shipowners' Claims* arbitration, and by the Iran-US Claims Tribunal (see *INA Corp v Iran*; *Amoco International Finance Corp v Iran*). Courts and tribunals have been reluctant, however, to question avowed public interest. In this context, it was held in *Libyan American Oil Company (Liamco) v Libya* that '[m]otives are indifferent to international law, each State being free to judge for itself what it considers useful or necessary for the public good' (at 114 with further reference). In effect, this turns the public purpose requirement into a self-judging obligation. By way of contrast, in *BP Exploration Company (Libya) Ltd v Government of the Libyan Arab Republic*, the arbitral tribunal found that the expropriation was performed 'for purely extraneous political reasons and ... [was] arbitrary and discriminatory in character' (at 329) (see also *Oil Concession Disputes, Arbitration on*). More recently, the Iran-US Claims Tribunal and ICSID tribunals have started to question the public purpose character of expropriations. For instance, in *Liberian Eastern Timber Corporation (LETCO) v Republic of Liberia*, the ICSID tribunal found that none of the criteria for legality was present because the expropriatory revocation of a concession 'was not for a bona fide public purpose, was discriminatory and was not accompanied by an offer of appropriate compensation' (at 367) Similarly, in *ADC Affiliate Limited and ADC & ADMC Management Limited v Republic of Hungary*, where private investment in a new terminal at Budapest airport was expropriated by government decree, the ICSID tribunal held that it could 'see no public interest being served by the Respondent's depriving action of the Claimants' investment in the Airport Project' (at para. 429). The tribunal found that the expropriation measures were without public purpose, did not follow due process, were discriminatory, and without just compensation. (See also *Siag v The Arab Republic of Egypt*.)

21 The second requirement, that acts of expropriation be conducted in a non-discriminatory fashion, has also not attracted much attention in international practice. It prohibits expropriatory acts that target foreigners or certain groups of foreigners for political reasons or on other grounds that may not be reasonably justified. The Iran-US Claims Tribunal stated in *Amoco International Finance Corp v Iran* that 'discrimination is widely held as prohibited by customary international law in the field of expropriation' (at para. 140). The Cuban expropriations by the Castro regime, which were initially only directed against US property owners, were thus considered unlawful by the US Supreme Court in *Banco Nacional de Cuba v Sabbatino* (Sabbatino Case). Moreover, in *BP Exploration Company (Libya) Ltd v Government of the Libyan Arab Republic*, the arbitral tribunal condemned the arbitrary character of the Libyan oil concession expropriations.

22 The third requirement of due process is not systematically included in investment protection treaties. One example, however, of a BIT providing such a clause is The Agreement between the Government of the Republic of Cyprus and the Government of the Hungarian People's Republic on Mutual Promotion and Protection of Investments. Likewise, there is not much case law on the issue.

23 The standard of due process demands an actual and substantive legal procedure where a foreign investor can raise its claim once it is deprived of its investment. Due process further demands this legal procedure be underpinned by certain basic guarantees, such as accessibility, a fair hearing, and an independent and impartial adjudicator (see also Fair Trial, Right to, International Protection). Furthermore, the procedure has to be capable of producing relief within a reasonable time (see ADC Affiliate Limited and ADC & ADMC Management Limited v Republic of Hungary, at paras. 434–39).

4. Level of Compensation for Expropriation

24 For a long time, one of the most controversial legality requirements was the exact level of compensation due in case of expropriation. Many Western and developed countries adhered to a standard, as formulated by the US Secretary of State, Cordell Hull, in a diplomatic note to his Mexican counterpart in 1938, according to which '[t]he Government of the United States merely adverts to a self-evident fact when it notes that the applicable precedents and recognized authorities on international law support its declaration that, under every rule of law and equity, no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate and effective payment therefore' (US Department of State *Papers relating to Foreign Relations of the US 1938: The American Republics* [US Government Printing Office Washington 1956] vol 5, 685). This so-called Hull formula was contested not only by the Mexican government, pursuing land reform at the time, but also by the Soviet Union as well as later by other communist regimes and numerous developing countries. Many of them demanded a largely unfettered right to expropriate foreign property at any time and to provide compensation only if provided for by their respective national laws. For instance, when Chile nationalized its copper industry implementing the 1971 foreign property nationalization law, it refused not only to pay compensation; on the contrary, it deemed one of the nationalized corporations to be indebted to the Chilean State by a sum of approximately US\$300 million due to excessive profits (Chilean Copper, Nationalization, Review by Courts of Third States).

