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State Competence to Terminate Concession Agreements with Aliens

By DAVID C. BALDUS*

Introduction

International law today recognizes unequivocally the competence of states to take, within certain limitations, any property owned by an alien.¹ This means that a government's decision ordering an alien to transfer his property to the state will be considered lawful by other states and protected by them. While the limitations on this competence—compensation, public purpose and non-discrimination—do not enjoy such broad international support, the controversy over them has not lessened support for the community policy protecting state competence to take alien property.

When, however, the government's demand that property be transferred to the state interferes with the expectations created by a concession agreement, a more controversial issue is presented. If a government has promised a foreign corporation that it may drill oil on a certain piece of land for thirty years, and five years later the government takes the land, the problem is regarded as different than if the foreign corporation merely owned the land. The claim is made that the existence of expectations created by a concession agreement distinguishes the two situations, depriving the government of the competence to take any action interfering with the expectations is created, even if the government's purpose is public and non-discriminatory and compensation is paid. The Committee on the Study of Nationalization of the American

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¹ See, e.g., General Assembly Resolution 1803 (XVII) Dec. 14, 1962; Sohn & Baxter, *Convention on the International Responsibility of States for Injuries to Aliens* 103 (Draft No. 12, 1961); "State Responsibility," 2 *Yearbook of the Int'l L. Comm.* 104, at 117 (A/CN.4/106) (1957); White, *Nationalization of Foreign Property* (1961); Wortley, *Expropriation in Public International Law* (1959); Foighel, *Nationalization: A Study in the Protection of Alien Property in International Law* (1957).

Branch of the International Law Association states the claim this way:

Is 'nationalization' a valid excuse for the breach by a State of its contracts with foreigners? . . . In the view of the Committee, restrictions upon the taking of alien interests . . . may be expressed or implied by contract. . . . International law requires they be respected.²

It follows from this that the remedy for a unilateral termination is specific performance of the concession promise, although when this is "not possible" the remedy urged is the payment of lost profits.³

The counterclaim recognizing state competence to terminate rests on the proposition that contract rights are no different from other property rights and that the unilateral termination of a concession is lawful, subject, of course, to the limitations of compensation and non-discriminatory purpose. Professor Isi Foighel presents the claim as follows:

The fact that nationalization is not a breach of international law cannot be altered by the fact that nationalization destroys contract rights, for example, a concession which the nationalizing state has granted to a foreign company. There is no rule of international law that gives a greater degree of protection to rights secured by contract than to other rights of property.⁴

The claim denying state competence to terminate concessions has several justifications. The first is that contracts are of such great importance to any legal system their performance should be required. Professor Olmstead states, for example, that:

Any party has a duty to perform its obligations under a valid contractual agreement. . . . As all legal systems seem to enforce contracts between individuals who are subject to their juris-

² "Nationalization of the Property of Aliens," 13 Record of N.Y.C.B.A. 367, 376 (1958).

³ "Thus, the remedy for breach by a State of a contract with an alien whether designated as a breach or a taking or as expropriation or nationalization, is in the nature of specific performance. Where specific performance actually is no longer possible, then the foreign contractor must be placed as nearly as possible in the position he would have enjoyed absent the breach, that is to say, he is entitled to the profits he would have earned had not his contract rights been taken." *Id.* at 376-77; Kissam & Leach, *Sovereign Expropriation of Property and Abrogation of Concession Contracts*, 28 Fordham L. Rev. 177, 214 (1959).

⁴ Foighel, *op. cit. supra* note 1, at 74; White, *op. cit. supra* note 1, at 86; Wortley, *op. cit. supra* note 1, at 111; Speech by Mr. Kano, Nigerian Delegate to the Economic and Financial Committee of the General Assembly, U.N. Gen. Ass. Off. Rec. 17th Sess. 2nd Comm, 295 (A/C. 2/SR. 794-878) (1963).

diction, it is indeed paradoxical for the states of the world community to refuse to apply this same standard to their own agreements with individuals.⁵

The second justification rests on the maxim *pacta sunt servanda* (agreements are binding). Agreements between governments (treaties), it is argued, cannot be terminated unilaterally because of the principle *pacta sunt servanda*; and because concession agreements are so similar to treaties, the principle also applies to them, making their unilateral termination unlawful.⁶ The analogy between treaties and concessions draws strength from the frequent participation of the concessionaire's government both in the negotiation of the concession and in the settlement of disputes that arise during its performance.⁷ Moreover, the large size of corporate concessionaires and the "public" nature of concession agreements further contribute to the comparison between concessions and treaties.⁸

The third justification which elaborates the distinction between contracts and other types of property is stated with conviction by Professors Sohn and Baxter of Harvard.

It has on occasion been suggested that a concession constitutes a property right as well as a contract and that in the former aspect it is subject to expropriation or nationalization provided compensation is paid. . . . The logical consequence of the adoption of such a view would be to place a concession in the category of 'property of an alien'. . . . To provide that obligations under concessions and contracts may be terminated against the payment of compensation is to embrace the theory, now discredited, that a promisor has an option of performing his contract or paying the stipulated price for non performance

⁵ Olmstead, *Nationalization of Foreign Property Interests, Particularly Those Subject To Agreements With The State*, 32 N.Y.U. L. Rev. 1123, 1136 (1957); Brandon, *Legal Aspects of Private Foreign Investments*, 18 Fed. B.J. 298, 339 (1958).

⁶ "International law recognizes that the principle *pacta sunt servanda* applies to the specific engagements of States towards other States or the nationals of other States and that in consequence, a taking of private property in violation of a specific state contract is contrary to international law." Committee on Protection of Investments Abroad in Time of Peace, Int'l B.A. 7th Conf. Rep. 485 (1958); O'Connell, *Legal Issues in the Persian Oil Dispute*, 28 New Zealand L.J. 57, 58 (1952); see, Wehberg, *Pacta Sunt Servanda*, 53 Am. J. Int'l L. 775.

⁷ Schwebel, *International Protection of Contractual Arrangements*, Am. Soc'y Int'l L. Proc. 266, 267 (1959).

⁸ See Miller, *The Corporation as a Private Government in the World Community*, 46 Va. L. Rev. 1959.

in the form of damages. Such a view suggests that compliance with contracts, including concessions, is a matter of expediency, and that no moral opprobrium attaches to the violation of the promisor's pledged word. In strong contrast stands the power of a State to take property for its own use or for that of other persons—a power which is recognized by the principal legal systems of the world, although the purposes for which it may be exercised may vary from State to State.⁹

The fourth and most significant justification focuses on the effect a recognition of state competence to terminate concessions would have on the flow of private foreign investment.

The interest in a maximum flow of international capital and trade is, as a matter of economic fact, and as between borrower and investor, buyer and seller, wholly mutual. International contracts are a primary means of implementing that interest. Unilateral repudiation or alteration by States of their contracts with aliens hardly promotes that interest or the conclusion of contracts which is its expression.¹⁰

Stephen Schwebel goes so far as to assert: "If states were to be deemed to have reserved a legal right to violate their international contracts, the foreign investor would conclude no such contracts at all."¹¹ This statement assumes that the community's branding of a termination as unlawful and its demands for specific performance or lost profits will significantly deter termination and thereby promote the flow of international investment.¹²

⁹ Sohn & Baxter, *op. cit. supra* note 1, at 124; Ray, *Law Governing Contracts Between States and Foreign Nationals*, in Southwest Legal Foundation, Proceedings of the 1960 Institute on Private Investments Abroad 5, 9 (1960); Holmes stated that: "The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it, and nothing else." Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 462 (1897).

¹⁰ Committee on the Study of Nationalization, *supra* note 2, at 376; see Carlston, "Concession Agreements and Nationalization," 52 Am. J. Int'l L. 260 (1958).

¹¹ Schwebel, *supra* note 7, at 269; Professor O'Connell writes: "If States were able to cancel their contracts with foreign nationals there would be no security of investment and the smooth functioning of economic no less than of international relations would be severely impaired." O'Connell, *supra* note 6, at 58; Ray, *supra* note 9, at 73.

