

## The Doctrine of Acquired Rights

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### Introduction

#### *The Principle Affirmed*

“Respect for the property and for the acquired rights of aliens,” said the Swiss arbitrator in the *Goldenberg* case,<sup>1</sup> “is undoubtedly a part of the general principles admitted by international law.” Federal Judge Fazy was echoing here, two years later, the famous dictum of the Permanent Court of International Justice in the case of *Certain German Interests in Polish Upper Silesia*:<sup>2</sup>

“... the principle of respect for vested rights . . . forms part of generally accepted international law. . . .”

Not to refer to this judgment of The Hague Court when speaking on the doctrine of acquired rights would be to disregard a venerable tradition. But the formula used by the Permanent Court is more than an element of pre-

<sup>1</sup> Award of September 27, 1928, II *United Nations Reports of International Arbitral Awards*, pp. 903, 906.

<sup>2</sup> *Permanent Court of International Justice*, Series A, No. 7, p. 42.

war legal terminology. It would appear to have kept a remarkable vitality; it is to be found in the recent *Sapphire* award<sup>3</sup> and is expressed clearly in the important award given on August 23, 1958, in the arbitration between Saudi Arabia and Aramco:

"The principle of respect of acquired rights is one of the fundamental principles both of Public International Law and of the municipal law of most civilized States. . . ."

The accumulation of similar quotations no doubt will create a pleasant impression of security as to the certainty of the rules of international law and as to the strong protection they grant, or are supposed to grant, to private rights.

On the other hand, it is no less easy to create exactly the opposite impression and to quote numerous statements and facts which disclose the fragility of the so-called "acquired" or "vested" rights of aliens and betray a weakening of the traditional rules of public international law in respect of standards of treatment of aliens and the international responsibility of states. To illustrate this observation, I need only contrast to the once magic formula "acquired rights" one word: "nationalization."

#### Nationalization

In the legal and political climate of the present, do many words have such power of evocation? The mere mention of the term "nationalization," with its well-known historical and political content, is enough to cast doubt on the "fundamental principle of the law of nations" mentioned above. No concrete example need be given here. And, upon turning from the study of practice to that of official statements and doctrinal writings, we certainly would be struck by the undisguised contempt which several countries manifest for the principle

<sup>3</sup> *Sapphire International Petroleum Ltd., c/NIOC* (Mar. 15, 1963) p. 97; J. F. Lalive, *XIX Annuaire Suisse de Droit International* 273 (1962).

of respect for acquired rights. Such statements, often of a political character, should not be taken at their face value. They do express, in many cases, either a purely emotional attitude or the deliberate will to weaken the positions of an opponent. But such statements and attitudes also express, on occasions, legal beliefs of a rather controversial nature, to say the least.

For instance, the Asian-African Legal Consultative Committee, created in 1956, rejected (Japan alone dissenting) the principle of an international standard on the treatment of aliens and provided, in a draft convention, that the question of compensation in case of expropriation shall be governed entirely by the municipal law of the expropriating state. As expected, the Soviet Union has advocated repeatedly in international gatherings—particularly in the debates relating to the "permanent sovereignty over natural resources"—a reaffirmation of the inalienable right of a state to confiscate property and to set its own terms and standards of compensation. It has insisted on the sovereign rights of the state to carry out nationalization and expropriation measures "without let or hindrance."<sup>4</sup> Similarly, several developing countries have claimed, on the basis of their own notion of sovereignty and sometimes with some degree of naiveté, a right to nationalize to solve their economic difficulties—any compensation being excluded, of course, because this would prevent a solution of those economic difficulties.<sup>5</sup>

#### Western Attitudes

Perhaps more significant is the attitude of other states—mainly Western—from which a vigorous defense of

<sup>4</sup> See Gess, "Permanent Sovereignty over Natural Resources," *Int'l Comp. L. Q.* 398 (Apr., 1964) *passim*; International Law Association, *Report on Brussels Conference, 1962*, "Memorandum on Questions of Foreign Owned Property" by Soviet Association of International Law.

<sup>5</sup> Gess, *Ibid.*, at 426, quoting an amendment sponsored by Afghanistan. On the position of newly-independent states, such as Algeria, see Gess, *ibid.*, at 443, and *infra* note 34. Also see Schwebel, "The Story of the United Nations' Declaration on Permanent Sovereignty over National Resources," *A.B.A.J.* (May, 1963).

traditional rules and, notably, of the right of property—an acquired right par excellence—might have been expected. An example is the negotiations which preceded the signature, on November 4, 1950, in Rome, of the European Convention of Human Rights. The European states concerned were unable to agree either on a definition of private property or even, so it seems, on the principle of respect for property. This important lacuna in the treaty had to be filled later, at least in part, by the additional protocol of March 20, 1952.

The truth is that state interferences with rights of property have not been a monopoly of the Soviet bloc. In a truly world evolution, state interventions in economic life and activities have become more and more numerous in time of peace. And, as far as war and its effects are concerned, the policy adopted by the victors with regard to the liquidation of enemy or ex-enemy property was not such as to reverse this trend, hostile to the traditional principles. It is highly instructive, in this connection, to compare the treaties concluded after World War II with the peace treaties which followed World War I.

It is superfluous to attempt here a summary of the history of the principle and of the standards of compensation in case of expropriation of foreign property. This evolution is well-known. It has given rise, in capital-exporting countries, to many critical and sometimes—perhaps unduly—pessimistic comments.

However, it cannot be denied that, in our divided world, in an international society only now emerging and searching for common aims and values, the principle of respect for acquired rights appears particularly apt to stir controversies and create oppositions. In the opinion of many observers of the international scene, who think the fundamental problem of our time lies in the antagonism between “rich” and “poor” nations, the principle well may appear to be the expression of the conservatism of the “haves”—an ideological as well as a legal weapon in a world conflict of interests. Therefore, the mere statement of the doctrine may lead us to react according to our own prejudices. Like the concept of sovereignty, that of “acquired rights” is not a subject to

be studied easily in a scientific, unbiased, and dispassionate manner.

In fact, as the following analysis will show, the doctrine of acquired rights is not, as some of its opponents believe or claim to believe, an obstacle to any change, a barrier erected by selfish interests hostile to reform and to any evolution toward more social justice. It is a necessary expression of justice and of law; it is the affirmation of a social necessity which all nations, in the last analysis, have an interest (if not always an equal interest) to take into consideration.

#### *Complex Character of Subject*

But our subject is not difficult merely because it is partly political in character but also because of its wide scope and complex nature.

First because of its scope: To deal with the international protection of acquired rights means to deal with such chapters of the law of nations as the status of aliens under international law and the international responsibility of states, including diplomatic protection, judicial and arbitral procedures, etc. It involves at least a brief discussion of such notions as sovereignty, domestic jurisdiction, and nationalization. It is easy to perceive the many risks involved in any such attempt and the obvious criticisms of incompleteness and superficiality which may be levelled at a discussion such as the present one.

Moreover, the difficulty of the subject lies in the vagueness and obscurity of the very notion of acquired rights. As soon as we try to go beyond the stage of pure affirmations and of slogans—effective though they may be in political gatherings—and as soon as we attempt a truly legal analysis of the problem, innumerable difficulties arise. It is really striking to notice the uncertainties of theory and the embarrassed and hesitating attitude on this topic of some of the best writers. This being true, the contradictions found in international practice are not surprising.

To summarize, this is a particularly delicate topic to discuss. I shall endeavor to do so with an open mind and without prejudice and I shall try to give a clear formulation of the problem rather than to supply pre-



fabricated or comforting answers. When explaining the results of my inquiries, less emphasis may be given than you would expect on the questions of how far and of how international law does protect acquired rights. These points doubtless will be dealt with in some detail in other chapters of this volume.

My purpose in this discussion will be to consider and analyze the doctrine of acquired rights as it is or as it has been understood generally among international lawyers, particularly in Europe.

### Generalities

#### *Notion of Acquired Right*

What is meant by acquired rights or by the protection of acquired rights? Let us note that the very term "acquired" or "vested" right implies and suggests the idea of protection. Under scrutiny here is not just any right but an acquired right—a kind of reinforced individual power and, according to some, a right acquired permanently and immutably. The expression at first appears somewhat pleonastic. There is an intention, more or less conscious, to strengthen the idea, as is shown even more clearly in the terms "protection" or "respect of acquired rights." When speaking of a right and *a fortiori* of an acquired right, is it not necessarily in order to oppose some (external) threat, at least potential, to affirm the value of an individual prerogative or legal power deemed worthy of protection or respect? In fact, the expression is an abbreviated way to describe a much more complex legal reality. It is not only a subjective right which must be protected or respected, it is a whole social relationship, organized and regulated by law. In practice, "This amounts to nothing more than a right, from the point of view of the person interested in its respect."<sup>6</sup> This is why the doctrine under discussion neglects the whole of the legal relation and considers

<sup>6</sup> Kaeckenbeeck, "La Protection Internationale des Droits Acquis," 59 *Recueil des Cours de l'Académie de Droit International* 323 (1937).

only one of its aspects—the right or the individual power conferred, or recognized, by law.

However justified this choice or this starting point, it is advisable to mention it and to be conscious of it. The origin of the principle of acquired rights is found in legal individualism. It is far from surprising, therefore, that it should have been used in most cases as a defense against state interferences with the interests and rights of individuals and as a plea in favor of social *status quo*.

The first and obvious criticism which may be, and has been, levelled at the expression stresses the illogicality of the notion. What is a nonacquired right? Every right is acquired, or it is not a right.

For all its imprecision, the term has been adopted by usage. It does not seem to offer major disadvantages, in itself, provided, of course, sufficient agreement can be reached on a definition. This is where difficulties begin. As any study of the subject, however perfunctory, will demonstrate, it always has been quite impossible for practitioners and writers to agree on a common definition, whether in the field of the law of nations or in other domains.

#### *European Legal Thought*

Let us consider, for example, European legal thought before World War II. In France, acquired rights traditionally were distinguished from mere *expectancies*. Judicial decisions and writings stressed the achieved and complete character of the acquisition of an "acquired right" and did not take into consideration how the acquisition took place. On the other hand, a German doctrine which prevailed for a long time<sup>7</sup> considered as the true criterion of an acquired right the fact that it was based upon a special title of acquisition. The consequences of this theory are easily perceived with regard to legislative or executive power, for instance in internal public law on the subject of the acquired rights of state officials. It is easy, also, to imagine its possible influence upon the formation of international custom concerning

<sup>7</sup> Until Gierke; see Kaeckenbeeck, *ibid.*, at 325.



the protection of the rights of foreign concessionaires, for example.

May I make clear here that I shall now use the expression "acquired rights" in a wide and general sense, in accordance with what is, in my opinion, the prevailing view in international law. This is, of course, without prejudice to several qualifications and precisions which may be necessary in future developments. In this general sense, the term "acquired right" is synonymous with that of "subjective right" or, possibly, "individual right." The rights henceforth coming under scrutiny are, in fact, the pecuniary rights of aliens or, perhaps, the most important of them.

Without discussing here well-known disputes between the supporters of legal subjectivism and those of legal objectivism, let us recall that the terms "subjective right" or "individual right" also have given rise to objections. The famous French Jurist Léon Duguit, for instance, thought that law in no sense is a body of rights. He thought that no such thing as "subjective right" exists. In his opinion the insistence of the individualists—particularly the "School of the Law of Nature and of Nations" in the eighteenth century—upon the natural rights of man as opposed to the claims of absolutist sovereigns could be explained only by political preoccupations. Professor Duguit's criticisms were aimed also at the rights of the state—on which such lengthy talks are made in some international assemblies—and not limited to the rights of the individual. Also, to get a proper perspective, note that Professor Duguit was not attacking the concept of property in itself. For him property was a social function and not a subjective or individual right.

