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STATE RESPONSIBILITY

[Agenda item 4]

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International responsibility. Fourth report by F. V. García Amador, Special Rapporteur

RESPONSIBILITY OF THE STATE FOR INJURIES CAUSED IN ITS TERRITORY TO THE PERSON OR PROPERTY OF ALIENS
—MEASURES AFFECTING ACQUIRED RIGHTS

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[26 February 1959]

CONTENTS

	<i>Page</i>
INTRODUCTION	2
Chapter I. International protection of acquired rights	
I. RESPECT OF ACQUIRED RIGHTS AS A PRINCIPLE OF INTERNATIONAL LAW	
1. Régime applicable to the acquisition of patrimonial rights	3
2. The international obligation to respect acquired rights	4
3. Relationship between the above principle and the doctrine of "unjust enrichment"	5
4. Scope of international protection: the need to revise the traditional conception	6
5. The notion of "arbitrariness" and the doctrine of abuse of rights	7
II. NATURE AND CONTENT OF ACQUIRED RIGHTS	
6. Patrimonial rights <i>lato sensu</i>	9
7. Mixed (private and public) character of some of these rights	9
8. Special situations which do not involve acquired rights	10
Chapter II. Expropriation in general	
I. THE RIGHT OF "EXPROPRIATION"	
9. International recognition of the right	11
10. The various forms which the exercise of the right of "expropriation" may assume	11
11. Expropriation <i>stricto sensu</i> and "nationalization"	12
II. OTHER INTERNATIONAL ASPECTS OF EXPROPRIATION	
12. "Unlawful" expropriation and "arbitrary" expropriation	13
13. Measures of expropriation involving the non-observance of contracts or concession agreements	14
14. Motives and purposes of expropriation	15
15. Questions concerning the method of expropriation	16
III. COMPENSATION	
16. Legal nature of compensation	17
17. The obligation to indemnify and the law governing it	17
18. Amount of compensation and criterion for valuation of the property expropriated	19
19. Promptness of compensation and form in which payment is to be made	20
20. Lump-sum agreements	21
21. General considerations concerning the requirements in regard to compensation	22

Chapter III. Contractual rights		Page
I. TREATIES AND CONTRACTS AS SOURCES OF PRIVATE RIGHTS		
22. Treaties relating to private rights of a patrimonial nature		24
23. Object and forms of "public contracts"		25
II. LAW GOVERNING CONTRACTUAL RELATIONS BETWEEN STATES AND ALIENS		
24. The traditional position		26
25. Recent instruments and jurisprudence		27
26. New orientation of scientific doctrine		28
27. Applicability of the principle <i>pacta sunt servanda</i> —recent opinions in the affirmative		29
28. Position taken in the prevailing doctrine and practice		30
29. Reconsideration of the traditional position		31
III. EFFECTS OF NON-PERFORMANCE OF CONTRACTUAL OBLIGATIONS		
30. "Unlawful" non-performance and "arbitrary" non-performance		33
31. Component elements (general) of arbitrary non-performance		34
32. <i>Ultra vires</i> contracts and contracts with political subdivisions		34
33. Public debts		35
34. Legal nature of "compensation"		35

Introduction

1. In his second report to the International Law Commission (A/CN.4/106), the Special Rapporteur submitted a draft, chapter IV of which deals with the international responsibility which the State may incur as a result of "non-performance of contractual obligations and acts of expropriation". However, the Special Rapporteur's consideration of the subject was not only somewhat summary but also limited to a survey of the precedents and other relevant matters which can be found in traditional doctrine and practice. Both these qualifications can be explained by the fact that the Special Rapporteur's object was to present to the Commission, with the least possible delay, a draft covering each and every aspect of "international responsibility of the State for injuries caused in its territory to the person or property of aliens". But that task having been completed, the Special Rapporteur believes, in view of the Commission's request that he should continue with his work, that no subject requires more thorough study—and, in a sense, even complete reconsideration—than the aspects of responsibility envisaged in chapter IV of the draft.

2. Moreover, it should be stressed that the present report is not merely an expansion of chapter IV of the second report, for there is also a difference in the method of study adopted in each of them. The present report, besides giving more exhaustive treatment to the traditional doctrine and practice in the matter, also dwells on the new doctrinal and practical trends which have made their appearance mostly since the last World War. Although they do not jointly constitute a uniform movement, and some are even contradictory, there is no doubt that they have made a deep impact on the traditional notions and ideas. This fact is so certain that it would be wholly unrealistic to disregard it and to deny that the new tendencies can make a valuable contribution to the development and codification of the relevant rules on international responsibility.

3. In seeking the most satisfactory method of work, the Special Rapporteur adopted as a basis the principle

of "respect for acquired rights". The report thus starts from the premise that respect for private rights of a patrimonial nature constitutes one of the principles of international law governing the treatment of aliens. The traditional views on this principle may admittedly need revision, but, in the present state of development of international law, its existence and validity cannot be questioned. It can even be said that, coupled with the doctrine of "unjust enrichment", this principle constitutes the only solid basis on which the State's international responsibility in this context can be established. Moreover, from the technical-judicial point of view, it is the sole point of departure which permits a systematic and coherent consideration of the subject. There is no doubt, in fact, that, whatever the specific nature of the patrimonial rights involved or of the measures taken by the State, the latter's international responsibility will always be determined in the light of the principle of respect for the acquired rights of aliens.

4. The above considerations will be discussed in detail in chapter I. As regards the general structure of this report, chapter I deals with the basic notions which influence the present system of international protection of acquired rights and the component elements of the State's international responsibility in that connexion. Chapter II surveys "expropriation in general" and discusses the different international aspects of that measure, while chapter III concentrates on "contractual rights", in an endeavour to show the conditions and circumstances in which the State may incur international responsibility when the rights at issue are solely within that class. The Special Rapporteur unfortunately lacked the time necessary to deal with other aspects and matters which, today more than ever, are of fundamental relevance to the subject. These include, in particular, the extra-territorial effects of acts of expropriation and other problems of "private" international law, as well as the methods and procedures which lend themselves best to the settlement of international disputes arising in consequence of measures affecting the patrimonial rights of aliens.

CHAPTER I

INTERNATIONAL PROTECTION OF ACQUIRED RIGHTS

I. Respect of acquired rights as a principle of international law

5. As was stated in the introduction, this report starts from the premise that respect for private rights of a patrimonial nature constitutes one of the principles of international law governing the treatment of aliens. But notwithstanding the marked similarity and points of contact between the rules of international law in this matter and the "doctrine of acquired rights" in other contexts, the international application of this doctrine possesses its own characteristics and modalities and, above all, the juridical situations involved therein are of much greater complexity. This being so, consideration of the existing system of international protection accorded to such rights of aliens in specific circumstances should be preceded by a general survey of the subject. The first point to determine in this connexion is the mode of "acquisition" of such rights or, in other words, the juridical régime which governs an alien individual's capacity to acquire rights of a patrimonial nature.

1. RÉGIME APPLICABLE TO THE ACQUISITION OF PATRIMONIAL RIGHTS

6. Under international law, the acquisition of private rights of a patrimonial nature is governed entirely by municipal law. This does not, of course, preclude the possibility of aliens also acquiring rights of that nature by virtue of an international treaty, as has been frequently demonstrated in practice and expressly recognized by international judicial decisions. But in the absence of conventional rules on the matter—and this second mode of acquisition will be considered hereunder—the position is as stated above. Especially in matters relating to ownership and other rights *in rem*, the *lex rei sitae* alone can apply. In fact, although in practice this is done infrequently, a State may even make it impossible for aliens to acquire immovable property in its territory; it may also prohibit or restrict the acquisition of other patrimonial rights, although this second practice is even less frequent than the first. This principle, which confirms the exclusive sovereignty of the State in all matters pertaining to its economic and social structure, is expressly enunciated in article 116 of the Inter-American Convention on Private International Law ("Bustamante Code").¹

7. In apparent contrast with the foregoing, the American Declaration of the Rights and Duties of Man (Bogotá, March 1948) and the Universal Declaration of Human Rights (Paris, December 1948) explicitly recognize that "Everyone has the right to own property...". The object of that wording was undeniably to invest every person, at least in principle, with the capacity to acquire rights of a patrimonial character in

any place whatever. But the primary purpose, which can be perceived in subsequent instruments on the recognition and protection of human rights and fundamental freedoms and even in the Universal Declaration itself, seems to be rather to protect private property, once acquired, against "arbitrary" actions of the State. It is doubtless for this reason that none of those instruments, as will be shown presently, establishes a régime applicable to the acquisition of ownership and other patrimonial rights. This peculiarity of private rights of a patrimonial nature in the matter of their acquisition reflects one of the fundamental differences between them and the other rights envisaged in the instruments referred to above or the rights which aliens have traditionally been held to enjoy *vis-à-vis* the State of residence. The acquisition of those other rights does not in any way depend on municipal law, as they are enjoyed in any place whatever by virtue of the principles of international law governing the treatment of aliens. Moreover, it is not difficult to see that this fundamental difference necessitates also a distinct régime applicable to the enjoyment and exercise of patrimonial rights alone. Although they deserve, once they are "acquired", the protection of international law, the resulting obligation of the State to respect them cannot be of the same nature and scope as when the rights involved are rights inherent in the human person.

8. At this stage, it is appropriate to consider the second mode of acquisition, i.e. cases in which international treaties or agreements confer on or recognize to the nationals of the contracting States the capacity to acquire property or patrimonial rights. An example can be found in the Treaty of Commerce and Navigation between Austria and Great Britain of 22 May 1924, article 3 of which contains a "most favoured nation" clause reading as follows:

"The subjects or citizens of each of the Contracting Parties in the territories of the other shall be at full liberty to acquire and possess every description of property, movable and immovable, which the laws of the other Contracting Party permit, or shall permit, the subjects or citizens of any other foreign country to acquire and possess."²

Similarly, under article 10 of the draft Convention prepared by the Economic Committee of the League of Nations for the International Conference on the Treatment of Foreigners, held in Paris in 1929:

"1. Nationals of all the High Contracting Parties shall be placed on terms of complete equality with the citizens or subjects of any one of the Parties as regards patrimonial rights, the right of acquiring, possessing..."³

And a recent European Convention provides as follows:

"Nationals of any Contracting Party shall enjoy in the territory of any other Party treatment equal to that enjoyed by nationals of the latter Party in

¹ *The International Conferences of American States, 1889-1928*, p. 338.

² League of Nations, *Treaty Series* 1925, Vol. XXXV, p. 178.

³ League of Nations publication, II, *Economic and Financial 1929 II.5, Addendum* (document C.36.M.21.1929.II) p. 5.

respect of the possession and exercise of private rights, whether personal rights or rights relating to property.”⁴

2. THE INTERNATIONAL OBLIGATION TO RESPECT ACQUIRED RIGHTS

9. The fact that the acquisition of patrimonial rights is governed, whenever there are no treaty provisions on the subject, solely by municipal legislation has not prevented international law from imposing on every State the obligation to respect those rights once they have become “acquired”. This obligation to abide by the principle of respect for such rights of aliens assumes practical significance in two sets of circumstances: in cases of State succession, and in those that arise in a given State in consequence of some acts or omissions which are attributable to its authorities and affect those rights. The first point to consider, therefore, if only very briefly, is the position which results from the acquisition by a State of (all or) part of another State’s territory.

10. On this point, diplomatic practice and international case law have built up a substantial volume of precedent from which the applicable rules can be readily discerned. So far as the general principle is concerned, the statement made on the subject by the Permanent Court of International Justice is unequivocal. In its Advisory Opinion on the German Settlers in Poland (1923), it held that

“Private rights acquired under existing law do not cease on a change of sovereignty.”

Elaborating that point, the Court added that

“... even those who contest the existence in international law of a general principle of State succession do not go so far as to maintain that private rights including those acquired from the State as the owner of the property are invalid as against a successor in sovereignty.”

And later, the Court expressed the opinion

“... that no treaty provision is required for the preservation of the rights and obligations now in question.”⁵

These statements of the Permanent Court clearly show that, in the event of a territorial change, there exists an international obligation to respect the rights of private

⁴ The Convention, however, contains another provision which states: “Notwithstanding article 4 of this Convention, any Contracting Party may, for reasons of national security or defence, reserve the acquisition, possession or use of any categories of property for its own nationals or subject nationals of other Parties to special conditions applicable to aliens in respect of such property.” See European Convention on Establishment (Paris, 13 December 1955), arts. 4 and 5, *European Treaty Series*, No. 19, p. 2.

⁵ Publications of the Permanent Court of International Justice, *Collection of Advisory Opinions*, series B, No. 6, Settlers of German Origin in Territory ceded by Germany to Poland, pp. 36 and 38. See also other statements of the Court in *Collection of Judgments*, series A, No. 2, The Mavrommatis Palestine Concessions case, p. 28, and series A, No. 7, Case concerning certain German interests in Polish Upper Silesia, pp. 22 and 42.

individuals acquired under the legislation previously in force.⁶

11. The same can be said regarding the rights acquired by foreign private individuals under a State’s own legislation. In those cases, which are those of particular interest in the context of the present report, the position as regards the applicability of the general principle which requires the State to respect those rights is substantially the same. In one of the judgements cited in the preceding paragraph, the Permanent Court declared that

“... the principle of respect for vested rights... forms part of generally accepted international law [*droit international commun*]...”⁷

Another express statement of the principle was made by the Special German-Romanian Arbitral Tribunal established to adjudicate on claims arising under paragraph 4 of the annex to articles 297 and 298 of the Treaty of Versailles:

“Respect for private property and the acquired rights of aliens undoubtedly forms part of the general principles recognized by the law of nations.”⁸

Moreover, as will be shown in the appropriate context, there have been many other concrete instances in which international jurisprudence has held that the principle applied in the event of acts or omissions affecting this category of rights. And the same rule has been confirmed by conventional law. For the time being, and by way of illustration, it is worth citing the Economic Agreement of Bogotá, article 22 of which provides as follows:

“Foreign capital shall receive equitable treatment. The States therefore agree not to take unjustified, unreasonable or discriminatory measures that would impair the legally acquired rights or interests of nationals of other countries in the enterprises, capital, skills, arts of technology they have supplied.”⁹

12. In dealing with this obligation of the State, the question arises whether rights of a patrimonial nature belong among the “human rights and fundamental freedoms” which have been internationally recognized by the United Nations Charter and other post-war instruments. As was shown in the Special Rapporteur’s second report (A/CN.4/106, chapter III, 10 (b)), some of these instruments expressly recognize the right to own private property and also lay down rules for its protection against the “arbitrary” action of the State. This point, however, will be considered below, during

⁶ For other comment on the application of the principle in cases of “State succession” see Sayre, “Change of Sovereignty and Private Ownership in Land”, *American Journal of International Law* (1918), vol. 12, pp. 475-497, and “Change of Sovereignty and Concessions”, *ibid*, pp. 705-743; Makarow, “Les changements territoriaux et leur effets sur les droits des particuliers”, *Annuaire de l’Institut de droit international*, (1950), vol. I, pp. 208-255; O’Connell, *The Law of State Succession* (1956), *passim*.

⁷ Series A, No. 7, p. 42.

⁸ *Affaire Goldenberg* (1928), United Nations, *Reports of International Arbitral Awards*, vol. II, p. 909.

⁹ *Documents on American Foreign Relations*, vol. X (1948), p. 521.

the consideration of the measure of international protection afforded to acquired rights and of the general component elements of the notion of "arbitrariness", which is the basic notion from which the State's international responsibility in this context derives.

3. RELATIONSHIP BETWEEN THE ABOVE PRINCIPLE AND THE DOCTRINE OF "UNJUST ENRICHMENT"

13. In international judicial decisions, including those of the Permanent Court, the doctrine of "unjust enrichment" (*enrichissement sans cause*) has been used as a criterion for determining the quantum of reparation for damage caused by acts or omissions contrary to international law.¹⁰ This, however, is not the sole function which the doctrine has fulfilled in practice. It has also served in the determination of the component elements of international responsibility in many cases which have a bearing on the subject-matter of the present report, although on one occasion a well-known Claims Commission held that the doctrine of "unjust enrichment", as a general principle of law recognized by civilized nations, "... has not yet been transplanted to the field of international law".¹¹ Yet, as will be shown more fully at the appropriate stage, "unjust enrichment" in this very sense has "... long been recognized as a legitimate cause of action under the various systems of law, including international law".¹² And it is precisely because it is a cause of action, i.e. a source of quasi-contractual obligations between States and aliens, obligations the non-fulfilment of which may render the State responsible at international law, that the doctrine of "unjust enrichment" is related, and indeed very closely related, to the principle of respect for acquired rights.

14. Moreover, this close relationship between the two doctrines or principles can be discerned not only in the above-mentioned context of responsibility, but also elsewhere within the system of international protection of acquired rights. For example, the very *raison d'être* of compensation for expropriation ordered in the public interest is the idea that the State, i.e. the community, must not benefit (unduly) at the expense of private individuals. On the other hand, private individuals have no right to expect the compensation which they receive in such cases for their property to be a "source of enrichment".¹³ These are the reasons why it has rightly been said that the theory of compensation based on enrichment is much more flexible than one based on the principle of respect for private property, for it permits the taking into consideration of equities in favour

not only of the individual but also of the community.¹⁴

4. SCOPE OF INTERNATIONAL PROTECTION : THE NEED TO REVISE THE TRADITIONAL CONCEPTION

15. International law imposes on the State the obligation to respect the patrimonial rights of alien private individuals. However, the principle of respect for acquired rights does not imply an absolute or unconditional obligation. The idea of "respect" in no way corresponds to that of "inviolability". From the purely juridical standpoint, none of the "human rights and fundamental freedoms", not even the right to life and the security of the person, is absolutely inviolable, and that qualification has been recognized in all of the post-war international instruments.¹⁵ And the protection extended to patrimonial rights is—if such a term may properly be used—particularly "relative".¹⁶ In fact, from the point of view of international law, respect for acquired rights is conditional upon the subordinate to the paramount needs and general interests of the State. This is not solely due to the fact that "in principle, the property rights and the contractual rights of individuals depend in every State on municipal law ..."¹⁷ It is also, and indeed primarily, due to the fact that, according to a fundamental legal precept, private interests and rights, regardless of their nature and origin or of the nationality of the persons concerned, must yield before the interests and rights of the community. International law cannot ignore this universal precept. In the words of an Arbitral Tribunal, "the law of nations demands respect of private property, but recognizes that the State has the right to depart from that principle when its higher interests so require."¹⁸

16. Consequently, this report must seek to determine the extent to which at international law, the patrimonial rights of aliens are in fact protected; in other words, the essence and exact limits of the State's obligation to respect those rights. Only thus will it be possible to ascertain the component elements of international responsibility in the different circumstances which may arise. As will be shown, the scope of the international protection, and consequently also the existence and imputability of responsibility, will in each case depend both on the "acquired right" at issue and on the conditions and circumstances in which the act or omission on the part of the State takes place. But before referring to the criteria which serve as the basis for the determination of the component elements of responsibility, we should first see whether there is any genuine justification for the criticisms and objections voiced on occa-

¹⁰ On this point, see Schwarzenberger, *International Law*, vol. I, *International Law as applied by International Courts and Tribunals* (3rd ed., 1957), pp. 557, 653 *et seq.*

¹¹ General Claims Commission, United States and Mexico, *Dickson Car Wheel Company (U.S.A.) v. United Mexican States* (1931), United Nations, *Reports of International Arbitral Awards*, vol. IV, p. 676.

¹² Nussbaum, "The Arbitration between the Lena Goldfield's Ltd. and the Soviet Government", *Cornell Law Quarterly* (1950), vol. 36, p. 41.

¹³ In *Delagoa Bay Railway Arbitration* (1900), the Tribunal explicitly declared that it would be "... contrary to the most elementary considerations of equity to make this measure [compensation] a source of enrichment for the Company ...", see *Martens II* (30) N.R.G., p. 413.

¹⁴ Bin Cheng, *General principles of law as applied by International Courts and Tribunals* (1953), p. 48.

¹⁵ On this point, see the Special Rapporteur's second report (A/CN.4/106, chapter III, 10 (b)).

¹⁶ In the course of the deliberations of the *Institut de droit international* (Siena session), A. de Luna assimilated the right of ownership to what the classical jurists called *jus naturae secundarium*. See *Annuaire de l'Institut de droit international* (1952), vol. II, p. 254.

¹⁷ Publications of the Permanent Court of International Justice, *Judgments, Orders and Advisory Opinions*, series A/B, No. 76. The *Panevezys-Saldutiskis Railway case*, p. 18.

¹⁸ *Arbitration between Germany and Portugal* (1919), *Award II* (1930), United Nations, *Reports of International Arbitral Awards*, vol. II, p. 1039.

sions in recent years against the principle of respect of acquired rights itself. As a general rule, these criticisms and objections fall into two categories: those based on reasons of a political and social nature and those supported by purely juridical arguments.