¹² "First, there is, or ought to be, a deterrent effect upon the breach of international contracts where such breach is recognized by international law as unlawful. That deterrent effect may be tangible as well as psychological, for other states are not required to give effect to an act that violates international law." Schwebel, *supra* note 7, at 272; [If lost profits were paid] there would appear to be virtually no economic, but only an emotional, point in the state's act. It may be added that in cases of some major investments, the impossibility of payment of full compensation would, as a matter of law, debar taking." *Id.* at 273.

A fifth and final justification rests on the fear that recognition of such a competence would increase the danger of fighting in the settlement of concession disputes. "It seems plain," Mr. George Ray of Aramco has written, "that to permit this change would result in the substitution of the will of the State for law, and, therefore, would increase the risks of resorting to force for the protection of claimed rights."¹³

The claim that states lack the competence to terminate concessions, while advanced during the 1930's has been made with increasing vigor during the last ten years by members of the legal profession,¹⁴ businessmen,¹⁵ and publicists¹⁶ from the capital exporting states, particularly the United States. Because of the recent resurgence of support for the claim, it has been labelled the "modern"¹⁷ theory of concession agreements, while the view that concessions may be expropriated in the same way as any other property is called the traditional theory.

Proponents of the "modern" view recognize that controversy exists on this issue, but they insist that contemporary international law not only should reflect their viewpoint, but also that it does. The purpose of this article is to challenge that view. It will be argued that the question is still unsettled, and that the "modern" theory states the law neither as it is nor as it should be.

Part I explains how controversies over the termination of concessions arise and are settled in the world today. Part II suggests a community policy which reasonably accommodates the conflicting interests in termination disputes, while Part III describes how past disputes on this issue have been decided. Part IV concludes that international law should protect state claims to terminate.

¹³ Ray, *supra* note 9, at 73.

¹⁴ See, e.g., Committee on the Study of Nationalization, *supra* note 2; Committee on Protection of Investments Abroad in Time of Peace, *supra* note 6; American Bar Association, Section of International and Comparative Law, *The Protection of Private Property Invested Abroad* (1963).

¹⁵ See, e.g., National Ass'n of Manufacturers, *Industry Believes* (1960); Ray, *supra* note 9.

¹⁶ See, e.g., Carlston, *supra* note 10, at 260; Wadmond, *The Sanctity of Contract between a Sovereign and a Foreign National*, American Bar Association, Section of Mineral and Natural Resources, *Am. B.A. Proc.* 177 (1957); Domke, *Foreign Nationalizations—Some Aspects of International Law*, 55 *Am. J. Int'l L.* 585 (1961); and see writers cited in notes 5, 7, and 9 *supra*.

¹⁷ Fatouros, *Government Guarantees to Foreign Investors* 262 (1962).

AGREEMENT, TERMINATION, CLAIM AND AUTHORITATIVE DECISION

a. *Agreement*

A concession agreement creates expectations that an alien investor may use certain national resources, land and public facilities for an agreed upon time.¹⁸ In exchange for the government's promise creating this expectation, the alien agrees to invest his capital and skill in the development of a natural resource (e.g., oil), or in the construction and operation of a public utility (e.g., canal, railroad), or other enterprise desired by the government (e.g., oil refinery). Because such undertakings usually require both substantial investment and a number of years of operation to become profitable, a state promise in the form of a concession agreement is frequently a prerequisite to the type of investment that governments desire.

The government's objective in making the agreement may simply be to share in the concessionaire's profits, although it may hope additionally to stimulate the nation's economy, or to improve the skills and enlightenment of its nationals. Conclusion of a concession can also win for the grantor government economic and power benefits from the alien's government. Concession agreements, therefore, provide an opportunity for a greater creation and sharing of wealth and other values than would be possible if the government and concessionaire were left to their own resources.

b. *Termination*

If the concession agreement is freely entered, the parties share at least momentarily a common interest in following the policies projected by it. But, as common experience teaches us, political or economic changes may persuade a nation's leaders to terminate or alter a previously granted concession. The problem for the government usually involves wealth or power. The concession may be considered a bad bargain, with termination providing an opportunity to get another concession and a higher return from the same or another concessionaire.¹⁹ Or the government may

¹⁸ See Carlston, *International Role of Concession Agreements*, 52 Nw. U. L. Rev. 618 (1957).

¹⁹ The Iranian Government was motivated by this consideration in both its 1932 and 1951 terminations of oil concessions held by a British concessionaire. Cottam, *Nationalism In Iran* 204-05 (1964).

plan to take over the concession and enjoy the profits presently made by the concessionaire. Termination may also be seen simply as a means of halting the extraction of natural resources. In many underdeveloped nations, demands are strong: (a) that the nation's natural wealth should only be used to promote national development; and (b) if income from the exploitation of resources is no longer needed for this purpose, the natural wealth should be left in the ground.²⁰

Termination may also be motivated by power considerations. In many underdeveloped nations, control of the nation's resources is perceived as a means to political power. Indeed, it is widely believed that "unless a state is the master of its own resources, it cannot exercise the right of political self-determination."²¹ The fear is that foreign corporations will act as agents for their governments in the exercise of the political influence provided by large concessions, thereby re-instituting colonialism under a new form—neo-colonialism. While this expectation may sound preposterous to American ears, there is little doubt that it is shared by many Afro-Asians. Consider this statement by a Burmese U.N. delegate:

The so-called 'complex of formerly colonized countries' was attributable to a still too recent past. Moreover, the countries that had just gained their independence did not forget that their still precarious sovereignty continued to be threatened by a new form of colonialism. His country, for its part, remembered that when it lost its independence, it had been colonized originally not by the United Kingdom, but by the British East India Company. His delegation therefore felt that developing nations must be protected against the possible encroachment by companies of the rights of the State.²²

²⁰ Many politically aware Iranians believe, for example, that the nation's oil is a "god-given resource which if properly utilized can raise the standard of living of the people, establish a healthy industrial-agricultural economy, and restore much of the prestige and dignity Iran has lost," but that if "maximum returns from this great resource" are not realized "it is best that Iran's oil stay underground . . . despite the suffering that cutting off the oil revenue would produce." *Id.* at 202; Argentina's termination of fourteen concessions on November 15, 1963 was partly motivated by a desire to preserve the nation's oil reserves. *N.Y. Times*, Nov. 14, 1963, p. 49, col. 1.

²¹ Hyde, *Permanent Sovereignty over Natural Wealth and Resources*, 50 *Am. J. Int'l L.* 854, 857 (1956).

²² U. N. Gen. Ass. Off. Rec. 17th Sess., 2nd Comm. 394 (A/C.2/SR. 794-878) (1963); Hyde, *supra* note 21, at 858.

Thus, the objective in termination may be to transfer control of an important basis of political power to the terminating government or to a concessionaire of different nationality.

The motive in terminating may also be to gain a power advantage with the concessionaire's government. Since a termination is generally perceived to be a deprivation by the concessionaire's government, it or threat of it may constrain the concessionaire's government to follow a course desired by the terminating government.²³

The government's internal power position can also be a consideration. Public opinion may demand the end of certain concessions, or termination may strengthen a government politically in need of an act of belligerence toward the "imperialists."²⁴ Domestic power considerations may also be important in nation or industry-wide nationalizations. Usually justified in terms of socialism, communism, social reform, or revolution, general expropriations of this type are frequently designed to reorganize the power and wealth structure of an industry or of the entire nation.²⁵ In contrast, special, small scale expropriations normally have no power consequences for the government.

Termination can be undertaken with or without the consent of the concessionaire. If the concessionaire is willing to substitute a new agreement, or to accept compensation in exchange for his defeated expectations, no controversy will arise. If, however, the concessionaire will not consent, the government's course will depend on whether the terms of the concession provide some basis for a possible termination (e.g., non-performance by the concessionaire or change of conditions). When the facts provide the basis for such a claim the government may sue for termination in its own courts. Generally, however, the concession and the facts provides no such justification. The government must then exercise its sovereign power by enacting a local law which: (a) terminates the concession promise without transferring control of the enterprise; or (b) takes the concession property; or (c)

²³ In 1958, for example, Indonesia terminated a number of Dutch concessions as a means of influencing Dutch policy in West New Guinea. See p. 91 *infra*.