25 At a time of shifting majorities in the United Nations resulting from decolonization in the 1960s, the issue of compensation was taken up by the UNGA which addressed the topic under the rubric of Permanent Sovereignty over Natural Resources (Natural Resources, Permanent Sovereignty over). In 1962, UNGA Resolution 1803 [XVII] of 14 December 1962, was adopted as a compromise of that title with large support. While it stressed the right to expropriate as an emanation of State sovereignty, it also made it subject to the rules of international law:

Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely

individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law (Art. 4 UNGA Res 1803 [XVII] [14 December 1962]).

Matters became even more divisive in the early 1970s when the Group of 77 (G77), a group of developing countries, demanded the establishment of a New International Economic Order [NIEO]. One of the central issues on their agenda was a change to the traditional rules on expropriation and compensation. In 1973, UNGA Resolution 3171 (XXVIII) of 17 December 1973 also entitled 'Permanent Sovereignty over Natural Resources' was adopted by a majority of States, outvoting most Organization for Economic Cooperation and Development countries. It omitted any reference to international law. Instead, it affirmed that:

[T]he application of the principle of nationalization carried out by States, as an expression of their sovereignty in order to safeguard their natural resources, implies that each State is entitled to determine the amount of possible compensation and the mode of payment, and that any disputes which might arise should be settled in accordance with the national legislation of each State carrying out such measures (Art. 3 UNGA Res 3171 [XXVIII] [17 December 1973]).

26 During the negotiations concerning a NIEO in the context of UNGA Resolution 3281 (XXIX) of 12 December 1974 entitled Charter of Economic Rights and Duties of States, the question of compensation quickly became one of the most controversial issues. Ultimately, the Charter was not adopted by consensus, but by a divisive vote of 120 in favour, six against, and 10 abstentions. Art. 2 (2) (c) UNGA Resolution 3281 (XXIX) of 12 December 1974 provides that in case of expropriation 'appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent.'

27 It is unlikely that these UNGA resolutions have effectively changed the law according to their terms. The United Nations Charter does not confer any law-making powers to the UNGA, the declaratory character of the resolutions is questionable and the evolution of general international law as 'instant custom' as a result of voting behaviour in the UNGA is largely rejected. However, the claims of developing countries for a lower standard of compensation as stipulated by these resolutions have eroded the formerly established standard of 'prompt, adequate and effective' compensation.

28 A further element contributing to the uncertainty of the level of compensation for expropriations was the practice of many States to enter into global settlement agreements after espousing their nationals' claims. Especially during the second half of the 20th century, many global settlement agreements were concluded with Eastern European communist countries which provided for lump sum payments by the expropriating States to the home States of the expropriated property owners, usually at considerably reduced value. While the lump sum payment settled the international claim, the actual compensation of the former property owners was regularly achieved by national distribution procedures based on the national legislation of their home States. Whether the reduced compensation payments according to lump sum agreements can be regarded as an expression of a change of customary international law (see *Libyan American Oil Company [LIAMCO] v Government of the Libyan Arab Republic*) or considered as constituting a conscious departure from the customary standard (see *Sedco Inc v National Iranian Oil Co and Iran*) remains controversial.

29 It is against this background that the dense web of BITs should be understood, although their existence raises similar issues concerning the relationship between treaty and custom. In general they are future-oriented agreements aiming more broadly at the encouragement and protection of foreign investment through a number of substantive protection standards, such as fair and equitable treatment, full protection, and security, as well as the two non-discrimination standards of

national treatment and most-favoured-nation treatment (National Treatment, Principle; Most-Favoured-Nation Clause). Nevertheless, the protection against expropriation usually figures as one of the central provisions of any BIT. Most BITs provide for a standard of 'prompt, adequate and effective' compensation. In addition, they frequently concretize the compensation obligation by stating that the amount of compensation should be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place, a rule which aims at avoiding losses to investors as a result of reductions in market value flowing from announcements of expropriations.

30 Many BIT provisions further specify the prompt and effective requirements of the traditional standard by stating that 'prompt' means without delay plus interest until the date of actual payment, while 'effective' is usually understood as fully realizable and in a freely convertible currency.

31 The plethora of arbitral decisions since the 1990s demonstrates that it is not so much the theoretical debate about 'adequate' versus 'appropriate' compensation that is important but more the actual valuation technique used. In order to establish the fair market value, tribunals frequently rely on the so-called discounted cash-flow method according to which the discounted cash-flow of a going concern determines its value. Here, a property transfer free from external constraints is simulated. The former owner should receive the amount of compensation a hypothetical able and willing buyer would pay for the property.