17. One of the most severe critics of the first group is Friedman, in whose view the concept of acquired rights is not only "obscure, ambiguous and indefinable" but also "finds no support in international judicial decisions and was practically repudiated by States during the preparatory work for the Codification Conference [1930] and cannot, therefore, be raised to the dignity of a principle of international law".¹⁹ Most of the criticisms or objections, however, are more moderate in tone. Kaeckenbeeck has said that, as a means of solving disputes arising out of major social reforms ("nationalizations"), "the theory of acquired rights has proved to be totally inadequate and ineffective".²⁰ Similarly, Foighel has said that the (traditional) international jurisprudence reflects a period of history in which the sole economic system recognized in the principal countries was liberalism, and that, at present, in view of the changes in the conditions and circumstances which had served as its basis, the principle of respect is no longer important in the determination of the minimum standard of international law which States are unconditionally bound to observe in their relations with foreigners.²¹

18. As regards the position adopted by Governments before The Hague Codification Conference (1930), none of the replies received by the Preparatory Committee repudiated the State's obligation to respect the acquired rights of aliens on the grounds that the State enjoyed absolute legislative (or administrative) independence in the matter. A study of those replies indeed shows that all the Governments concerned admitted that the freedom of the State to "affect" the patrimonial rights of aliens was subject to specified conditions.²² Substantially the same conclusion can be drawn from a survey of the opinions expressed by States Members of the United Nations in the course of the discussion in the United Nations of questions regarding expropriation and nationalization.²³

19. Moreover, as will be shown in the next chapter, the essential notion of "respect for acquired rights"

forms part of the existing system of international protection of "human rights and fundamental freedoms". Naturally, this does not in any way mean that the principle of respect can retain its traditional significance or scope or, *a fortiori*, the characteristics attributed to it by the "orthodox" school of thought.²⁴ The extent to which the "traditional" conception is open to the criticisms and objections which have been directed against it will be shown below; but there is no denying the need for revising it, with a view to bringing the principle of respect for the acquired rights of aliens fully into line with the idea that private ownership and all the other patrimonial rights—as sources of social obligations—require, regardless of the nationality of the person in whom they are vested, constantly increasing sacrifices in the interests of the community at large. This idea is already discernible as the common denominator in the socio-economic structures and legal systems of all the countries of the world. Furthermore, in order to take into account certain recent developments of another character, it will also be necessary to revise the position traditionally maintained regarding the application of the principle in certain specific cases.

20. The second class of criticisms and objections levelled against the principle of respect relies on purely technical juridical arguments.²⁵ Certain learned authors have expressed some doubts regarding its practical usefulness as a principle of general application, suggesting, instead, that the varied and different patrimonial rights under international protections should be considered individually and separately. Cavaglieri, for example, maintains that the more correct approach is to determine, in each concrete case, whether the measure adopted by the State with regard to the alien's property is consistent with the *minimum* rights which he is recognized to possess by international law.²⁶ More recently, Guggenheim has suggested that it might be preferable to abandon the traditional approach, in which the problem of the protection of patrimonial rights is considered in terms of "acquired rights", and instead to study each of the specific categories (rights *in rem*, concessions, etc.) which play a practical part in the protection of private ownership under the law of nations.²⁷

¹⁹ S. Friedman, *Expropriation in International Law* (1953), p. 126.

²⁰ G. Kaeckenbeeck, "La protection internationale des droits acquis", *Recueil des cours de l'Académie de droit international* (1937-I), vol. 59, p. 361.

²¹ Foighel, *Nationalization, A Study in the Protection of Alien Property in International Law* (1957), pp. 53-54. See, for similar views, K. Katzarov "Rapport sur la nationalisation", *International Law Association, New York Conference*, 1-7 September 1958, p. 10, and the same author's "La propriété privée et le droit international public", *Journal du droit international* (1957), No. 1, pp. 6-51.

²² League of Nations Conference on the Codification of International Law, *Bases of Discussion*, vol. III; League of Nations publication, V. Legal, 1929.V.3.V. (document C.75.M.69.1929.V, pp. 33-37).

²³ The most recent official views on the subject are cited by M. Brandon in *The Record in the United Nations of Member States on Nationalization* (1958), work presented to the forty-eighth Conference of the International Law Association, *passim*.

²⁴ As will be shown in the two chapters that follow, according to the "orthodox" school of thought, expropriation, whatever its class or the conditions in which it is effected, gives rise to an obligation to pay "adequate", "rapid" and "effective" compensation; and in cases where there existed a contractual relationship between the State and the alien, the State's international responsibility derives directly from mere non-performance, by application of the principle *pacta sunt servanda* to all such contractual relationships and obligations.

²⁵ The very expression "acquired rights" has evoked objections such as that of Duguit: "Jamais personne n'a vu ce que c'était qu'un droit non acquis. Si l'on admet l'existence de droits subjectifs, ces droits existent ou n'existent pas; telle personne est titulaire d'un droit ou non. Le droit non acquis est l'absence de droit". See *Traité de droit constitutionnel*, vol. II, p. 201.

²⁶ Cavaglieri, "La notion des droits acquis et son application en droit international public", *Revue générale de droit international public* (1931) vol. 38, p. 293.

²⁷ P. Guggenheim, "Les principes de droit international public", *Recueil des cours de l'Académie de droit international* (1952-I), vol. 80, p. 126.

21. There can, in fact, be no doubt that not all patrimonial rights merit the same degree of protection, and that the measure of protection afforded must necessarily vary in accordance with the conditions and circumstances in which the State takes the measures in question. For example, is the content of the obligation to make reparation the same in the case of individual expropriations of the ordinary and usual type as in the case of expropriations which result from a change in the socio-economic structure of the State and are general and impersonal in character? Do the existence and imputability of international responsibility depend on the same factors in the various circumstances to which the failure to fulfil contractual obligations may give rise? These and many other examples which might be cited demonstrate the variety and complexity of the situations which must be considered in connexion with the international protection of acquired rights. Nevertheless, while each situation or category of situations must be examined and resolved individually and separately, the "principle of respect for acquired rights", as a principle of a general character, is undoubtedly of value from the technical and practical points of view. It is the basic principle on which the obligation (or obligations) of the State in this matter is founded and, consequently, the sole *raison d'être* of international responsibility. If supplemented by the notion of "unjust enrichment" in the manner outlined above, it can continue to provide the essential rules applicable to compensation, which is in fact the crucial issue in this area of international responsibility.

5. THE NOTION OF "ARBITRARINESS" AND THE DOCTRINE OF ABUSE OF RIGHTS

22. It remains to inquire as to the component elements of international responsibility for the acts or omissions with which this report is concerned. As has been seen, the measure of protection extended to aliens in this matter by international law and, consequently, the existence and imputability of responsibility depend in each case not only on the "acquired right" at issue but also on the conditions and circumstances in which the act or omission on the part of the State takes place. In contrast to the other cases of international responsibility for injuries caused to foreigners, the acts or omissions imputable to the State in this matter fall into two main categories: (a) those which constitute a "wrongful" act in themselves and (b) those which merely constitute an "arbitrary" act. It is not difficult to see the reason for this distinction—which cannot always be readily made in the case of other acts or omissions infringing the rights of aliens—as well as the different legal consequences which derive from acts or omissions in one or the other of these categories.

23. "Wrongful" acts or omissions are those which result from the non-performance by the State of any conventional obligation undertaken by it with respect to the patrimonial rights of aliens. The origin or source of this obligation, which imposes a specific standard of conduct, may be a treaty with the State of which the alien is a national or a contractual relation with the alien himself, provided in the latter case that the obli-

gation is genuinely "international" in character. The juridical consequences of non-performance of such an obligation are obvious: as the wrong is "intrinsically" contrary to international law, it not only directly and immediately involves the responsibility of the State but also imposes on the State the "duty to make reparation" *stricto sensu*, that is to say, the reparation must take the form of restitution in kind or, if restitution is impossible or would not constitute adequate reparation for the injury, of pecuniary damages. In traditional practice, international obligations giving rise to acts or omissions of this kind have been a somewhat infrequent occurrence, but the situation has changed in relatively recent years and the contractual relations between the States and aliens raise problems that are of great importance to the development and codification of international law.

24. "Arbitrary" acts or omissions, on the other hand, although they also involve conduct on the part of the State that is contrary to international law, occur in connexion with acts that are intrinsically "legal". In the various cases of international responsibility examined in this report, the State is in fact exercising a right—the right to "affect" the patrimonial rights of individuals for various reasons and purposes and in various ways—and responsibility will therefore be incurred only if the right is exercised in conditions or circumstances which involve an act or omission contrary to international law. The position is not the same as in the case of "wrongful" acts or omissions, for simple "violation" of the principle of respect for acquired rights does not involve the international responsibility of the State. International responsibility exists and is imputable only if the State's conduct in the exercise of the right in question can be shown to have been "arbitrary". Consequently, in view of the intrinsic legitimacy of the measure "affecting" the alien's rights, any "arbitrary" acts or omissions imputable to the State cannot be regarded as having the same juridical consequences as acts that are merely "wrongful". It will be seen later that international responsibility in such cases cannot and should not imply a "duty to make reparation" *stricto sensu*.

25. The distinction between "wrongful" and "arbitrary" acts or omissions was explicitly recognized by the Permanent Court of International Justice in connexion with expropriations, as will be seen in the following chapter, and it has also been generally recognized in diplomatic practice, international case-law and the writings of publicists concerning State responsibility for the non-performance of obligations stipulated in contracts with aliens. It should be noted that the notion of "arbitrariness" is fully in conformity with the essential idea animating the present system for the international protection of "human rights and fundamental freedoms". The Universal Declaration of Human Rights (article 17, para. 2) states that "No one shall be *arbitrarily* deprived of his property". The use of the word "arbitrarily" is not accidental but reflects an intention to subordinate to specific conditions the exercise of the State's rights with regard to private property. As the legislative history of article 17 of the Declaration shows, the discussion centred on the problem of determining these conditions or of defining the scope of the word

“arbitrarily”.²⁸ In this connexion, reference may appropriately be made to article 1 of the Protocol to the European Convention on Human Rights and Fundamental Freedoms, signed in Paris on 20 March 1952, which reads: “... 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.” Although not completely precise, this article is much more explicit with regard to the conditions governing the exercise of the State’s competence.

26. What are the component elements of the notion of “arbitrariness”? In other words, on the basis of what rule or rules is it possible to decide when an act or omission is “arbitrary”? It is necessary first to distinguish between those criteria which are generally applicable and those applicable only to specific acts or omissions. It is, of course, impossible to discuss the latter in this context; and attention will therefore be directed to the criteria which are *grosso modo* applicable to any situation that may arise. The first of these criteria relates to the motives and purposes of the State’s action. Although *prima facie* the question might be considered a purely domestic one in the sense that it is outside the scope of international law to judge the reasons and objectives which lead the State to take a measure affecting the patrimonial rights of individuals, whether national or alien, examination of the practice of international tribunals does not justify that conclusion. In principle at least, the question is of interest to international law and it is, therefore, within the province of international law to determine the motives or purposes that may justify the State’s action or, in any event, to prescribe those which cannot justify it. Another generally applicable criterion relates to the method and procedure followed by the State authorities. Although the State’s freedom of action is much greater in this respect than it is with regard to the grounds and purposes of the measure taken, this question also undeniably falls within the province of international law. The question that must be answered is whether an act or omission constituting a “denial of justice” is imputable to the State. In such case, as in the case of a measure which cannot be justified on grounds of genuine public interest, the “arbitrary” nature of the act or omission would be evident.

27. The third and last of the generally applicable criteria, and in a sense the most important, relates to discrimination between nationals and aliens.²⁹ The tra-

²⁸ With regard to the legislative history of article 17, the point to be noted is not so much that amendments tending to replace the word “arbitrarily” by the words “contrary to the laws” were rejected, since the real purpose of the amendments was rather to restrict the scope of the provision (cf. E/CN.4/SR.61), but the fact that the question was discussed with a view to determining the conditions to which the exercise of the State’s right should be subordinated, particularly in the matter of compensation (cf. E/CN.4/AC.1/SR.38). The divergence of views in this respect was one of the main reasons for the decision to adjourn consideration of the matter *sine die* during the preparation of the draft Covenant on Economic, Social and Cultural Rights (E/CN.4/SR.418).

²⁹ The “arbitrary” character of the measure applied by the State may also depend on the “compensation”. Nevertheless, as will be seen below, it is unnecessary to refer to compensation in the present discussion of generally applicable criteria.

ditional view in this matter has been that, as in the case of other acts or omissions injuring aliens, the State is responsible if its conduct is not in conformity with the “international standard of justice”, even if it has applied the same measure to its nationals. In effect, it was argued that in this matter also aliens should receive preferential treatment. Apart from the fact that this view has much less justification in the matter of patrimonial rights than in the case of rights inherent in the human person, the problem can no longer be posed in terms of the “minimum standard”. As has more than once been pointed out in the Special Rapporteur’s earlier reports, in giving recognition to human rights and fundamental freedoms contemporary international law makes no distinction between nationals and aliens and necessarily implies a régime of “equality” in the use and enjoyment of such rights and freedoms. Thus, in so far as concerns the notion of “arbitrariness”, the alien is entitled only to claim that the State should not discriminate against him in taking or applying the measure in question, and that the measure should not have been taken solely by reason of his status as an alien.

28. The foregoing considerations emphasize the importance of the “doctrine of abuse of rights” in this area of international responsibility. As was pointed out in the Special Rapporteur’s earlier reports, international responsibility is generally regarded as a consequence of “non-fulfilment or non-performance of an international obligation”. Nevertheless, both in the writings of publicists and in diplomatic and legal practice it has been recognized that international responsibility may also be incurred if a State causes injury through the “abusive” exercise of a right; that is to say, if it ignores the limitations to which State competence is necessarily subject and which are not always formulated in exactly defined and specific international obligations.³⁰ It is not difficult to understand why it was recently said that “the *arbitrary exercise* of State competences and the use of juridical institutions for purposes alien to them are in fact *abuses of rights*.”³¹

29. The notion of “arbitrary action” is in fact so closely linked to the doctrine of “abuse of rights” as to be largely coterminous in practice. The acts or omissions in which international responsibility may originate in the cases with which the present report is concerned occur in connexion with the exercise of rights of the State. It is for this reason that it is necessary to invoke the limitations placed by international law on the exercise of State competence in this matter. This is not the case if there exist international obligations the non-performance or non-fulfilment of which result in “wrongful” acts giving rise to direct

³⁰ On the theoretical development and practical applications of the “doctrine of abuse of rights”, see García Amador, “State Responsibility—Some New Problems”, *Recueil des cours de l’Académie de droit international* (1958).

³¹ R. L. Bindschedler, *La protection de la propriété privée en droit international privé*, *ibid.* (1956-II), vol. 90, pp. 212-213. It has also been said in connexion with expropriation that “international law undoubtedly gives broad discretion to the State in the exercise of the right to expropriate alien private property, but in this as in many other matters it would intervene in the case of manifest abuse...” Cf. Bing Cheng, “Expropriation in International Law”, *The Solicitor* (London, 1954), vol. 21, p. 99.

and immediate responsibility on the part of the State. It is, however, necessary in all other cases, since the act or omission imputable to the State is related to an intrinsically lawful action. It is recognized that this view diverges from the traditional approach in that it characterizes as merely "arbitrary" acts and omissions which—like the denial of justice—have always been considered to be "wrongful" and as such to give rise to the "duty to make reparation". Nevertheless, no other course would seem possible if it is desired to work out a system consistent with the special character of the cases of international responsibility with which this report is concerned.

II. Nature and content of acquired rights

30. Paradoxical though it may be, international law has established the principle of respect of acquired rights without defining or systematically classifying the rights in question. This is to be explained in part by the fact that under international law private patrimonial rights, whatever their nature or the nationality of their possessor, are governed, in the absence of treaties or of certain contractual relations between States and specific aliens, by municipal legislation. Nevertheless, certain questions raised by the nature and content of "acquired rights" are undeniably international in character, and many of those questions seem to have been resolved in practice.

6. PATRIMONIAL RIGHTS *lato sensu*

31. The first problem that must be considered in connexion with the definition and systematic classification of acquired rights, from both the international point of view and that of comparative law, is one of terminology. There is an obvious lack of uniformity in the nomenclature employed even by countries belonging to a single legal system (common law, the "continental system", etc.). Frequently this lack of uniformity extends even to substantive matters, that is to say, to the nature and content of acquired rights. The absence of common institutions and concepts is, of course, even more marked when the municipal law of countries belonging to different legal systems is examined. Nevertheless, in all judicial systems "rights" may be divided into the two broad categories, "patrimonial" rights and "personal" rights. The first are essentially economic in content and possess a pecuniary value, unlike the second, which are purely moral or political in character. It may be added that in general patrimonial rights include not only rights in real and movable property and rights *in rem* in tangible goods but also rights in intangible goods, including contractual rights whose content is economic.

32. In diplomatic practice and international case-law there are some precedents bearing on this point which shed light on the character and content attributed to "acquired" or patrimonial rights. In the first place—and on this point absolute uniformity seems to exist—the right of (private) ownership of tangible goods is the typical expression of the "acquired right", to which the other rights *in rem* in such property, whether movable or immovable, may undoubtedly be assim-

lated for the purposes under discussion. The situation is not so simple in the case of "intangible" property. Some of the treaties of peace signed at the end of the First and Second World Wars contain provisions directed towards the protection of private "property" which cover not only movable and immovable tangible goods but also "rights" and "interests" of every kind including rights and interests in industrial, literary or artistic property.³² An equally broad interpretation of the term "property" is to be found in some of the agreements concluded since the last war concerning the compensation to be paid to aliens whose "property, rights and interests" have been nationalized.³³ The most important question in the context of this report is, however, whether "intangible" property should be understood to include "contractual" rights, that is to say, rights acquired by aliens under a contract or other form of contractual relation (concessions, public debts, etc.) entered into with a State.

33. The difficulties in this connexion are principally attributable to the fact that the question is not always approached from the same point of view or with the same purpose in mind. From the point of view of their legal nature, such contractual rights undeniably fall, by reason of their characteristic economic content, within the general category of patrimonial rights. On this point, unanimity is virtually complete both in doctrine and in practice.³⁴ The problem really arises in relation to the treatment of this class of rights when they are affected through specific actions of the State; it must be decided, for example, whether they are capable, like tangible property, of being expropriated, or whether only the rules of traditional international law concerning the non-performance of the contractual obligations of the State should be applied in their case.³⁵ But this is a completely separate problem which will be examined in detail in chapter III.

7. MIXED (PRIVATE AND PUBLIC) CHARACTER OF SOME OF THESE RIGHTS

34. Acquired or patrimonial rights are commonly classified as "private" rights. However, the question of their true legal nature arises fairly frequently in both theory and practice because some of the rights in question are in fact of a mixed character (private and public). In particular, the question has had to be considered in the case of rights acquired under concessions granted by the State to individual aliens and the mixed character of such rights has in fact been expressly recognized in arbitral decisions. For example, in the Warsaw Electric Company case (1932), the single arbitrator (Asser) held that "... the concession granted by the City to the Company has, as is generally the case with all concessions, a double character: it falls

³² See, for example, article 297 (c) of the Treaty of Versailles (1919) and article 78, para. 9 (c), of the Treaty of Peace with Italy (1947).

³³ With regard to these agreements, see chapter II, section III, 18.

³⁴ See the numerous sources cited by Herz, "Expropriation of Foreign Property", *American Journal of International Law* (1941), vol. 35, pp. 243-262, footnotes 7 and 8.

³⁵ With regard to this distinction, see S. Friedman, *op. cit.*, pp. 151-153 *et seq.*

within the scope of both public and private law".³⁶ The question was considered by the Permanent Court of International Justice in the German Settlers in Poland case (1923),³⁷ and the dual character of such rights was also expressly recognized in the Report of the Transvaal Concessions Commission.³⁸ Some publicists go further and consider that concessions and other rights have the character of "public rights".³⁹

35. What juridical consequences from the point of view of international responsibility ensue from the classification of such rights? For example, does the manner in which the rights are classified affect the extent of the State's obligations with regard to the rights of aliens? Discussing the question of "State succession", Kaeckenbeeck has maintained: "According as the private or the public character [of the concession] is thought to prevail, the application or rejection of the rule of respect for private rights appears justified. There is no doubt that the weight of opinion is at present in favour of the obligation to respect concessions, but in view of the considerable public importance which some concessions may have, it would be undue optimism to believe that the debate on this question is for ever closed." Further defining his position, he went on to say: "But, in my opinion, the gist of the matter is rather that the operation of the principle of respect for vested rights is not checked by a change in the person of the State as long as the private law character of the relation prevails, but it is checked when the public character of the legal relation prevails."⁴⁰ As will be seen in chapter III, the problem is somewhat different if the concession was granted by the State itself, especially in the case of a certain type of concession which cannot be considered on the same footing as concessions of the traditional kind. In any event, the mixed character of such legal relations undeniably affects the scope of the State's obligations.

8. SPECIAL SITUATIONS WHICH DO NOT INVOLVE ACQUIRED RIGHTS

36. In practice, it is sometimes necessary to decide whether certain interests, expectancies and other special situations can be considered as falling within the sphere of acquired rights for the purposes of international protection. As Herz has pointed out, the civil law of a country in almost every one of its specific rules, and often also in its constitutional and administrative law, creates situations in the continuation of which an individual may be interested. These situations may be changed by acts of legislation or even of administrative practice, so that to give foreigners vested rights against each of these changes would mean to insure them against every change which may concern their interests. It is clear that a line of demarcation must be drawn between "acquired rights" properly so called and that

which is beyond their sphere. Although, as Herz states, international law by no means gives a clear-cut solution,⁴¹ some of these situations have been resolved in practice.

37. For example, good will, that is to say, the advantage or benefit of a specific commercial or industrial situation, was an issue in a case heard by the Permanent Court of International Justice and the question was decided in the negative. On that occasion, a claim was put forward to the possession of an "acquired right" in virtue of "the possession of customers and the possibility of making a profit" in the business established by a national of the claimant Government.⁴² In his dissenting opinion, Sir Cecil Hurst, who, in this respect, agreed with the majority, discussed the point and held that "it would be right to say that an acquired right had been violated" if the Belgian Government had, for example, prevented the fulfilment of a contract which Chinn had entered into with a third party.⁴³ The Court of Arbitration for Upper Silesia held: "As a general rule, the freedoms relating to the employment of labour and to gainful activity, which rest on the general freedom of industry and trade, are not acquired rights. The latter must be based rather on a special title of acquisition: the law must regard them as specific rights . . ." ⁴⁴

38. Nor does it seem that industrial, literary or artistic property can be the subject of an international claim based on the notion of "acquired right", in the absence of conventions between the States concerned, as in the case mentioned above.⁴⁵ Reference might also be made to other special situations which have arisen in international practice, but the foregoing examples illustrate the basic criterion which seems to have been adopted. However, mention should be made of the situations which have arisen as a result of the establishment of State monopolies over insurance and other activities, which are the subject of copious literature and considerable divergence of opinion.⁴⁶

CHAPTER II

EXPROPRIATION IN GENERAL

I. The right of "expropriation"

39. The patrimonial rights of private individuals may be "affected" by the State not only through acts of expropriation *stricto sensu*, but also in other ways

⁴¹ Cf. Herz, *loc. cit.*, pp. 245-246.