²⁴ Internal power was a consideration in President Nasser's decision to terminate the Suez Canal concession in 1956, and in Argentina's November 1963 terminations; see pp. 88, 93, *infra*.

²⁵ Fatouros, *op. cit. supra* note 17, at 242.

makes the government's promised performance impossible.²⁶ Upon termination the government may tender compensation, a promise to pay compensation in the future, or it may offer nothing.

c. Claims

In the course of terminations taken against the consent of the concessionaire, disputes arise, and claims are made to authoritative decision makers²⁷ for the prescription and application of community policy. The usual claimants, the terminating state, the concessionaire, and the concessionaire's government, each hope that international law will support his demands, which for the deprived concessionaire, will be the recovery of the concession property or damages. Another possible claimant is the purchaser of expropriated property. He may find himself in a national court defending against the claims of an expropriated concessionaire who insists that because the termination was unlawful, the boatload of oil, tobacco, sugar or other commodity in the buyer's possession belongs to the plaintiff concessionaire.

The specific claims made by these claimants fall into three main categories. First are the claims relating to the competence of the government to terminate a concession at all, while the second category relates to limitations on the competence to terminate—compensation, the government's purpose in terminating, and specific promises made not to terminate during the period of the concession. The third category of claims relates to the payment of compensation. The second and third categories of claims, included in the summary below, are not analyzed in this article, but are set forth here to place the competence issue in full context.

CLAIMS RELATING TO THE TERMINATION OR ALTERATION OF
CONCESSION AGREEMENTS UNDERTAKEN WITHOUT THE
CONSENT OF THE CONCESSIONAIRE

- I. *Claims relating to state competence to terminate.*
- II. *Claims relating to limitations on the competence to terminate.*
 - A. Claims relating to the duty to pay compensation.

²⁶ See Mann, *State Contracts and State Responsibility*, 54 Am. J. Int'l L. 572, 574-77 (1960); Fatouros, *op. cit. supra* note 17, at 236-42.

²⁷ An authoritative decision maker is an individual whom the community expects will resolve the conflicting claims made to him.

B. Claims relating to the purpose of the terminating government.

1. Public purpose
2. Power purpose
3. Discriminatory purpose

C. Claims relating to government promises that it will not terminate during the term of the concession.

III. *Claims relating to compensation.*

- A. Claims relating to the amount of compensation paid.
- B. Claims relating to when compensation is paid.
- C. Claims relating to how compensation is paid.

d. *Authoritative decision*

The government officials of nation-states play the most important role in the authoritative resolution of termination disputes. Executive officials of the capital importing and capital exporting states serve the double function both of making claims to authority and of deciding through negotiations the controversies that their claims and counterclaims create. But unlike most areas of international law, claims relating to the termination problem are not made with expectations of reciprocity. Since the flow of capital today is primarily one way, from the wealthier to the poorer nations, the Afro-Asian and South American states have few opportunities to claim on behalf of a deprived concessionaire, while the wealthier states lack identification with the problems of the underdeveloped states. Without the expectation that the identical claim may be shortly directed against him, the governmental claimant and decision maker has more difficulty in perceiving the common interests that exist between the parties to a dispute.

Government officials and their agents also serve on arbitration commissions agreed upon by states to settle termination disputes. Judges in national courts outside the terminating state may pass on the lawfulness of a termination when the deprived concessionaire seeks to recover expropriated commodities within the court's jurisdiction. A final but important group of authoritative decision makers are the arbitrators agreed upon by the parties to a concession.

International organizations have played a relatively minor role

in the termination problem. Neither The Permanent Court of International Justice nor the International Court of Justice has passed on the merits of a termination dispute which did not involve a treaty. During the last decade, however, U.N. organs have sought to clarify community policy on the protection of foreign investments and have touched the termination problem. The International Law Commission has undertaken the task of codifying the law of state responsibility,²⁸ while both the Commission on Permanent Sovereignty over National Wealth and Resources and the General Assembly have labored to develop a compromise between the conflicting demands of the capital importing and capital exporting communities.²⁹

Through this process of authoritative decision, the nations of the world seek to identify and promote the common interest while rejecting those claims which ignore or oppose such interest. Both capital importing and capital exporting states have a common interest in promoting persuasive rather than coercive economic relations and in stimulating the interstate flow of capital, goods and services.³⁰ Governments also share a common interest in protecting their authority and control over natural resources³¹ and in ensuring fair treatment for their nationals abroad.³² When these interests have conflicted in particular controversies, the general community acting through authoritative decision makers has normally presumed in favor of the accommodation of interests which contributes most to the common good.

Because international organizations have played such a small role in the settlement of particular termination disputes, the enforcement of authoritative decisions has been left primarily to the states involved. As a result, decision makers have had to rely on the resources of their governments and on their own authority to gain compliance with decisions taken. The traditional authori-

²⁸ See *State Responsibility*, 2 Yearbook of the Int'l L. Comm. 1 (A/CN.4/119) (1959) for a review of the Commission's work; Garcia Amador, *State Responsibility: Some New Problems*, 94 Hague Recueil 365 (1958).

²⁹ U.N. Gen. Ass. Off. Rec. 17th Sess., 2nd Comm. (A/C.2/SR. 794-878); Yearbook of the United Nations: 1962 504 (1963); Hyde, *supra* note 21, at 854.

³⁰ General Assembly Resolution 626 (VII) Dec. 21, 1952, for example expressed the need for "maintaining the flow of capital in conditions of security."

³¹ The General Assembly has affirmed the national "Right to exploit freely national wealth and resources" and called on all states to "refrain from acts, direct or indirect designed to impede the exercise of the sovereignty of any state over its natural resources." *Ibid.*

³² See General Assembly Resolution 1803 (XVII) Dec. 14, 1962.

tative doctrines regarding state responsibility for injuries to aliens provide the most important means of inducing compliance, although the economic instrument through control of trade and aid has also been used.

In summary, the function of prescribing what termination claims will be protected by international law has been fulfilled by a variety of authoritative decision makers. State practice, in the form of diplomatic settlements between governments, both public and private arbitrations, and municipal judicial decisions have played the major role in shaping community expectations, although during the last ten years the U.N. General Assembly has added to the stream of authoritative communication, providing further insight into what future authoritative decisions will be. The function of applying community policy to particular disputes has been served by diplomatic settlements, arbitration, and municipal courts.

II. Clarification of Community Policy

The purpose of the following analysis is to present a rationale for the suggestion that state competence to terminate concession agreements should be protected by international law. The intention is to approach this task from the standpoint of one more identified with the interests of the world community as a whole rather than with any particular group. The legal problem presented by the competence issue is the reasonable accommodation of the five sets of interests which may be at stake in any concession termination.

Each national government has a power interest in its freedom to control the people, resources, and institutions within its jurisdiction. The claim to terminate a concession represents a demand that the international community protect the terminating government's exercise of its authority and control, while the claim that a government lacks the competence to terminate is a direct challenge to this power interest. The second interest involved is that of the capital exporting states in protecting the investments of their nationals from deprivation by foreign governments. Third, the concessionaire's government may perceive a power interest at stake if the termination: (a) reduces its control over decisions of the terminating government; or (b) deprives it of a

source of raw materials it considers important to its economy or national security.³³

The fourth interest at stake is the promotion of an international economy in which private investment flows freely across state lines, while the fifth and final interest that may be engaged is the minimization of coercion in transnational economic relations. The maintenance of the most primitive form of economic relations depends on the expectation that coercion will not be used against the investor or his property in an arbitrary way. Even more important to the interests of the world community is the assurance that termination disputes are settled by peaceful means. The wastefulness of the fighting and economic sanctions that can accompany disputes over the termination of important concessions, makes it imperative that the world community refuse to protect claims creating a serious potential for crisis.

The interests of encouraging investment through persuasive means are considered inclusive interests because they affect the value position of all participants in the investment process. In contrast, the interests of protecting investors and of preserving or improving the power positions of the states involved are considered exclusive interests because of their more particular and limited impact on the participants.³⁴ The legal challenge is to work an accommodation of these interests which promotes the common interest. And for this purpose a common interest refers to one which promotes human dignity through the broadest shaping and sharing of values by persuasive rather than coercive means. The following paragraphs suggest a community policy to achieve this goal in termination disputes, with special reference to the claim that states lack the competence to terminate concession agreements.