The so-called School of Social Law, in its criticisms of the idea of subjective right considered as the basis of any legal order, has called attention to the connection and the interdependence of duties and rights, stressing objective law as the rule of conduct governing society. The right of property itself (the most absolute type of right for individualists) implies and has always implied certain duties, it was pointed out, such as the duty to act as a good neighbor. In short, the evolution of ideas, a relative decline of legal individualism, the influence of

a more "social" philosophy of law have brought about—as they were bound to bring about, whatever the terminology used—a certain transformation of the contents and purpose ascribed to the notion of acquired right or of subjective right.

In the history of legal thinking, this relative weakening of the concept of acquired right seems to take place simultaneously with its extension. Acquired rights having gradually assumed the broad meaning of subjective rights, every existing right is, thus, an acquired right. The term ceases to be reserved to certain powers or situations particularly immune to possible state interference. Having regard to the multiform and vague character of the concept, to the uncertain terminology in use, and to the diversity of doctrines and theories, these general indications may suffice by way of introduction.

Are we going to turn now to international law? Not yet. In his treatise on the law of nations, a well-known Swiss scholar, Paul Guggenheim writes, quite rightly, that the notion of acquired rights "depends originally on municipal law and on private international law."<sup>8</sup> To obtain a better grasp of the notion, therefore, we shall examine the problem as it appears on the domestic scene, which entails also a consideration of national rules of conflict of laws.

#### Doctrine of Acquired Rights in Intertemporal Law

##### *Principle of Nonretroactivity*

The doctrine of acquired rights often is considered as one aspect of, or even as another label for, the principle of nonretroactivity. The preoccupation here is to protect certain individual rights against possible injuries caused by retrospective legislation. Here we are within the domain of transitional legislation, or what was first called by a Swiss author, at the beginning of this century, "private intertemporal law."<sup>9</sup>

<sup>8</sup> I *Traité de Droit International Public*, 332.

<sup>9</sup> Affolter (in 1901), according to Wolff, *Private International Law* (2d ed.) p. 24.

Retroactivity is an ambiguous concept, and the principle of nonretroactivity is capable of several interpretations. As a rule of construction, as guidance for judges, it offers little interest for the present study. "It means only that retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matters of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment."<sup>10</sup> Of direct concern to our inquiry is the possibility or the prohibition of general retrospective legislation—as distinguished from the special case of *ex post facto* legislation. In this connection it is not necessary to analyze at great length the concept of retroactivity. A quotation may help us understand the problems involved:

"The maxim of the law, as stated by Coke (2 Inst. 95,292) is: 'Omnis nova constitutio futuris formam imponere debet, et non praeteritis!' But it is clear that new law cannot always be solely prospective in its operation; it is almost certain to affect existing rights and, still more, existing expectations. It may be intended to operate in the future, but the mere fact that it operates at all inevitably, in the long run, impinges upon rights and duties which existed long before it came into being. This is particularly true of laws concerning property of a permanent and continuing nature, such as real property, which at some time or other must come within the ambit of every change in the law relevant to it. . . ."<sup>11</sup>

The fact remains, however, that many legislations, *e.g.*, many European codes, have adopted more or less directly the principle of respect for acquired rights.<sup>12</sup> In

<sup>10</sup> Allen, *Law in the Making* (5th ed., Oxford) p. 442.

<sup>11</sup> *Ibid.*, at 441.

<sup>12</sup> *E.g.*, Articles 1 and 4 of the Final Title of the Swiss Civil Code:

"The legal effects of facts prior to the coming into force of the Civil Code continue to be governed by the rules . . . which governed them when these facts took place. . . . The legal effects of

many countries there is a definite tendency hostile to retrospective legislation, even in the absence of a constitutional limitation; and it may be said to express a deep-rooted need of permanence, security, and justice. All civilized states appear to be conscious of this need.

#### *Absence of a General Principle of Law*

The question then arises whether one of those "general principles of law recognized by civilized nations" exists within the meaning of Article 38 (1) of the Statute of the International Court of Justice—a principle which would prohibit retrospective legislation violating acquired rights. A comparative study reveals, on the contrary, a wide variety in national attitudes toward the problem of retroactivity of laws. If one common feature exists, it is the inexistence of a general and absolute prohibition of retrospective legislation for "there may be occasions when public exigency compels a departure from the general principle, and it is impossible therefore to say that retrospective legislation is in all circumstances unjustifiable."<sup>13</sup>

#### *Problem, One of Convenience*

The problem, thus, resolves itself in one of legislative policy, of convenience, of a choice between conflicting interests and tendencies. Sometimes the legislator relies on public policy, on superior considerations of national interest to suppress existing rights or situations. Sometimes, on the other hand, equity requires not a modification or suppression of certain private rights but their protection, and the legislator refrains from giving the new statute retrospective effect. As aptly observed by the Belgian Jurist and Diplomat Kaeckenbeeck—whose

facts which took place at a time when the old law was in force but which did not result in the creation of acquired rights before the coming into force of the Civil Code are governed from this time onwards by the new Code."

See also Article 5, Austrian Civil Code; Article 2, French Civil Code; and *op. cit. supra* note 6, at 325.

<sup>13</sup> *Supra* note 10, at 444.

classic study on acquired rights remains to this day, in my opinion, the best general analysis of the problem—it would be artificial to attempt to develop a “standard notion of acquired right, having universal value as the criterion of non-retroactivity.” Far from being able to supply a precise criterion for the legislative choice needed, the term “acquired right” is, perhaps, no more than a convenient label to describe the result of such choice. “It is in fact the nature of, or the underlying motive for the new statute, rather than the ‘acquired’ character of the right,” writes Kaeckenbeeck, “which will lead to a decision on whether it is convenient, or not, to give it retroactive effect.”<sup>14</sup>

These remarks on the freedom enjoyed by national legislators with regard to retroactivity and acquired rights do not prejudice in any way the answer to be given to the question of international responsibility of states for injuries caused to aliens by retrospective legislation. However general, these observations on intertemporal law needed to be made. They may help throw some light on the problem at the international level. But before entering this field of discussion, it appears useful to adopt the angle of private international law; after the conflict of laws “in time,” the conflict of laws “in space.”

#### Doctrine of Acquired Rights in Private International Law

From the field of intertemporal law, the principle of the protection of acquired rights has passed to that of private international law. This is not surprising; its motivating force, its “*idée-force*” (to use Fouillée’s famous phrase) is in both cases the same; *i.e.*, it expresses a need for permanence and security in social relations. Considering this basic analogy, naturally lawyers would have felt inclined to transpose the ideas and solutions of intertemporal law and to use them in international conflicts. Whether this transposition was justified or misleading remains to be seen.

<sup>14</sup> *Op. cit. supra* note 6, at 332.

I shall refrain from discussing in detail the doctrines of acquired rights in private international law. Only those main features will be pointed out which, in my opinion, may be useful to form a background for the further elucidation of the subject in international law. Little needs to be said on Anglo-American theories of acquired or vested rights, based on the principle of territoriality and purporting to explain why the local judge applies foreign law. It is well-known that the theory of vested rights, which was the basis of the original restatement owing to Beale’s authority, has practically been destroyed, mainly by the criticism of W. W. Cook.<sup>15</sup>

#### *Pillet’s Theory*

In Europe, the theory of acquired rights has played an important rôle in legal thinking, particularly in France. As a convenient illustration, Antoine Pillet is an obvious choice. He thought that the international respect for acquired rights was one of the three objects of private international law, together with the status of foreigners and the conflict of laws. The doctrine may be summarized as follows: Justice requires that rights acquired in one country be recognized and protected legally in others. It is conceded that a state is master within its territory; but for this reason it must respect the sovereignty of other states and, thus, pay due regard to acts accomplished in foreign states in accordance with the law in force in foreign territory. The effects produced under such foreign law must, therefore, be recognized elsewhere, at least insofar as the state concerned, when enacting its laws, has not acted *ultra vires*. In Pillet’s words:

“This principle can be formulated as follows: every time a right has been regularly acquired in any country, this right must be respected and its effects must be guaranteed to it in another country

<sup>15</sup> Reese, “Conflicts of Laws and the Restatement, Second,” XXVIII *Law & Contemp. Prob.* No. 4, 679 (Duke University, Autumn, 1964).



belonging, as does the first, to the international community. It is a necessity absolutely unavoidable, a principle without which no international commerce and, therefore, no relation between the citizens of one country with foreign citizens would be possible."<sup>16</sup>

Pillet, however, weakens somewhat the absolute character of his statement when he concedes that there are both limitations and exceptions. First are these limitations: Penal, political, and fiscal statutes have no effect abroad; they are "strictly territorial" and do not come under the principle of international respect for acquired rights.<sup>17</sup> Second are two exceptions: Public policy and the case in which the right acquired abroad corresponds to no right known and organized in the local law. Moreover, the recognition of rights acquired in another country does not offer a complete guarantee of permanence. Pillet admits, in conformity with his own principle, or so he claims, that,

"... as a result of the same international necessity and the same idea of respect of the various sovereigns for each other, an act regularly accomplished in one country may affect rights regularly acquired in other countries."<sup>18</sup>

The most interesting part of his doctrine for this consideration is the analogy he draws with conflicts of law in time and with the idea of nonretroactivity, especially in the case of the so-called "annexation conflicts." Pillet had been struck by the continuity of international practice in annexation cases. This practice, he rightly observed, did—and does—confirm "the stability of juri-

<sup>16</sup> "La Théorie générale des droits acquis," in 8 *Recueil des Cours*, III 489, at 491 (1925).

<sup>17</sup> The invalidity of this sweeping generalization, shared by one of Pillet's leading opponents on acquired rights, Arminjon, was demonstrated by the debates held in *Aix-en-Provence* by the *Institut de Droit International* in 1954; cf. P. Lalive, 52 *Friedens-Warte* 219 (1954).

<sup>18</sup> Pillet, *supra* at 533.

dical situations acquired under the law of the former sovereign." This was true both in the case of treaties regulating the cession of territory and in the absence of such treaties. The following conclusion could, therefore, be formulated: He thought "it is an absolute rule that a change of legislation following the annexation has no effect on situations acquired prior to the cession of territory."<sup>19</sup>

The rules of the law of nations in such cases will be discussed below. Let us note here that this example; *i.e.*, of annexation or cession of territory, seems to have been used by several writers on acquired rights as a link between the field of private intertemporal law and the field of private international law. In the latter case the change in the governing law is brought about—not, as in the former case, of intertemporal law by a new intervention of the same legislator but by the fact that the same territory and persons come under a new sovereignty. The situation thus created by a cession of territory may appear first to be the same as that produced in the conflict of laws by persons or property moving in space and being governed by two legislations in succession. For the supporters of the doctrine of acquired rights, the solution should be the same in both cases: The second legislator must respect legal situations regularly created under the (chronologically) first applicable law.

French conflict lawyers usually describe by the term "mobile conflicts" the problems raised by a change in the connecting factor; *i.e.*, by the fact that a given situation is governed successively by different legal systems—a result identical to that produced by a cession of territory in the so-called annexation conflicts. Many examples can be quoted: A movable acquired in a foreign country is brought in the state; spouses transfer their matrimonial domicile from one country to another, etc. The problem is, in each case, how to delimitate the respective domains, in the succession of legal relations thus created, of the old law and of the new law.<sup>20</sup>

<sup>19</sup> *Ibid.*, at 491.