5. Damages in Case of an Illegal Expropriation

32 The PCIJ stated in the *Case concerning the Factory of Chorzów (Germany v Poland)* that when an illegal act is committed, a State is obliged 'to wipe out all the consequences' of that act and to re-establish the situation which would have existed had the illegal act not occurred. Art. 31 (1) UN ILC Articles on State Responsibility of 2001 provides for full reparation in case of violation of international law. Primarily, this should be achieved by restitution. Where this is not possible, damages should be paid instead of restitution in kind. If the damaged property is replaceable, the amount of damages should amount to the replacement value if no other consequential damages such as loss of income opportunities occurred due to the illegal expropriation. The amount is limited by the actual damage. Therefore gains or benefits of the injured party have to be deducted from the amount.

D. Special Issues Arising from Human Rights Norms

33 There is no binding treaty governing the protection of property at the global level. The case law of the European Court of Human Rights (ECtHR) is by far the most developed on a regional level. The Inter-American Court of Human Rights (IACtHR) has made important judgments with regard to property rights of indigenous peoples, while the African Court on Human and Peoples' Rights (ACtHPR) has not yet decided any case.

1. Scope of Protected Property

34 Regional human rights conventions do not define the term property. The ECtHR has generally adopted a broad concept of property in its case law concerning Art. 1 Protocol No 1 ECHR. Protocol No 1 ECHR, securing certain Rights and Freedoms other than those already included in the Convention, stipulates the following:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to

enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

35 Tangible as well as intangible property, including shares of stock, intellectual property rights, claims to money, good will, licences, and claims to social security benefits have been considered as protected property (see also Intellectual Property, International Protection; Social Security, Right to, International Protection). However, the ECtHR has refrained from offering any definition of the term property. By contrast, in the *Mayagna (Sumo) Awas Tingni Community v Nicaragua* Case, the IACtHR defined property as contained in Art. 21 ACHR 'as those material things which can be possessed, as well as any right which may be part of a person's patrimony; that concept includes all movables and immovables, corporal and incorporeal elements and any other intangible object capable of having value' (at para. 144). In this regard, the IACtHR also found that the communal land rights of indigenous populations were protected property under the ACHR.

2. Scope of Protection

36 Unlike investment law, human rights law does not exclusively protect foreign property. The ECHR and ACHR protect the property of everyone under the jurisdiction of the States Parties to the treaty independent of their nationality.

37 However, under the ACHR, in contrast to Protocol No 1 ECHR, only natural persons enjoy protection. According to the case law of the IACtHR, it is not competent to receive complaints from legal persons. Thus, for companies there is no protection of their property under the ACHR (see also Corporations in International Law).

3. Interferences

38 The property protection clauses of human rights treaties are also applicable to cases in which there is a lesser degree of interference not amounting to expropriation, eg State control of the use of property.

39 For an expropriation to occur, the ECtHR requires either formal expropriation or a total deprivation of the economic value of the property. The property must be left without any meaningful alternative use (see *Pine Valley Developments Ltd and Others v Ireland*). Furthermore the deprivation must be irreversible and not only of a temporary nature.

40 Art. 1 (2) Protocol No 1 ECHR provides for a 'State to enforce such laws as it deems necessary to control the use of property' and is applied by the ECtHR if there has not been a total deprivation of the economic value of the property and if the aim of the measures was to limit or control the use of the property. In all other cases, the ECtHR applies the general principle contained in Sentence 1 of Art. 1 (1) Protocol No 1 ECHR: 'Every natural or legal person is entitled to the peaceful enjoyment of his possessions.'

4. Possible Justifications for Interferences

(a) Expropriations

41 For an expropriation to be justified, the deprivation of property has to be in the public interest, in accordance with national and international law, and proportionate with regard to the public purpose to be achieved.

(i) Public Interest

42 States enjoy a large margin of appreciation in the determination of whether a public interest exists. This margin relates to the necessity for interference with property rights as well as to

appropriate remedial measures. According to its case law, the ECtHR considers that the national authorities shall make an initial assessment of what is in the public interest. In *James and Others v the United Kingdom*, the ECtHR stated that it would respect this assessment 'unless that judgement [is] manifestly without reasonable foundation' (at para. 46). Examples for interferences lacking a public purpose include *Tregubenko v Ukraine*, where a lack of funds was not accepted as being in the public interest for not honouring a judgment debt, and *Burdov v Russland*, where the inability of the State to honour its debt under a final and binding judgment was not accepted as justification for quashing such a judgment.

(ii) Lawfulness

43 The ECtHR has repeatedly stated that the lawfulness of an interference with the peaceful enjoyment of property is the first and most important requirement of Art. 1 Protocol No 1 ECHR. The rules of domestic law must be sufficiently accessible, precise, and foreseeable (see *Lithgow and Others v the United Kingdom*, para. 110). This criterion of lawfulness is infringed when national case law leads to an inconsistent application of a rule which itself could result in unforeseeable or arbitrary outcomes and deprive litigants of effective protection of their rights (see *Carbonara and Ventura v Italy*, paras 63–65).