⁴² Oscar Chinn case (1934), Publications of the Permanent Court of International Justice, series A/B, No. 63, p. 88.

⁴³ *Ibid.*, p. 122.

⁴⁴ Jablonsky case, cited by Bindschedler, *loc. cit.*, p. 224.

⁴⁵ With regard to this special situation, see S. Basdevant, *Répertoire de droit international*, vol. VIII, p. 46.

⁴⁶ See, for example, Fachiri, "International Law and the Property of Aliens", *British Year Book of International Law* (1925), p. 50. Under a draft convention approved by the International Law Association, the establishment of state monopolies which may put an end to established businesses should entail the complete indemnification of any such businesses belonging to aliens. See *Report of the 37th Conference* (1932), p. 61.

³⁶ United Nations, *Reports of International Arbitral Awards*, vol. III, p. 1687.

³⁷ Publications of the Permanent Court of International Justice, series B, No. 6, p. 39.

³⁸ Kaeckenbeeck, *loc. cit.*, p. 350.

³⁹ Bindschedler, *loc. cit.*, p. 221.

⁴⁰ "Protection of Vested Rights in International Law", *British Year Book of International Law*, 1936, pp. 11 and 12.

and for different reasons and purposes. In Anglo-American legal literature there is an ever-increasing tendency to speak of "taking", which doubtless has a wider meaning than that generally attributed to the term "expropriation", but which also has the disadvantage, at least when translated into other languages, of being on occasions inexact. This is the case, for example, when the State's action consists or results in the destruction of the private property or in the non-observance of some contract or concession agreement. But in any event, this problem of terminology—which, in view of the diversity to juridical notions revealed by any study of comparative law and the existing imperfections in the relevant branch of the law of nations, would be very difficult to solve—is not the crux of the matter.

40. The truly important problem is that of substance, i.e., the essence of the right which entitles the State to "affect" private property by very varied means and for equally different reasons and objects. This act of "affecting"—as understood in its etymological and, to some extent also, juridical sense—includes every measure which consists of or directly or indirectly results in the total or partial deprivation of private patrimonial rights, either temporarily or permanently. This is the basis on which, without prejudice to the further comments on the point which will be made in this chapter and in the next, the international aspects of the State's right of "expropriation" will now be considered. The term "expropriation" itself will also be employed subject to the distinctions and definitions to be formulated below.

9. INTERNATIONAL RECOGNITION OF THE RIGHT

41. The right of "expropriation", even in its widest sense, is recognized in international law, irrespective of the patrimonial rights involved or of the nationality of the person in whom they are vested. This international recognition has been confirmed on innumerable occasions in diplomatic practice and in the decisions of courts and arbitral commissions, and, more recently, in the declarations of international organizations and conferences. Traditionally this right has been regarded as a discretionary power inherent in the sovereignty and jurisdiction which the State exercises over all persons and things in its territory, or in the so-called right of "self-preservation", which allows it, *inter alia*, to further the welfare and economic progress of its population. In its resolution 626 (VII) of 21 December 1952 relating to the under-developed countries, the General Assembly has stated that "the right of peoples freely to use and exploit their natural wealth and resources is inherent in their sovereignty and is in accordance with the Purposes and Principles of the Charter of the United Nations".

42. Within the context of this report, the fact that the right of "expropriation" has been explicitly recognized by international law must obviously be stressed. In fact, save in the exceptional circumstances which will be considered below, an act of expropriation, pure and simple, constitutes a lawful act of the State and, consequently, does not *per se* give rise to any international responsibility whatever. As was pointed out in the preceding chapter (section 5), such responsibility can only exist and be imputable if the expro-

priation or other measure takes place in conditions or circumstances inconsistent with the international standards which govern the State's exercise of the right or, in other words, contrary to the rules which protect the acquired rights of aliens against "arbitrary" acts or omissions on the part of the State. As will be shown, the notion of "arbitrariness", which has been adopted as the basis for determining whether international responsibility arises, applies, although not always to the same extent, to each of the various forms which the exercise of this right by the State may assume. First, however, it is appropriate to consider the various means whereby the State may "expropriate" or "affect" the patrimonial rights of aliens and to determine which of them are of the greatest interest from the point of view of international responsibility.

10. THE VARIOUS FORMS WHICH THE EXERCISE OF THE RIGHT OF "EXPROPRIATION" MAY ASSUME

43. Naturally, not all the measures taken by States which "affect" the patrimonial rights of aliens are of equal interest to international law, and indeed some are virtually without interest. The confiscation of property, the imposition of fines and other measures of a penal character generally fall within this category. International case-law contains precedents which fully demonstrate the compatibility of such measures with the international rules governing the treatment of aliens.⁴⁷ The intrinsic lawfulness of such measures does not, of course, exclude the possibility of their adoption or application amounting to a "denial of justice", and of the act of omission concerned consequently giving rise to international responsibility.⁴⁸ But the possibility of the State incurring international responsibility is remote; and it is equally so when the State destroys property belonging to aliens for reasons of public safety or health, provided that the circumstances are ones in which the notion of *force majeure* or state of necessity is recognized by international law.⁴⁹ In international jurisprudence exemption from responsibility has also been based on the "police power" of the State.⁵⁰

44. Even though it has been contended that international law places limits on the State's power to impose taxes, rates and other charges on the property, rights or other interests of aliens, particularly when the measures taken discriminate against the latter,⁵¹ the fundamental

⁴⁷ See, *inter alia*, the Robert Wilson case (1841), Moore, *History and Digest of Arbitration, etc.* (1898), vol. IV, p. 3373; and the Louis Chazen case (1930), United Nations, *Reports of International Arbitral Awards*, vol. IV, p. 564.

⁴⁸ See, for example, the Bronner case (1868), Whiteman, *Damages in International Law*, vol. II, p. 931. On "abuse of competence" in this context, see J. C. Witenberg, "La protection de la propriété immobilière des étrangers", *Journal Clunet* (1928), vol. 55, p. 579.

⁴⁹ See, in this connexion, the Special Rapporteur's third report (A/CN.4/111), chapter VI, No. 4.

⁵⁰ See, *inter alia*, the J. Parsons case (1925), Nielsen, *American and British Claims Arbitrations, etc.* 1926, p. 587.

⁵¹ See on this point the report by Dr. J. C. Witenberg to the Protection of Private Property Committee, *Report of the 36th Conference of the International Law Association* (1930), pp. 322-325.

lawfulness of this class of measures in the international context, regardless of their nature or scope, has very seldom been disputed. The possibility of the State incurring international responsibility can only arise if the measure is of a discriminatory nature, and practical experience has shown this eventuality to be highly unlikely.⁵² The same rule can be said to apply to rights of importers and exporters and to prohibition on the import or export of specified merchandise:⁵³ the State can only be held internationally responsible if the measure is not general but personal and arbitrary.⁵⁴ Nor are there any restrictions of an international character on the State's right to control the rate of exchange of its currency and to devalue it, although the contrary view has been advanced also on this point.⁵⁵ In a case which arose after the Second World War, it was held that creditors who had made bank deposits before the devaluation of the legal currency were not entitled to claim the original value.⁵⁶

5. The above survey does not in any way exhaust the various means whereby the State may "affect" the patrimonial rights of private individuals. Besides expropriation *stricto sensu* (and nationalization), as well as other kinds of "indirect" expropriation, there is a special category which relates to rights of a contractual nature or origin. In considering the measures which affect these patrimonial rights, a distinction should be drawn between acts which affect rights in this class alone and those which also involve an expropriation of tangible property. The latter will be referred to below, during the examination of other international aspects of the institution of expropriation.

⁵² The Conference of the International Law Association referred to in the previous footnote resolved as follows: "There is a limit in International Law to a State's right to tax the property, rights and interests of foreigners; but this limit is one of fact and degree. In particular, taxes of this nature which discriminate against foreigners are contrary to International Law." *Ibid.*, pp. 361-362. In the draft convention which it approved at its Oxford Conference, the I.L.A. accepted the principle of non-discrimination, in the sense that a State should not be permitted to impose on aliens taxes or charges other or higher than those levied upon its own nationals. See *Report of the 37th Conference* (1932), p. 60. See for a similar view art. 7 of the draft code on the equitable treatment of foreign investment approved by the International Chamber of Commerce at its Twelfth Congress (Quebec, 1949), Brochure 129 (Paris, August 1949), p. 14.

⁵³ See Borchard, *The Diplomatic Protection of Citizens Abroad* (1915), p. 182.

⁵⁴ See *Lalanne and Ledour case* (1903), Ralston, *Venezuela Arbitrations of 1903* (1904), p. 501.

⁵⁵ See Dupuis, "Règles générales du droit de la paix", *Recueil des cours de l'Académie de droit international* (1903-II), vol. 32, p. 163. What can be admitted is that "National legislation—including currency legislation—may be contrary in its intentions or effects to the international obligations of the State". Separate Opinion of Judge Lauterpacht in the *Case of Certain Norwegian Loans* (1957), *Judgment of 6 July 1957, I.C.J. Reports 1957*, p. 37.

⁵⁶ *Fabar case* (United States v. Yugoslavia), *Settlement of Claims by Foreign Claims Settlement Commission* (1955), p. 23. In the *Serbian Loans case*, the Permanent Court declared that it was, of course, "a generally accepted principle that a State is entitled to regulate its currency". Publications of the Permanent Court of International Justice, *Collection of Judgments*, series A, Nos. 20-21, p. 44. As regards the scope of the State's rights in this respect, see Mann, "Money in Public International Law", *British Year Book of International Law* (1949), p. 259 *et seq.*

11. EXPROPRIATION *stricto sensu* AND "NATIONALIZATION"

46. There is no doubt that some of the measures to which reference has been made result in a direct economic benefit to the State at the expense of the owners of the property concerned. But this does not occur in every instance and such benefit is not always the purpose which affords the legal grounds and justification for the measure. In the case of expropriation *stricto sensu*, the situation is, however, perfectly well defined. Within the definition, formulated at the beginning of this chapter, of the State's right to "affect" private property generally, this specific measure can be characterized and distinguished from others as the act whereby the State appropriates patrimonial rights vested in private individuals in order to put them to a public use or to provide a public service. It should be noted that this definition, which is complementary to the earlier one, concentrates solely on the two essential component elements of expropriation: the "appropriation" of private patrimonial rights and the purpose to which the expropriated property is to be put. A more explicit definition, mentioning not only the content and purpose of the State's action but also the grounds on which it may be based, the methods or procedures through which it may be effected, the individual or general and impersonal character which may be attributed to it, the direct or indirect form which it may assume and the scope of the obligation to compensate for the expropriated property, besides being difficult in the present context, might provoke unnecessary complications from the point of view of international law. Moreover, the distinction between a State's acts of expropriation founded on the right of "eminent domain" and those which fall within the exercise of its police power—a distinction which originally stems from differences in grounds and purposes and also has a bearing on the question of compensation—is daily becoming more difficult to make, because of the evolution which the conception of the State's social functions has undergone in both those areas.⁵⁷

47. Attention will be drawn in this chapter to the differences—at times substantial—between the several notions of expropriation and the régimes applicable thereto, currently prevalent in various countries or groups of countries. What consequences, then, can this lack of uniformity in the relevant municipal practice have from the point of view of international responsibility? This question will be answered explicitly in due course. For the time being, one thing alone needs stressing: that international law, lacking a definition of private ownership, has failed to establish a common or universal régime relating to expropriation. Without prejudice, of course, to the existing international rules which govern certain aspects of the institution, is it not therefore inevitable that the municipal law of the State which effects the expropriation should play an important part? The answer is obvious, for the traditional rules relating to this aspect of the international protection of acquired rights were themselves nothing but a faithful reflection of the principles contained in the

⁵⁷ On this point see Herz, "Expropriation of Foreign Property", *American Journal of International Law* (1941), vol. 35, pp. 251-252.

municipal law of States, principles which, at that time, were remarkably uniform. For the same reason, must not the profound transformation which has taken place during the last forty years in the social function of private ownership and in the character of expropriation also have fundamental consequences?

48. Before the First World War, expropriation was normally directed against individual property. But thereafter, various States began to generalize the practice—which was resumed and intensified after the Second World War—of carrying out acts of expropriation on a wide scale and impersonally. This type or form of expropriation is commonly referred to as “nationalization”.⁵⁸ In contrast with individual or personal acts of expropriation, nationalization measures reflect changes brought about in the State’s socio-economic structure (land reforms, socialization of industry or of some of its sectors, exclusion of private capital from certain branches of the national economy); or, looked at from another angle, nationalization measures constitute the instruments through which those changes in the former liberal economy are introduced. Although measures of this category are sometimes prescribed in the State’s constitution, as a general rule they are adopted, and are always applied, pursuant to special statutory provisions which lay down the conditions and procedures for carrying the nationalization into effect.⁵⁹ There are also other differences, including some fairly marked ones, between nationalization and expropriation pure and simple, but any attempt to point them out would show that many of the characteristic features of the former can also be found, and in fact, often are found, in the latter.⁶⁰ In brief, therefore, except in the matter of compensation, where important distinctions can be noted, the two juridical institutions are, at least from the point of view of international law, substantially the same.

II. Other international aspects of expropriation

49. Of all the questions raised by expropriation, compensation is undoubtedly that of the greatest interest

⁵⁸ For a summary account of the “nationalization” measures taken before 1917 and during the period between the two world wars, see Friedman, *Expropriation in International Law* (1953), p. 12 *et seq.* As regards land reform and the nationalization of the oil industry in Mexico, see Kunz, “The Mexican Expropriations”, *New York University Law School Pamphlets* (1940), Series 5, No. 1. On the Romanian land reform, see Deák, *The Hungarian-Rumanian Land Dispute* (1928), *passim*. On nationalization measures taken since 1945, see Doman, “Post-war Nationalization of Foreign Property in Europe”, *Columbia Law Review* (1948), vol. 48, p. 1140 *et seq.*

⁵⁹ As regards constitutional provisions which envisage “nationalization”, see K. Katzarov, “Rapport sur la nationalisation”, paper prepared for the *International Law Association, New York Conference, 1-7 September 1958*, p. 11.

⁶⁰ As regards the various definitions which have been formulated of “nationalization”, see, in particular, Foighel, *Nationalization, A Study of the Protection of Alien Property in International Law* (1957), pp. 13-20; Perroux, *Les nationalisations* (1945). With regard to the special aspects of the post-war nationalization measures, as well as the problems which they raise from the domestic point of view, see Scammel, “Nationalisation in Legal Perspective”, *Current Legal Problems* (1952), vol. 5, pp. 30-54.

to international law and will therefore be considered in a separate section of the present chapter. This section will refer to other aspects of the institution, in order to show the extent to which they, too, are of interest in the international context. First, however, it is necessary to consider the notion of “unlawful” expropriation, which has been explicitly recognized in practice, in order to contrast it with the notion of “arbitrary” expropriation, and to analyse the special problems created by acts of expropriation involving the non-observance of contracts or concession agreements.

12. “UNLAWFUL” EXPROPRIATION AND “ARBITRARY” EXPROPRIATION

50. The first step must be to agree on the meaning of the term “unlawful”. According to a generally accepted principle, an expropriation is not necessarily “unlawful” even when the action imputable to the State is contrary to international law. Unlike other acts and omissions of this nature which are qualified with the same adjective or the adjective “wrongful”, an expropriation can only be termed “unlawful” in cases where the State is expressly forbidden to take such action under a treaty or international convention. By analogy, acts of expropriation which do not satisfy the requirements of form or substance stipulated in an international instrument are deemed to fall within the same category. This qualification, which stems from the idea that expropriation is intrinsically lawful both from the municipal and international points of view, has been confirmed in the decisions of the Permanent Court of International Justice and of other judicial bodies. The Permanent Court, for example, in the case concerning certain German interests in Polish Upper Silesia (1926 and 1928), held that expropriation was only “unlawful” in the two instances stated above.⁶¹ Other aspects of this question will be referred to again, but, for the present, the point to stress is that the “unlawful” character of an expropriation assimilates it, so far as the existence and imputability of international responsibility are concerned, to other acts or omissions which render the State responsible directly and immediately. In other words, in the event of an “unlawful” expropriation, responsibility comes into play and becomes imputable merely by reason of the State’s act being done, even though the measure of expropriation might be fully consistent with the conditions or requirements (municipal or international) to which the exercise of the right would have been subject in the absence of a treaty.⁶²

51. Once this basis is established, and having regard also to the points developed in the preceding chapter (section 5), it is not difficult to determine what is meant by “arbitrary” expropriation. This second category covers measures of expropriation which are not in conformity with the international conditions and limitations to which the exercise of the right of expropria-

⁶¹ Publications of the Permanent Court of International Justice, *Collection of Judgments*, series A, No. 7 (Merits), pp. 21 and 22; cf. *ibid.*, series A, No. 17, Judgment 13 (Indemnities), pp. 46 and 47.

⁶² When instead of a treaty a contract or concession agreement with the alien individual concerned prohibits expropriation, the position is, as will be shown in the next section, different.

tion is subject and which, consequently, involve an "abuse of right". But what are the "limitations" placed on the exercise of the right of expropriation? Or, to put the question in simpler terms, in what features of the institution can the notion of "arbitrariness" enter into play? A survey of diplomatic practice and international case-law in the matter of expropriation, whether individual or general, shows that the three aspects to consider in determining whether the State has acted in an arbitrary manner are as follows: the motives and purposes of the expropriation; the method or procedure adopted to effect it; and above all, the compensation given for the expropriated property.⁶³

13. MEASURES OF EXPROPRIATION INVOLVING THE NON-OBSERVANCE OF CONTRACTS OR CONCESSION AGREEMENTS

52. There is a tendency, of relatively recent origin but shared by some authoritative writers, to extend the notion of "unlawful" expropriation to cases in which the State and the alien individual are bound by a contractual relationship. Where such a relationship exists, one of two things may occur in practice: the expropriation may simply affect (annul, rescind or modify) the contract or concession agreement under which the expropriated property or undertaking was acquired, or there may be non-observance of a specific obligation not to expropriate or otherwise to affect the stipulations contained in such an instrument.⁶⁴ The tendency referred to above is based on the idea that, by analogy with treaties, the non-observance by the State of the obligations which it has assumed in those contracts or concession agreements constitutes a "wrongful" act, which gives rise to direct and immediate international responsibility. In brief, the premise is that the principle *pacta sunt servanda* applies equally to treaties and to contractual relationships between States and alien private persons.

53. The applicability of this principle to such contractual relationships will be considered in detail in the next chapter. But even at this stage it is worth citing some concrete examples of the tendency referred to above. In the draft presented to the *Institut de droit international* by Lapradelle, it was stipulated that

⁶³ As regards the different legal consequences of "wrongful" and "arbitrary" measures affecting patrimonial rights, see also chapter I, section 5, *supra*.

⁶⁴ The Agreement of 29 April 1933 between the Imperial Government of Persia and the Anglo-Persian Oil Company Limited stipulated, in its article 21, that "This Concession shall not be annulled by the Government and the terms therein contained shall not be altered either by general or special legislation in the future, or by administrative measures or any other acts whatever of the executive authorities". I.C.J. Pleadings, Anglo-Iranian Oil Co. Case (United Kingdom v. Iran), p. 31. In the Agreement concluded in 1951 between the Government of India and three foreign companies concerning the establishment of oil refineries, the Government undertook not to expropriate the companies concerned or take over their operations during twenty-five years and to pay reasonable compensation in the event of expropriation after the expiry of that period. Other instruments merely specify the circumstances in which the State shall be entitled to revoke the concession; such was the case, for example, in a concession Agreement concluded by the Government of the United Kingdom of Libya (*Official Gazette of the United Kingdom of Libya*, 19 June 1955, clause 27, pp. 71 and 72).

"Nationalization, a unilateral act of sovereignty, shall respect obligations validly entered into, whether by treaty or by contract."⁶⁵ The resolution on the subject adopted by a Committee during the Cologne Conference (July 1958) of the International Bar Association stipulated, in much more explicit form, that "international law recognizes that the principle *pacta sunt servanda* applies to specific undertakings entered into by States with other States or with nationals of other States and that, consequently, any expropriation of private property which violates a specific contract concluded by the State is contrary to international law".⁶⁶ Similarly, it has even been said that the presence of an undertaking not to expropriate imposes a "higher obligation", the non-observance of which creates a liability not only to pay compensation for the expropriated property or undertaking but also to indemnify the alien for all the damage and loss which he has sustained.⁶⁷

54. The majority opinion, however, does not seem to support this tendency. At its Siena session, the *Institut de droit international* rejected a proposal to the effect that the State should be bound to respect (express or tacit) undertakings not to nationalize entered into either with another State or with alien private individuals.⁶⁸ The argument invoked in support of this opinion relies on the juridical nature of contractual relationships between States and private individuals and on the irrenunciabile character of the right of eminent domain. Foighel, for example, has stated in this connexion that there is no rule of international law which gives a special degree of protection to patrimonial rights.⁶⁹ As regards the second factor, R. Delson stated at the recent Conference of the International Law Association that "the right of the State to take property for public use is so fundamental that it cannot even be surrendered by contract (although, of course, proper indemnification for the taking must be made)".⁷⁰

55. So far as this last aspect of the question is concerned, there can be no doubt whatever that, from the

⁶⁵ Lapradelle, "Les effets internationaux des nationalisations", *Annuaire de l'Institut de droit international* 1950, vol. 43, I, p. 68.

⁶⁶ At the time of preparing the present report, the Special Rapporteur did not have the printed text of the resolution at his disposal. The problem has already been considered by the Association in the past. On that occasion, the same view was advanced by, *inter alia*, F. M. Joseph, The International Aspects of Nationalization, an outline, paper prepared for the International Bar Association, *Fifth International Conference of the Legal Profession*, Monte Carlo (Monaco, 19-24 July 1954), p. 2.