<sup>20</sup> Batiffol, *Traité élémentaire de droit international privé* (2d ed., No. 318).

*Theory of Vareilles-Sommières*

Any such transportation in space of persons or property across frontiers, with the resulting displacement of the connecting factor, necessarily takes place in a time dimension. Hence, writers tend to use the techniques of intertemporal law and to draw on the idea of nonretroactivity. This approach may be illustrated by the work of another French author—rather forgotten today but not without merit—the Marquis of Vareilles-Sommières who tried to revive the old statute theory. His theory is based on Ulric Huber's teaching which had so much influence on Anglo-American legal thought in the conflict of laws. In his view, conflicts in space must be solved according to the same rules as conflicts in time. The principle of nonretroactivity works in all cases and requires a strictly chronological application of laws. A basic idea: A person who, after acting in a certain country, goes to another is in the same position as the person who, in one and the same state, is successively governed by two statutes, the second of which abrogates the first. The respect for rights acquired abroad under the first applicable law is, thus, merely a result of chronological application of laws. Each state must respect the sovereignty of others and pay due regard to the acts made in foreign countries under the law in force at the time. Vareilles-Sommières points out, however, that the future effects of the act will be governed by the "new" law as a result of the territoriality principle.

*Criticism and Conclusion*

More recent European conflict writers have stressed the errors of such theory. The analogy between the problem of intertemporal law and that of private international law, already noted by von Savigny, is no identity. In the former case, the same legislator intervenes twice, and the second intervention is presumed to bring about progress. In the latter case, the problem arises from the coexistence of different national legal orders.

In the former situation as we have seen, the legislator is free to act as it thinks fit and to give retrospective effect or not to its statutes, according to its own sense

of justice and convenience. In the latter situation, the national legislator of the second country is no less free to lay down its conflict rules according to its notion of convenience and equity, *i.e.*, to respect or ignore rights acquired in foreign countries and under foreign laws. The law of nations does not oblige it to adopt certain specific conflict rules on this point. The second state is, for instance, at liberty to refuse recognition to a right acquired abroad but whose equivalent is entirely unknown in its own legal system. Conversely, it may recognize certain effects of acts which took place abroad and did not produce such effects under the then governing law.

In both cases the national legislator is entitled to decide freely upon the retroactive or nonretroactive effects of its laws, with only one general reservation: For the case when such decision would result in a violation of the rights of aliens so as to involve the international responsibility of the state.<sup>21</sup>

To summarize, nothing much seems to survive today in the science of private international law of the rather artificial theories and structures built by the supporters of the absolute principle of international respect for acquired rights. The general consensus is that the so-called mobile conflicts cannot be solved by resorting to the doctrine of acquired rights. One conclusion here may be borrowed from a leading European Lawyer Batiffol, who writes:

"The formula is insufficient as was experienced in municipal law with the retroactivity of laws, because the notion of 'acquired right' is too uncertain. . . ."<sup>22</sup>

Two useful lessons can be drawn, however, from the preceding survey, and they may shed some light on the problem in international law. First, the notion of ac-

<sup>21</sup> This is not the place to discuss under what conditions (*e.g.*, unreasonable and unjust discrimination against aliens; *cf.* the notions of the minimum standard, abuse of right, etc.) this responsibility would be involved. Even if it were the case, such legislation would not be null and void but merely would give rise to a duty to pay compensation.

<sup>22</sup> See *supra* note 20.

quired right is most vague and cannot constitute the technical and precise criterion which could be incorporated usefully into a rule of law. Second, albeit obscure, it does contain an irreducible element of truth. Whether in the field of conflicts or in that of intertemporal municipal law, it expresses an essential longing for justice, for stable social relations, and for security.

#### Doctrine of Acquired Rights in Public International Law: In the Case of Transfer of Sovereignty

##### General Observations

Two sets of circumstances should be considered separately, in which the acquired rights of aliens may be injured or threatened, as the principle of protection may not, necessarily, have the same scope or effect in each. This distinction seems advisable, even though it may lead to some repetition and overlapping.

It is in the case of cessions of territory (annexation) that problems of acquired rights first called for an application (by what seemed a natural analogy) of the rules developed in the fields of intertemporal law or of private international law. In most cases the question is regulated by *conventional* international law: The cession of territory is the result of a treaty which generally confers rather wide powers and rights on the acquiring or successor state. Can this state, in the exercise of its sovereignty, modify or suppress at will the rights validly acquired by aliens under the former sovereignty?

Apart from treaty law contained in the treaties of peace, the rules of general, *i.e.*, mainly of customary, international law should, of course, be considered. They play an important rôle and may supplement treaty provisions or make their interpretation easier by throwing light on the possibly exceptional or derogatory character of a treaty stipulation.

From a comparatively abundant body of decisions, note these cases:

First, because of its historical interest, is the Florida treaty. In *United States v. Percheman*,<sup>23</sup> Mr. Chief Jus-

<sup>23</sup> Sup. Ct., 7 Peters 51.

tice Marshall recognized the validity of a title on land situated in Florida, since the right had been acquired *before* Spain's cession of this state to the United States.

##### The Hungarian Optants Case

A famous decision was rendered on January 10, 1927, by the Rumano-Hungarian Mixed Arbitral Tribunals in the case of the *Hungarian Optants in Transylvania*. The facts of the case are well-known. After the cession of the province of Transylvania to Rumania, under the 1920 Treaty of Trianon, agrarian legislation was adopted in Rumania, which expropriated with partial and posterior compensation a number of land owners, several of which had chosen Hungarian nationality and were, thus, aliens. The fundamental and far-reaching question was whether, under international law, aliens could claim a treatment *superior* to the treatment of nationals in the case of general expropriation decrees enacted in the public interest.

Relying both on Article 250 of the Treaty of Trianon, which prohibited the seizure or liquidation of property, rights, or interests of Hungarian residents in the ceded territories, and on general international law, the Mixed Arbitral Tribunal found that the Rumanian decrees violated the general principle of respect for acquired rights. Rumanian arguments based on the sovereignty of the state and on the absence of discrimination (national treatment) were rejected.

The remainder of the story, briefly: The Rumanian government refused to admit the tribunal's jurisdiction and to accept the award, the attempted mediation of the Council of the League of Nations, the creation of an "agrarian fund," and the signature of the Paris agreements. This political solution does not seem to detract from the interest of this international award. In a comment published in 1927, the great international lawyer, George Scelle, wrote:

"The fundamental principle of general international law is the respect for private property. Any act which injures the respect of private property and



of acquired rights is a derogation from general international law.'<sup>24</sup>

*Decision No. 7 of World Court*

The most famous and leading authority on this question is, of course, Decision No. 7 of the Permanent Court of International Justice, in the case of *Certain German Interests in Polish Upper Silesia* (1926). At the beginning of this discussion was mentioned the well-known dictum of the Court, that "the principle of respect for vested rights . . . forms part of generally accepted international law which, as regards this point, constitutes the basis of the Geneva Convention."<sup>25</sup>

The case is a classic, so it is superfluous to outline the facts here. The great interest offered by the decision lies in its elucidation of the concept of liquidation of private property, defined as an exception to general international law, based on a treaty and to be given a restrictive interpretation because of its exceptional character. It should, thus, be distinguished sharply from *expropriation* for a public purpose, which is permitted by general international law under certain conditions as an exception to the general principle of respect for alien property.

Decision No. 7 appears to be a key judgment within the domain of the acquired rights of aliens. As a result of the special provisions in the peace treaties concluded after World War I and World War II, the idea of respect for alien property suffered. By this decision the Permanent Court "restored the principle of respect for private property in its traditional authority in international law, which had been exposed to injury as is frequently the case in time of crisis. . . ."<sup>26</sup>

*Advisory Opinion No. 6*

Another no less interesting decision of The Hague Court is in connection with the cession of German terri-

<sup>24</sup> Scelle, *Revue Générale de Droit International Public* (Paris, 1927) p. 433, at 475.

<sup>25</sup> *Supra* note 2.

<sup>26</sup> Gidel, *Revue Générale de Droit International Public* 76, 132 (Paris, 1927).

tory to Poland: The Advisory Opinion No. 6 concerning German Settlers in Poland. These settlers possessed, in ceded territory, certain lands under contracts of a rather peculiar nature—the *Rentengutsverträge*—which had been concluded with a German Settlement Commission before the transfer of territory. Having affirmed the validity of the rights acquired by the settlers under these contracts, the Court held that they remained valid and were not annulled automatically by the transfer of sovereignty, as contended. This is, indeed, a striking confirmation of the principle of respect for acquired rights in case of cession of territory, "All the more important as the Court expressly stated that no treaty stipulation is necessary in order to protect the rights or maintain the obligations" of a private nature acquired prior to the cession.<sup>27</sup>

*Justification of Rule*

The rule is, thus, firmly established and appears undisputed. Before trying to determine its exact scope, it may be useful to explain briefly its *justification*. This is easy to discover. As in the domains of intertemporal law or of conflict of laws, it is a fundamental requirement of any legal order; *i.e.*, one of continuity and stability of legal relations and situations. In the case of annexation or cession of territory, these general considerations are strengthened by the acquiring state's political interest. It is in that state's interest not to antagonize the local population by an abrupt and immediate change of legal regulations or by an automatic and radical suppression of previously acquired rights. Likewise, in purely municipal situations, the legislator endeavors to avoid too brutal changes and retroactive legislation. It usually adopts transitional measures to bring about a

<sup>27</sup> Kaeckenbeeck, *op. cit. supra* note 6, at 389. See also Gidel, *Des Effets de l'Annexion sur les Concessions* (1904); O'Connell, *Law of State Succession* (1956) p. 104 ff.; *cf.* the Lighthouses case between France and Greece (1956) p. 122; Rousseau, *Principes Généraux du Droit International* (1944) p. 95; Verdross, "Les Règles Internationales Concernant le Traitement des Etrangers," 37 *Recueil des Cours* 327, 364 (1931) III.

gradual and peaceful entry into force of the new statutes. *A fortiori*, it would seem, the state acquiring a new territory ought to do the same, especially since it often appears as a *foreign* legislator to local populations.

However solemnly confirmed in international case law, notably by decisions of the World Court, the principle of respect for acquired rights in case of a cession of territory is subject to important limitations. First, the principle covers only certain rights, mainly individual private rights—a fact easily understood in a society in which public law and private law are distinguished traditionally and sharply and in which the concept of sovereignty “has gradually been freed of any patrimonial connotations.”<sup>28</sup> As for subjective rights of a public or political character, they usually do not enjoy the protection granted to acquired rights. This is true, at least, in general international law.

#### “Mixed” Rights

What about those rights of a mixed nature: semipublic, semiprivate? Although it is possible to rely on the prevailing character of the right, difficulties remain. There is no international criterion to distinguish between subjective rights—private or mixed—which deserve to be considered as acquired and other subjective rights because the classification of rights, like their creation and definition, depends on each national legislator.<sup>29</sup> For example, in the case of the *Countess of Buena Vista*,<sup>30</sup> the United States characterized as a public right, connected with a political organization, an office acquired in Cuba from the Spanish Crown and transferred to the claimant by inheritance. They refused to consider it as a right of a proprietary nature.