(iii) Proportionality

44 According to the case law of the ECtHR, there must be 'a reasonable relationship of proportionality between the means employed and the aim sought to be realized' (see *James and Others v the United Kingdom*, para. 50). The State has to strike a fair balance between the demands of the general interest of the community and the individual's right to the peaceful enjoyment of his property. The ECtHR found that this requirement is 'inherent in the whole of the Convention and is also reflected in the structure of Article 1' (see *Sporrong and Lönnroth v Sweden*, at para. 69). To establish whether the required balance had been respected, the ECtHR evaluates whether the person concerned had to bear 'an individual excessive burden' (see *James and Others v the United Kingdom*, at para. 50).

(iv) Compensation

45 The text of the ECHR does not explicitly provide for compensation to a national who has suffered an expropriation. For foreigners, the need to compensate already follows from Art. 1 (1) Protocol No 1 ECHR which contains the clause: 'subject to the conditions provided for...by the general principles of international law.' In *Lithgow and Others v the United Kingdom*, the ECtHR concluded in this regard that 'the general principles of international law are not applicable to a taking by a State of the property of its own nationals' (at para. 119). However, it developed a requirement to also compensate nationals in case of an expropriation by applying the proportionality principle. The ECtHR repeatedly reaffirmed that 'compensation terms are material to the assessment whether the contested legislation respects a fair balance between the various interests at stake and, notably, whether it does not impose a disproportionate burden on the applicants' (see *Lithgow and Others v the United Kingdom*, para. 120).

46 The requirement of achieving a fair balance between public and private interests will not be respected if property is expropriated without payment of an amount reasonably related to its value (see *Former King of Greece and Others v Greece*, para. 89). The ECHR does not, however, guarantee a right to full compensation in all circumstances since legitimate objectives of public interest may call for reimbursement at less than the full market value (see *Holy Monasteries v Greece*, para. 71). Examples of when a reduced level of compensation may be justified include government measures to achieve economic reform and/or greater social justice (see *Lithgow and Others v the United Kingdom*, para. 121). A total lack of compensation, however, is only justifiable in exceptional circumstances. (see *Lithgow and Others v the United Kingdom*, para. 120). Furthermore, an excessive length of expropriation proceedings must be taken into account in

calculating any compensation (see *Malama v Greece*, para. 51). Where there are unreasonable delays concerning the payment of compensation, the adequacy of the latter is diminished (see *Akkus v Turkey*, para. 29).

47 There may be situations in respect of nationalizations where less compensation is required than in cases involving the expropriation of a single item of property. Furthermore, the ECtHR limits its power of review in nationalization cases to ascertaining whether the decision regarding compensation falls outside the wide margin of appreciation of the expropriating State. It will respect the legislature's will in cases of nationalizations unless it is manifestly without reasonable foundation.

48 A further difference between nationals and non-nationals regarding the amount of compensation may stem from the fact that foreigners are more vulnerable to the domestic legislation of expropriating States and cannot participate in electing their law-makers. The ECtHR indicated in *James and Others v the United Kingdom* that there may 'be legitimate reason for requiring nationals to bear a greater burden in the public interest than non-nationals' (at para. 63). Although the ECtHR mentioned this principle, it does not as yet have any practical relevance.

(b) Control of Use and Other Interferences

49 The way the ECtHR deals with a State's control of the use of property and other interferences in property rights is comparable to expropriation cases. The State's actions must be lawful and in the public interest. The well-established case law concerning the requirement to balance fairly the demands of the general interest of the community against the protection of the individual's fundamental rights also applies to the control of the use of property or other interferences with property rights (see *Agosi v the United Kingdom*, para. 52; *Sporrong and Lönnroth v Sweden*, para. 69). There must be a reasonable relationship of proportionality between the means employed and the aim pursued. The availability of compensation is an important factor in the proportionality test applied.

50 However, there is no general requirement of compensation in cases where States' control the use of property and/or engage in other forms of interference with property rights. States enjoy an even larger margin of appreciation as far as the amount of compensation is concerned.

E. Conclusion

51 International legal rules protecting property rights are today mainly found in human rights instruments as well as in bilateral and multilateral investment agreements. The traditional law on property protection stemming from the rules on the treatment of foreigners plays only a subsidiary role in the case law of international courts and tribunals. The recent fast-growing case law of the ECtHR, and the surge of investment awards since the mid-1990s, will contribute to substantial clarifications of crucial issues such as the scope of protected property rights, the definition of indirect expropriation, the relevance of the legality requirements for expropriations, or the consequences of property deprivations.

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