⁶⁷ See Sir Hartley Shawcross, Some Problems of Nationalisation in International Law, *ibid.*, pp. 17 and 18.

⁶⁸ The proposal was rejected by 20 votes to 16, with 22 abstentions. See *Annuaire de l'Institut de droit international* (1952), vol. II, p. 318. A proposal covering only undertakings entered into with a State was adopted by a majority of 50 votes. *Ibid.*, p. 317.

⁶⁹ Foighel, *op. cit.*, p. 74.

⁷⁰ R. Delson, "Nationalization, Comments" (paper presented to the 48th Conference of the International Law Association, New York, September 1958), p. 3. For a similar view, see Farfanfarma, "The Oil Agreement between Iran and the International Oil Consortium: the Law Controlling", *Texas Law Review* (1955), vol. 34, p. 271.

municipal law point of view, the position is indeed as stated above.⁷¹ But the important question, naturally, is whether the same rule applies in international law. Schwarzenberger, in whose view such undertakings "crystallized" the relations between the parties on the basis of the municipal law of the grantor as it existed at the time when the concession was granted, argues that they are internationally valid—again by analogy with treaties—except in cases where, by reason of some express constitutional provisions or generally known rules of constitutional law, the organs of the State are not free to contract.⁷² Apart from the problem which such a line of reasoning raises as regards vitiated consent, can it juridically be applied to contractual relations between States and alien private individuals? In substance, this again raises the question whether the principle *pacta sunt servanda* can be applied to such relationships as a rule of international law.

56. On the basis of the considerations which will be pointed out in the next chapter, the first step must be to distinguish between, on the one hand, contracts and concession agreements which are governed by municipal law and, on the other hand, those modern instruments which are subject to the law of nations or to some legal system other than the local law. In the case of the former, which are the instruments envisaged in this section, the interests of the State and the notion of public utility on which the right of expropriation is based, must continue to prevail over private interests. No private individual, whether a national or an alien, can disregard this universal legal precept, and all that he has the right to demand is that compensation be granted for the expropriated property. With the second class of instruments the position is different, provided that the instrument in question has "internationalized" the contractual relationship to such an extent that the State is no longer entitled to invoke the rule of domestic jurisdiction.

14. MOTIVES AND PURPOSES OF EXPROPRIATION

57. In distinguishing between expropriation *stricto sensu* and the other forms in which the State's right to "affect" the property of private individuals may be exercised, it was shown that the "destination" which the expropriated property is given, in other words, the motives and purposes of the action taken by the State, is one of the essential component elements of expropriation. The question that must now be considered is the extent to which international law regulates this aspect of expropriation. The view has been taken by some writers that "even in the extreme case where a State expressly takes foreign property without giving any reason or motivation for its action, international

law does not contain any special rule dealing with such a case in a way different from ordinary expropriation for public use".⁷³ Other writers, while recognizing that expropriation is lawful only if it is justified by reasons of public interest, nevertheless hold that in this matter the State possesses unlimited discretionary powers.⁷⁴

58. On the other hand, it has been argued that the power to expropriate finds its juridical basis in the requirements of the "public good" or the "general welfare" of the community and that, although the public welfare is considered by international law to be of such overriding importance that it is allowed to derogate from the principle of respect of private rights, such derogation is conditional upon the presence of a genuine public need, and is governed by the principle of good faith.⁷⁵ A number of decisions of international tribunals support this view. For example, the Permanent Court of Arbitration, in defining the power to expropriate in the Norwegian Claims case (1922), expressly circumscribed the exercise of that power to what might be required for the "public good" or for the "general welfare".⁷⁶ In the Walter Fletcher Smith case (1929), the arbitrator observed that "the expropriation proceedings were not, in good faith, for the purpose of public utility. . . . The properties seized were turned over immediately to the defendant company, ostensibly for public purposes, but, in fact, to be used by the defendant for purposes of amusement and private profit, without any reference to public utility."⁷⁷ The requirement that expropriation must be justified by reasons of public interest is also embodied in a number of international treaties.⁷⁸

59. It is undeniable that, in principle at least, the test of "arbitrariness" is applicable to the motives and purposes of expropriation, for plainly, if international law recognizes the undoubtedly very wide power of the State to appropriate the property of aliens on the ground that, as under municipal law, the interests of the individual must yield to the general interest and public welfare, the least that can be required of the State is that it should exercise that power only when the measure is clearly justified by the public interest. Any other view would condone and even facilitate the abusive exercise of the power to expropriate and give legal sanction to manifestly arbitrary acts of expropriation. In certain circumstances it may, as will be shown below, be thought proper to exempt the State from the

⁷³ J. H. Herz, *loc. cit.*, p. 253. Friedman considers that the motives of expropriation are a matter of indifference to international law, since the latter does not contain its own definition of "public utility". *Op. cit.*, p. 141.

⁷⁴ Cf. Bourquin, "Règles générales du droit de la paix", *Recueil des cours de l'Académie de droit international* (1931-I), vol. 35, p. 166; Kunz, *loc. cit.*, p. 55.

⁷⁵ Bin Cheng, *General Principles of Law as applied by International Courts and Tribunals* (1953), pp. 38 and 39-40.

⁷⁶ *The Hague Court Reports* (ed. by J. B. Scott, 1932), p. 66.

⁷⁷ United Nations, *Reports of International Arbitral Awards*, vol. II, pp. 917-918; see references to other cases in Cheng, *op. cit.*, p. 39.

⁷⁸ See, for example, article 22 of the Agreement of Bogotá cited in footnote 9 of the previous chapter and article III of the Treaty of Commerce between Afghanistan and India of 4 April 1950, in United Nations, *Treaty Series*, vol. 167, p. 112.

⁷¹ The opinion of the Supreme Court of the United States in the case of *Georgia v. City of Chattanooga* (264 U.S. 472, 480 (1924)), cited by Delson) gives an idea of the position which would be taken on this point by the courts of any country: "The taking of private property for public use upon just compensation is so often necessary for the proper performance of governmental functions that the power is deemed essential to the life of the State. It cannot be surrendered, and, if attempted to be contracted away, it may be resumed at will."

⁷² See G. Schwarzenberger, "The Protection of British Property Abroad", *Current Legal Problems* (1952), vol. 5, pp. 313 and 314.

fulfilment of requirements which are in appearance as essential as this one, but in such cases the exception will be based on good grounds. In no circumstances, however, could a measure of this kind taken by the State capriciously or for reasons other than public utility, be regarded as valid at international law. This statement is not at variance with the view correctly advanced by various writers that the discretionary powers of the State in the matter are in practice unlimited, provided that the latter view is understood to mean only that it is for municipal law, and not for international law, to define in each case the "public interest" or other motive or purpose of the like character which justifies expropriation. Particularly at the present time, when régimes of private property vary widely, it would be idle to attempt to "internationalize" any one of them, however generally accepted it might seem to be, and to impose it upon States which have adopted another system in their own constitutional law. It is accordingly sufficient to require that all States should comply with the condition or requirement which is common to all; namely, that the power to expropriate should be exercised only when expropriation is necessary and is justified by a genuinely public purpose or reason. If this *raison d'être* is plainly absent, the measure of expropriation is "arbitrary" and therefore involves the international responsibility of the State.

15. QUESTIONS CONCERNING THE METHOD OF EXPROPRIATION

60. International law allows States greater freedom of action with regard to the method of expropriation than with regard to the motives and purposes of expropriation. For example, the system of expropriation resulting from the constitutional law of the State concerned or, as is usual in cases of "nationalization", from special acts of the legislature, is totally irrelevant from the point of view of international law.⁷⁹ Nevertheless, as is recognized even by the authors who most strongly maintain the primacy of municipal law in matters of expropriation, an expropriatory act "must, in this respect, exhibit the same characteristics as acts habitually falling within the exercise of governmental power. It must be the normal result of the working of the machinery of political life, that is to say, of a smooth and regular functioning of the governmental machine. Failing this it would amount to an unlawful act".⁸⁰

61. Schwarzenberger, basing himself on the decisions of the Permanent Court of International Justice, cites as examples summary expropriation without previous investigation of individual cases, lack of means of redress by legal action and non-compliance with the essentials of an expropriation procedure in force. If an act of expropriation is contrary to the minimum standard, its illegality is not affected even by the payment of an adequate compensation.⁸¹ Provisions of this kind are embodied in certain treaties. Thus, the Treaty of

Friendship, Commerce and Consular Relations between the United States of America and Germany concluded on 8 December 1923, specifies that property shall not be taken away without due process of law (article 1).⁸² The Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 20 March 1952, although it also contemplates other conditions and aspects of expropriation, provides: "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 (article 1)."⁸³

62. It would therefore seem clear that the test of "arbitrariness" can also be applied to the methods and procedures employed in expropriating alien property. Like any other measure affecting the patrimonial rights of aliens taken by the State, expropriation may in the course of the procedure by which it is effected result in a "denial of justice" and, in such case, the international responsibility of the State is undoubtedly involved. The most obvious example is, of course, that of procedures which unjustifiably discriminate between nationals and aliens to the detriment of the latter. Apart, however, from this eventuality, which is highly unlikely in the case of measures of individual expropriations, a "denial of justice" may result from grave procedural irregularities or, in its broadest sense, may be established on many other grounds.⁸⁴ Subject to these reservations, which seem inescapable in the light of the general but none the less fundamental principles governing the international responsibility of States, it may be said that a State is under no obligation to adopt a method or procedure other than those provided for in the relevant provisions of municipal law. A State may even, where special circumstances require and justify such a course, depart from the usual methods and procedures, provided that in so doing it does not discriminate against aliens or commit any other act or omission which is manifestly "arbitrary". In short, the State's freedom of action in regard to methods and procedures is in a sense wider than that it enjoys in regard to the grounds and purposes of expropriation.

III. Compensation

63. From the international point of view, compensation is undoubtedly the crucial question in the matter of expropriation in the public interest. Although an expropriatory measure may be "arbitrary" by reason of the non-observance of any of the requirements mentioned earlier, compensation remains the basic requirement, even in the case of expropriations of a general and impersonal character. It is for this reason that compensation has occupied so prominent a place in past diplomatic and judicial practice and in the writings of publicists.

⁷⁹ The same stipulation is contained in article 1 of the Treaty signed by the United States of America and Norway on 5 June 1928.

⁸⁰ See also in the same sense the provision of the Agreement of Bogotá quoted in footnote 103 below.

⁸¹ With regard to the broad conception of "denial of justice" see the Special Rapporteur's second report (A/CN.4/106), chapter II, section 8.

⁷⁹ In this connexion, see Herz, *loc. cit.*, p. 247.

⁸⁰ Friedman, *op. cit.*, p. 136.

⁸¹ Schwarzenberger, *International Law*, vol. I, *International Law as applied by International Courts and Tribunals* (3rd ed., 1957), p. 206.

16. LEGAL NATURE OF COMPENSATION

64. Before proceeding further it would seem desirable to define the term "compensation" in the context of expropriation, since the same word is used to designate one of the forms or types of "reparation" for injuries caused by an act or omission contrary to international law or, to use the terminology which is now familiar, an act or omission which is "wrongful" or "unlawful".⁸⁵ Although compensation and reparation have some points in common—and it is perhaps for this reason that some writers have studied the former in the light of the principles governing the latter—there can be no doubt that the two are in fact wholly distinct legal institutions. As was stated by the Permanent Court of International Justice in the *Chorzów Factory* case, the difference stems from the character of the act which gives rise to "compensation". In the case of an "illegal" act, including an "illegal" act of expropriation such as that which the Permanent Court was considering, compensation is one of the forms of "reparation" for the loss sustained and may, as such, cover not only the direct loss but also any other damages caused by the illegal act or omission for which reparation is to be made. Compensation for lawful expropriation, on the other hand, is limited to the value of the property expropriated.⁸⁶ Whereas in the case of an unlawful act, responsibility arises directly and immediately from the act or omission causing the injury, responsibility, if any, in the case of (lawful) expropriation will depend, in so far as indemnification is concerned, solely on the amount, promptness and form of the compensation paid. Responsibility would in fact arise from the "arbitrary" character of the compensation. It is therefore of importance to ascertain the exact legal nature of compensation for expropriation, not only in order to determine when and on what grounds international responsibility arises, but also—and in a sense chiefly—to avoid confusion concerning the criterion or criteria applicable in determining the quantum of compensation and the time and form of the payment.

65. Another question to be determined is whether compensation is a *sine que non* of expropriation on grounds of public interest. Both in legal theory and practice the prevailing opinion is that expropriation of alien property without compensation is "confiscation". It is even held by not a few writers that expropriation not accompanied by compensation satisfying the requirements of international law is also confiscatory. In this connexion, two questions must be answered: first, whether the State is in fact under an obligation to compensate aliens for expropriated property, and, second, the extent to which international law, if it imposes such an obligation upon States, regulates and establishes the requirements in regard to compensation. Both questions will be examined later in this section, but it should be noted at this point that, even if compen-

sation is inseparable from expropriation, "confiscation" should not be confused, as it sometimes is, with "unlawful" expropriation. As it is the "unlawful" character of an act of expropriation which makes it intrinsically contrary to international law and hence capable of immediately and directly involving the responsibility of the State, measures not of this character cannot have the same juridical consequences. The position is, however, different in regard to what were called above "arbitrary" acts of expropriation; even if compensation is an inescapable requirement, "confiscation" is, or derives from, a measure which is lawful in itself, so that international responsibility could arise only from the non-observance of a requirement concerning compensation.⁸⁷ Perhaps of great importance, however, is the fact that, in the modern world at least, the real difference between expropriation and confiscation lies not so much in the presence or absence of compensation as in the motive or purpose of the measure taken by the State. In view of the fact that expropriation without compensation may be lawful (even from the international point of view), the term "confiscation" should be applied only to measures which are punitive in character or taken on political grounds. Consequently, the important factor in considering measures of this kind is that referred to in section I (10) of this chapter, namely, whether or not they are of an "arbitrary" character by reason of some act or omission on the part of the State constituting a "denial of justice".

17. THE OBLIGATION TO INDEMNIFY AND THE LAW GOVERNING IT

66. It is of evident importance, in considering the question of compensation, to determine whether it is a rule of international law that expropriation of foreign property obliges the State to indemnify the foreign owner and, if so, by what law the obligation is governed. The problem is not merely to determine whether such an international obligation exists or not; it is also—and perhaps chiefly—to determine the law which governs it. In other words, it is necessary to ascertain to what extent the obligation, if it is found to exist, is regulated by international law itself and to what extent it is for municipal law to fix the quantum of compensation and the time and form of its payment. Although it might seem illogical to suggest that an obligation established by international law may be governed by other rules of law, the phenomenon is one not infrequently found in examining the organic and functional relationships between international and municipal law. The problem is in fact simply that of establishing the respective functions and spheres of application of the two legal systems in relation to the duty to pay compensation, a question which is of particular importance.

67. First, however, it is necessary to examine the crucial question, namely, whether international law imposes a duty upon States to pay compensation to aliens for expropriated property. In the opinion of some authors, the answer is in the negative. Strupp, for example, was of the opinion that "there is no rule of customary international law which prohibits the State

⁸⁵ As was shown in the previous reports, reparation in its broadest sense includes both "satisfaction" and reparation *stricto sensu*, while reparation includes restitution in kind (*restitutio in integrum*) and compensation or pecuniary damages. See in particular third report (A/CN.4/111), chapter IX, section 19.

⁸⁶ Publication of the Permanent Court of International Justice. *Collection of Judgments*, series A, No. 17, Judgment 13 (Indemnities), pp. 46-48.

⁸⁷ See, for example, Fachiri, "International Law and the Property of Aliens" in *British Yearbook of International Law* (1929), pp. 46, 54 and 55.

from expropriating the property of the nationals of another State, with or without compensation, provided that, in so doing, the expropriating State does not establish any difference in treatment or any inequality between its own nationals and aliens (in the absence of a treaty, equal treatment with nationals is the most an alien can demand) and that the measure in question is not in fact or in law directed against aliens generally or some aliens as such.⁸⁸ Kaeckenbeek has expressed the view that: "... the legislative abolition of an acquired right does not invariably give rise to a right to compensation" and that "it is therefore necessary to inquire whether international law provides a rule or standard which can be used to determine the cases in which the payment of compensation is essential"; he concludes that the only effectively recognized rule or standard is the principle of non-discrimination.⁸⁹ Other writers might be cited in the same sense⁹⁰ but, as will be seen, the preponderant view is that the State is under an international obligation to indemnify foreign property owners, although opinions differ as to the requirements that must be satisfied by the compensation paid.

68. The negative view does not appear to be supported by international practice. Traditional case-law, at least, which is based on the principle of respect for acquired rights and the prohibition of "unjust enrichment", offers ample precedents in support of the affirmative view. In the *Upton* case (1903), the Mixed Claims Commission held that "the right of the State ... to appropriate private property for public use is unquestioned, but always with the corresponding obligation to make just compensation to the owner thereof."⁹¹ In the *de Sabla* case (1933), the Commission examined the problem directly from the standpoint of international responsibility: "It is axiomatic that acts of a government in depriving an alien of his property without compensation impose international responsibility."⁹² In another case, it was held that the right to expropriate "has no existence as a right apart from the obligation to make compensation."⁹³ In the *Chorzów Factory* case, the Permanent Court of International Justice declared, albeit less directly, that the payment of fair compensation was necessary to render an expropriation lawful.⁹⁴ To these and other precedents must

be added those offered by international case-law in the matter of requisition in time of war or national emergency.⁹⁵

69. This abundant and conclusive body of case-law is, however, rooted in the conception of private property which prevailed in municipal law until the First World War. Since that date, a number of tendencies have emerged which have destroyed the previous uniformity. As an outcome of these tendencies, differences, in some cases very substantial ones, are to be found in comparative law and contemporary systems of municipal law can be placed in three categories from this point of view. In a first group of States, which continue to adhere substantially to the principles of economic liberalism, expropriation in the public interest is lawful only if compensation is paid. This group still includes a large majority of States. In a second group of States, in consequence of the increased emphasis on the social function of property, compensation is no longer considered an essential element of expropriation. In the third group, consisting of States with a socialist economy in which ownership of the means of production has been transferred to the State and private property has been reduced to a minimum, compensation has completely lost its original compulsory character and has become wholly dependent on the will or discretion of the State.⁹⁶

70. The foregoing must not, of course, be understood to mean that the resulting lack of uniformity in municipal law deprives of any basis the State's international obligation to pay compensation to aliens for property expropriated in the public interest. This obligation, although it may have originated as one of the "general principles of law recognized by civilized nations", has now become a principle of customary international law. Like any other principle, the international obligation to pay compensation may be modified or even set aside altogether if it ceases to be consistent with the needs and interests of the international community, as has happened in the case of some principles. But so long as this is not the case, the principle of respect for the acquired rights of aliens requires compensation in the case of any measure involving expropriation, whether individual or general, on grounds of public interest. As in the case of any international obligation, the State may not invoke the defence of "municipal law".

71. Nevertheless, without prejudice to the traditional validity and effectiveness of the principle, exceptions may be admitted. One exception which would seem wholly justified would be that of an expropriation of property acquired under the system of municipal law which does not contemplate compensation or leaves compensation wholly to the discretion of the State. An

⁸⁸ "Le litige roumano-hongrois concernant les optants hongrois en territoire roumain" in *La réforme agraire en Roumanie* (1927), p. 450.

⁸⁹ "La protection internationale des droits acquis" in *Recueil des cours de l'Académie de droit international* (1937-I), vol. 59, pp. 360-362.

⁹⁰ See, for example, Friedman, *op. cit.*, pp. 3 and 204 *et seq.*; N. Doman, Compensation for Nationalized Property in Post-War Europe. *The International Quarterly Review* (July 1950), vol. 3, p. 324.

⁹¹ *United States-Venezuela Mixed Claims Commission* (1903), page 174. See in the same sense, the statement by the arbitrator in the David Goldenberg and Sons case (1928) quoted in footnote 109 below.

⁹² American and Panamanian General Claims Arbitration, *Report of B. L. Hunt* (1934), p. 447.

⁹³ Eastern Extension, Australasia and China Telegraph Company, Ltd. case (1923) in *American and British Claims Arbitration*, Report of F. K. Nielsen (1926), p. 76.

⁹⁴ Publications of the Permanent Court of International Justice, *Collection of Judgments*, series A, No. 17, p. 46.

⁹⁵ With regard to the last category of cases, see Bin Cheng, *op. cit.*, pp. 45 and 46.

⁹⁶ In this connexion, see Friedman, *op. cit.*, pp. 7-12. For a detailed and systematic analysis of the position taken by the States Members of the United Nations on the various occasions when the subject was discussed in the General Assembly, the Commission on Human Rights and the Economic and Social Council, see M. Brandon, *The Record in the United Nations of Member States on Nationalization* (1958), paper submitted to the Forty-eighth Conference of the International Law Association, *passim*.

alien who makes an investment in such circumstances must remain subject to the provisions of that municipal law and accept as valid at international law any action taken by the competent state authorities in accordance with those provisions. The situation is completely different from that of an alien who is subjected to expropriatory measures which infringe the law in force at the time of the acquisition of his property, or to measures taken under new legislation which abrogates or amends with retroactive effect the law previously in force. The situation is not necessarily the same where a State invites or encourages, by advertisement or other means, foreign capital to invest in industries necessary for the economic development of the country. It has been argued that, in such cases, the application of the principles of *estoppel* or *venire contra factum proprium* precludes expropriation without compensation.⁹⁷ But unless the inviting State has expressly undertaken not to expropriate without compensation, it is difficult to see how the foreign investor can "acquire", merely by reason of the invitation, the right to compensation in the event of expropriation. If the invitation is silent on that point, the alien concerned cannot acquire more rights than those specified in the provisions of municipal law in force at the time of the investment.