Together with rights of a clearly private nature, such as the right of ownership, certain mixed rights are protected by the above-mentioned principle. This would appear to be the case, according to the prevailing doctrine

<sup>28</sup> *Ibid.*, at 339 ff.

<sup>29</sup> See *infra* note 85.

<sup>30</sup> Moore, I *Digest of International Law*, 99, p. 428.

and to international practice—at least prewar practice—for concessionary rights because of their contractual basis and, perhaps, their economic value. But this is a delicate question which should be subjected to further detailed analysis.

#### Limitations to Principle

The principle of respect for rights acquired prior to the change of sovereignty is limited also in scope in another way because of its purpose and by the nature of things. Stability of legal relationships does not and cannot mean a final *status quo*, the eternal and absolute permanence of established situations. It has never been contended that the principle deprives the acquiring state of its power to legislate for the future. The state keeps its competence to enact legislation affecting acquired rights, to adapt those rights to its own legal system. This is understood, of course, without prejudice to any obligations assumed by treaty and to the general guarantees offered by the law of nations, to be specified below, concerning the status of aliens and the international responsibility of states.

In the case of annexation conflicts, as in intertemporal law or as in private international law, therefore, the doctrine of acquired rights appears less a rigid and strict rule and more a flexible and limited principle—in the nature of a recommendation, binding only for a temporary and reasonable period but not absolute. In other words, the state acquiring the territory remains free to legislate even as regards acquired rights. It is limited in the exercise of its legislative power by the general rules of international law on the responsibility of states. The essential fact here is that the limits to the state's legislative power are not defined by the imprecise concept of acquired rights. These limits are determined through other criteria or standards, to be outlined below.

#### The Case of Newly-independent Countries

Recently, the question of the protection of acquired rights has been raised repeatedly in connection with the

decolonization process. When the transfer of sovereignty takes place on the occasion of a former colony's accession to independence, can the doctrine outlined above with regard to classical annexation conflicts be maintained in its traditional form? Or, is a different solution justified by the special circumstances of the case? At least a brief discussion of this important problem is necessary in any study of the doctrine of acquired rights.

First, observe again that private rights are protected generally, in a more or less detailed and efficacious manner, by provisions contained in a treaty or in the act which finalizes the new state's accession to independence. To illustrate, Article VI (1) of U.N. General Assembly Resolution 388 (V), part A, "Economic and Financial Provisions Relating to Libya," states:

"... the property, rights and interests of Italian nationals, including Italian juridical persons in Libya, shall, provided they have been legally acquired, be respected. They shall not be treated less favorably than the property, rights and interests of other foreign nationals, including foreign juridical persons."

Such quotations would lead to the conclusion that international treaty practice does confirm the validity of the principle of respect for acquired rights. But legal instruments are only a part of reality. Recent events emphasize their fragility and the uncertainty of the principles of international law in periods of crisis and of quasi-revolutionary upheavals. As aptly pointed out by Charles De Visscher, in *Theory and Reality in Public International Law*,<sup>31</sup> the respect of vested rights in the case of transfer of sovereignty—a principle recognized by cases and writers—may be explained by the coincidence of the contents of the rule, on the one hand, and of the political interests of the succeeding state, on the other; *i.e.*, the interests not to antagonize local populations and other states by a brutal suppression of established situations.

<sup>31</sup> English translation by Corbett (Princeton, 1957) p. 192.

This explanation certainly holds good with respect to transfers of territories which took place in Europe after the two world wars, although the state's political interest has not always been strong enough to prevent violations of acquired rights. This is shown, for instance, by the various disputes between Poland and Germany, which were brought before the Permanent Court of International Justice. But this coincidence of interests often is lacking entirely, or, at least, is much weaker, in the case of a colony becoming independent. Here the holders of acquired rights in many cases are citizens of the former colonial power. Their rights well may have been acquired in extremely favorable, though formally regular, conditions. Even when this is not the case, maintaining citizens—now aliens—in their established and often privileged positions is likely to appear to local public opinion as an intolerable survival of the former colonial regime and as an unbearable restriction of the new sovereignty.

Moreover, the respect for acquired rights—especially rights in immovable property—is bound to conflict, to a more or less pronounced degree, with plans of social reform, for example land reforms. Since such plans may be considered vitally important by the new regime, it is easy to understand why even the best treaty provisions and the texts drafted in the most precise and unambiguous terms may prove to be inadequate protection.

Also remember that the doctrine under consideration was established within the context of a legal philosophy in which public law and private law were clearly distinguished and within a society in which the concept of sovereignty had lost its patrimonial connotations. In the case of underdeveloped countries becoming (sometimes without transition) independent states, the context and presuppositions of the problem would appear profoundly different. Convinced of the necessity of an economic as well as political decolonization, anxious to take the "road to socialism" within the shortest possible time, they are apt to regard the principle of the protection of acquired rights as an instrument of social conservation and as an obstacle to progress and to complete freedom of a newly-independent country.



*Sovereignty Over Natural Resources**U.N. Debates*

A striking illustration of the divergent views existing today in this matter is found in the debates which took place in the United Nations with regard to "Permanent Sovereignty over Natural Resources,"<sup>32</sup> particularly in a comparison of the statements made there by the Dutch and Algerian delegates.

Commenting on a Chilean draft resolution, at the third session of the Commission on Permanent Sovereignty, the Netherlands thought it necessary to propose an amendment concerning old investments, so that they also should be considered as protected by the generally accepted principle of respect for acquired rights—a principle recognized in a preliminary study prepared by the U.N. Secretariat. Taking an entirely opposite stand, the Algerian delegation asserted firmly, during the General Assembly's seventh session, that each state at its discretion could recognize or not private rights acquired prior to independence. In its opinion, the principles embodied in the draft resolution could be applied only in the case of contracts entered into freely, and international standards concerning compensation, for instance, were inapplicable to earlier agreements. This thesis is expressed well in the following draft amendment:

"Considering that the principles of international law cannot apply to alleged rights acquired before the accession to full national sovereignty of formerly colonized countries and that such alleged acquired rights must be subject to review as between equally sovereign States. . . ."

As is well-known, the debate led eventually to the adoption of a joint United States-United Kingdom amendment which entirely reserves the problem of the rights and duties of the successor state with respect to rights acquired prior to independence, owing to, *inter alia*, the fact that the International Law Commission was work-

<sup>32</sup> See the study of Gess, *op. cit. supra* note 4, at 442 ff.

ing on state succession. Contrary to the unambiguous statements made by the sponsors of the amendment, the Algerian spokesman chose to interpret this part of the resolution as leaving intact the state's complete discretion in the matter.<sup>33</sup>

*Political Nature of Problem*

As a matter of fact, the problem is primarily political. A solution is hardly to be expected by resorting to purely juridical criteria which appear ill-adapted to a quasi-revolutionary situation. The fact that newly-independent states should dispute the binding force of agreements entered into during the colonial period, sometimes in hardly equitable conditions, was expected. A matter of more serious concern is the tendency of some newly-independent states to consider agreements they signed *after* independence—whether treaties or, *a fortiori*, contracts, such as concessions—as no more than the expression of a kind of temporary balance of interests.<sup>34</sup>

Admittedly, however, the social and political circumstances of the first years after independence, the extraordinary rapidity of an evolution which often could not be foreseen, may result in the most carefully drafted agreements becoming out-of-date. How many clauses of the Evian Agreements between France and the FLN can be held in force today? The French government, itself, seems to have admitted in this case the necessity of a kind of permanent revision. However understandable

<sup>33</sup> *Ibid.*, at 445.

<sup>34</sup> A good illustration of this state of mind is an article published in April, 1963, p. 10, by the Algerian weekly, *Révolution Africaine*. In it the author stressed the need for a "dynamic" conception of cooperation with industrial countries:

"African Statesmen, worthy of this name, shall endeavor to consolidate, in cooperation with France, what is useful to their people, and to reduce simultaneously the effect of its negative elements; they will do so by requesting, at the favourable moment, a revision of agreements which may have been justified and necessary at another period of history, but certain provisions of which will gradually reveal their obnoxious and unfair character as soon as decolonization progresses. . . ."

such situations may be from a political viewpoint, they must remain exceptional. The instability of such agreements and the weak protection they offer to acquired rights cannot be considered as a permanent and normal phenomenon. International morality, the security of international relations, and, in the final analysis, the very national interest of newly-independent states do require an agreement to be the law of the parties and not the mere starting point of continuous haggling. The doctrine of acquired rights is met here by the principle *pacta sunt servanda*; and, since foreign investments are vitally necessary for developing countries, let us remember that the best guarantee to be given new investments lies in the record of capital-importing states with regard to their past undertakings.<sup>35</sup>

Doctrine of Acquired Rights in Public International Law:  
In the Absence of any Transfer of Sovereignty

*The Principle in International Practice*

In the second hypothesis; *i.e.*, when there is no transfer or cession of territory, the principle of acquired rights does not seem to have been observed as well as in the case of state succession.<sup>36</sup> International practice in the twentieth century, particularly after World War I, is rich in examples of violations of the rights of aliens, sometimes even in disregard of formal undertakings. The political motives which, in case of acquisition of territory, induced the state to respect vested rights in its own interest, are lacking in the present case.

However poorly it has been observed in many cases, the principle of acquired rights has received support in a not inconsiderable number of international decisions. Of the many possible examples, only three will be used. These are significant in several respects. Two date from the period between the two world wars, one dates from the postwar era. These are the two decisions of the Permanent Court of Arbitration—*Religious Properties in*

<sup>35</sup> Luchaire, *La Personnalité Morale et ses limites* (Paris, 1960) p. 176.

<sup>36</sup> Ch. De Visscher, *supra* note 31, at 242.

*Portugal and Norwegian Shipowners Claims* cases—and the award given in 1958 in the *Arbitration Between Saudi Arabia and the Arabian American Oil Company (Aramco)*.

*The Case of Religious Properties in Portugal*  
(Award of September 4, 1920)<sup>37</sup>

The main facts of the case are: After the Portuguese Republic was proclaimed, a decree, in 1910, ordered the seizure of several religious establishments. France, the United Kingdom, and Spain protected their citizens and claimed an indemnity on their behalf. According to the arbitration agreement of 1913, (Article III), the Tribunal had to decide according to the relevant treaties in force or, in the absence of treaties, according to the rules and the general principles of law and equity. One most interesting aspect of the case is the arguments advanced by the British government.

“ . . . The Government of His Britannic Majesty do not in any way intend to constitute themselves judges of the legality or validity, from the point of view of the internal law of Portugal, of the acts of the Portuguese Government. This is a matter of internal politics with which they have no concern. But His Majesty's Government are of the opinion that the Portuguese State, in taking possession as it has done, of property legally acquired by British nationals in conformity with the legislation of Portugal and under the cover of protection of its public and private law, has acted contrary to the principles of the law of nations which governs the relations between the States.”

The British government was not disputing the fact that aliens are governed by local laws, such as laws of police

<sup>37</sup> I *United Nations Reports of International Arbitral Awards*, 9. See also the review of international practice in Green, *International Law Through the Cases* (2d. ed., London, 1959) and Cheng, *General Principles of Law as Applied by International Courts* (1953).

and security and on ownership of land. But it stressed the obligations resulting therefrom for Portugal:

“ . . . In return for this subjection, foreigners are entitled to count upon legal protection and guarantees under the cover of which they came into the country and acquired their rights. . . .”