Stated most broadly, the recommended policy is the promotion

³³ The nationalization of the Iranian oil industry caused the fear in France that the Western source of oil in the entire Middle East may be endangered; 85% of French oil imports came from the Middle East. *N.Y. Times*, May 23, 1951, p. 29, col. 5.

³⁴ The reference of inclusive and exclusive interests is to the degree of their collective impact on participants involved. Interests are on an inclusive or exclusive continuum. McDougal, Lasswell and Vlasic, *Law and Public Order in Space* 150 (1963). See this work generally for the methodology employed in this article; this book does not, however, discuss the controversy over the termination of concession agreements.

of international investment through persuasive strategies with protection for common exclusive interests and the rejection of special interests. Maintenance of a steady flow of private foreign investment is a common interest because it can improve the value position of both the investor and host government in a way which would not be possible without their co-operation. This is not to say that all existing investment relationships are fair and desirable. But it is in the common good to maintain a sufficient flow of capital so that governments may enter the investment relationships they desire. The crucial thing is to provide states with the maximum choice of means to exploit their national resources. The failure to perceive this fact strengthens the suspicion in some quarters that the "common interest" of promoting international investment is simply another label for the investor's interest. The investor is, of course, in the enviable position of benefiting from this common interest, but so also does the host government, a fact reflected by the substantial international support for it.³⁵

The promotion of international investment, embodies two subsidiary policies: (a) protection of agreements; and (b) payment of equivalent compensation for terminated agreements. The "modern" view denying competence to terminate rests on the assumption that if concession expectations are not protected by specific performance businessmen will not invest abroad.³⁶ It is submitted, however, that this assumption overlooks the primary consideration in foreign investment decisions. The businessman invests abroad for profit. He is concerned with the protection of his concession expectations only as a means of ensuring a return on his money. If the terminating government pays him the equivalent of the return he anticipated, he may reasonably be expected to undertake again the same risk in another investment. If compensation can satisfy the investor's expectations of profit, it will induce him to re-invest abroad in spite of termination and can thereby maintain a flow of international investment. To

³⁵ See note 30 *supra*.

³⁶ None of the writers supporting the "modern" view has attempted to document this crucial assumption. Although the effect of past expropriations on investment decisions is, of course, difficult to demonstrate, the few studies on the subject indicate that fear of expropriation is only one of many considerations influencing the decision to invest abroad. See, Fatouros, *op. cit. supra* note 17, at 54 n. 75.

achieve this goal, the level of compensation paid must satisfy this test: would the typical concessionaire whose enterprise is taken for compensation be willing to undertake the same investment with the expectation that he may be treated that way again in the future?

In applying this policy, the decision maker must determine: (a) the reasonable expectations of profit created by the initial agreement; and (b) the extent these expectations were realized both in performance and in the compensation offered by the government.

To determine what the investor's reasonable expectations were at the time of agreement, the decision maker should analyze both the political and economic risk involved in the investment. On the economic side, the inquiry would, among other things, look to the type of industry, the skill and experience of the concessionaire, the amount invested, and the time expected for the operation to become profitable. But expectations about profits from a concession will also depend on the perceived probability that the government will terminate in the future. Obviously, a company which invests with high prospects of premature termination cannot reasonably expect the same return from its investment as a company making the same investment on the basis of a good faith promise not to terminate within fifteen years. To assess the risk of investment, therefore, the political risks at the time of agreement must also be analyzed, although from the viewpoint of community policy a careful distinction must be drawn between political risks created by the government and those inherent in the type of enterprise involved. Prior government terminations and hostile attitudes toward investment which increase the perceived risk of termination at the time of agreement should not be considered legally relevant. Governments should not be rewarded for creating destructive communications which work against community interests, while communications creating positive expectations (e.g., promises in statutes and concession agreements) should be considered by the decision maker. Expectations of premature termination resulting from the nature of the concession, however, should be viewed differently. Was it reasonably expected that the concession enterprise would serve a useful function for the entire

term of the agreement? Is the concession "closely related to large and changing public interests"?³⁷

This policy alone would have the effect of encouraging investment in low risk situations and deterring it when economic risk was high. And often the communities or industries which have the greatest need for investment present the greatest economic risk to the investor. In order to encourage investment in high risk situations where development is important to the national community, international law should require heavier compensation for the deprived concessionaire who has undertaken such risks.³⁸

The level of compensation should also depend on the extent to which the investor's expectations have already been fulfilled. Profits may have been so great that termination with but minor compensation can satisfy the expectations of the investor and induce him to undertake a similar investment again. On the other hand, if the expectations of the investor have not been realized up to the time of termination, the government should pay him enough of his anticipated, but unrealized, gain to induce the contemporary businessman to invest with expectations of a similar termination settlement.

There is no reason why compensation cannot serve the function of promoting an international economy when concessions are terminated, in the same way that it does when alien "property" is taken by the state. In terms of this community interest, there is no difference between "property" and concessions. The important thing in the taking of either interest is the termination of the alien's expectations about the use of land and resources. The significance of land "ownership" is the expectation that the owner may use it indefinitely, while a concession agreement creates expectations that land and resources may be used for a certain period of time. The certainty of the expectation in the two cases is different and can be expected to induce a different

³⁷ Transvaal Concessions Commission, Report, 35 Par. Pap., Cd. No. 623, at 8 (1901).

³⁸ The Transvaal Concessions Commission recommended increased compensation for terminated concessions where "hazardous enterprises have been pioneered into stability in an unsettled and underdeveloped country where profit was uncertain and total loss a possible contingency." *Ibid.*

type of reliance from an owner than from a concessionaire; but if the flow of international investment is the concern, a difference in reliance calls only for different levels of compensation. There is no reason presented by this interest why a concessionaire's original expectations must be protected (specific performance of the concession), while the alien landowner's expectations may be terminated and replaced with an equivalent (compensation).³⁹

Moreover, the argument that community adoption of the "modern" view is needed to maintain a flow of foreign investment overlooks one-half of the investment process, which requires the participation and consent of the capital importing government as well as the investor. What affect, therefore, would the adoption of the "modern" view have on the willingness of underdeveloped nations to enter investment agreements? All the available evidence supports Professor White's view that in today's world the reluctance of many states to admit foreign capital "would be greatly increased" by such a community policy. Suspicion of corporate motives, fear of exploitation⁴⁰ and political interference contribute to this condition, which has been described, by a Greek delegate to the U.N., as follows:

It would . . . be regrettable if the attitude of certain developing countries towards foreign capital was not considered in its proper context and if account was not taken of the deep current of nationalism and anticolonialism that prevailed in those countries, even though it was unwarranted. Those countries often regarded private enterprise and, even more so, foreign private enterprise, with great distrust.⁴¹

The power interest of states in exercising control over people when exercised within appropriate limits, and resources within their jurisdiction, is an exclusive interest consistent with the

³⁹ *West River Bridge v. Dix*, 47 U.S. 507 (1848) explicitly repudiated this distinction. Deciding that Vermont's termination of a bridge concession was lawful the court said: "We are aware of nothing peculiar to a franchise which can class it higher, or render it more sacred, than other property." *Id.* at 533.

⁴⁰ Mr. Gonzalez of Costa Rica reflected these attitudes in November, 1962, when he explained before a U.N. committee his country's objection to an "unrestricted flow of private foreign capital:" (a) it diminished the national wealth of the recipient country; (b) Costa Rica had had a bad experience with foreign investment in public services; and (c) "experience had taught" Costa Rica that the "sole motive" of the investor was profit in spite of what he said. U.N. Gen. Ass. Off. Rec. 17th Sess., 2nd Comm. 272 (A/C2/SR. 794-878) (1963).