72. The second of the two questions—the extent to which the obligation to pay compensation is governed by international law itself and the extent to which it is for municipal law to fix the quantum of compensation and the time and form of its payment—is of particular importance and, particularly is contemporary practice, is indeed frequently the only question that gives rise to serious difficulty. In the absence of treaties which determine when and in what amount compensation is to be paid, the mere acceptance of the principle that the State is under an international obligation to indemnify foreign property owners is not sufficient in itself, for the principle cannot in itself serve to establish the rules which govern the amount, promptness and form of compensation. According to the doctrine which has long been upheld by certain States and which has comparatively recently acquired some currency in legal writings, international law not only imposes an obligation to pay compensation but also requires that compensation must, in order to be internationally valid, be "just" (or "adequate"), "prompt" and "effective".⁹⁸

73. The question whether this doctrine—which expresses the orthodox position in the matter—faithfully

⁹⁷ See W. Friedman, "Some Impacts of Social Organization on International Law" in *American Journal of International Law* (1956), vol. 50, p. 506.

⁹⁸ See, for example, Viénot, *Nationalisations étrangères et intérêts français* (1953), p. 38; Report of the Committee on Nationalization of Property, in *Proceedings and Committee Reports of the American Branch of the International Law Association* (1957, 1958), pp. 66, 67; Report of the Netherlands Branch Committee of the *International Law Association, New York University Conference* (1958), pp. 18 and 22; resolution adopted by the Committee on the "Protection of Investments Abroad in Time of Peace" at the Cologne Conference (1958) of the International Bar Association quoted in footnote 66 above; Barros Jarpa, *Answers to the Questionnaire of the International Committee on Nationalization*, distributed in English during the Forty-eighth Conference of the International Law Association (1958), p. 2. According to Viénot, "Cette compen-

sation doit présenter un triple caractère selon les termes maintenant très généralement adoptés: elle doit être prompte, adéquate et effective. . . . La rapidité du versement de l'indemnité est incontestablement un élément fondamental de la valeur de l'indemnisation. Quant à l'adjectif 'adéquate', il implique une équitable estimation du préjudice subi et la remise au propriétaire dépossédé d'une masse de biens en nature ou en espèces, équivalente à celle dont il a été privé. Le terme "effective" implique que l'indemnisation ne doit pas être une simple promesse, ou revêtir des modalités telles que le bénéficiaire ne puisse disposer de l'indemnité."

18. AMOUNT OF COMPENSATION AND CRITERION FOR VALUATION OF THE PROPERTY EXPROPRIATED

74. With regard to the quantum of compensation, the general tendency in individual expropriations has been and continues to be in favour of the payment of "just" or "adequate" compensation. This statement is borne out by international case-law, at least so far as traditional practice is concerned, although the precedents are neither very abundant nor very explicit on the point. In the *Delagoa Bay Railway* case (1900), under the *compromis* of 13 June 1891, the arbitration tribunal was given authority to "... pronounce, as it shall deem most just, upon the amount of the indemnity due by Portugal..."⁹⁹ The tribunal ordered the payment of the sum of 15.5 million francs as compensation.¹⁰⁰ In the *Norwegian Claims* case (1922), the Permanent Court of Arbitration held that the claimants were entitled to "... just compensation . . . under the municipal law of the United States, as well as under the international law..."¹⁰¹ In the *Chorzów Factory* case

sation doit présenter un triple caractère selon les termes maintenant très généralement adoptés: elle doit être prompte, adéquate et effective. . . . La rapidité du versement de l'indemnité est incontestablement un élément fondamental de la valeur de l'indemnisation. Quant à l'adjectif 'adéquate', il implique une équitable estimation du préjudice subi et la remise au propriétaire dépossédé d'une masse de biens en nature ou en espèces, équivalente à celle dont il a été privé. Le terme "effective" implique que l'indemnisation ne doit pas être une simple promesse, ou revêtir des modalités telles que le bénéficiaire ne puisse disposer de l'indemnité."

⁹⁹ Moore, *op. cit.*, vol. II, p. 1875.

¹⁰⁰ *Sentence finale du Tribunal arbitral de Delagoa* (Berne, 1900), p. 89. However, regarding the real nature of this compensation, see section 32 below.

¹⁰¹ See *The Hague Reports* (1932), vol. II, p. 69.

the Permanent Court of International Justice stated that "fair compensation" was necessary to render an expropriation lawful.¹⁰²

75. The term "adequate compensation" or a similar expression appears in a number of treaties, to most of which the United States is a party. As a general rule, these treaties also stipulate, in accordance with the classic view, that the compensation shall be "prompt" and "effective". Examples of this practice are the Treaty of Friendship, Commerce and Navigation with Greece of 3 August 1951, article VII of which provides for "the prompt payment of just compensation... in an effectively realizable form" of "the full equivalent of the property taken...", the Treaty of Friendship, Commerce and Navigation with Japan of 2 April 1958, which contains a similar provision, and the Agreement with Czechoslovakia relating to commercial policy of 14 November 1946, which provides for "adequate and effective compensation". The Economic Agreement of Bogotá, signed at the Ninth International Conference of American States (1948), is the most explicit in this respect: "The States shall take no discriminatory action against investments by virtue of which foreign enterprises or capital may be deprived of legally acquired property rights, for reasons or under conditions different from those that the Constitution or laws of each country provide for the expropriation of national property. Any expropriation shall be accompanied by payment of fair compensation in a prompt, adequate and effective manner."¹⁰³ The Convention between Belgium and Poland concerning certain questions relating to private property, rights and interests of 30 December 1922 envisaged "proper" compensation (article IV), and the Danish-Russian Preliminary Agreement of 23 April 1923, "full" compensation (article IV). Some treaties between European countries signed since the last war also provide for the payment of just or adequate compensation.¹⁰⁴

76. In view of the substantial extent to which international case-law, the treaties mentioned above and general doctrine in the matter have been influenced by municipal law, it may be of interest to draw attention to an apparent change of emphasis which is discernible in the most recent constitutions. The constitutions drafted before the last war generally provided—and those still in force continue to provide—for "just", "adequate" or "full" compensation, whereas the post-war constitutions tend frequently to employ such terms as "fair", "equitable" and "reasonable". In some cases at least, these differences may, of course, be purely terminological rather than a reflection of a change in the conception of private property resulting in a different assessment of the amount of compensation payable by the State. Of much greater significance, perhaps, is the fact that a great many modern constitu-

tions which consider compensation to be an essential element of expropriation on grounds of public interest make no reference whatever to the amount of compensation considered proper or authorize the State to fix the amount when expropriatory measures are carried into effect.¹⁰⁵

77. In any event, it is clear that the mere requirement that compensation should be "adequate" or "just" does not in itself provide a sufficient basis to determine the quantum of compensation to be paid. Even where there is no doubt as to their interpretation, the use of any of these terms immediately raises the question of determining the amount of compensation that should in fact properly be paid to the owners of expropriated property in the various cases and circumstances that may arise. In other words, it is necessary to ascertain the rule or rules that must be followed in assessing the value of expropriated property. And in this connexion, it must be noted that, in spite of their undeniable similarity and the points of contact between them, these rules should not be confused with the rules applied in determining the amount of compensation in the case of injury caused by "unlawful" acts or omissions imputable to the State. Unfortunately, however, if the problem is narrowed to that of the rules applicable in cases of expropriation *stricto sensu*, it is extremely difficult, if not entirely impossible, to set out systematically the criteria which seem to have been observed in practice. For example, in the case repeatedly cited in this chapter, the Permanent Court laid down, albeit indirectly, the criterion of the "value of the undertaking at the moment of dispossession, plus interest to the day of payment".¹⁰⁶

78. But even under this rule not all the difficulties would be resolved. For example, in estimating the (market) value, what weight is to be given to the possible depreciation of the property or of the currency in which the indemnity is to be paid? How are accounts receivable or other intangible property to be evaluated? These and many other questions which may arise and have in fact arisen in practice have not been resolved in the same way in all cases, nor will it always be possible to solve them in accordance with fixed and predetermined rules. The marked degree of uncertainty that exists results from the different situations to which expropriation gives rise because of the variety of the property which may be the object of expropriation and the diversity of circumstances in which it may be carried out.¹⁰⁷

19. PROMPTNESS OF COMPENSATION AND FORM IN WHICH PAYMENT IS TO BE MADE

79. The other two conditions that must in the orthodox view be satisfied if the compensation is to conform to international law—that is, that it should be

¹⁰² Publications of the Permanent Court of International Justice, *Collection of Judgments*, series A, No. 17, p. 46. As will be seen below, the word "fair" was used by the Permanent Court in the same sense as the word "just" or "adequate".

¹⁰³ Article 25. However, seven of the signatory countries made reservations with respect to this provision of the Agreement. See *International American Conferences*, Second Supplement, 1945-1954 (1956), pp. 163, 169, 170.

¹⁰⁴ See Foighel, *op. cit.*, p. 116.

¹⁰⁵ See Peaslee, *Constitutions of Nations* (1950).

¹⁰⁶ *Loc. cit.*, series A, No. 17, p. 47.

¹⁰⁷ With regard to the criteria and considerations which must be taken into account in evaluating expropriated property, see Joseph, *loc. cit.*, pp. 4 and 5, and Brandon, *Legal Aspects of Private Foreign Investments*, *The Federal Bar Journal* (Washington, 1958), vol. 18, pp. 314, 315.

“prompt” and “effective”—do not have the same support in practice, even in the case of individual expropriations, as the requirement that compensation should be just. The absence of satisfactory precedents is particularly marked in regard to the “effectiveness” of the compensation. On the other hand, in a number of decisions of international tribunals, explicit reference is made to the requirement that payment should be prompt. For example, in the *Norwegian Claims* case, the Court spoke of “... just compensation in due time”,¹⁰⁸ and in the *Goldenberg* case (Germany-Romania, 1928), the arbitrator held that “... although international law authorizes the State to make an exception to the principle of respect for the private property of aliens when the public interest so requires, it does so on the condition *sine qua non* that fair payment shall be made for the expropriated or requisitioned property as quickly as possible.”¹⁰⁹

80. As has been seen, in treaties referring to the matter it is generally stipulated not only that the compensation shall be “adequate” but that the payment shall also be “prompt” and “effective”. However, in another group of treaties which are typical of the post-war period, provision is made for the payment of compensation in instalments, extending, in some cases, over a period of years. The treaties in question are not “lump-sum agreements”, the most striking feature of the new practice which will be examined below, and generally provide for the payment of compensation covering the total value of the property expropriated.¹¹⁰ Nevertheless, it should be noted that the treaties in this second and more recent group embody the settlement reached by the States concerned with the nationalizing State. The treaties in the first group are, on the other hand, normative in character. Before considering what conclusions can be drawn in this respect, it will be useful to examine the position in municipal law.

81. As was noted earlier, the great majority of constitutional provisions relating to expropriation still provide for the payment of an indemnity covering the value of the expropriated property. Only about half, however, provide for the “prior” or “prompt” payment of the compensation. Those which do not impose this additional obligation on the State either make no mention of the matter or explicitly provide that in certain emergencies payment of the indemnity may be deferred.¹¹¹ With regard to the “effectiveness” of the payment, it cannot for obvious reasons be expected that constitutions should contain provisions establishing the form in which payment is to be made. The usual practice is for compensation to be paid in cash in the legal currency. In the post-war European legislation under which measures of nationalization were carried out, the deferred payment of compensation is

frequently found, even in the case of some western European countries, payment, as will be seen in the next section, being made in the form of public bonds.

20. LUMP-SUM AGREEMENTS

82. In earlier sections, attention has been directed chiefly to the practice with regard to individual expropriations. This section deals with the practice in the case of nationalizations, in particular those carried out immediately after the Second World War as part of the broad programmes of socio-economic reform undertaken by various countries of eastern and western Europe. It was in connexion with these general and impersonal expropriations that “lump-sum” agreements were concluded under which the expropriating State and the State of nationality of the aliens affected by the expropriation agreed on a lump-sum compensation as indemnification for all the property expropriated, without regard to its real value. This practice, as will be seen below, is of interest both from the point of view of the quantum of compensation and also to some extent from that of its “promptness” and “effectiveness”.¹¹²

83. From the point of view of compensation, a number of facts should be noted in connexion with the post-war European nationalizations. First, provision was made in all cases for the payment of compensation for the property or undertakings expropriated. In the central European countries, an exception was made in the case of persons who had collaborated with the enemy or behaved unpatriotically during the war; in this case, the non-payment of compensation was a confiscatory measure imposed as a penal sanction. In the other cases, the compensation did not as a rule cover the total value of the property or undertakings, and sometimes was less than half the estimated value. In exceptional cases, compensation was payable immediately, payment normally being made in the form of public bonds or sometimes shares of the expropriated undertakings themselves, redeemable at different dates. Practically none of the enactments made distinctions on the basis of the nationality of the persons affected and some even provided for preferential treatment of aliens affected by the nationalization.¹¹³

84. The practice embodied in the agreements mentioned has a number of general characteristics which should be noted before considering the aspects more directly related to compensation.¹¹⁴ In the first place, unlike agreements concluded in order to regulate the amount, form and time-limit for payment of compensa-

¹⁰⁸ *Loc. cit.*, in footnote 76 above.

¹⁰⁹ United Nations, *Reports of International Arbitral Awards*, vol. II, p. 909. In another arbitral decision (Portugal v. Germany, 1930) reference is made to a “reasonable time”. See *Annual Digest and Reports of Public International Law Cases*, years 1929-1930, p. 151.

¹¹⁰ With regard to these instruments see Foighel, *op. cit.*, pp. 120-121.

¹¹¹ See Peaslee, *op. cit.*, *passim*.

¹¹² The practice appears to have been initiated with the Agreement of 30 May 1941, between Sweden and the USSR, the text of which has not been published. See Foighel, *op. cit.*, p. 97. The sums agreed on as compensation for the American and British petroleum interests nationalized by Mexico in the pre-war period might also be considered examples of this practice. See Friedman, *op. cit.*, pp. 28-29.

¹¹³ With regard to these and other features of the post-war European legislation on the subject, see Doman, *Post-War Nationalization of Foreign Property in Europe*, *Columbia Law Review* (1948), vol. 48, pp. 1140 *et seq.*

¹¹⁴ An account of these agreements—some twenty-five in all—appears in Foighel, *op. cit.*, p. 133.

tion to be paid in the future, these agreements were concluded *a posteriori* and embody the settlement of a dispute or the adjustment of a situation between the two States concerned. Such arrangements envisage "negotiated" compensation, separate and independent from any which may have been fixed unilaterally under the nationalization measures. The agreements, therefore, as a rule involve "compromise" formulas which vary according to the cases and circumstances. In this respect, the practice followed is markedly similar to that adopted in other agreements concluded in the past for the purpose of fixing a lump sum as full "reparation" for injuries to aliens caused by wrongful acts or omissions imputable to the contracting States, and which settle or discharge the individual claims to which such acts or omissions have given rise.¹¹⁵ The agreements under discussion also have the effect of discharging claims. Thus, article 3 of the Swiss-Yugoslav agreement stipulates that, after the payment of the agreed compensation, the Swiss Government will consider all claims by its nationals as finally settled. Lump-sum agreements of this type have various other features which are not so directly relevant to the purposes of this report.¹¹⁶

85. Although lump-sum agreements are also of interest from the point of view of the "promptness" and "effectiveness" of compensation, the chief matter of interest is the lump sum agreed upon as compensation for all the property expropriated from the nationals of the claimant State. The relationship between this figure and the real value of the property or, as the case may be, the total amount of the claims, is appreciably different in the various agreements. It has, for example, been calculated that the compensation which Poland agreed to pay Great Britain amounted to only one-third of the value of British investments and the proportion was the same in the case of the compensation agreed upon with Czechoslovakia. On the other hand, it is considered that the compensation paid under the settlement with Yugoslavia covered half the value of the investments and that paid under the agreement with France relating to British interests in the French gas and electric industry amounted to 70 per cent of the value of the investments.¹¹⁷ These examples, which are illustrative of the relationship between the amount of the compensation stipulated in other treaties and the estimated value of the property or the total amount of the claims, show that lump-sum agreements, far from envisaging "just" or "adequate" compensation, provide for "partial" indemnification, the amount of which varies appreciably depending on the case and the circumstances. In the case of lump-sum agreements, there is no absolute uniformity with regard to the rule followed in valuing the property and determining the amount of compensation,¹¹⁸ which is understandable in

view of the diversity of the situations giving rise to this type of international settlement.

86. As regards the "promptness" of compensation, these agreements do not as a rule provide for the immediate payment of the total amount. The Yugoslav-United States agreement is an exception in this respect, part of the funds transferred to the Federal Reserve Bank by the Yugoslav Government during the German occupation being used for the purpose. The other agreements provide for the payment of the compensation in two or more instalments, with or without interest, and often in the form of obligations or shares in the industries or undertakings expropriated. For example, under the Anglo-French agreement referred to in the last paragraph, the credit-vouchers were payable in seven annual instalments and bore interest at the rate of 3 per cent. In the agreements concluded with the countries of eastern Europe the instalments extended over a considerable period, in some cases up to seventeen years, although under some of the agreements a substantial proportion of the compensation was payable in the first instalment. It is clear that the time-limit for the payment of the agreed compensation necessarily depends on the circumstances in each case and, in particular, on the expropriating State's resources and actual capacity to pay. Even in the case of "partial" compensation, very few States have in practice been in a sufficiently strong economic and financial position to be able to pay the agreed compensation immediately and in full.

87. Similar considerations apply with regard to the "effectiveness" of the compensation. Although a wide variety of forms of payment are contemplated in the agreements, payment is generally effected through the use of frozen assets of the expropriating State in the other State, or through the delivery of specified raw materials or other goods. An example of such payment in kind is furnished by the agreement between Poland and France, which provided for the delivery of specified quantities of coal over a number of years. Examples of the first form of payment are offered by the Yugoslav-United States agreement mentioned earlier and the agreement between Switzerland and Romania, under which 25 per cent of the agreed compensation was to be paid from Romanian funds frozen in Swiss banks. In the Swiss-Hungarian agreement, on the other hand, it was stipulated that part of the compensation would be paid in the legal currency of the expropriating State.

21. GENERAL CONSIDERATIONS CONCERNING THE REQUIREMENTS IN REGARD TO COMPENSATION

88. In the discussion in a preceding section of the international obligation of the State to compensate foreign property owners, no conclusion was reached with regard to the law by which that obligation is governed. It remains to ascertain to what extent the obligation, if it is assumed to exist, is regulated by international law itself and to what extent it is for municipal law to fix the quantum of the compensation and the time and form of its payment. This second question, in which the greatest difficulties usually originate, can now be examined in the light of the international practice discussed above. In the interests of

¹¹⁵ See in this connexion Whiteman, *op. cit.*, vol. III, pp. 2067, 2068.

¹¹⁶ In this connexion see Bindschedler, *La Protection de la propriété privée en droit international public, Recueil des cours de l'Académie de droit international (1956-II)*, vol. 90, pp. 278-297.

¹¹⁷ See Schwarzenberger, "The Protection of British Property Abroad", *Current Legal Problems (1952)*, vol. 5, p. 307.

¹¹⁸ See in this connexion Foighel, *op. cit.*, pp. 117-119.

consistency, expropriation and nationalization will again be discussed separately, for the requirements in regard to compensation may not always be the same in the two cases.

89. What are the requirements in regard to compensation in the case of expropriations of the ordinary and usual type? So far as the "amount" is concerned, the general principle followed in judicial and diplomatic practice and still recognized in most domestic constitutional enactments is that the compensation must be "adequate", that is to say, that it must cover the value of the property expropriated. The principle is referred to as a "general" one because there may be cases and situations in which compensation which does not cover the full value of the expropriated property must be regarded as valid and effective from both the domestic and the international standpoint. For example, if the foreign investment has been made in a country whose constitution does not provide for the payment of full compensation, there will be no ground for requiring the State to pay compensation equivalent to the actual value of the property. Mention should also be made of the case of investments made under a constitutional system which does not contemplate compensation or which leaves the question of compensation wholly to the discretion of the State. The situation is substantially the same and must be resolved in the same way. In none of these cases can the principle of respect for acquired rights properly be invoked.

90. On the other hand, it would be contrary to international law if the expropriating State discriminated between nationals and aliens to the prejudice of the latter in fixing the amount of the compensation. This situation would, of course, arise only in the case, which rarely occurs in practice, of expropriations of this type affecting national and foreign property owners. Sir John Fischer Williams formulated a good many years ago what has come to be the prevailing doctrine in this respect: "where no treaty or other contractual or quasi-contractual obligation exists by which a State is bound in its relations to foreign owners of property, no general principle of international law compels it not to expropriate except on terms of paying full or 'adequate' compensation... This conclusion does not imply that a State in the absence of a treaty or contractual obligation is free to discriminate against foreigners and attack their property alone."¹¹⁹ The position is similar with regard to the "promptness" and "effectiveness" of compensation and practice affords even less justification for the view that precise rules of international law exist in this respect. If payment is made within the time-limits and in the form required by municipal law and if the compensation is not manifestly arbitrary in either respect, there would appear to be no ground for requiring the State to make payment more rapidly or in a more effective form. In spite of the absence of international rules precisely regulating these two aspects of compensation, it may, however, be required that aliens should receive the most favourable legal treatment to

which nationals of the expropriating State would be entitled in like circumstances.