The claimant government's position is also interesting, inasmuch as it expressly rejects the Portuguese defense of discrimination (national treatment) and stresses the particular situation of aliens who do not share in the political rights of citizens. Furthermore, the British memorandum formulates with utmost clarity the doctrine of acquired rights:

“ . . . Respect of property, respect of acquired rights . . . are legal principles of all civilized countries. It is upon the security which they assure and the confidence they inspire that the relations entertained by nations with each other are based. . . .”

According to several commentators, this is a truly exemplary formulation of the principle of the protection of acquired rights.<sup>38</sup>

As far as the award itself is concerned, it held that the expropriation was valid and that Portugal had, thus, become the owner of the properties. However, as a counterpart, Portugal had to pay to the claimants a global compensation.

Note, however, that the Portuguese government really was not disputing the legal ground invoked by the three claimant countries, according to which their citizens had established themselves in Portugal in reliance upon a legal system that protected private property. Portugal emphasized its complete regard for law and equity, and it relied mainly on the somewhat technical following argument: The owners of the expropriated properties

<sup>38</sup> Fachiri, *Brit. Yearbook Int'l L.* 168 (1925); Schindler, “*Besitzen Konfiskatorische Gesetze Ausserterritoriale Wirkungen?*” III *Annuaire Suisse de Droit International*, 91 (1946).

were not, in its opinion, the individuals protected by the three governments, but they were associations organized under Portuguese law and authorized by it as Portuguese persons. As noted above, this contention failed to deter the Court from ordering the payment of compensation, the amount of which was determined *ex aequo et bono*.

*The Norwegian Shipowners' Claims*  
(Award of October 13, 1922)<sup>39</sup>

The origin of the dispute lies in the requisition by the U.S. government, during World War I, of some Norwegian ships which were in U.S. harbors or were being built in the United States. The legislation in the United States, which empowered the President to requisition, protected private ownership insofar as it provided for the payment of compensation. Nothing in this legislation, as the Court eventually found, was contrary to international law. But its application by U.S. authorities gave rise to Norwegian protests and claims. The award rendered in this case (by three arbitrators, one American, one Norwegian, and one Swiss) is first class. Let me quote two extracts concerning the principle of acquired rights and the notion of just compensation:

“No State can exercise towards the citizens of another civilized State ‘the power of eminent domain’ without respecting the property of such a foreign citizen or without paying just compensation as determined by an impartial tribunal, if necessary.”

As for the question of indemnity, the Court said:

“Just compensation implies the complete restitution of the *status quo ante* based, not upon future gains of the United States or other powers, but upon the loss of profits of the Norwegian owners as compared with other owners of similar property.”

<sup>39</sup> *Supra* note 37, at 309.



These citations explain why doctrinal writings in international law consider in general the decision in the *Norwegian Shipowners' Claims* case as one of paramount importance and as a formal recognition of the protection of private ownership by the law of nations.<sup>40</sup> The dissatisfaction expressed at the time by the U.S. government does not bear on the validity of those basic principles. Some writers, however, feel that the authority of the award is somewhat lessened by the fact that the Court did not decide on the basis of strict law but was required by the arbitration agreement (Article I, 2) to decide "in accordance with the principles of law and equity. . . ."<sup>41</sup> This observation, which could be repeated with respect to many other international awards, does not seem convincing, having regard to the whole decision and the various motives relied upon by the Court.

Many other decisions could be cited, such as those of the Permanent Court of Arbitration; e.g., in the *Russian Indemnity* case, in the French Claims against Peru, or in the famous *Canevaro* case, which recognize, more or less implicitly, the protection of the right of ownership. Also the *Sabla* case, between the United States and Panama, could be mentioned, in which the admission of the doctrine of acquired rights is all the more striking, since de Sabla failed to use the local remedies available to him against the expropriation.<sup>42</sup>

Lastly, let me draw attention again to the award given in the *Goldenberg* case by the Swiss Federal Judge Fazy, which contains a firm pronouncement of the principle of acquired rights and of the duty of the state expropriating alien property to pay a fair and prompt compensation.<sup>43</sup>

Let us turn now to a more recent decision which is important not only because of the interests at stake in the dispute but by reason of the nature of the issues and the motives adopted by the Tribunal.

<sup>40</sup> Schindler, *supra* note 38, at 89.

<sup>41</sup> Schwarzenberger, *International Law* (3d ed., London, 1957) p. 204.

<sup>42</sup> 28 *Am. J. Int'l L.* 602 (1934).

<sup>43</sup> *Supra* note 1, at 903.

*The Arbitration Between Saudi Arabia and Aramco (Award of August 23, 1958)*<sup>44</sup>

With regard to the principle of acquired rights, the award given by the Tribunal, presided over by Professor Sauser-Hall of Geneva, is quite categorical. The Tribunal found, in the operative part of the award, that the rights of the concessionary company, Aramco, "Are in the nature of acquired rights and cannot be modified by the granting State without the Company's consent." On the other hand, one main ground for decision—if not the essential ground—was that "the principle of respect for acquired rights is one of the fundamental principles both of Public International Law and of the municipal law of most civilized States. It has been affirmed by a wealth of judicial decisions. . . ."<sup>45</sup>

Other statements to the same effect could be quoted:

" . . . the concession has the nature of a constitution which has the effect of conferring acquired rights on the contracting Parties."<sup>46</sup>

The following extract expresses the Tribunal's opinion on the relationship between the principle of acquired rights and the concept of state sovereignty (so often invoked with a view to justify violations of acquired rights):

"Nothing can prevent a State, in the exercise of its sovereignty, from binding itself irrevocably by the provisions of a concession and from granting to the concessionaire irrevocable rights. Such rights have the character of acquired rights. . . ."<sup>47</sup>

If the true scope and effect of the award—as distinguished from the general influence that its motives are likely to have in international case law—are to be prop-

<sup>44</sup> Published in Geneva by the Tribunal (1958), in English and Arabic.

<sup>45</sup> Official text, p. 101.

<sup>46</sup> *Ibid.*, at 61; the plural "contracting Parties" should be noted.

<sup>47</sup> *Ibid.*

erly understood, several circumstances should be remembered. Both parties to the dispute recognized, as stated in the award, the principle of respect for acquired rights. The Saudi Arabian government contended that "the object of the arbitration is merely to determine what are the rights granted to the Company."<sup>48</sup> Commentators might conclude from this fact (as has been done with regard to the *Delagoa Bay* case)<sup>49</sup> that the award lacks significance on this point, since the principle itself was not in dispute. Such a conclusion would be exaggerated, especially when you recall that several contentions made on the government's side; e.g., on sovereignty and on the right of the state to regulate transport, had the indirect effect of undermining the principle of respect for acquired rights.

Also remember the origin of the dispute and the exact nature of the issues as defined by the Tribunal: The question was whether two concessions, successively granted by the same state to two foreign persons, were compatible with each other. Stated in these terms it has closer analogies with a problem of domestic intertemporal law than with, for instance, the vexed international question of the effects of nationalization on the property of aliens. It would appear, therefore, that the motives contained in the award are relevant only within the limits of the issue in dispute, as defined by the Tribunal. They should not—or could not, it might be argued—be extended to and applied in other circumstances and other problems, such as state responsibility in case of nationalization.

A further point to the same effect might be made. Answering the question whether the state could unilaterally modify, by a second concession, rights granted to a former concessionaire, the Tribunal relied on the principle of acquired rights considered, it might be thought, as a principle of Hanbali Muslim law. Is not the whole problem, therefore, one of purely domestic (Saudi Arabian) law? Envisaged in such light, the award hardly

<sup>48</sup> *Ibid.*, at 35.

<sup>49</sup> La Fontaine, *Pasicrisis Internationale* 398 (1902).

could be cited as a valid precedent in international relations.

Such interpretation, however, does not conform with the real sense and intent of the award, which states expressly that the principle of acquired rights is a basic principle of public international law.<sup>50</sup> After mentioning that this principle is confirmed by many judicial decisions, it recites only international cases as illustrations.<sup>51</sup> True, the award says that the principle is recognized by Hanbali law, but this seems to be no more than a confirmation of an independent conclusion added, perhaps, *ex abundanti cautela*. For various reasons, then, it would appear that the Arbitral Tribunal first relied upon the principle as one of international law and only last as one of Muslim law.

It must be conceded, nevertheless, that the award is not devoid of ambiguity on this point. On the one hand, it seems to emphasize the *international* character of the principle and cites only international decisions to support it. On the other hand, the Tribunal takes obvious care to base its findings, to a large extent, on the law of Saudi Arabia, supplemented by the *Aramco* concession.

As for the real nature of the principle of acquired rights, the exact thought of the arbitrators is somewhat difficult to perceive on the sole basis of the following characterization:

"... One of the fundamental principles both of Public International Law and of the municipal law of most civilized States. . . ."

Now, municipal systems of law, whether in intertemporal law or in conflict of laws, may and do differ to a substantial degree on the existence and scope of the notion of acquired rights. This has been shown above. It follows that this cannot be accepted as one of the "general principles of law recognized by civilized nations" *in foro*

<sup>50</sup> *Supra* note 45.

<sup>51</sup> As observed by Bastid, "*Le Droit international public dans la Sentence de l'Aramco*," *Annuaire Français de Droit International*, 300 (1961).

*domestico*, in the sense of the well-known formula used by Article 38(1) c of the Statute of the International Court of Justice.<sup>52</sup> Moreover, nothing indicates *a priori* that the doctrine of acquired rights must have the same meaning and the same scope in municipal law and in public international law. As the considerations expressed above suggest, it does *not* have the same meaning or scope. The element which, in the notion of acquired rights, may be *common* to the law of nations and to the various municipal legal systems is not a rule nor even a general principle sufficiently determined. It is merely the expression of a fundamental need for a minimum degree of justice.

It would be premature to pass judgment at this stage. Let us turn now to another aspect of the question and leave the *Aramco* award without further analysis. Whatever the interpretations given to certain passages of the decision, it gives to the principle of acquired rights a formal and even solemn confirmation which is bound to exert an influence even beyond the somewhat narrow limits of the dispute as they were defined by the Arbitration Tribunal.

#### *Diplomatic and Treaty Practice*

To be complete, any study of acquired rights should include a survey of respect for the acquired rights of aliens in diplomatic practice, which is remarkably abundant and complex—since the case of the creation of a monopoly in 1838, by the King of Naples, of the extraction and sale of sulphur, to the present day. Such an investigation may be omitted, however, since it would involve too lengthy developments without bringing fruitful or conclusive results. The many diplomatic interventions in favor of citizens injured abroad in their acquired rights often resulted in solutions of a political, rather than legal, character, of the most varied types

<sup>52</sup> A comparative study would fail to reveal, it is submitted, that minimum "common denominator" which is necessary to lend substance to such "general principle." The only question, then, is whether the principle forms part of customary international law.

and from which it is practically impossible to deduce general and consistent rules.

Clearly, the governments of the injured owners considered the injuries to the private rights of their citizens as a violation of international law. But upon turning to the governments of the countries which committed (or allowed) the injuries, it is difficult to ascertain whether they felt a violation of any principle of international law had occurred. In many cases, the payment of compensation seems to have been a consequence of political or economic factors; *i.e.*, a matter of convenience rather than of law.