⁴¹ *Id.* at 333; another fear expressed in the U.N. was that a lack of competence to terminate would deter agreement because it "discouraged initiative and left little room for bargaining." *Id.* at 329.

common good. Nation states carry the primary responsibility for the welfare of the world's population. It is desirable, therefore, that each national community enjoy the maximum freedom of choice in ordering and reordering the use of its resources, unless this freedom substantially interferes with an inclusive interest or a predominant exclusive interest of another state. Since, in the termination context, compensation can be made to maintain the flow of international investment, protection of this power interest promotes the common interest.

Protection of investors from economic deprivation is another interest deserving of community support, since all states desire that their nationals be treated fairly by other governments. The common interest does not, however, appear to support a policy of lost profits, which represents a limitation on state freedom of action for the sole purpose of indulging the investor. The lost profits controversy is primarily a conflict between the exclusive interests of state and investor, and because of the state's greater responsibility for the welfare of the world's population, its interest should prevail over the investor's. Compensation at the level needed to maintain a flow of foreign investment fulfills the investor's reasonable expectations of profit and represents a reasonable compromise of the state's and investor's interests.

The power advantage which the concessionaire's government may derive from a concession is not worthy of community protection. If a concession agreement provides the concessionaire's government with influence over the decisions of the grantor government or control over its national resources, a termination, even if compensated, will extinguish this advantage. Authoritative protection of this power interest, however, is inconsistent with the principle that power should be shared between governments only by persuasive means, in this case by an agreement between the two governments. In the typical concession there is clearly no intention on the part of the grantor government to share power with the concessionaire's government, which is not even a party to the agreement. Since the grantor government has not consented to a sharing of power with the concessionaire's government and has received no benefit for its loss of power, community intervention to protect this interest would not promote the common good.

The policy of minimizing coercion in transnational economic relations also militates against the claim that states must perform their concession agreements. In important concession disputes, the terminating government usually perceives important power interests to be at stake. The result is strong opposition to demands for specific performance, creating a potential for crisis and coercion between the two states. Similarly, termination of an important concession, even if compensated, can be expected to create pressure within the concessionaire's government or nation for corrective action in defense of the national interest. A holding by international law that compensated terminations are "unlawful" will strengthen the position of those demanding coercive measures in support of national interests. In contrast, authoritative recognition of state competence to terminate will weaken supporters of coercive countermeasures by depriving them of a base of power; instead proponents of moderation and persuasion would have the weight of international authority on their side.

A community policy supporting the "modern" view may also increase the reluctance of capital importing states to resolve their termination controversies through adjudication, a means of dispute settlement with considerable promise but little support today. Professor Olmstead's lament states the problem squarely:

... it is indeed anomalous that so much uncertainty and doubt exist about the provision of an accessible and independent tribunal to which the foreign investor may proceed with a dispute. Compared with the confidence that a foreign investor and a State manifest in one another by entering into a foreign investment agreement, the reluctance of some States to agree to reasonable and independent remedies for disputes is difficult to explain.⁴²

Many leaders in the Afro-Asian world entertain serious doubt about the degree to which traditional international law protects their vital interests, a suspicion which is particularly acute in cases involving a direct conflict between their interests and the interests of the Western powers.⁴³ Rather than submit to the

⁴² Olmstead, *Economic Development Agreements, Part II: Agreements between States and Aliens; Choice of Law and Remedy*, 49 Calif. L. Rev. 504, 508 (1961).

⁴³ See Anand, *Role of the "New" Asian-African Countries in the Present International Legal Order*, 56 Am. J. Int'l L. 383, 402 (1962). In 1952 the
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uncertainties of adjudication, most developing states prefer to negotiate their differences, and contribute to the development of an international law in which they have more confidence. Reliance on negotiation between the powerful and weak states usually involved in termination disputes carries a greater risk that coercion will be employed and crisis or fighting will be the outcome.

A community policy protecting state competence to terminate can, it is submitted, promote a flow of international investment through persuasive means and at the same time protect the exclusive interests of the investor and the terminating state which promote the common good. The "modern" view overprotects the interests of the concessionaire and his government, threatens to discourage the importing of capital, and increases the risk of crisis and fighting in the settlement of termination controversies.

This analysis has sought a reasonable accommodation of the interests engaged by a state's termination of its concession promise to an alien. The same interests are at stake, however, if the government's promise was made to the concessionaire's government in a treaty, rather than to the alien in a concession agreement. From the standpoint of community policy, the crucial consideration is the effect a termination of expectations about the use of land and resources will have on the various interests involved. And since the effects of a termination are the same whether the promisee is the concessionaire or his government, community policy should refuse to recognize a demand for specific performance in both situations.

III. The Trend of Past Decision

Past claims that terminating states must specifically perform their concession agreements have produced three overlapping lines of authoritative decision. The first⁴⁴ ran up to the middle of the 19th century, until which time there were no generally recognized limits on state competence to terminate. A second line which began in the 1850's and ran into the 1930's saw primarily small

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Iranian government's fear of adjudication before the I.C.J. flowed in part from the expectation in Iran that the Company might be awarded lost profits through 1993, an outcome considered extremely unfair by the Persians. N.Y. Times, Sept. 2, 1952, p. 1, col. 3.

⁴⁴ See pp. 76-77 *infra*.

scale expropriations. During the early part of this period, competence to terminate was recognized with compensation as a limitation,⁴⁵ while the Great Depression saw an authoritative groping for some further restriction.⁴⁶ The third and final line of decision⁴⁷ began in the thirties and continues to date. These decisions, which have been primarily a response to large scale, ideologically and power motivated terminations, have generally recognized the competence to terminate, although the last ten years has witnessed one arbitral award⁴⁸ and a rising trend of doctrinal opinion⁴⁹ supporting the "modern" view.

During the first half of the 19th century the leadership of the Western powers perceived no interest in promoting foreign investment. Capital was needed at home and foreign investment tended toward speculations and not toward occupations then considered productive.⁵⁰ As a result, governments generally refused to intervene in termination controversies. The U.S. government justified its application of this policy in four main ways: (a) intervention was only proper when the wrong complained of was the equivalent of a common law tort "inflicted by force, and not the result of voluntary engagements or contracts;"⁵¹ (b) aliens "must estimate the character of those with whom they contract and assume the risk of their ability and will to execute their contracts;"⁵² (c) it does not "comport with the dignity of any government to make a demand upon another which might not ultimately, on its face, warrant a resort to force for the purpose of compelling compliance with it;"⁵³ and (d) a different policy "might prove exceedingly inconvenient to some of the States of this union as well as to other sovereign States."⁵⁴

The second half of the 19th century, however, saw changes in the economy of the industrialized nations which were reflected in the trend of authoritative decision. In contrast with the earlier

⁴⁵ See pp. 77-80 *infra*.

⁴⁶ See pp. 80-85 *infra*.

⁴⁷ See pp. 84-94 *infra*.

⁴⁸ *Saudi Arabia v. Arabian American Oil*, [1958] 27 Int'l L. Rep. 117, 127.

⁴⁹ See pp. 56-60 *supra*.

⁵⁰ Fatouros, *op. cit. supra* note 17, at 244.

⁵¹ 6 Moore, *International Law Digest* 710 (1906), quoting U.S. Sec. of State Fish in 1871; see generally *id.* at 705-10.

⁵² *Id.* at 708, quoting U.S. Sec. of State Buchanan in 1848.

⁵³ *Id.* at 707, quoting U.S. Sec. of State Marcy in 1855.

⁵⁴ *Id.* at 709, quoting U.S. Sec. of State Buchanan in 1848.

part of the century, "foreign investment began to be regarded with increasing favor."⁵⁵ Although governments still refused to interfere on behalf of their nationals for "mere breach" of contract, claims were advanced if the capital importing state used its governmental power to deny the investor legal redress for his defeated expectations. Two situations gave rise to this claim. In the first, the concessionaire had a claim against the government based on the terms of the contract, but the government refused to provide him with an adequate remedy in local court—a denial of justice.⁵⁶ The outcome of diplomatic intervention in this situation would be agreement on a decision maker to hear the claim, either a local judge, an arbitrator, or the diplomats of the two countries. The second situation arose when the grantor government employed its sovereign power to terminate a concession without compensation and without recourse to a judicial determination of the concessionaire's rights—in diplomatic parlance "arbitrary or confiscatory annulments of concessions or contracts."⁵⁷ In this situation the alien would have no remedy even if the government's courts remained open to him, since the local court would normally be bound to apply the terminating law. The outcome of diplomatic interference in such a case would be: (a) a negotiated settlement of the dispute in whole or in part by the government officials; and/or (b) agreement that another decision maker, usually arbitrators, would settle all or part of the dispute.