91. In the case of expropriations of the "nationalization" type, owing no doubt to the complexity of the situations involved and the uncertainties by which practice is still characterized, three different schools of thought continue to exist. The orthodox view, held by the authorities and associations cited in footnote 98, and others, is that the distinction between the two types of expropriation has no juridical effect so far as the "amount", "time" or "effectiveness" of compensation are concerned, since the fundamental principles involved are the same.¹²⁰ The relevant provision of the draft submitted by Lapradelle to the *Institut de droit international* was opposed by some of the members of the *Institut* on the ground that traditional doctrine was applicable to nationalization.¹²¹ Other authors take the opposite view and hold that in the case of nationalizations involving a change in a country's socio-economic structure, the question of compensation in all its aspects is a matter entirely within the discretion of the State, thus echoing the position taken by some Governments.¹²² A third group of publicists, who seem to constitute a majority, are strongly inclined to favour the application of principles that are more flexible and thus consonant with the system of lump-sum agreements. One of the first to maintain that the obligation to pay full compensation might in practice have the consequence of making a projected reform impossible was Judge Lauterpacht.¹²³ The notion of physical "impossibility" is shared by other publicists belonging to this group.¹²⁴ Other authors are more explicit on this point and hold that the nationalizing State's capacity to pay is one of the most important of the factors which must be taken into account in establishing the amount, time and form of compensation.¹²⁵

¹²⁰ See Podestá Costa, *Derecho Internacional Público* (Third edition, 1955), vol. I, pp. 469, 470; Bullington, "Treatment of Private Property of Aliens in Land in Time of Peace", *Proceedings of the American Society of International Law* (1933), p. 108; Rubin, "Nationalization and Compensation: a Comparative Approach", *University of Chicago Law Review* (1950), vol. 17, p. 460.

¹²¹ See *Annuaire de l'Institut de droit international* (1950), vol. I, pp. 73-112 and (1952), vol. II, p. 251 *et seq.*

¹²² See, for example, Friedman, *op. cit.*, p. 208.

¹²³ "Règles générales du droit de la paix", *Recueil des cours de l'Académie de droit international* (1937-IV), vol. 62, p. 346. See also Oppenheim-Lauterpacht, *International Law* (eighth edition, 1955), vol. I, p. 352. The argument of "financial impossibility" was invoked by Romania in the agrarian reform carried out in the 'twenties (see *op. cit.* in footnote 58 above), and later by Mexico in connexion with its agrarian reform (see Kunz, *loc. cit.*, p. 27).

¹²⁴ See De Visscher, *Theory and Reality in Public International Law* (translated by P. E. Corbett, 1957); Bindschedler, *loc. cit.*, p. 250.

¹²⁵ See, *inter alia*, Lapradelle, *Les effets internationaux des nationalisations*, article 11 of the draft submitted to the *Institut de droit international*, *Annuaire* (1950), vol. I, p. 69; Chargueraud-Hartman, "Les intérêts étrangers et la nationalisation", *Etudes internationales* (1948), vol. I, p. 348; Vitta, *La Responsabilità Internazionale dello Stato per Atti Legislativi* (1953), pp. 143 *et seq.*; Guggenheim, "Les principes de droit international public", *Recueil des cours de l'Académie de droit international* (1952-I), vol. 80, p. 128. In marked contrast to this position, it has been maintained that "... A territorial sovereign may find its very right to expropriate conditioned upon its power to pay". See Charles Hyde, "Compensation for Expropriation", *American Journal of International Law* (1939), vol. 33, p. 112.

¹¹⁹ "International Law and the Property of Aliens", *British Year Book of International Law* (1928), p. 28. In the same sense, see Cavaglieri, "La notion des droits acquis et son application en droit international public", *Revue générale de droit international public* (1931), vol. 38, p. 296. See also the authors cited in footnotes 89-91 above.

92. It may be added in this connexion that, in solving the problem, it is necessary to take into account not only juridical considerations but also considerations of equity and considerations of a practical, technical and political character. The argument of "impossibility" is of great importance for, if it is desired to remain consistent with the idea which legitimates the institution of expropriation in general—that is to say, that private, national or foreign interests must yield to the interest of the community—it would be unjust to deprive the less wealthy States and the under-developed countries of the power to exploit directly their natural resources and public service or other industries or undertakings established in their territory. "Capacity to pay" is also of importance from the point of view of the promptness and effectiveness of compensation not only because it must be taken into account in both connexions but also because the expropriating State will, if not pressed to make the payment or granted concessions with regard to the form of the payment, in many cases undoubtedly be able to pay compensation more "adequate" to the value of the property.¹²⁶ In the case of "nationalization", the compensation should be subject to flexible requirements or conditions, much less rigid than those which may properly be required in the case of expropriation of the usual or ordinary type. But neither this nor any other of the considerations set out above should be taken to imply abandonment of the principle that there should be no discrimination between nationals and aliens to the prejudice of the latter, which must necessarily be applied in every measure affecting acquired rights; nor do these considerations authorize the State to fix compensation which, by reason of its amount or the time or form of payment, transforms the expropriation into a confiscatory measure or a mere despoliation of private property.

CHAPTER III

CONTRACTUAL RIGHTS

I. Treaties and contracts as sources of private rights

93. According to a theory which has gained currency of late, a State assumes the same international obligations upon entering into a contractual relationship with an alien private individual as when it establishes a relationship of the same nature with another State. This would mean that the principle *pacta sunt servanda*, which demands respect of private rights acquired pursuant to a treaty, also applies to rights acquired by virtue of contracts concluded between States and aliens. The implications of this theory are obvious: that the existence and imputability of international responsibility derive in both cases solely from the mere non-performance of the contractual obligation in question.

94. The above theory stems from the analogy—usually purely formal—which exists between treaties

and such contractual relationships. But is there any other basis for assimilating the two categories of relationships, all rights and obligations, so far as responsibility is concerned? The problem is naturally no longer the same as the one which confronted traditional doctrine and practice, nor can it be resolved solely according to the notions and principles which they established. Certain developments in the realm of contractual relations between States and alien private individuals indicate the need for a reconsideration of some fundamental aspects of this question. This process will be attempted in the present chapter.

22. TREATIES RELATING TO PRIVATE RIGHTS OF A PATRIMONIAL NATURE

95. The first question to consider is that of private rights acquired by virtue of an international treaty. Instruments of this type may assume a variety of forms, although for the purposes of the present report, this fact is not necessarily of special significance. A distinction is often drawn, for instance, between treaties which confine themselves to creating rights and obligations between the Contracting States and those which also vest certain rights directly in the nationals of all or some of the parties to the instrument. The most frequently cited example of the second variety is the Agreement of 1921 between Poland and the City of Danzig (*Beamtenabkommen*), regarding which the Permanent Court of International Justice declared that, if such was the intention of the Contracting Parties, there was nothing to prevent individuals acquiring direct rights under a treaty.¹²⁷ As will be shown hereunder, the fundamental question, from the point of view of international responsibility, is solely whether the State has defaulted in the performance of any obligation stipulated in the treaty, and, in that connexion, the specific act or omission which can be imputed to it is of no importance.

96. One of the varieties of instruments referred to above is composed of treaties which expressly forbid one of the Contracting States to expropriate specified property. Stipulations of this nature were contained in some of the Peace Treaties concluded at the end of the First World War, and the Geneva Convention of 15 May 1922 between Germany and Poland, which prohibited the expropriation by the latter of certain property in Polish Upper Silesia, gave the Permanent Court an opportunity to rule on the juridical consequences of non-compliance with such provisions.¹²⁸ Earlier examples of this type of instrument can be found in the Treaties of Commerce and Navigation concluded at the end of the nineteenth century between Japan and Great Britain, Germany and France, which were the subject of an award by the Permanent Court of Arbitration.¹²⁹ In recent times, the more frequently encountered type of instrument provides for the pro-

¹²⁷ Publications of the Permanent Court of International Justice, *Collection of Advisory Opinions*, Series B, No. 15, pp. 17 and 18.

¹²⁸ On this point see chapter II, section 12, *supra*.

¹²⁹ See S. Friedman, *Expropriation in International Law* (1953), pp. 187 and 188.

¹²⁶ Lump-sum agreements have other practical, technical and political advantages. In this connexion see Foighel, *op. cit.*, p. 98.

tection of private ownership and other patrimonial rights not by prohibiting expropriation but by subjecting its exercise to specified conditions.

97. Not all the treaties in this last group envisage the same system of protection. The general purpose of all such instruments, however, is to protect private property against the arbitrary exercise of the right of expropriation, especially in the matter of compensation. Some merely require that compensation shall be paid for all classes of property or for specified categories expressly mentioned in the treaty; others call for observance of the conditions stipulated in the municipal legislation on the same terms as in cases involving nationals of the contracting State; while yet another group stipulates the relevant conditions and requirements directly and explicitly. Examples of these different forms and varieties of instruments were given in the preceding chapter.¹³⁰

98. There is no need to explain the basis of a State's international responsibility in these cases: the mere non-observance of the prohibition against expropriation or of the conditions and requirements to which the exercise of the rights of expropriation is subordinated constitutes non-performance of an "international" obligation. According to the terminology which is being used in this report, such non-performance is "unlawful" (see section 28, *infra*). But there is the possibility—indeed not very remote—of an instrument of the type mentioned not being drawn in sufficiently explicit terms. It then becomes necessary, in order to determine whether the measure taken by the State is wholly consistent with the terms of the instrument, to fall back on the rules of international law regarding the interpretation and application of treaties. In these circumstances, a somewhat different situation may arise: the measure in question, or the manner in which it was adopted or carried into effect, may reveal, at most, an "abuse of right", which has caused unjustified damage to the alien incompatible with the purposes of the instrument concerned. In such a case, the existence and imputability of international responsibility would depend rather on the "arbitrary" character of the action taken.

23. OBJECT AND FORMS OF "PUBLIC CONTRACTS"

99. A State may enter into contractual relations with alien individuals or bodies corporate, just as with its own nationals, for many purposes and by means of various instruments. The purpose or object of any such instrument may equally well be the purchase and sale of some category of merchandise as the provision of a specified technical or professional service. A third group of instruments provides for the exploitation of some of the country's natural resources, such as oil or

other minerals, or for the operation of certain public services such as transport or electric power. Yet a fourth group relates to matters of a very different nature, namely, loans and bonds issued by the State. As will be shown in part III of this chapter, the last-named, notwithstanding their special characteristics, also give rise to an essentially contractual relationship.¹³¹

100. Many of the instruments referred to above are as a rule concluded between States which are "underdeveloped", i.e., lacking in modern technical facilities, and private individuals or companies from highly industrialized States, who possess the necessary technical capacity to ensure the intensive exploitation of a country's national resources or to furnish the public services necessary to modern life. These instruments consequently form the basis for almost all investment of foreign private capital.

101. So far as their juridical nature is concerned, these instruments may assume different forms. Besides the special case of the bonds and other debentures referred to above, a distinction has at times been drawn between ordinary contracts and concession contracts. The term "concession" is used both in municipal law and in international relations in general to describe such a multitude of activities that it has rightly been stated that there is no agreed definition of the word in international law.¹³² It is true that, so far as their content is concerned, concession contracts sometimes confer on the contracting individual or company certain rights and prerogatives, and consequently also impose obligations, of a semi-political character, such as the right to import or export free of all duty or other state charges, the right to exercise control or authority over the part of the territory in which the foreign undertaking is operating, including responsibility for the maintenance of public order, the right to expropriate land required for purposes of exploitation, and so forth.¹³³ But apart from this and their purely formal characteristics, such concession contracts are not substantially different from ordinary contracts. There is thus almost unanimous agreement that they merely constitute one variety of contract which States may conclude with private individuals.¹³⁴

¹³¹ As regards the various approaches adopted in trying to explain the special juridical nature of "public loans", see Borchard, "International Loans and International Law", *Proceedings of the American Society of International Law* (1932), pp. 143-148.

¹³² See Huang, "Some International and Legal Aspects of the Suez Canal Question", *American Journal of International Law* (1957), vol. 51, p. 296.

¹³³ On this point see McNair, "The General Principles of Law recognized by Civilized Nations", *British Yearbook of International Law* (1957), p. 3.

¹³⁴ See Gidel, *Des effets de l'annexion sur les concessions* (1904), p. 123. According to a more recent view, an economic concession is a contract between a public authority and the concessionaire and, whatever might be its form, always involves a complicated system of rights and obligations between the concessionaire on the one part and the State on the other. Such a relationship is of a mixed public law and private law character. See O'Connell, *The Laws of State Succession* (1956), p. 167. As regards other opinions expressed on the juridical nature of concessions, see Carlston, "International Role of Concession Agreements", *Northwestern University Law Review* (1957), vol. 52, pp. 620-622.

¹³⁰ See, for other illustrations of the different systems of protection, Wilson, "Property-Protection Provisions in the United States Commercial Treaties", *American Journal of International Law* (1951), vol. 51, pp. 83-107, and M. Brandon, "Provisions relating to Nationalization in Treaties registered and published by the United Nations", *International Bar Association, Fifth International Conference of the Legal Profession* (Monte Carlo, 1954), pp. 59 *et seq.*

102. In view of the factors pointed out above, however, and because of their economic importance, there is now a tendency to regard concession contracts as instruments *sui generis* and even to use other names or expressions to designate them.¹³⁵ It has been suggested, for example, that they should be called "international economic development agreements", so as to stress their international status and the fact that the State is consequently responsible for non-compliance with their terms.¹³⁶ This, however, already touches on the fundamental aspect of the question—i.e., the law which governs the various contractual relations which a State may establish with alien private individuals.

II. Law governing contractual relations between States and aliens

103. The question which arises is whether the similarity which may exist between contractual relations established by States with private individuals or bodies corporate of foreign nationality and relations of the same nature which States enter into between themselves affords juridical grounds for affirming that the principle *pacta sunt servanda* is equally applicable to such relations. In order to answer this question properly, it is first necessary to know what law or legal system governs the various different contractual relations which a State may enter into with an alien. The problem is similar to, and to some extent identical with, that which is ordinarily known in private international law as the "choice of law", and which may here be called simply the determination of the "law of the contract"; i.e., of the law or juridical rules which, by the express, tacit or presumed agreement of the parties—or, in certain cases, by virtue of overriding provisions contained in the local legislation—govern the rights and obligations stipulated in the contract. Only when this preliminary question is answered will it be possible to determine how the principle *pacta sunt servanda* (as a principle of international law) applies to contractual relations between States and aliens.

24. THE TRADITIONAL POSITION

104. Strictly speaking, in traditional international law this problem did not even arise, for—as was shown in the Special Rapporteur's second report (A/CN.4/106, chapter IV, section 12)—the basic assumption was that all such contractual relations were always governed by municipal law. One of the most equivocal and explicit statements of the traditional position can be found in the judgement of the Permanent Court of International Justice in the Serbian Loans case (1929). The Tribunal stated:

"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. The question as to which this law is forms the subject

of that branch of law which is at the present day usually described as private international law or the doctrine of the conflict of laws. The rules thereof may be common to several States and may even be established by international conventions or customs, and in the latter case may possess the character of true international law governing the relations between States. But apart from this, it has to be considered that these rules form part of municipal law. The Court, which has before it a dispute involving the question as to the law which governs the contractual obligations at issue, can determine this law only by reference to the actual nature of these obligations and the circumstances attendant upon their creation, though it may also take into account the expressed or presumed intention of the parties."¹³⁷

105. In the cases of the Serbian and Brazilian loans, the Permanent Court approached the question of the "applicable law" strictly from the point of view of private international law, in that it considered the possibility of the applicable rules being those of a State other than the contracting State by reason of an express agreement between the parties or of a presumption which could be inferred from the terms of the instrument.¹³⁸ The important point in the present context, however, is what "substantive" law governs the contractual relationship established between the State and the alien private individual. In this connexion, the Court clearly took it for granted that such relationships are governed, so far as the validity and other substantive aspects of the relevant instrument are concerned, by the municipal law of a State. Even in the hypothetical case in which the rules governing the conflict have been established by international conventions or customs and thus possess the character of "true international law governing the relations between States", those rules, by reason of their strictly "adjective" character, would serve no other function than to resolve the conflict between the possible applicable laws. In brief, the "choice of law" would always be a matter for the municipal law of a State.

106. The decisions of international claims commissions contain many statements of the traditional position.¹³⁹ Basing itself on that body of judicial precedent and on diplomatic practice, the Committee established by the League of Nations for the study of international loan contracts conceded that "Every contract which is not an international agreement—i.e., a treaty between States—is subject (as matters now stand) to municipal law..."¹⁴⁰ The question has at times arisen, both in the Permanent Court and in cases dealt with by arbitral commissions, whether the municipal law governing the contractual relation is the law of the contracting State,

¹³⁷ Publications of the Permanent Court of International Justice, *Collection of Judgments*, series A, Nos. 20/21, p. 41. See for the same view the judgment in the Brazilian Loans case, *ibid.*, p. 121.

¹³⁸ See also *ibid.*, pp. 42 and 123.

¹³⁹ See, *inter alia*, Feller, *The Mexican Claims Commissions 1923-1934* (1935), p. 178.

¹⁴⁰ See Report of the Committee for the Study of International Loan Contracts, League of Nations Publication, II, *Economic and Financial*, 1939.II.A.10 (document C.145.M.93.1939.II.A), p. 21.

¹³⁵ On the importance of concession contracts in the world economy, see Carlston, *op. cit.*, pp. 629 *et seq.*

¹³⁶ See J. N. Hyde, "Permanent Sovereignty over Natural Wealth and Resources", *American Journal of International Law* (1956), vol. 60, p. 862, and Carlston, "Concession Agreements on Nationalization", *ibid.* (1958), vol. 52, p. 260.

the law of the State of which the private individual is a national or the law of some other country. This aspect of the question, however, has no bearing on the concrete problem under consideration, although it can be said that, as a general rule, the applicable law is that of the contracting State.¹⁴¹ And this is indeed easily understandable in view of the nature and purpose of the usual type of contractual relationship, which is unlikely to be governed by a law other than that of the contracting State.

25. RECENT INSTRUMENTS AND JURISPRUDENCE

107. The type of contractual relationship envisaged during the development of the traditional doctrine is undoubtedly that embodied in the common type of "public contract". But some of the more recent instruments of the type considered in the preceding section contain clauses which make it impossible to assimilate them, at least *in toto*, to contracts of that nature. These clauses expressly stipulate that the contractual relationship shall be governed, either wholly or in certain particulars, by a legal system or specified legal rules other than the municipal law of the contracting State or of any other State. One of the earliest examples of such a clause was contained in the "5 per cent 1932 and 1935 bonds" of the Czechoslovak Republic, guaranteed by the French Government and concluded with French bankers, regarding which it was agreed that "Any disputes which may arise as to the interpretation or execution of the present provisions shall be subject to the jurisdiction of the Permanent Court of International Justice at The Hague acting in execution of Article 14 of the Covenant of the League of Nations. The Czechoslovak State undertakes to lay such disputes before the Permanent Court of International Justice whose jurisdiction it accepts." As was pointed out by Mann, in commenting on this provision, according to generally recognized principles, the submission to the jurisdiction of a specific court implies the submission to the law of that court.¹⁴²

108. The Concession Agreement entered into by the Imperial Government of Persia and the Anglo-Persian Oil Company on 29 April 1933 also envisaged recourse to an international jurisdiction, but was much more explicit on the point to which reference has just been made. Article 22 of that Agreement, after stipulating that any differences between the parties of any nature whatever were to be settled by arbitration, according to the method and procedure prescribed in the article itself, provided that "The award shall be based on the juridical principles contained in Article 38 of the Statute of the Permanent Court of International Justice". Another interesting detail of these instruments, which appears in article 21 of the Persian Concession Agreement, was first inserted in the Concession Contract entered into in 1925, between the Soviet Union

and the Lena Goldfields Ltd. This clause reads: "The contracting parties declare that they base the performance of the present Agreement on principles of mutual good will and good faith as well as on a reasonable interpretation of this Agreement." A provision to the same effect appeared in the Concession Agreement of 11 January 1939 between the Sheikh Shakhbut of Abu Dhabi and the Petroleum Development (Trucial Coast) Ltd.

109. A more exhaustive and detailed provision to this effect is contained in article 45 of the 1954 Consortium Agreement between Iran, a private company of the nationality of the contracting State and other companies of various foreign nationalities. The articles provides as follows: "In view of the diverse nationalities of the parties to this Agreement, it shall be governed and interpreted and applied in accordance with principles of law 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 principles of law recognized by civilized nations in general, including such of those principles as may have been applied by international tribunals". The elaborate methods and procedures of settlement envisaged by this Agreement are also of a markedly "international" character.¹⁴³ A Concession Agreement entered into by the Libyan Government provides that the "Concession shall be governed by and interpreted in accordance with the laws of Libya and such principles and rules of international law as may be relevant, and the umpire or sole arbitrator shall base his award upon those laws, principles and rules".¹⁴⁴

110. International jurisprudence relating to such instruments, although neither plentiful nor wholly conclusive, casts considerable light on the question of the law which governs them. An example can be found in the Lena Goldfields Arbitration (1930). So far as the question of the applicable law was concerned, the Court of Arbitration accepted the distinction formulated by counsel for the plaintiff company, namely, that on all domestic matters not excluded by the contract, including its performance by both parties inside the USSR, Russian law was "the proper law of the contract"; but that for other purposes, "the proper law" was contained in the general principles of law such as those recognized by Article 38 of the Statute of the Permanent Court of International Justice, because, among other reasons, many of the terms of the contract contemplated the application of international rather than merely national principles of law. In dealing with the question of compensation for damage caused, the Court of Arbitration stated that it preferred to base its award on the principle of "unjust enrichment", as a general principle of law recognized by civilized nations.¹⁴⁵ In

¹⁴³ See articles 42-44 in J. C. Hurewitz, *Diplomacy in the Near and Middle East, A Documentary Record: 1914-1956* (1956), p. 48.

¹⁴⁴ *The Official Gazette of the United Kingdom of Libya*, 19 June 1955, p. 73. The Concession Agreement concluded on 8 April 1957 between the Libyan Government and the Gulf Oil Co. contains an arbitral clause (clause 28) to the same effect.

¹⁴⁵ See Nussbaum, "The Arbitration between the Lena Goldfields Ltd. and the Soviet Government", *Cornell Law Quarterly* (1950), vol. 36, p. 51.

¹⁴¹ As regards the criteria which have been applied in international jurisprudence to solve conflicts of laws arising in this connexion, see Schwarzenberger, *International Law*, vol. I: *International Law as applied by International Courts and Tribunals* (third ed., 1957).