Although somewhat similar remarks may be made as regards international conventions, a study of treaty practice concerning acquired rights well might be more interesting and revealing. Many treaties do, indeed, recognize, with varying modalities, the principle of protection of acquired rights and, in particular, of the right of property. Let us mention, apart from treaties of peace, the treaties of commerce or of establishment, such as the FCN treaties concluded by the United States, and various bilateral treaties concluded with Eastern European states, for example, by Switzerland, concerning compensation for nationalized property. The latter type of treaty does not seem to allow general or clearcut conclusions, inasmuch as the nationalizing states obviously were reluctant to insert in them statements of principle on their duty to compensate for injuries to acquired rights. The fact remains, nevertheless, that the very existence of such treaties cannot be explained entirely by mere considerations of convenience or political expediency. Such treaty practice does seem to confirm, even among nationalizing states, the recognition, however reluctant and grudging, of a duty to indemnify in case of injuries to the property of aliens.<sup>53</sup>

As a last aspect, let me mention also a growing number of bilateral treaties, in recent years, concerning (some-

<sup>53</sup> The treaty practice of Eastern European states has been studied carefully by one of the best specialists on this problem, Bind-schedler; La Haye, "*La Protection de la Propriété privée en droit international public*," 90 *Recueil des Cours* 179 ff. (1956) II.



times among other subjects) the protection of private investments. This development of the treaty method of protection reflects, according to many, a lack of confidence in the effectiveness of customary international law. This discussion will not attempt to analyze from the point of view of acquired rights the various types of such bilateral agreements which seem much in favor today, not only in the United States but also in Japan, France, Germany, Switzerland, etc.<sup>54</sup> The United States generally is considered to be in the forefront in the formulation and defense of the principle of the protection of acquired rights.<sup>55</sup> Her official doctrine—as expressed in treaties, in public statements regarding diplomatic protection, in decisions of claims commissions, etc.—relying on a minimum international standard, tends to protect the rights and interests of U.S. citizens abroad.

This is hardly the place to recall such obvious facts, but let me stress the coincidence between the U.S. practice and that of Switzerland in this matter. Among the European states, Switzerland is known always to have maintained with the utmost possible firmness, if not always with success, the validity of the principle of respect for acquired rights—even, when the need arose, as against the United States.<sup>56</sup> Many illustrations could be quoted of this Swiss attitude, consistently reaffirmed in governmental statements,<sup>57</sup> not to mention the numer-

<sup>54</sup> A good survey of these treaties may be found in a doctor's dissertation presented recently at the Faculty of Law of Geneva University: see Preiswerk, *La Protection des Investissements dans les traités bilatéraux* (1963).

<sup>55</sup> *Supra* note 41, Vol. I, at 201.

<sup>56</sup> In the Interhandel case.

<sup>57</sup> Answering, in 1929, a League of Nations questionnaire on the codification of rules on state responsibility (SDN, Doc. C 75 M69, 1929 V, 239), the Swiss Federal Council stressed the fact that the protection of acquired rights is one of the recognized principles of international law. In another case, the Swiss authorities protested against a Rumanian decree on exchange control and foreign payments, as follows:

"... The Law of Nations obliges all States to protect the property of aliens. Contractual rights are a part of property. It is, therefore, inadmissible that a contracting party be injured at some

ous arbitral awards given by or with the participation of Swiss jurists.<sup>58</sup>

From this rapid survey of international judicial practice, supplemented by some observations on diplomatic and treaty practice, this provisional conclusion can be drawn: There exists a rule of international law—seemingly customary—which protects the acquired rights of aliens.

### What Are Acquired Rights?

#### Property

It remains to determine the exact meaning, in international law, of acquired rights. This is, indeed, a delicate question which seems to have embarrassed the most qualified writers on the law of nations. One fact is generally admitted: *Ownership* in immovables is an acquired right, it is even the archetype of acquired rights. Ownership in movables, other real rights, such as mortgages, also would seem to be in this category. Grotius himself is said to have regarded ownership as a natural right which the state was under a duty to protect.

#### Contractual

What about claims and *contractual rights*? According to some,<sup>59</sup> "It goes without saying" that contractual claims and rights are also acquired. At one time some states distinguished, in the field of diplomatic protection, between injuries to property rights and other injuries

future stage by such a state encroachment upon acquired rights." (Salis-Burckhardt, I *Le Droit Fédéral Suisse*, No. 140 bis, cited by Guggenheim, I *Traité*, p. 338).

<sup>58</sup> Cf. the Goldenberg case, II *United Nations Reports on International Arbitral Awards*, 909. In the case of British claims in Spanish Morocco (*ibid.*, at 647, decision of Oct. 23, 1927), Judge Huber said:

"... It may be considered as established that in International Law an alien cannot be deprived of his property without a just indemnity."

<sup>59</sup> Bindschedler, *supra* note 53, at 217.

suffered by their citizens.<sup>60</sup> The possibility of a distinction seems further confirmed by recent attempts to strengthen or replace the international protection of property by the protection of contracts (between a state and an alien) by means of the principle *pacta sunt servanda*.<sup>61</sup> However, neither legal theory nor practice would appear to warrant such distinction in the field of protection of acquired rights. In fact, practice in both the United States and Switzerland, for instance, use the term "property" in a wide sense including contractual rights.<sup>62</sup> This is because, in the absence of an international law definition of "proprietary" and "contractual," it is up to each national legislator to determine its own concepts of property and contract. Comparative law shows that different definitions are given in various countries. Even a distinction as fundamental for so many European civil law jurists as that between real rights and personal rights is not to be found—or certainly not in any comparable manner—in Scandinavian legal systems. As aptly stated by Mr. Fatouros:<sup>63</sup>

“. . . There is every reason to apply the same international rules in the case of contractual rights and of other rights of property. The relation between these two categories is so close that attempt-

<sup>60</sup> On U.S. policy with regard to contract claims, see Borchard, *Diplomatic Protection of Citizens Abroad* §§ 109-125, and Jennings, "State Contracts in International Law," in *Selected Readings on Protection by Law of Private Foreign Investments* (New York: Matthew Bender & Co., 1964), with further references.

<sup>61</sup> See Wehberg, "*Pacta Sunt Servanda*"; Verdross, "The Status of Foreign Private Interests Stemming from Economic Development Agreements with Arbitration Clauses"; Ray, "Law Governing Contracts Between States and Foreign Nationals"; and Wadmond, "The Sanctity of Contract Between a Sovereign and a Foreign National" in *Selected Readings on Protection by Law of Private Foreign Investments* (New York: Matthew Bender & Co., 1964). Also see Fatouros, *Government Guarantees to Foreign Investors* (New York, 1962) p. 269.

<sup>62</sup> *Supra* note 57.

<sup>63</sup> *Supra* note 61, at 271.

ing to distinguish between them might create considerable difficulties. . . ."

#### Concessions

How are we, then, to characterize rights derived from concessions? They were mentioned above under the discussion of state succession.<sup>64</sup> Concessionary rights are considered by some writers as mixed rights which should, however, be included with private rights in the protection of acquired rights by reason of their contractual character and economical value.<sup>65</sup> For others, they should be characterized as subjective, public rights and considered as acquired because of their pecuniary nature and the special title of acquisition on which they are based.<sup>66</sup>

International practice and decisions regarding the protection of contractual rights confirm the preceding theoretical considerations. The protection of such rights, in fact, would appear to be easier to realize, in some respects, than that of other acquired rights, such as property. The reason is that the doctrine of acquired rights is supported and strengthened by the principle of good faith and, more specifically, of respect for the given word.<sup>67</sup>

#### *Binding Force of Contract with Foreign State*

This point of view implies that we accept the binding character of agreements made between a state and a foreign national. It has been argued, sometimes with a great deal of talent and ingenuity, that "it is impossible for a sovereign state irrevocably to bind itself towards a foreign national or a citizen in the absence of an interstate treaty."<sup>68</sup> While it is impossible to elaborate here on this

<sup>64</sup> On concessions in case of state succession, see Mosler, *WirtschaftskonzeSSIONEN bei Aenderung der Staatshoheit* (1948).

<sup>65</sup> Kaeckenbeeck, "*La Protection Internationale des Droits Acquis*," 59 *Recueil des Cours de l'Académie de Droit International* 352 (1937).

<sup>66</sup> Bindschedler, *supra* note 53, at 217.

<sup>67</sup> *Pacta sunt servanda*.

<sup>68</sup> See Vedel, *Rapport au Congrès International de l'Arbitrage* (Paris, May, 1961) p. 9.

vexed question,<sup>69</sup> in my opinion such contention is wholly unacceptable, legally and morally. Common sense and law indicate that there can be no obligation and no contract, if one of the parties remains free to abide or not to abide by it.<sup>70</sup> To recognize the binding force of such agreements does not imply their assimilation to international treaties, with the natural consequences therefrom.<sup>71</sup>

#### *State Responsibility for Breach of Contract*

Many international decisions have affirmed the international responsibility of states for injuries to contractual rights,<sup>72</sup> particularly in disputes relating to contracts of supply<sup>73</sup> and in cases of concession contracts. The many litigations concerning alleged violations of concessions are well-known and need not be reviewed here. But, by way of example, note the classic *Shufeldt Claim* case<sup>74</sup> which throws some light on the conditions

<sup>69</sup> See the studies mentioned *supra* note 61; and Mann, "The Proper Law of Contracts Concluded by International Persons," 35 *Brit. Yearbook Int'l L.* 34 (1959) and the same in 54 *Am. J. Int'l L.* 572 (1960); Jennings, *supra* note 60; J. F. Lalive, *Int'l Comp. L. Q.* (1964) p. 987.

<sup>70</sup> A promise to pay or do something tomorrow "if I choose to do so" is no legal promise, since it is subject to what civil law terminology calls a "purely potestative" condition.

<sup>71</sup> *Contra*, it seems, Pugh, "Legal Protection of International Business Transactions," *Lawyer's Guide to Int'l Bus. Transactions* (Philadelphia, 1963) Joint ALI-ABA Committee on Continuing Legal Education, § IV, p. 317.

<sup>72</sup> This observation does not prejudice, it is hardly necessary to point out the answer to the question, "What conditions, if any, must be fulfilled so this international responsibility is involved in such cases?"

<sup>73</sup> See the French claims against Peru (Dreyfuss Brothers' claim), award of Oct. 11, 1920, I *United Nations Reports of International Arbitral Awards*, 215; and the famous Landreau case between the United States and Peru (award of Oct. 26, 1922, *ibid.*, at 347).

<sup>74</sup> Award of July 24, 1930, *Brit. Yearbook Int'l L.* 170 (1931). See also the Delagoa Bay Railway arbitration, the various decisions of Umpire Ralston in the Venezuelan Arbitrations, *e.g.*, in the Martini case, 1904, and the Oliva case, in 1903. In the latter case, the award affirms the responsibility of Venezuela for the motive

in which a concession may be revoked without injury to an acquired right.

#### What Interests Are not Acquired Rights?

##### *Goodwill and Clientele*

The first example which comes to mind is that of goodwill: the *Oscar Chinn* case between the United Kingdom and Belgium.<sup>75</sup> A British citizen, Mr. Chinn, was engaged in the transport business on the Congo River. When the Colonial government lowered the transport rates in the state enterprise *Unatra*, Mr. Chinn lost his customers. In the view of the British government, such governmental measure deprived Mr. Chinn of any possibility of continuing business and making profits. It was, therefore, a violation of the general principles of the law of nations and, in particular, of respect for acquired rights. This contention was rejected, by six votes to five, by the Permanent Court.<sup>76</sup>

This leading case is considered, in general, as fixing the possible limit of the domain of acquired rights. A distinction would result thereof between property and contractual rights which are protected by the principle of acquired rights, on one part, and other rights or interests, such as goodwill, on the other. These are linked with general economic circumstances and are not pro-

that a nation is bound by its contracts the same as an individual; and, although it has the power to annul them, it must pay damages for the injuries resulting therefrom. Disputes relating to concessions also have been brought, with varying degrees of success, before the Permanent Court of International Justice or the International Court of Justice (as in the *Mavrommatis* and the *Anglo-Iranian* cases). The most recent and important decision in this field is, of course, the *Aramco* award.