On the basis of this policy a large body of termination precedents developed during the late 19th century and the first thirty years of the 20th century.⁵⁸ This writer has found in these cases

⁵⁵ Fatouros, *op. cit. supra* note 17, at 244.

⁵⁶ See, Dunn, *The Protection of Nationals: A Study in the Application of International Law* 167 (1932); Moore, *op. cit. supra* note 51, at 717-22; Freeman, *The International Responsibility of States for Denial of Justice* 111-13 (1938).

⁵⁷ 5 Hackworth, *Digest of International Law* 610 (1944); see, Moore, *op. cit. supra* note 51, at 722-28; Wetter, *Diplomatic Assistance to Private Investment: A Study of the Theory and Practice of the United States During the Twentieth Century*, 29 U. Chi. L. Rev. 275 (1962).

⁵⁸ Mulligan (U.S. v. Peru, 1870), 2 Moore, *International Arbitrations* 1643 (1898); Hammaken (U.S. v. Mexico, 1870), 4 Moore, *International Arbitrations* 3470 (1898); Thurston (U.S. v. Dominican Republic, 1895), 6 Moore, *International Arbitrations* 729 (1898); Cherry (U.S. v. Colombia, 1897), 3 Whiteman, *Damages in International Law* 1714 (1943); Cheek (U.S. v. Siam, 1898), *Id.* at 1651; Punchard, McTaggart, Lowther (U.K. v. Colombia, 1899), Whiteman, *op. cit. supra* at 1692; Delagoa Bay and East African Railway (U.S. and U.K. v. Portugal, 1900), *Id.* at 1694; May (U.S. v. Guatemala, 1900), *Id.* at 1708;

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no claim that the concessions involved could not be terminated on payment of compensation; nor did any decision award a remedy of specific performance, a fact which takes on added significance in light of the great power of the U.S. government in South America, where most of the controversies arose. Many of these decisions do characterize the terminations as unlawful, but in every instance the basis of this holding was a failure to pay adequate damages.⁵⁹ Nor did these decisions consistently apply a policy of lost profits. In almost half the leading cases of the period,⁶⁰ decision makers refused to consider lost profits, instead measuring compensation in terms of expenditures made, actual cost of construction or the value of the concession at the time of taking. Those decisions awarding lost profits either failed to explain how they were measured or relied on such concepts as—reasonably anticipated, within the contemplation of the parties, proximate and immediate consequence, probable and not merely possible.⁶¹

The following summary of two leading cases provides some insight into community expectations during this period. In the *Delagoa Bay* case, the Portugese government had granted to an American and British owned company a thirty-five year concession to build and operate a railroad in an African colony.⁶² When the railroad was near completion, the Portugese government demanded an extension that had not been agreed upon in the concession. The concessionaire failed to complete the work in the time required, the concession was cancelled with no tender of

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Salvador Comercial (U.S. v. Salvador, 1902), *Id.* at 1683; Oliva (Italy v. Venezuela, 1903), Ralston, Venezuelan Arbitrations of 1903 780 (1904); Rudloff (U.S. v. Venezuela, 1903), *Id.* at 194; Company General of the Orinoco (France v. Venezuela, 1905), Whiteman, *op. cit. supra* at 1688; Emery (U.S. v. Nicarragua, 1909), *Id.* at 1643; Shufeldt (U.S. v. Guatemala, 1930), Dept. of State Arb. Ser. No. 3 (1932).

⁵⁹ Garcia Amador, Special Rapporteur of the U.N.'s International Law Commission, writes that in the "quite large number of precedents found in diplomatic practice . . . at no time was any question raised as to the validity of the act of expropriation itself; the only issue was the form and measure of the compensation to be paid to the aliens affected." "States Responsibility," 2 Yearbook of the Int'l L. Comm: 1957 104 at 120 (A/CN. 4/106) (1957).

⁶⁰ See cases cited note 58 *supra*.

⁶¹ See Whiteman, *op. cit. supra* note 58, at 1836-37 and cases cited note 58 *supra*.

⁶² *Delagoa Bay and East African Railway* (U.S. and U.K. v. Portugal, 1900), Whiteman, *op. cit. supra* note 58, at 1694.

compensation and the railroad seized. The British government claimed that the Portugese:

had no right to cancel the concession, nor to forfeit the line already constructed . . . and that for that wrong Her Majesty's Government are bound to ask for compensation. . . . If the Portugese Government admit their liability to compensate . . . Her Majesty's Government will admit that the amount of that compensation is a proper matter for arbitration.⁶³

Washington demanded "restoration of property or indemnity for losses inflicted" by the Portugese taking.⁶⁴ A diplomatic agreement appointed arbitrators to fix "the amount of compensation due."⁶⁵ Their opinion stated:

Whether one would, indeed, brand the action of the government as an arbitrary and dispoiling measure or as a sovereign act prompted by reasons of state which always prevails over any railway concession, or even if the present case should be regarded as one of legal expropriation, the fact remains that the effect was to dispossess private persons from their rights and privileges of a private nature conferred upon them by the concession, and . . . the State which is the author of such dispossession is bound to make full reparation for the injuries done by it.⁶⁶

In the *Shufeldt* claim a ten year concession to extract chicle in Guatemala was, after six years of operation, terminated by the legislature on the ground that it was "harmful to the national interest."⁶⁷ A United States claim for damages only was upheld by the Arbitrator H.K.M. Sisnett:

it is perfectly competent for the Government of Guatemala to enact any decree they like and for any reasons they see fit. . . . This Tribunal is only concerned where such a decree, passed even on the best grounds, works injustice to an alien subject, in which case the Government ought to make compensation for the injury inflicted. . . .⁶⁸

In contrast to the period from the end of the 19th century to 1930, the period of the Great Depression saw claims denying

⁶³ McNair, *The Seizure of Property and Enterprises in Indonesia*, 6 *Netherlands Int'l L. J.* 218, 224-25 (1959).

⁶⁴ 6 Moore, *op. cit. supra* note 51, at 728.

⁶⁵ Whiteman, *op. cit. supra* note 58, at 1695.

⁶⁶ *Id.* at 1698.

⁶⁷ *U.S. v. Guatemala*, 1930 note 58 *supra*.

⁶⁸ *Id.* at 871.

competence to terminate and heard the first formulations of the arguments which now support the "modern" view on concession agreements. The momentum behind this shift in decision appears to have come from a 1928 decision of the Permanent Court of International Justice, which stated that specific performance was the proper remedy for expropriations which terminated *treaty* promises.⁶⁹ In this case the Polish government expropriated a factory owned by a German national in violation of its treaty promise that it would take alien property only under circumstances which did not exist in this case. Before the merits of the case were heard by the Court, Germany agreed to settle for compensation, which the Court awarded. But in an extremely influential dictum, the Court stated that the proper remedy for an "illegal" taking of property was: "Restitution in kind, or if that is not possible, payment of a sum corresponding to the value which a restitution in kind would bear."⁷⁰ Even though no subsequent court or arbitral award has applied this policy in a treaty dispute, some writers consider it "clear and well settled" that states lack the competence to take any property which terminates expectations created by a treaty.⁷¹ Moreover, this principle supplies the basis for the argument that concession promises must be performed because treaties must be.

The arbitral award, *Czechoslovakia v. Radio Corporation of America* (1932),⁷² represents the first authoritative decision to invoke the doctrine of *pacta sunt servanda* in the context of a concession termination dispute. In this case the concessionaire held a ten year concession to establish and operate a direct radio circuit between Czechoslovakia and the U.S. After almost three years of operation, the Czech government informed R.C.A. that it was granting a second concession to a competitor, a decision prompted by a decline in governmental revenues from the concession. R.C.A. insisted that the first concession gave it exclusive rights and that the second concession would interfere with its

⁶⁹ Case concerning the Factory at Chorzow (Merits), P.C.I.J., ser. A, No. 17 (1928).