¹⁴² See Mann, "The Law Governing State Contracts", *British Yearbook of International Law* (1944), p. 21.

the arbitration between Petroleum Development (Trucial Coast) Ltd. and the Sheikh of Abu Dhabi (1951), the sole arbitrator, Lord Asquith, interpreted the clause relating to the law governing the Concession Agreement, which used substantially the same wording as the one in the last-cited case, with the statement that "... Clause 17 of the agreement... repels the notion that the municipal law of any country, as such, could be appropriate." In his opinion, the terms of that clause clearly prescribed "... the application of principles rooted in the good sense and common practice of the generality of civilized nations—a sort of 'modern law of nature'."¹⁴⁶ In a later arbitration relating to a contract which contained no provision on the applicable law, the arbitrator set forth similar opinions and conclusions.¹⁴⁷

26. NEW ORIENTATION OF SCIENTIFIC DOCTRINE

111. In keeping with the criterion applied in practice, traditional doctrine was quasi-unanimous in contending that contractual relationships between States and aliens were governed—with all the consequences which that implied from the point of view of international responsibility—by municipal law. More recently, however, a group of international jurists, basing itself mostly on the instruments and decisions to which reference has been made, has stressed the need for a reconsideration of the question with a view to revising the traditional theory. One of the pioneers of this group was Mann.¹⁴⁸ In his view, having regard to the Young Loan case and other precedents, the formula according to which a contract is to be "localized" in a particular country is too narrow. It is the "legal system" to which a contract is subject. The parties may submit their contract to international law, i.e. "internationalize" it, or even refer it to rules of strict public international law. There are also some cases of State contracts which even though *prima facie* subject to municipal law, have been submitted by the parties to international law rather than to the law of a particular country. Such was the case, for example, with the Czechoslovak bonds. Moreover, in the absence of an express reference, a state contract should be regarded as "internationalized" if it is so rooted in international law as to render it impossible to assume that the parties intended it to be governed by a national system of law. Mann cites the Young Loan case as an example of such an "implied internationalization" of a contract.¹⁴⁹

112. Schwarzenberger also suggests that the principal factor, in determining the legal system to which the contractual relationship should be subject, is the intention of the parties. The State granting the concession

¹⁴⁶ The complete text of the award can be found in *International and Comparative Law Quarterly* (1952), pp. 247-261; the passage cited is on page 251.

¹⁴⁷ See Arbitration between the Ruler of Qatar and International Marine Oil Co. Ltd., *International Law Reports* (Edited by Lauterpacht), Year 1953, p. 541.

¹⁴⁸ The idea that some of these contractual relationships are governed by international law had in fact been expressed at the beginning of the century, in connexion with "public debts", by Wuarin, Freund and von Liszt. See Borchard *op. cit.*, p. 148.

¹⁴⁹ Mann, *op. cit.*, pp. 19-21.

must be presumed authorized to submit the contract to a foreign municipal law or to international law. In such cases, it is clear that it was the intention of the parties that the concession should not be affected by any subsequent change in the grantor's municipal law nor be subject to any other form of interference by the grantor's state organs.¹⁵⁰ Farmanfarma, in whose view the intention of the parties is also fundamental, dwells on the extent to which the traditional notions regarding public international law and private international law have been modified by recent arbitral decisions. In his view, the least that can be said is that the line of demarcation between those two bodies of law has become obscured; or rather, that an intermediate area has appeared and—with the spread of the international activities of large corporations, such as the oil companies—seems to be expanding. Consequently, if a Government and a corporation conclude a contract containing an arbitration clause, the corporation has removed itself from the realm of national law and jurisdiction and has subjected itself to a legal system halfway between public international and private law.¹⁵¹

113. Jessup approaches the problem in the light of his notion of "transnational law", which covers all law that regulates actions or events which transcend national frontiers, including both public and private international law as well as other rules which do not wholly fit into such standard categories. In his opinion, there is nothing in the character of the parties which precludes the application of one or the other bodies of law into which the legal field is traditionally divided. The liability of a State for its actions may be governed by (public) international law, by conflict of laws, by its own domestic law or by foreign national law; nor is there anything in the character of the forum which precludes it from applying one or the other of those bodies of law.¹⁵² Huang, in opposing the traditional doctrine, states that the "internationalizing" factors inherent in concessions of international importance constitute cogent and persuasive arguments for the application of public international law. They constitute "points of contact" or "connecting factors" which a municipal or an international tribunal, applying established rules of conflict of laws, would take into consideration in trying to find the proper law of the contract of transaction.¹⁵³

114. Finally, Lord McNair, in a recent detailed study of the subject, believes that a distinction should be drawn between two different situations. When the contracting State and the State of the alien's nationality both possess sufficiently developed legal systems, capable of governing modern contracts, the parties negotiating the contracts, or tribunals in adjudicating upon them, are likely to adopt one of those systems, or one for certain parts of the contract and the other for other parts. But when the legal system of the country in

¹⁵⁰ Schwarzenberger, "The Protection of British Property Abroad", *Current Legal Problems* (1952), vol. 5, p. 315.

¹⁵¹ See Farmanfarma, "The Oil Agreement Between Iran and the International Oil Consortium: The Law Controlling", *Texas Law Review* (1955), vol. 34, p. 287.

¹⁵² See Jessup, *Transnational Law* (1956), pp. 2, 102.

¹⁵³ See Huang, *op. cit.*, p. 285.

which for the most part the contract is to be performed is not sufficiently "modernized" for the purposes of regulating this type of contract, it is unlikely that the territorial law of either party can afford a solution that will commend itself to the parties or to tribunals, except in regard to some obligation which has special reference to the local law such as the employment of local labour. In the second case, the system of law most likely to be suitable would be not public international law *stricto sensu*, for the contract is not one between States, but the "general principles of law recognized by civilized nations".¹⁵⁴

27. APPLICABILITY OF THE PRINCIPLE *pacta sunt servanda*—RECENT OPINIONS IN THE AFFIRMATIVE

115. In the light of these precedents and of the trends of learned opinion concerning the law which governs contractual relations between States and aliens, the next question to be considered is that of the applicability of the principle *pacta sunt servanda* (as a principle of international law) to such contractual relations. The question is crucial for the purposes of international responsibility, since, as was indicated at the beginning of this chapter, the applicability of this principle will determine whether, by analogy with interstate agreements, international responsibility exists and is imputable solely by reason of the non-performance of obligations stipulated in the contract or concession.

116. The question appears to have been raised for the first time, at least in the terms in which it is now formulated, by the Swiss Government in its memorandum to the Permanent Court of International Justice in the *Losinger and Company* case (1936). The Swiss Government contended that the principle was applicable and based its contention on the following considerations: "The principle *pacta sunt servanda*... must be applied not only to agreements directly concluded between States, but also to agreements between a State and an alien; precisely by reason of their international character, such agreements may become the subject of a dispute in which a State takes the place of its nationals for the purpose of securing the observance of contractual obligations existing in their favour. The principle *pacta sunt servanda* thus enables a State to resist the non-performance of conventional obligations assumed by another State in favour of its nationals... A State may not invoke any provisions of its domestic private law or of its public law in order to evade the performance of valid contractual obligations. To admit the contrary would introduce an element of chance into all contracts entered into by a State with aliens, since the State would have the power to repudiate its obligations by means of special legislation."¹⁵⁵

¹⁵⁴ See McNair, *op. cit.*, p. 19. Under one of the provisions formulated by the League of Nations Committee referred to during the consideration of the traditional position, the proposed International Loans Tribunal was to adjudicate "on the basis of the contracts concluded and of the laws which are applicable... as well as on the basis of the general principles of law", League of Nations Publication, II. *Economic and Financial*, 1939.II.A.10 (document C.145.M.93.1939.II.A).

¹⁵⁵ Publications of the Permanent Court of International Justice, *Pleadings, Oral Statements and Documents*, series C, No. 78, p. 32.

117. On the basis of a supposed analogy between treaties and contracts between a State and an alien, it is thus argued that the principle *pacta sunt servanda* is applicable as a principle of international law. It is claimed that the principle is applicable to such contracts by reason of their "international character" and also because failure to apply the principle would place the validity and effectiveness of obligations assumed in favour of alien individuals at the mercy of unilateral decisions on the part of the contracting State. On other occasions, however, it has been contended that the principle is applicable as one of "the general principles of law recognized by civilized nations". The *Losinger and Company* case was settled out of court, thus depriving the Permanent Court of International Justice of an opportunity to give a ruling on the subject, but in the arbitration which preceded the submission of the case to the Court, the umpire, H. Thelin, held: "It must therefore be assumed that Yugoslav law, like the law of the other European countries, embodies the principle of respect of contractual obligations, without which no transaction would be secure. *Pacta sunt servanda; pactis standum est; jura vigilantibus scripta*; these ancient Roman maxims continue to be valid."¹⁵⁶

118. Some writers on public international law have supported this view, without necessarily excluding the other. L. Wadmond, for example, maintains that a contract between a State and an alien "is binding on both parties. It is binding under international law. It is binding as well under the general principles of law accepted by civilized nations".¹⁵⁷

119. The Swiss position received some support in the studies recently made by non-governmental organizations of state measures affecting the patrimonial rights of aliens. The resolution adopted in committee during the Cologne Conference of the International Bar Association (1958) quoted in chapter II is one of the most explicit endorsements of this position: "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."¹⁵⁸ The same position is taken in some of the replies to the questionnaire prepared for the Forty-eighth Conference of the International Law Association (New York, 1958). In its reply, the American Branch states: "the contractual obligations freely assumed by a State [towards aliens] are no less binding than its treaty obligations."¹⁵⁹ Other replies received by the International Law Association's International Committee

¹⁵⁶ *Ibid.*, pp. 83-84.

¹⁵⁷ "The Sanctity of Contract between a Sovereign and a Foreign National". Address delivered on 26 July 1957 at the London meeting of the American Bar Association, p. 6.

¹⁵⁸ See footnote 66. In this sense, it has also been argued that, since States are obliged to exercise good faith in their relations with aliens, it follows that they are bound by the contractual agreements they enter into with aliens, although such agreements are not *stricto sensu* international agreements. See M. Brandon, "Legal Aspects of Private Foreign Investments", *The Federal Bar Journal* (Washington, 1958), vol. 18, pp. 338-339.

¹⁵⁹ See *loc. cit.* (footnote 98).

on Nationalization draw the same analogy and maintain that the principle *pacta sunt servanda* must be applied without reservations; they therefore deny categorically to the State any right to end a concession or contract before the expiry of its term.¹⁶⁰

120. In other replies, on the other hand, a somewhat more liberal or flexible position is taken. Some of them express the view that a State may end a contract prematurely without violating a rule of international law, provided that it pays the alien concerned an adequate, prompt and effective compensation.¹⁶¹ Other replies would admit that possibility only if such state action was justified by a grave change of circumstances, as in cases of *force majeure*.¹⁶² In one of the replies the view was taken that it should be made possible to reduce the obligations incurred by a capital-importing country where this was necessary under the *clausula rebus sic standibus*.¹⁶³ In another context, it was held that, where a concession has acquired a certain international status, as, for example, by a provision for international arbitration or by the conclusion of an international "umbrella agreement" to shield the concession, a breach of such provisions would certainly constitute an international wrong.¹⁶⁴ In the resolution which it adopted on the subject, the Conference of the International Law Association contented itself with a declaration that "the principles of international law establishing the sanctity of a State's undertakings and respect for the acquired rights of aliens require... (ii) that the parties to a contract between the State and an alien are bound to perform their undertakings in good faith. Failure of performance by either party will subject the party in default to appropriate remedies".¹⁶⁵

28. POSITION TAKEN IN THE PREVAILING DOCTRINE AND PRACTICE

121. In accordance with the doctrinal position described above, the mere non-performance of the contract would, at least in principle, constitute an "unlawful" act, but in traditional practice and doctrine non-performance gives rise to state responsibility only if it involves an act or omission contrary to international law. Borchard, one of the first to contribute to the formulation of the traditional doctrine, contended that "diplomatic interposition" in such cases of responsibility "will not be based on the natural or anticipated consequences of the contractual relation, but only on

arbitrary incidents or results, such as a denial of justice or flagrant violation of local or international law".¹⁶⁶ Miss Whiteman recognized that in such cases it is often impossible to show that a legal wrong exists, or that one of the parties has the particular right it alleges to have under the contract until the court having jurisdiction of the matter has ascertained the facts and passed upon the questions in dispute. For this reason, in order to substantiate an international claim of this kind, it is necessary to prove that the respondent Government has committed a wrong through its duly authorized agents or that the claimant has suffered a denial of justice in attempting to secure redress.¹⁶⁷ Other American writers have expressed themselves in the same or similar terms.¹⁶⁸ The same view has been taken by European publicists. Lipstein, for example, maintains that "...the failure of a State to fulfil a contractual obligation [towards an alien], unless such a failure is confiscatory or discriminatory in nature, does not automatically result in a breach of international law".¹⁶⁹ Hoijer had contended earlier that "unlawful invasion of the [contractual] rights of an alien does not *per se* constitute a violation of international law; the latter is violated only if no reparation is made for the injuries sustained after the remedies established by the laws of the country have been exhausted".¹⁷⁰

122. In the draft codifications, both private and official, which deal with the various cases of international responsibility of States for non-performance of contractual obligations towards aliens, the same view prevails with regard to the acts or omissions which give rise to state responsibility in such cases. With the exception of the Bases of Discussion drawn up by the Preparatory Committee of The Hague Conference (1930), which considered that a State is responsible for damage suffered by a foreigner as the result of the enactment of legislation which "...directly infringes rights derived by the foreigner" from a concession or contract, the draft codifications adopt the traditional view. Even the Harvard Research draft (1929) does not consider that the State is responsible for injury to an alien resulting from the non-performance of a contractual obligation unless local remedies have been exhausted or the non-performance as such constitutes an unlawful act.¹⁷¹

123. Diplomatic practice and international case-law have traditionally accepted almost as a dogma the idea

¹⁶⁰ See replies of Prof. Gihl and Dr. Weiss-Tessbach, in International Law Association, New York University Conference (1958), International Committee on Nationalization, p. 9.

¹⁶¹ Prof. Foighel, Mr. Röed and the Netherlands and Swiss Branches, *Ibid.*

¹⁶² Prof. Magerstein and Swedish Branch, *Ibid.*, p. 10.

¹⁶³ *Ibid.*, p. 13.

¹⁶⁴ Prof. A. Magarasevic, Prof. Magerstein and the Swiss Branch. Prof. E. Lauterpacht pointed out that not only the violation of a treaty but perhaps also the violation of "international interest" (for example, interference with a public international service) could constitute such a violation. *Ibid.*, p. 10.

¹⁶⁵ When the Spanish original of the present report was drafted, the printed text of the resolution was not yet available.

Translator's note: In the printed English text of the resolution in question, which has since become available, the word "penalties" appears instead of "remedies".

¹⁶⁶ *The Diplomatic Protection of Citizens Abroad*, 1915, p. 284.

¹⁶⁷ *Damages in International Law* (1943), vol. III, p. 1158.

¹⁶⁸ See, *inter alia*, Eagleton, *The Responsibility of States in International Law* (1928), pp. 160 and 167-168; Feller, *op. cit.*, pp. 173, 174; Freeman, *The International Responsibility of States for Denial of Justice* (1938), pp. 111, 112.

¹⁶⁹ "The Place of the Calvo Clause in International Law", *British Yearbook of International Law* (1945), p. 134.

¹⁷⁰ Olof Hoijer, *La responsabilité internationale des Etats* (Paris, Les Editions internationales, 1930), p. 118. In the same sense see Witenberg, "La recevabilité des réclamations devant les juridictions internationales", *Recueil des cours de l'Académie de droit international* (1932-III), vol. 41, pp. 57-58.

¹⁷¹ With regard to these draft codifications, see the Special Rapporteur's second report (A/CN.4/106), chapter IV, section 12.

that the mere non-performance by a State of its obligations under a contract with an alien individual does not in itself necessarily give rise to international responsibility. The abundant precedents in this matter will be examined in greater detail in the last section of this chapter, but it may be useful at this point to refer by way of illustration to some arbitral awards in which the traditional view is explicitly stated. In the *George W. Cook* case (1930), the General Claims Commission (United States-Mexico) held that: "The ultimate issue upon which the question of responsibility must be determined... is whether or not there is proof of conduct which is wrongful under international law and which therefore entails responsibility upon a respondent Government."¹⁷² In the International Fisheries Company case (1931), the same Commission stated even more explicitly and unequivocally: "If every non-fulfilment of a contract on the part of a Government were to create at once the presumption of an arbitrary act, which should therefore be avoided, Governments would be in a worse situation than that of any private person, a party to any contract."¹⁷³ Some exceptional decisions might be cited in which the State appears to have been held to have incurred responsibility by reason of non-performance as such, on the grounds that, as was maintained on one occasion by United States Commissioner Nielsen, such non-performance involves "confiscatory" action. On examination of these cases, it is, however, evident that the "confiscatory" character of the non-performance amounts in fact either to a denial of justice or to an arbitrary repudiation of the contract on the part of the executive authorities.¹⁷⁴

29. RECONSIDERATION OF THE TRADITIONAL POSITION

124. The analysis made above points clearly to the need for reconsideration of the traditional position with regard to the existence and imputability of international responsibility arising from contractual relations between States and aliens. It is undeniable that the traditional position contemplated contractual relations of the ordinary type and that it will therefore not always be possible to deal satisfactorily with the situations resulting from the modern forms of such contractual relations by a strict application of the traditional notions and principles. In order to ascertain whether the principle *pacta sunt servanda* is applicable, with all the legal consequences which this implies in regard to the responsibility of the contracting State, it is necessary first to determine whether the contract or contractual relation in question is (directly) governed by public international law or by a body of laws other than the municipal law of a particular country. In other words, it must be determined whether the obligations stipulated in the instruments in question are genuinely "international" in character. It will be seen below that, from a strictly legal point of view, it is only in this case that the principle *pacta sunt servanda* is applicable, by analogy with treaties and conventions between States. With this criterion in mind, contractual relations

between States and aliens may be classified in two main groups.

125. The first group comprises contractual relations of the traditional type, which are still the most numerous and frequent, and in which there is no stipulation, expressed or implied, providing that the instrument shall be governed wholly or in certain particulars by legal principles of an international character.¹⁷⁵ It is obvious that the obligations assumed by a State in these cases are "internal" in character since, as was pointed out in the Special Rapporteur's second report (chapter IV, section 12), a private person who enters into a contract with a foreign Government thereby agrees to be bound by the local law with respect to all the consequences of that contract. Accordingly, the principle *pacta sunt servanda* would be applicable to such obligations only as a principle of municipal law and in accordance with the legislation of the contracting State. Although it has been maintained that the principle is applicable as one of "the general principles of law recognized by civilized nations", it is clear that the powers possessed by the State by virtue of its right to "affect" private property, whatever its nature or the nationality of its owner, include the right to terminate before the expiry of their term, any contractual relations it may have entered into with private persons.¹⁷⁶ Consequently, the only international obligations of the State are those relating to the conditions and circumstances of non-performance. In such cases, international responsibility is incurred not by reason of the failure to observe the principle *pacta sunt servanda* but because non-performance involves an act or omission contrary to international law; in other words, what is important is not the mere fact of non-performance but its "arbitrary" character. This question will be considered again in part III, in connexion with the distinction between "unlawful" non-performance and "arbitrary" non-performance.

126. The contractual obligations comprised in the second group involve more complex situations, chiefly because of the diversity of the clauses contained in the more recent instruments. As has been seen, these instruments are generally of two types: (a) those which contain the stipulation, express or implied, that the instrument shall be governed wholly or in part by (public) international law, the "general principles of law" as a source of international law, or some other "legal system" described in less precise terms but substantially similar in content; and (b) arbitration clauses which contemplate the settlement of disputes by means of international arbitration or some other method or procedure. There appears to be no sound basis for adding, as has been suggested by some writers, a third category comprising those contracts or concessions which, because of their nature, object or importance to the world economy, involve "international interests".¹⁷⁷ Although at first sight this suggestion seems

¹⁷² United Nations, *Reports of International Arbitral Awards*, vol. IV, pp. 215-216.

¹⁷³ *Ibid.*, p. 700.

¹⁷⁴ In this sense, see Feller, *op. cit.*, pp. 174-175.

¹⁷⁵ This is, of course, without prejudice to the problems of private international law which arise in connexion with the choice of the law governing the contract from among the municipal legislations of two or more States.

¹⁷⁶ With regard to this question see section 13 *supra*.

¹⁷⁷ See Wadmond, *op. cit.* (in footnote 157) and E. Lauterpacht, *loc. cit.* (in footnote 160 *supra*).

logically and even legally justified, since the presence of such interests does in fact "internationalize" the contractual relation, the test proposed is somewhat vague and imprecise and would inevitably give rise to numerous difficulties in practice. As will be seen below, it must be assumed in the absence of any stipulation, express or implied, to the contrary that such contracts or concessions are governed by municipal law.

127. In instruments of the first type, the fact that it is expressly stipulated that a particular substantive law shall apply necessarily implies the intention of the parties to exclude the contract, or some of its particulars, from the application of municipal law. As has been observed by some of the writers cited in section 24, this has the effect of "internationalizing" the contractual relationship in question by making it subject to a body of law or legal principles foreign to, and of a higher order than, the municipal law of the State. As the obligations in question are genuinely "international" in character, the principle *pacta sunt servanda* can properly be applied.¹⁷⁸ In so far as the contract is governed by international law or international legal principles, mere non-performance by the State would directly give rise to international responsibility, as in the case of acts or omissions imputable to the State which are incompatible with the provisions of a treaty or other international agreement. As will be seen below, the purpose of the "internationalization" of a contractual relation must be to "liberate" the relation from municipal law, so as to preclude the State from invoking its municipal law to justify a failure on its part to perform the obligations assumed towards an alien private individual.