<sup>75</sup> Permanent Court of International Justice, Series A/B, No. 63, p. 88.

<sup>76</sup> "The Court, though not failing to recognize the change that had come over Mr. Chinn's financial position, a change which is said to have led him to wind up his transport and shipbuilding businesses, is unable to see in his original position—which was characterized by the possession of customers and the possibility of making a profit—anything in the nature of a genuine vested right. . . ."



tected. The decision has sometimes been attacked, however, as failing to recognize that the Colonial government's measure was an abuse of right.<sup>77</sup>

Likewise, the question must be asked whether the creation of state monopoly violates acquired rights. Leading internationalists were divided sharply on this issue after 1911, when Italy established a monopoly of life insurance. Did that decision amount to an indirect expropriation, entailing a duty to pay compensation? Eminent jurists, such as Messrs. Clunet, Anzilotti, and Wehberg, thought so at the time, while others, such as Messrs. Jèze and Fischer-Williams denied it.<sup>78</sup> Following the protests of several governments, however,<sup>79</sup> the Italian government accepted to amend its statute and to leave foreign insurance companies a further period of ten years, in which to continue business and dispose favorably of their property in that country. Creation of a state monopoly seems to be a borderline case, and it would be rash to state absolutely that such decision never violates acquired rights. It may well involve the international responsibility of the state, in any case (and perhaps only in the case) when there is an abuse of right.<sup>80</sup>

This example illustrates the idea, indicated by the majority of writers, that individual liberties, such as freedom of trade or industry, although protected by the constitution in many countries, are *not* acquired rights.<sup>81</sup>

<sup>77</sup> See Van Essen, "A Reappraisal of Oscar Chinn," *Symbolae Verzijl* (1958) p. 145.

<sup>78</sup> Fachiri, *supra* note 38, at 166; cf. Fouilloux, *La Nationalisation et le Droit International Public* (1962) pp. 159-160.

<sup>79</sup> Cf. France, Austria, Hungary, Great Britain, Germany, and the United States. See Basdevant, 8 *Répertoire de Droit International* 1, 51 (1930) and Fischer-Williams, *Brit. Yearbook Int'l L.* 314 (1928). In the case of Uruguay, a similar decision to create a state insurance monopoly was repealed eventually.

<sup>80</sup> A standard study on this notion was written by Kiss, *L'Abus de droit en Droit International* (Paris, 1953) p. 123 ff.

<sup>81</sup> The reason is, according to Guggenheim (I *Traité*, pp. 332-333) that these freedoms are "capable of being modified within the framework of Municipal Law." This reason is just as relevant in respect of other rights or legal situations equally capable of being modified within the framework of national law.

The same is true, again as a general rule, for an interest in a certain amount of profit or for an interest for the continuing value of a currency, since each state is entitled to determine the form, value, and rates of its currencies, as was recognized by The Hague Court in the *Serbian and Brazilian Loans* cases.<sup>82</sup>

#### Meaning of Practice

What conclusion is to be drawn from such a review of various kinds of rights and interests? The outstanding fact seems to be the great difficulty in defining and delimiting the elusive concept of acquired right. So many judicial or doctrinal pronouncements amount to no more than affirmations or, as Professor Jennings said, "mere incantations."

There seems to be a definite feeling that, in certain cases, some established situations deserve international protection and must be maintained. Thus, the reaction appears to proceed from an instinct of justice and equity. But it is difficult to move from the domain of instinct to a rational level and to deduce a legal notion of sufficient precision as to supply the necessary base of a *rule* of international law.

The true explanation of this difficulty lies in the absence of an autonomous notion of acquired rights particular to international law.<sup>83</sup> This is brought out in a study by Herz on "Expropriation of Foreign Companies."<sup>84</sup> The author analyzes the classic example of an acquired right; *i.e.*, the right of property in international law:

"... Since the law of property is a matter regulated by municipal laws of the different countries in various ways, it might be expected that international

<sup>82</sup> Permanent Court of International Justice, Series A, Nos. 20-21, pp. 44, 122. See on this point Bindschedler, *op. cit. supra* note 53, at 225; cf. also the decision of the Reichsgericht of Jan. 27, 1927, in the Giulini case, R-C. IV 359, 26.

<sup>83</sup> See *supra* note 81.

<sup>84</sup> 35 *Am. J. Int'l L.* 243 (1941).

law, when dealing with property, would have its own definition. . . ."

But mere elements of such definition exist in fact, and the author stresses the very broad notion of property, which has been adopted in international case law. This provides no answer, however, to the question in which cases are injuries to alien property prohibited by international law. Herz shows further that the notion of expropriation is difficult to distinguish from that of denial of justice. On the other hand, another necessary but difficult distinction must be drawn between acquired rights and mere expectancies or other interests, as shown in the *Oscar Chinn* case. On this basic issue, Herz comments:

" . . . 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. By acts of legislation or of administrative practice, this situation may be changed. To give foreigners vested rights against each of these changes would mean to ensure them against every change which may concern their interests. And it is clear that somewhere a line of demarcation has to be drawn between acquired rights and that which is beyond their sphere. . . ."

It is perhaps significant that, after having made these remarks, Herz does not draw this line of demarcation. Is it drawn by international law?

In this connection, note a well-known decision of the Permanent Court of International Justice, rendered in 1939 between Lithuania and Estonia in the *Panevezys-Saldutiskis Railway* case,<sup>85</sup> which lays down the principle that private property rights and contractual rights depend in each state on municipal law, as to their exist-

<sup>85</sup> Series A/B, No. 76, p. 18.

ence, their mode of acquisition, their contents, etc. Each national legal system must create and define subjective rights and determine and limit their contents. Once a right has been created, new limitations obviously cannot have been ruled out.<sup>86</sup>

#### *Rôle of International Law*

The fact that municipal law is thus recognized a very broad competence with respect to the property and pecuniary rights of aliens does not imply that international law has no rôle in the matter. It does not mean that the question belongs to the domestic jurisdiction of the state.<sup>87</sup> This is not the place to elaborate on this subject, but let us recall that there is no question which, by nature, necessarily belongs to domestic jurisdiction.<sup>88</sup> As clearly established by an abundant international case law, while the definition and regulation of pecuniary rights (acquired rights)—proprietary or contractual—are left to municipal legislation, the *exercise* of such competence is regulated and limited by rules of international law. These rules are very broad, and municipal law is presumed to be in conformity with international law. But it is well established in international cases that no state can rely on its own legislation to limit the scope of its international obligations.<sup>89</sup> International tribunals, moreover, never have considered themselves bound by the decisions of national courts.

<sup>86</sup> See above, the observations made under "International Law."

<sup>87</sup> See Article 2, ¶7 of the United Nations Charter. In the *Anglo-Iranian Oil Company* case, it was contended by Iran (and by some other countries, such as Soviet Russia) that, in connection with property rights, each national legislator had a discretionary power; *i.e.*, not limited by international law.

<sup>88</sup> See the apt observation of the Permanent Court of International Justice in the case of *Nationality Decrees issued in Tunisia and Morocco* (Series B, No. 4, p. 23):

"The question whether a certain matter is or is not solely within the jurisdiction of the State is an essentially relative question; it depends upon the development of international relations. . . ."

<sup>89</sup> For instance, Permanent Court of International Justice, Series A, No. 17, p. 33. *Chorzow Factory* case (merits).

The conclusion is, thus, inescapable: If the notion of acquired rights or of pecuniary rights depends upon municipal law as a general principle, it does not follow that each state enjoys a discretionary power in respect of such rights belonging to aliens. The exercise of this power is limited by the law of nations. What are these limits? What are these rules of international law? This is the whole problem.

It is evident that a state may, in the normal exercise of jurisdiction, injure in certain cases the pecuniary rights of aliens and that, on the other hand, an injury may, under certain conditions, be unlawful. To determine these conditions, an inquiry would be needed into vast fields of international law, such as that of state responsibility, status of aliens, etc.; and it could not and cannot be restricted to a consideration of the doctrine of acquired rights.

It is outside the scope of the present study to conduct such a broad inquiry. Let us, however, formulate several general observations by way of conclusion.

#### Conclusion

First, international law will become relevant only if there is an injury, not to any interest of an alien but to a *right*. At both the international and the municipal levels, any economic interest is not necessarily recognized as worthy of protection by law. The famous *Oscar Chinn* case is a well-known illustration.

Second, the question of state responsibility can arise only when a right is injured *as the result of a state decision*. This is not the case if the damage suffered by an alien was caused by a change in general economic circumstances or by a natural catastrophe.<sup>90</sup>

Third, all state injuries to the pecuniary rights of aliens do not entail an international responsibility and a corresponding duty to compensate. The necessary limits of the doctrine of acquired rights should be kept in

<sup>90</sup> The case of war is, in general, assimilated to this hypothesis. See Bindschedler, *op. cit. supra* note 53, at 214.

mind.<sup>91</sup> There is no alternative but to accept Mr. Kaackenbeeck's opinion, when he writes:<sup>92</sup>

"Let us not forget that there is hardly any social change, any progress which does not injure some acquired rights. To compel the legislator to halt its course before each such right would mean to obstruct and to make impossible its very mission. . . ."

The question of indemnity—"a different and new question" will arise only when "the sacrifice demanded to the holder of the right is so considerable and so exceptional" that, in all justice, a compensation is required.

Here a distinction should be drawn between two kinds of state measures: Those which limit or suppress rights without transferring them to the state or to a third party chosen by the state and those which have as a result or purpose the transfer of the rights to the state or to a party of its choice. The abolition of slavery or of lotteries, the prohibition of the production or sale of liquor, etc., may be illustrations for the first category. In such cases there would be no duty to compensate, as a general rule, since there has been no unjust enrichment of the state. In the second category, this principle of unjust enrichment would be the ground of the international duty to pay reparation. However, a further distinction appears to be called for here, between cases in which no compensation is required by international law for the suppression and transfer to the state of certain rights (examples: fiscal measures, confiscations of a penal character, creation of a state monopoly)<sup>93</sup> and those in which reparation is prescribed by the law of nations.

It must be conceded that those distinctions and subdis-

<sup>91</sup> See *supra*, the conclusions submitted on intertemporal law and private international law.

<sup>92</sup> *Op. cit. supra* note 65, at 359; cf. also Cavaglieri, "La Notion des Droits Acquis et son Application en Droit International Public," 38 *Revue Générale de Droit International Public* 257, 283 ff. (1931).

<sup>93</sup> E.g., creation of a monopoly of such things as tobacco, life insurance, liquor, etc.



inctions are somewhat fragile. The practice of states in this field is extraordinarily varied and contradictory. It is not altogether easy to ascertain, in those cases in which an indemnity actually was paid, if such payment was considered as an act of grace, as a mere matter of convenience, or as a matter of law. Any comparative study of national attitudes would illustrate this point.<sup>94</sup>

*When Compensation Is Due*

The criterion of the existence of a duty to compensate is not the justification of the state action from the point of view of public interest. Compensation may be owed even when the suppression of acquired rights is entirely justified from that viewpoint.<sup>95</sup> On the other hand, the absence of public interest as a ground for state intervention will may prove the arbitrary character thereof and entail the duty to indemnify.