⁷⁰ *Id.* at 48; see, Baade, *Indonesian Nationalization Measures before Foreign Courts—A Reply*, 54 Am. J. Int'l L. 801, 825-27 (1960) for an excellent analysis of this case.

⁷¹ Fatouros, *op. cit. supra* note 17, at 222; the writer lists a number of authors supporting this view. *Id.* at 223 n. 20.

⁷² 30 Am. J. Int'l L. 523 (1936).

terms and could not be lawfully granted. The government maintained that the agreement was not exclusive. A panel of three arbitrators interpreted the concession agreement in favor of R.C.A., holding that Czechoslovakia "has not the right to establish a second direct radio telegraphic link,"⁷³ and that it must specifically perform. The government had argued that public not private law concepts were applicable. Even conceding this, said the Tribunal, "in public law the sentence *pacta sunt servanda* will also apply, just as public interest requires stability as regards any arrangement legally agreed upon. . . ."⁷⁴ The opinion did not, however, rule out the possibility of lawful termination in all situations. Indeed, it states explicitly that termination is possible if the state can "show that public interests of vital importance would suffer if the agreement should be upheld under the rules of ordinary civil law." The opinion emphasized, however, that "any alteration or cancellation of an agreement on this basis as a rule should only be possible subject to compensation to the other party."⁷⁵ The Tribunal then went on to hold that sufficient reason did not exist in this case for a lawful termination: "that this expectation sometimes proves to fail in not giving the country as large a profit as was expected cannot be considered sufficient reason for releasing that public institution from its obligations as signatory of said agreement."⁷⁶

The facts of the *Czechoslovakia* case were almost identical to those in an arbitration between R.C.A. and China three years later,⁷⁷ except that in the *China* decision, the arbitrators held that the agreement did not give R.C.A. an exclusive right of operation. The Chinese government's decision to grant another concession to a competitor was, therefore, held lawful. Because the Chinese had neither modified nor terminated the concession the issue of their competence to do so was not decided. Neverthe-

⁷³ *Id.* at 534.

⁷⁴ *Id.* at 531.

⁷⁵ *Ibid.*

⁷⁶ *Id.* at 534; In 1932 another important termination dispute grew out of a decline of revenues from the Anglo-Iranian oil concession in Iran. The government demanded a new concession, but the company and the British government denied the right of the Persian Government to cancel the concession unilaterally. Termination followed and the dispute was brought before the Council of the League of Nations. But before it acted a new concession was signed on April 29, 1933. Shwadrán, *The Middle East, Oil and the Great Powers* 42-44 (1955).

⁷⁷ *Radio Corporation of America v. China* (1935), 30 *Am. J. Int'l L.* 535 (1936).

less, the language of the Tribunal reflected a view similar to that expressed in the *Czechoslovakia* case, but without a consideration of when a compensated termination would be lawful.

The Chinese Government can certainly sign away a part of its liberty of action; and this also in the field of the establishment of international radio-telegraphic communications. . . . It will, as any other party, be bound by law and by any obligations legally accepted.⁷⁸

Another authority marshalled in support of the "modern" view⁷⁹ on concessions is the 1935 decision of the U.S. Supreme Court, *Perry v. United States*.⁸⁰ In this case, the plaintiff sued on a U.S. government bond which promised repayment in gold. Before the bond's maturity, Congress decided that U.S. obligations would not be repaid in gold and the Treasury would pay only in "legal tender currency." The government argued that it was not bound by the terms of the bond because an earlier Congress could not restrict a later Congress from regulating the currency system. It was further asserted that Congress could repudiate the earlier promise if it finds its "fulfillment inconvenient," and that the "Government cannot by contract restrict the exercise of a sovereign power." In a 5-4 decision, Chief Justice Hughes stated that Congress was without power to "alter or repudiate the substance of its own engagements when it has borrowed money under the authority which the Constitution confers."⁸¹

Because the Court cited international authority⁸² in support of the state's competence to enter a binding agreement, and because of Chief Justice Hughes' experience as United States Secretary of State, the case has affected expectations on an international level, even though Perry appears to have been a U.S. national. There are, however, definite limits on the relevance of this case to the termination controversy. First the holding of the case recognizes the competence of the government not only to enter a binding agreement, but also to terminate it if an equivalent is tendered.

⁷⁸ *Id.* at 540.

⁷⁹ Kissam and Leach, *supra* note 3, at 202; Ray, *supra* note 9, at 59-60; Committee on the Study of Nationalization, *supra* note 2, at 375; American Bar Association, *op. cit. supra* note 14, at 84.

⁸⁰ 294 U.S. 330 (1935).

⁸¹ *Id.* at 350-51.

⁸² 1 Oppenheim, *International Law* §§ 493-94 (4th ed.); *id.* at 353.

For the Court's order was not specific performance (payment of the gold promised), but the cash value of the difference in purchasing power between the gold he was promised and the \$10,000 in legal tender offered by the government.⁸³ Second, the policy applied by the Court, protecting the "credit of the United States," has only an indirect relevance to the competence issue in international law.⁸⁴ Third, the Court emphasized that even though the government bound itself by an agreement, it could lawfully refuse to perform by invoking its sovereign immunity from legal process; simply by withdrawing its consent to be sued, the government could avoid its binding obligation.⁸⁵

Another precedent invoked⁸⁶ to deny state competence to terminate is the *Losinger* case which came before the Permanent Court of International Justice in 1936.⁸⁷ In this controversy, Yugoslavia terminated a railroad concession agreement which provided for compulsory arbitration of all disputes. Subsequent to the termination, a Yugoslav law was enacted requiring all claims against the government to be made "before the ordinary courts of the State."⁸⁸ On the basis of this law the arbitrator refused to hear the concessionaire's claim arising from the termination. The Swiss government thereupon filed a memorial in the Permanent Court claiming that the Yugoslav Government could not by local law release itself from the obligation to arbitrate the termination dispute.⁸⁹ The relief demanded was an order that Yugoslavia submit the case to arbitration, i.e., specific performance. The Swiss government argued that:

the principle of *pacta sunt servanda* must be applicable not only to agreements directly concluded between states, but also to those between a State and foreigners. . . . A State may not invoke any provisions of its domestic private law or of its

⁸³ 294 U.S. 330, 357-58 (1935). And since Perry failed to prove an injury he was left without a remedy. Professor Henry M. Hart, Jr. writes: "Whatever conclusions may emerge from a study of the decision, a conviction as to what it means is not among them . . . the Court made two inconsistent decisions, one on an abstract question of public morality and the other on a concrete question of private justice." Hart, *The Gold Clause In United States Bonds*, 48 Harv. L. Rev. 1057, 1094 (1935).

⁸⁴ 294 U.S. 330, 351 (1935). The Court's decision was based on Article I, Sec. 8 and Sec. 4 of the 14th Amendment of the U.S. Constitution.

⁸⁵ *Id.* at 354.

⁸⁶ Domke, *supra* note 16, at 597.

⁸⁷ *Losinger Case* (Preliminary Objection), P.C.I.J., ser. A/B, No. 67 (1936).

⁸⁸ *Id.* at 19-20.

⁸⁹ *Id.* at 15; *Losinger Case*, P.C.I.J., ser. C, No. 78, at 7-9 (1936).

public law in order to evade the performance of valid contractual obligations. To admit the contrary would introduce an element of chance into all contracts entered into by a State with aliens since the State would have the power to repudiate its obligations by means of special legislation.⁹⁰

The case was ordered on for argument, but before a hearing was held Yugoslavia and Switzerland agreed "to discontinue the proceedings."⁹¹ The authority of this case, therefore, resides in the claim of the Swiss government that Yugoslavia was bound to perform its arbitration agreement. To what extent the Swiss arguments reflected community expectations is unclear, and even if they did it should be observed that the Swiss were only demanding specific performance of the promise to arbitrate; the competence of Yugoslavia to terminate the concession agreement was not even in issue.