128. In the case of the second class of instruments, the situation is substantially the same, although much simpler. The mere fact that a State agrees with an alien private individual to have recourse to an international mode of settlement automatically removes the contract, at least as regards relations between the parties, from the jurisdiction of municipal law.¹⁷⁹ Unlike the *Calvo Clause* which reaffirms the exclusive jurisdiction of the local authorities, agreements of this type imply a "renunciation" by the State of the jurisdiction of the local authorities. If an arbitration clause of this type were governed by municipal law, it could be amended

¹⁷⁸ This view must not be confused with the position taken in the Swiss memorandum in the *Losinger and Co.* case: "In a wide sense, the notion of international obligations, or engagements, covers not only those existing directly between States, but also those existing between States and private individuals protected by their Governments, when such engagements produce international repercussions and when, by their origin or their effects, they extend in reality to several countries." See *loc. cit.*, p. 128. The Swiss position is more closely related to the "theory of international contract" in French jurisprudence, to which J. Donnedieu de Vabres refers in *L'évolution de la jurisprudence française en matière de conflits de lois* (1938), p. 561, quoted in A.S. Proceedings (1958), p. 269.

¹⁷⁹ See, in this sense, Barros Jarpa, *loc. cit.*, p. 5 (in footnote 169). The reference is, of course, to methods and procedures of settlement of a genuinely international character, such as those provided for in the instruments mentioned in section 23, and not to those which have long been included in many contracts and concessions providing for arbitration or other modes of settlement governed by municipal law.

or even rescinded by a subsequent unilateral act of the State, which would be inconsistent with the essential purpose of stipulations of this type, whatever the purpose of the agreement or the character of the contracting parties. Accordingly, as the obligation in question is undeniably international in character, non-fulfilment of the arbitration clause would directly give rise to the international responsibility of the State. In so far as concerns the substantive law to be applied by the arbitral body, there would be a strong presumption, in the absence of any stipulation, express or implied, to the contrary, that it is the intention of the parties that the interpretation and application of the contract should be governed by municipal law. The reason for this presumption in plain: given the nature and scope of the State's powers with respect to patrimonial rights, whatever their character or the nationality of their owners, the substance of the contractual relation can be governed by a body of law other than the municipal law of the State only if there is an express stipulation to that effect or the State has, at least, given its tacit consent thereto.

129. In this connexion, it cannot be argued on the basis of the traditional position that because individuals are not subjects of international law rights and obligations resulting from a contract between a State and an individual cannot be regarded as "international" in character. It is not necessary to deal further with this point, which is examined in several places in the Special Rapporteur's earlier reports.¹⁸⁰ It need only be remarked that, as Jessup has said, there is nothing in the character of the parties or of the forum which precludes the application of a body of law other than the domestic one, even if it is (public) international law itself.¹⁸¹ Schwarzenberger is even more explicit: "A Head of State or Government has discretionary power to recognize an entity as an international person and to enter into relations with it on the basis of international law. If international law is declared to be the law applicable to a concession, the situation is somewhat similar. For purposes of the interpretation and application of the concession, the grantor [State] agrees to treat the grantee [private individual] as if the latter had international personality."¹⁸² In the matter of contracts, the international personality and capacity of the individual depend on the recognition granted to them by the State in its legal relations with him. Agreements which provide in one form or another for the application of a legal system or of principles alien to municipal law, or for the settlement of disputes by international means and procedures, differ from those governed exclusively by municipal law in that the contractual relation between a State and a private person is raised to an international plane, thus necessarily conferring upon that person the necessary degree of international personality and capacity.

¹⁸⁰ See the Special Rapporteur's first report (A/CN.4/196, chapter V, sections 16, 17 and 18) and third report (A/CN.4/111, chapter VIII, section 15).

¹⁸¹ See *op. cit.* in footnote 152, *supra*.

¹⁸² See *op. cit.* in footnote 150, *supra*.

III. Effects of non-performance of contractual obligations

130. It is necessary lastly to examine the conditions and circumstances which determine the existence and imputability of the international responsibility of the State for non-performance of obligations entered into with alien private individuals. It will then be possible to establish the various legal consequences of non-performance and, in particular, the real character of the "compensation" due in the case of contracts governed by municipal law. Before proceeding further, however, a distinction must be drawn in the light of the various categories of contractual relations examined in part II.

30. "UNLAWFUL" NON-PERFORMANCE AND "ARBITRARY" NON-PERFORMANCE

131. The reason and justification for the distinction drawn between the "unlawful" and the "arbitrary" non-performance by the State of contractual obligations entered into with an alien private individual will be readily understood in the light of the considerations set out at the end of part II of this chapter. The terms and the sense in which they are used are already familiar, the more so as the same distinction was discussed in the chapter dealing with expropriation in general (chapter II, section 12). In both contexts, the distinction is an expression of the same basic idea. The only difference in the present context is in regard to the matter of "unlawful" non-performance, since an expropriation of tangible assets can be unlawful only if it violates a treaty obligation, whereas, in considering contractual rights, another possibility must be envisaged, that of contractual relations between a State and an alien which create obligations of an "international" character. As in the case of treaties, when a contract or concession is governed by international law or by international principles, or provides for a mode of settlement of a genuinely international character, the rights of aliens derive from an "international" source and the obligations of the State are necessarily also international. It follows that the mere non-performance of these obligations directly and immediately gives rise to state responsibility.

132. In other cases, the position is completely different. In accordance with the traditional view, the mere non-performance of obligations entered into with aliens (and governed by municipal law) does not directly and immediately give rise to the international responsibility of the State. Responsibility exists and is imputable only if the non-performance occurs in a manner or in circumstances which involve a violation of international law. In accordance with the traditional view, the presence of any such condition or circumstance converts non-performance into an "unlawful" act or omission or, to use the Anglo-American terminology, a "tortious" breach. In other words, non-performance in these cases is deemed to constitute an act or omission which gives rise to the "international" responsibility of the State for injuries caused in its territory to the person or property of aliens". In the case, however, of contractual obligations governed by municipal law, should non-performance, whatever the con-

ditions or circumstances of its occurrence, be treated, from the strictly legal point of view, as an act or omission which gives rise to state responsibility for acts which are merely "unlawful"? If the real character of the acts or omissions constituted by the non-performance of obligations entered into by States with private persons, including aliens, is considered, it is clear that, from the strictly legal point of view, they cannot be regarded as acts which are merely "unlawful".

133. The reason is very simple and in a sense may even be called obvious. Why has it been held traditionally that the State is not responsible for the "mere" non-performance of contractual obligations entered into with aliens? In other words, what is the real basis of the distinction which has been made between this category of acts and omissions and those which give rise directly and immediately to international responsibility? In the two previous chapters, and more particularly in the discussion of expropriation in general, it was pointed out that, as the State has a right to expropriate, international responsibility cannot arise and be imputable to the State by reason of the act of expropriation *per se*; it is incurred by reason of the failure of the State to observe the rules of international law governing the exercise of the right. It was also pointed out that the right to expropriate, in its widest sense, included the right to rescind, amend, etc. contracts entered into with private persons. On this point, no doubt whatever seems to arise in municipal law, because the right to expropriate is exercised by virtue of the State's power of "eminent domain", its police power or by virtue of any other right inherent in the sovereignty which it exercises in its territory over persons, things and legal relations.¹⁸³ Accordingly, if the non-performance by the State of a contractual obligation of the type under consideration in fact constitutes the exercise of a right, at least in principle, there is no justification for the adoption of rules for the determination of the international responsibility of the State different from those followed in the case of the expropriation of tangible property.

134. In this connexion, the traditional view does not appear to be wholly consistent, since it is only by recognizing that the State exercises a right when it fails to perform a contractual obligation with private individuals that it is possible to maintain that the mere fact of non-performance does not give rise directly and immediately to the international responsibility of the State. The inconsistency lies in the fact that, while this "right of non-performance" is admitted, at least implicitly, the acts and omissions which give rise to responsibility in such cases are at the same time treated as "unlawful" acts whose "unlawfulness" derives from the fact that they are intrinsically contrary to international law. In order to remove this inconsistency, the word "arbitrary" should be used to describe non-performance in conditions and circumstances capable of giving rise to the international responsibility of the State.¹⁸⁴ As in

¹⁸³ On this point, see section 13 and footnotes 68-71.

¹⁸⁴ In diplomatic and judicial practice, as well as in the writings of publicists, the term is used comparatively frequently with reference to the non-performance of such contractual obligations of the State, but in these cases it is used to mean an "unlawful" act or omission.

the case of other acts of expropriation, the non-performance of contractual obligations by municipal law can give rise to responsibility only by reason of the "arbitrariness" of the measure or act or omission imputable to the State. If it is admitted that non-performance *per se* is intrinsically lawful, the failure on the part of the State to observe the (international) legal requirements to which the exercise of that right is subject cannot convert it into an "unlawful" act. By analogy with expropriation, the failure on the part of the State to observe any of these requirements, even in regard to compensation, does not suffice to convert non-performance into an "unlawful" act *stricto sensu*. Responsibility exists and is imputable to the State, but it arises from other grounds and has very different juridical consequences.

135. In both contexts, this concept of "arbitrary" non-performance is of evident importance. Before considering the juridical consequences, which will be examined at the end of the chapter, it may be useful to discuss the conditions and circumstances which must attend non-performance for it to give rise to international responsibility imputable to the State. Naturally, the problem arises in substantially the same form as in the case of the "arbitrary" expropriation of property and in general in any other case involving the exercise of the State's right to "affect" the patrimonial rights of individuals.

136. In the preliminary draft submitted to the Commission in the Special Rapporteur's second and third reports, attention was drawn to three categories of acts or omissions contrary to international law, namely those in which the non-performance (a) is not justified on grounds of public interest or of the economic necessity of the State; (b) involves discrimination between nationals and aliens to the detriment of the latter; or (c) involves a "denial of justice" within the meaning of article 4 of the preliminary draft.¹⁸⁵ These rules, which set out (in general terms) the component elements of "arbitrary" non-performance and which reflect the practice generally accepted as law in the matter, must be considered in conjunction with the rules relating to "compensation", to ensure their general conformity with the distinction that has been drawn between "arbitrary" and "unlawful" non-performance. It is desirable, however, to examine the precedents in international case-law which were not considered in the Special Rapporteur's previous reports, in so far as they relate to the component elements (general and special) of "arbitrary" non-performance.

31. COMPONENT ELEMENTS (GENERAL) OF ARBITRARY NON-PERFORMANCE

137. This and the three following sections are not intended to be exhaustive. Their purpose is simply to elucidate the elements which have been considered in

¹⁸⁵ See article 7 (A/CN.4/111, appendix). The last paragraph of article 7 excludes cases in which the contract or concession embodies the *Calvo Clause*. In accordance with other provisions of the draft (article 13), the State does not incur responsibility if the measures taken are the consequence of *force majeure* or are justified by some other grounds for exoneration from responsibility.

international case-law to be the component elements of the responsibility imputable to the State by reason of the non-performance of contractual obligations entered into with aliens. As the analysis is intended to be purely illustrative, the main emphasis will be placed on the causes and circumstances which have been considered to give rise to international responsibility in regard to various contracts or classes of contracts. Since a more detailed classification not only would entail serious difficulties but would also not be relevant to the purpose of this report, contracts will be considered under the headings of contracts in general, *ultra vires* contracts, contracts entered into with political subdivisions, and public debts. This classification is, of course, without prejudice to the fact that some of the conditions and circumstances giving rise to responsibility are or may be common to all types of contractual relationships between States and alien individuals. This is true, in particular, of the cases examined below.¹⁸⁶

138. In the great majority of the cases adjudicated by international courts and tribunals, the "arbitrary" character of the non-performance is linked to the notion of "denial of justice" construed in a sufficiently wide sense to include acts and omissions of the Executive and even of the Legislature. In some decisions it has been held that the non-performance of a contract was a gross injustice done to the alien.¹⁸⁷ The other decisions as a rule have simply found the claim to be admissible, depending on whether a denial of justice on the part of state organs was established or not.¹⁸⁸ In some cases, the State has been found to have incurred international responsibility by reason of the fact that its conduct was motivated by purely political ends and purposes implying an act of reprisal against the State of which the contracting alien was a national.¹⁸⁹ In another group of cases, the responsibility of the State is based on the notion of "unjust enrichment", i.e.; on the ground that the State derived an economic or financial benefit from the non-performance of its contractual obligations to the alien concerned.¹⁹⁰

32. *Ultra vires* CONTRACTS AND CONTRACTS WITH POLITICAL SUBDIVISIONS

139. The question which must be answered in connexion with these contracts is whether the State incurs international responsibility by reason of non-performance or repudiation where the official who entered into the contract with the alien had no authority to do so. In other words, may the State decline responsibility on the grounds that the contract is *ultra vires*? As has

¹⁸⁶ On this point, see commentary on article 8 of the Harvard Research draft, *op. cit.*, pp. 169-173, and Eagleton, *op. cit.*, pp. 160 *et seq.*

¹⁸⁷ See Pond's case and Treadwell's case in Moore, *Digest and History of International Arbitrations to which the United States has been a Party* (1915), vol. IV, pp. 3467 and 3468.

¹⁸⁸ See, for example, Salvador Commercial Company case in *Foreign Relations of the United States* (1902), pp. 844-845.

¹⁸⁹ See case of "Compagnie générale de l'Orénoque" in J. H. Ralston, *Report on the French-Venezuelan Mixed Claims Commission of 1902* (1906), pp. 360-367.

¹⁹⁰ In this connexion, see the cases mentioned in chapter I, section 3, and in footnote 193 *infra*.

recently been pointed out, international case-law on the subject shows a more liberal approach towards the admission of state responsibility, particularly in cases where the contract was made within the apparent authority of the contracting official.¹⁹¹ Arbitral awards rendered in the nineteenth century and at the beginning of the twentieth century, at least, clearly reveal the then prevailing tendency not to consider the State responsible for the repudiation of such contracts. These decisions were apparently based on the fact that "the right of an individual to make contracts for his Government must be clearly established, in order to render such Government responsible therefor. It is thus not sufficient...to show that the person with whom the contract was made is one who...discharged the duty of issuing supplies to the garrison; but it is further necessary to prove that he had the power to make contracts for such supplies on behalf of the Government".¹⁹²

140. Not all the decisions holding a State responsible at international law are based on the same grounds. Some of them are based on the notion of "unjust enrichment" and hold the State responsible for the failure, without justification, to perform a quasi-contractual obligation.¹⁹³ In other decisions, the State is held to have incurred international responsibility by reason of the fact that it "ratified" the contract by subsequent action and thus converted it into a valid contract. The idea that a State may, by an act or a series of acts of its organs, validate a contract which was void *ab initio* under its municipal law, is explicitly contained in several decisions.¹⁹⁴ In these, and more particularly in other cases, the arbitral tribunal or commission emphasized the "apparent authority" of the contracting official, the international responsibility of the State being founded on the arbitrary or unjustified character of its conduct in repudiating the contract.¹⁹⁵

141. In the Special Rapporteur's earlier reports and in the preliminary draft submitted to the Commission, questions concerning the international responsibility of the State for acts or omissions of organs or officials of its political subdivisions were deliberately omitted. The reason for that omission—the remarkable development of the international personality of some of these entities—also justifies the omission of any examination

¹⁹¹ See, on the development of case-law on this subject, the recent and thorough study by Theodor Meron, "Repudiation of *Ultra Vires* State Contracts and the International Responsibility of States" in *The International and Comparative Law Quarterly* (1957), vol. 6, pp. 273-289.

¹⁹² See Case of Mary Smith in Moore, *op. cit.*, vol. IV, p. 3456. See also Case of Beales, Nobles and Garrison, *ibid.*, p. 3548 and the so-called Tinoco case. United Nations, *Reports of International Arbitral Awards*, vol. I, pp. 387 and 397-399.

¹⁹³ See, for example, William A. Parker case, *ibid.*, vol. IV, p. 35, and the more recent General Finance Corporation case (1942), *United States Department of State Publication 2859*, pp. 541-548.

¹⁹⁴ See, *inter alia*, H. J. Randolph Hemming case, United Nations, *Reports of International Arbitral Awards*, vol. VI, p. 53, and the *Jalapa R. R. and Power Company case*, *United States Department of State Publication 2859*, pp. 542, 543.

¹⁹⁵ In this sense, see Trumbull's case, Moore, *op. cit.*, vol. IV, pp. 3569, 3570, and *Aibolard case*, *Revue de droit international privé et droit pénal international* (1905), vol. I, p. 893.

of the international case-law concerning contracts entered into by aliens with political subdivisions of a State (see in particular, second report, commentary to chapter II). Such contracts raise questions other than that of the responsibility imputable to the State for non-performance on the part of the contracting political subdivisions. On occasion, the question has also arisen of determining whether responsibility can be imputed to the State for acts or omissions which "interfere" with the performance or effectiveness of such contracts. On this last point, an analogy can be drawn between a contract of this type and a purely private contract (between an alien and a national of the respondent State) and the question again arises of the international responsibility of the State for acts or omissions which interfere with the performance or effectiveness of the contract.

33. PUBLIC DEBTS

142. An account is given in the Special Rapporteur's second report (chapter IV, section 13) of the position generally taken in codifications and by leading writers with regard to the international responsibility imputable to the State when it repudiates or purports to cancel its public debts (or suspends or modifies the service of the public debt in whole or in part); this position emphasizes the differences between public debts and other contractual relations, which justify a less rigid approach to the question of determining State responsibility in such cases. This view, as well as the arguments and grounds on which it is based, substantially coincides with the trend of international case-law in the matter, as is shown by some of the well-known cases cited below.

143. In one of these cases, the umpire expressly held that a person who holds an interest in the public debt of a foreign country is entitled to the same support in claiming and recovering it as he would be in a case where he has suffered from a direct act of injustice or violence.¹⁹⁶ In another case, it was held that "It is a principle of international law that the internal debt of a State, described as public debt...can never be the subject of international claims to obtain immediate payment in cash".¹⁹⁷ As in the case-law relating to other types of contractual relations, there are instances in which the State has been held responsible at international law for non-payment, when the act or omission imputable to it has been manifestly arbitrary or completely unjustifiable. In the prevailing case-law, only in exceptional cases has it been held that "fundamentally...there is no difference in principle between wrongs inflicted by breach of a monetary agreement and other wrongs for which the State, as itself the wrongdoer, is immediately responsible".¹⁹⁸

34. LEGAL NATURE OF "COMPENSATION"

144. As was indicated in section 30, in accordance with the traditional view, if the non-performance by

¹⁹⁶ See Colombian Bond cases, Moore, *op. cit.*, vol. IV, p. 3612.

¹⁹⁷ See Ballistini case, *Ralston's Report* (1904), p. 503.

¹⁹⁸ See *Aspinwall case*, Moore, *op. cit.*, vol. IV, p. 3632.

the State of its contractual obligations with an alien occurs in conditions or circumstances contrary to international law, the non-performance is treated as an act or omission which gives rise to international responsibility by reason of its "unlawful" character. The notion of "unlawful" non-performance logically and automatically entails the notion of "reparation", namely, the duty of the State to make reparation to an alien in the form of pecuniary damages if restitution in kind is impossible or inadequate. In some cases, "satisfaction" may also be required as a form of reparation. The practice of arbitral tribunals and commissions furnishes ample precedents to demonstrate the character and extent of the "compensation" payable by a State responsible for the non-performance of its contractual obligations.¹⁹⁹ The award in the *Delagoa Bay Railways* case (1900) is particularly interesting in this respect. Although this was a typical case of the expropriation of tangible property, the Tribunal, after drawing a clear distinction between the two forms of assessing "compensation", held that "the State, which is the author of such dispossession, is bound to make full reparation for the injuries done by it".²⁰⁰

145. It has already been seen, however, that the non-performance of contractual obligations, in conditions or circumstances contrary to international law—like the expropriation of tangible property and for the same reasons—can give rise only to "arbitrary" acts or omissions. Accordingly, by inescapable analogy with the basic institution (expropriation), all that can be demanded is "compensation" of the character examined in part III of the previous chapter, i.e., indemnification in respect of the interests of the alien affected

¹⁹⁹ In this connexion, see Majorie M. Whiteman, *Damages in International Law* (Washington, United States Government Printing Office, 1943), vol. III, pp. 1577-1579.

²⁰⁰ *Ibid.*, p. 1698. Nevertheless, in accordance with its terms of reference, the Tribunal had to pronounce, as it deemed most just, "upon the amount of the indemnity due by Portugal" in consequence of the rescission of the concession "and of the taking possession of that railroad...". See Moore, *Digest and History of the International Arbitrations*, etc. (1898), vol. II, p. 1875.

by the non-performance. The question accordingly arises of the manner in which the compensation or indemnification would be determined in cases other than those in which non-performance involves an expropriation of tangible property, to which the rules set out in chapter II would be applicable. The legal relationship involved being governed by municipal law, the relevant provisions of that law will necessarily apply. If the municipal law makes no provision for indemnification, or the compensation it contemplates is less than that provided for in the generality of countries, the alien must be presumed to have been aware of that fact and to have entered voluntarily into a contract with the State on that basis. He cannot therefore plead ignorance and claim that the State should indemnify him in accordance with rules alien to its municipal law and different from those established therein. The position is different in the case of retroactive measures; in this case, the alien would be entitled to compensation in accordance with the rules in force when he entered into the contract. It would not be an easy task to formulate other rules to cover all the cases which may arise as a result of the non-performance of contractual obligations, owing to the diversity and variety of the circumstances in which such non-performance may occur. The only case to which it is necessary to refer, because of its special bearing on the principle of respect of acquired rights and the important role it has played in practice, is that in which compensation is required when the State derives direct enrichment from non-performance. The wide powers possessed by the State in the matter must not constitute a source of enrichment at the expense of private individuals who have entered into contracts with that State and have duly performed their obligations.

146. When the contract or concession is governed not by municipal law but by a legal system or legal principles of an international character, the situation is different since non-performance in such cases is "unlawful". The situation will not, of course, always occur in the same circumstances; the circumstances may indeed vary considerably. For this reason, it is sufficient to say that, in principle, non-performance in such cases calls for "reparation".