It is admitted in general, in legal writings on international law, that injuries to the acquired rights of aliens do not as a rule involve a duty to compensate, if and when such injuries are the result of the normal exercise of the fiscal, monetary, or penal jurisdiction of the state. Notwithstanding the exclusive character of state jurisdiction in such matters as taxation and tariffs, an injury to the acquired rights of aliens in these fields may, under certain circumstances, involve the international responsibility of the state.

<sup>94</sup> An excellent and highly significant study is that of Bullington, "Problems of International Law in the Mexican Constitution of 1917," 21 *Am. J. Int'l L.* (1927). Quoting many decisions, the author shows that the practice of states, in making compensation for injuries caused by general, impersonal, legislative acts has varied to such an extent that "it would be futile to attempt to find any logical distinctions between laws in the practice." While the state acts involving the suppression of an industry or business for the public welfare seem to be considered generally as *not* requiring the state to make compensation, "opinion and practice differ so widely as to those acts not involving the suppression of an industry that it would be unwise to attempt to draw conclusions concerning them."

<sup>95</sup> *Supra* note 65, at 359.

As was observed rightly by Charles Cheney Hyde,<sup>96</sup> a state violates international law if, after having given a category of aliens special reasons to believe that no change in its legislation would take place for a certain time, it injures their rights by sudden legislative action. The United States protested on several occasions against such unexpected legislative moves apt to cause injuries to American citizens, albeit the state jurisdiction was in itself not disputed. The case of *Limon Free Port*, in Costa Rica, may be cited as an illustration. In 1884, the congress of Costa Rica abrogated without prior notice a statute of the preceding year, which established a free port in Limon for ten years.<sup>97</sup> While affirming that congress was entitled to act as it had done, the government of Costa Rica, in practice, refrained from applying to foreign citizens the statute which had suppressed the free port.<sup>98</sup>

Examples of this kind prove that international law *does* limit the exercise of legislative power, even in matters traditionally regarded as belonging to the state's exclusive jurisdiction, such as taxation and customs. But this limitation does *not* result—certainly not clearly or directly—from the doctrine of acquired rights. If the intervention of international law is to be justified in such case, it is by resorting to the notion of abuse of right (of the state) rather than to that of acquired rights (of aliens). In exercising its legislative power in that way, contrary to the well-founded expectations it had encouraged, the state committed an abuse of right, prohibited by international law.<sup>99</sup>

The concept of abuse of right, thus, appears at least

<sup>96</sup> I *International Law* 368 (1922).

<sup>97</sup> Moore, II *Digest of International Law*, 67.

<sup>98</sup> A similar case is that of the Free Zones in Guatemala in 1888 (*supra*, at 68). See Kiss, *supra* note 80, at 78.

<sup>99</sup> Analogous observations may be made concerning the exercise of state jurisdiction in monetary matters which traditionally are regarded as within the exclusive jurisdiction of the state. However, state responsibility will arise in case of abuse of right or, of course, of violation of treaty obligations. See Mann, "Money in Public International Law," *Brit. Yearbook Int'l L.* 292 (1949), and *supra* note 82.

a partial answer to the problem under consideration.<sup>100</sup> It limits the exercise of state jurisdiction and, thereby, protects acquired rights. But it is not sufficient in itself to allow a clear discrimination between cases in which a state interference with the rights of aliens does entail a duty to compensate and other cases in which it does not. The concept must be supplemented by other principles. The example of the right of property is, again, a case in point. Under the doctrine of acquired rights, this right is not immune from the jurisdiction of the territorial state. Contrary to what some supporters of absolute sovereignty have contended, the doctrine does not mean that private property is or should be sacred, intangible, or superior to the sovereignty of the state. It means that *arbitrary* measures; *i.e.*, contrary to the laws of the territorial state itself, are forbidden.<sup>101</sup> It also means the prohibition of abuse of right, of abuse of state competence. It means that a certain standard of justice must be respected with regard to the private rights of aliens.

#### *Uncertainty of Modern Law*

In the case of expropriation, in the narrow sense, or of nationalization, it generally is admitted that the *principle* of such a state measure is not governed by an international standard but by municipal law.<sup>102</sup> International

<sup>100</sup> See, for instance, the statements of the Permanent Court in the Polish Upper Silesia and the Free Zones cases, respectively, Series A, No. 7, p. 30 and Series A/B, No. 46, p. 167. See also Kiss, *op. cit. supra* note 80.

<sup>101</sup> Schwarzenberger, I *International Law* (3d ed., London, 1957) p. 204.

<sup>102</sup> A statement made, in 1947, by Swiss Foreign Minister Petitpierre (quoted by Bindschedler, *op. cit. supra* note 53, at 104) would seem to express the view most generally held:

"On the principle of this nationalization, we cannot intervene. It is a municipal measure taken by a State within the limits of its sovereignty and we cannot but recognize it as a fact, insofar as it applies equally to nationals and to aliens. . . . But a nationalization, *i.e.*, an expropriation, is admissible only if a fair indemnity is paid to the owner of the nationalized property. . . ."

practice on this subject has been summarized by one of the most lucid analysts of international relations<sup>103</sup> as follows: "Non-intervention but indemnification; this is the present equation balancing the freedom of the State to organize as it will and the security of international relations."

If wide and substantial agreement exists in international practice and writings on the principle of compensation (some extreme and political national views notwithstanding), the *amount* and the *modalities* of compensation are matters in dispute. While the individual character of expropriation allows, and therefore requires, full compensation, nationalization in international practice frequently has been accompanied by insufficient or symbolic indemnities. The political nature of many settlements, the absence of proper sanctions of many clear violations of international law, etc., are well-known facts. In the words of Charles De Visscher: "It is indeed a long way from such practices to respect for acquired rights in a society with an effective legal order."<sup>104</sup>

It would be erroneous to conclude from such practices that there is no rule of international law in this matter—just as it would be absurd, in municipal law, to affirm the inexistence of some legal rule because a number of torts or crimes remain unpunished. Some spectacular instances may have led certain internationalists to over-pessimistic conclusions as to the existence (distinguished from the efficaciousness) of the rules of international law in this field. However, interesting signs have seemed to indicate recently a certain recovery of international standards. An example quoted frequently is the 1962 United Nations Resolution on Permanent Sovereignty over Natural Resources. While reaffirming the possibility in law of expropriations, nationalizations, or requisitions for reasons of national interest, "which are recognized as overriding purely individual or private interests, both

<sup>103</sup> Ch. De Visscher, *Theory and Reality in Public International Law* (1957) p. 193.

<sup>104</sup> *Ibid.*, at 195.

domestic and foreign" (in fact not disputed) the resolution, on a controversial question, states:

"In such cases the owner shall be paid appropriate compensation, in accordance with the laws in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law. . . ."<sup>105</sup>

This resolution is of interest, inasmuch as it was passed against Soviet opposition<sup>106</sup> by an assembly in which industrial and capital-exporting states were the minority. The exact meaning of the term "appropriate compensation" and the contents of the relevant rules of international law remain undetermined. In the U.S. interpretation, Resolution 1803 reaffirms the principle of international law, which calls for prompt, adequate, and effective compensation in the event of expropriation or nationalization.<sup>107</sup>

#### *Insufficiency of National Treatment*

In a study of the doctrine of acquired rights, the example of expropriation or of nationalization of alien property is, also, important because it throws light upon the insufficiency of the national treatment criterion. As was emphasized rightly by the United Kingdom, in the case of *Religious Properties in Portugal*,<sup>108</sup> it cannot be accepted that a violation of acquired rights does not

<sup>105</sup> Resolution 1803 (17); cf. Gess, "Permanent Sovereignty over Natural Resources," *Int'l Comp. L. Q.* (April, 1964).

<sup>106</sup> A Soviet amendment asserted that the problem of compensation was to be solved entirely by the municipal law of the nationalizing state. See Gess, *supra*, at 428-429.

<sup>107</sup> *Ibid.*, at 428.

<sup>108</sup> See *supra* note 37. In the words of Sir Hersch Lauterpacht (*The Development of International Law by the International Court* [1958], cited by Jennings, *op. cit. supra* note 60, at fn. 76): "The plea of non-discrimination as a defence against a charge of violation of international law amounts, upon analysis, to a claim of the sovereign State to disregard international law and to erect its own law as the sole standard of the legitimacy of its action so long as such action is of general application. . . ."

involve a duty to compensate as soon as citizens and aliens are affected by the measure. In the idea of national treatment (so vigorously insisted upon by several states as an expression of their sovereignty and as a defense against political interventions by foreign states), there is certainly some truth. It may be admitted, therefore, that an injury to the rights of aliens is presumed *not* to violate international law insofar as nationals are equally injured. But this is no more—can be no more—than a mere rebuttable *presumption*. On the other hand, the criterion of national treatment is unobjectionable in the relationships between states which share the same juridical and political beliefs. For this reason it is used frequently enough in bilateral treaties.

#### *Summary*

The important fact remains, however, that state interference with acquired rights, although applied without discrimination to both nationals and aliens and although dictated by a legitimate public interest, may prove to violate this elementary standard of justice generally designated by the term "minimum standard of international law."<sup>109</sup> It cannot be contended lightly that a state measure does violate this minimum standard. In the words of Mr. Borchard,<sup>110</sup> international law does not oppose social experiments attempted in good faith and not with a view to spoliation. The standard is, in fact, one of equity, of a somewhat rudimentary character, and it necessarily takes into account the diversity of national opinions and legislations regarding the organization and substance of pecuniary rights. That this standard needs further elaboration and refinement, as Professor Jennings pointed out in the preceding chapter, every internationalist should agree.

<sup>109</sup> See Roth, *The Minimum Standard of International Law Applied to Aliens* (1949); cf. Fischer-Williams, "International Law and the Property of Aliens," 9 *Brit. Yearbook Int'l L.* 1 (1928).

<sup>110</sup> Commentary, Harvard Draft (1929), Article 5, cited by Kaeckenbeeck, "La Protection Internationale des Droits Acquis," 59 *Recueil des Cours de l'Académie de Droit International* 365 (1937).



Such is, in my submission, the true meaning and such are the limitations of the doctrine of acquired rights. Its imprecision has been emphasized with the help of some examples. Its central and underlying notion has been shown to be an insufficient tool to solve the main problem under scrutiny; that is, it gave no valid criterion for the determination of those cases of state injury to the pecuniary rights of aliens in which a duty to pay compensation was involved under international law and those in which no such duty was involved.

This should not be regarded in any way as a pessimistic conclusion. On the contrary it is submitted that the preceding analysis is correct and realistic; therefore, it is more apt to strengthen the law of nations and to encourage its respect than more ambitious conceptions of acquired rights sometimes put forward.

The principle of respect for the acquired rights of aliens is not a general principle of law recognized by civilized nations, within the meaning of Article 38 of the Statute of the International Court of Justice. Is it a part of customary international law? The answer is yes and no. It is negative if the principle is to be considered as autonomous, as distinct from the prohibition of abuse of right and as distinct from the respect for a minimum standard. The answer is affirmative, insofar as the doctrine of acquired rights is regarded as *one* possible and, on the whole, useful expression of a fundamental aspiration of the international community, as an essential and general demand for justice and security, and as a basic social requirement which has found other, possibly more precise, formulations in international law.