The trend of decision during the Great Depression clearly reflects a desire to establish some further limit on the competence to terminate other than the requirement of compensation. The few relevant cases do not, however, reflect a strong consensus on what that limitation should be. In addition, both the limited size of the concessions and the relative unimportance of the government interests at stake in these cases give little insight into how large scale, ideological, and power motivated expropriations would be treated by authoritative decision makers. The 1930's, however, saw the beginning of a line of termination controversies of precisely this type. The line has continued to the present day, along with a definite trend of authoritative response in favor of increased protection for the claim to terminate. This trend can be attributed in part to the different impact of a large scale termination on the interests of the terminating government. In addition, since the breakup of the colonial system, there has been: (a) increased participation by the capital importing states in the international legal system; and (b) increased demand by them for control over natural wealth and resources.

The Soviet Union initiated the first important termination of this type when in 1929 it ended the concession of the British firm Lena Goldfields, Ltd. In 1925 Lena had been granted a vast

⁹⁰ P.C.I.J., *Losinger Case—Pleadings, Oral Statements, and Documents*, ser. C, No. 78, at 32 (1936).

⁹¹ *Losinger Case (Discontinuance)*, P.C.I.J., ser. A/B, No. 69 (1936).

exploring, mining and transportation concession as part of the Soviet national plan for development during the New Economic Period.⁹² The company enjoyed considerable success until the fall of 1929 when the U.S.S.R. launched its first Five Year Plan, part of which apparently included the termination of the concession. This was achieved through various forms of government harrassment which finally forced the company to withdraw, whereupon the Soviets claimed termination on the ground of non-performance. In the ensuing arbitration, the company claimed damages for breach of contract and in 1930 the Tribunal ordered that Lena "be compensated in money for the value of the benefit of which it had been wrongfully deprived."⁹³ No issue of competence to terminate was raised by the case.

Another important termination occurred in March 1938, when the Mexican government seized seventeen U.S., British, and Dutch companies operating under concession agreements. All but one of the U.S. companies and the British government demanded the restoration of the seized properties, while the Dutch government demanded either "adequate, prompt, and effective compensation or . . . return of the properties. . . ."⁹⁴ Washington asked only for compensation, claiming that "the legality of an expropriation is contingent upon adequate, effective, and prompt compensation."⁹⁵ In the end all three governments settled for compensation.

A major termination dispute grew out of the Iranian government's decision in March 1951⁹⁶ to nationalize the Anglo-Iranian Oil Company which had been operating under a sixty year oil concession since 1933. By terminating the Iranian government hoped to get more Iranians into better positions in the oil industry and to improve the Iranian share of the oil revenue. Another goal was "to destroy the British ability to interfere in Iranian political affairs through the oil company. . . . The Iranian's

⁹² Nussbaum, *The Arbitration Between The Lena Goldfields Ltd. and the Soviet Government*, 36 Cornell L.Q. 31, 47 (1950).

⁹³ *Id.* at 51.

⁹⁴ Baade, *supra* note 70, at 827-28; see Kunz, *The Mexican Expropriations*, 17 N.Y.U.L.Q. Rev. 327, 363-68 (1940).

⁹⁵ Baade, *supra* note 70, at 810; the U.S. government took the same position in a 1937 concession termination dispute with Bolivia. Wetter, *supra* note 57, at 306-7; Kunz, *supra* note 94, at 368-73.

⁹⁶ Shwadran, *op. cit. supra* note 76, at 106 for the text of the nationalization decree.

insisted and deeply believed that they had documentary evidence to prove A.I.O.C. political interference."⁹⁷ Compensation was provided for in an implementation act of April 1951 which: (a) authorized the government to deposit in a bank up to twenty-five per cent of oil revenues to meet probable claims; and (b) set up a board which was to submit compensation suggestions for approval by both houses of the legislature.⁹⁸

The demand of the company and the British government for "full restitution"⁹⁹ of the concession did not, however, rest on the claim that states lacked the competence to terminate their concessions. In its memorial to the International Court of Justice, the British government explained that it did "not dissent from the proposition that a State is entitled to nationalize and generally to expropriate concessions granted to foreigners to the same extent as other property owned by foreigners."¹⁰⁰ Rather, the British demand was based on: (a) an explicit Iranian promise that the concession would not be ended before its term; and (b) an alleged discriminatory purpose.

The termination dispute lasted for three years. After the first attempts at a diplomatic settlement had failed, the British sued in the International Court of Justice, which held that it lacked jurisdiction, since a "concessionary contract" could not be considered a "treaty" within the meaning of the Iranian Declaration of October 2, 1930 conferring jurisdiction on the International Court.¹⁰¹ Further negotiations between Iran and Britain produced a 1954 diplomatic settlement granting a new concession to a consortium of eight foreign oil companies, with the original Anglo-Iranian Oil Company receiving a forty per cent interest. Both Iran and the other members of the new Iranian Oil Consortium paid A.I.O.C. additional compensation.¹⁰²

During the three years that Iran and Britain spent negotiating this settlement, community attitudes on the lawfulness of the termination were expressed on several occasions. In the initial

⁹⁷ Cottam, *op. cit. supra* note 19, at 205; N.Y. Times, July 12, 1951, p. 7, col. 3; Shwadran, *op. cit. supra* note 76, at 147.

⁹⁸ Anglo-Iranian Oil v. Jaffrate, [1953] Int'l L. Rep. 316, 322.

⁹⁹ ANGLO-IRANIAN OIL CASE—PLEADINGS, ORAL ARGUMENTS AND DOCUMENTS 117 (I.C.J. 1952).

¹⁰⁰ *Id.* at 85.

¹⁰¹ Anglo-Iranian Oil Case (Jurisdiction), [1952] I.C.J. Rep. 93.

¹⁰² Shwadran, *op. cit. supra* note 76, at 188.

crisis following the termination,¹⁰³ support for the Iranian position

¹⁰³ See N.Y. Times, June 12, 1951, p. 17, col. 6; *id.*, June 28, 1951, p. 5, col. 1; *id.*, Nov. 4, 1951, p. 8, col. 2.

came as expected from the capital importing community. One year and one-half after the termination, a U.N. resolution, certainly influenced by the Anglo-Iranian dispute, reflected an even broader consensus in favor of protection for the competence to terminate. On December 21, 1952 the General Assembly recommended by a vote of 36 to 4 that:

all Member States, in the exercise of their right freely to use and exploit their natural wealth and resources wherever deemed desirable by them for their own progress and economic development . . . have due regard, consistent with their sovereignty, to the need for maintaining the flow of capital in conditions of security, mutual confidence and economic co-operation among nations.¹⁰⁴

Two Italian court decisions strengthened the expectations created by this U.N. resolution. In each case the Anglo-Iranian Oil Company sued a vendee of the Iranian government in local possession of a boatload of oil, on the ground that the expropriation was unlawful and ownership remained in the concessionaire. Both courts went directly to the merits, holding the termination lawful. The first based its decision on the Italian Constitution, which authorized expropriation if compensation is paid.¹⁰⁵ The second court based its decision primarily on the international policy which gives states the right to expropriate "any real or personal rights . . . for reasons of public interest and against compensation." In the Court's view, the General Assembly resolution of December 21, 1952 constituted "a clear recognition of the international lawfulness of the Persian Nationalization Laws."¹⁰⁶

The dispute following Egypt's nationalization of the Suez Canal in 1956 was primarily a power contest, although the "legal"

¹⁰⁴ Yearbook of the United Nations: 1952 300 (1953); Voting against the resolution were New Zealand, United Nations of South Africa, United Kingdom and the United States.

¹⁰⁵ *Anglo-Iranian Oil v. S.U.P.O.R.* (Ct. of Venice 1953), [1955] Int'l L. Rep. 19, 22-23.

¹⁰⁶ *Anglo-Iranian Oil v. S.U.P.O.R.* (Civil Ct. of Rome 1954), [1955] Int'l L. Rep. 23, 41. On similar facts: (a) the Aden Supreme Court held the Iranian expropriation unlawful on the ground that the taking was without compensation. The decision did not suggest, however, that a compensated termination was unlawful. *Anglo-Iranian Oil v. Jaffrate*, [1953] Int'l L. Rep. 316, 322; (b) two Japanese courts refused to pass on the lawfulness of the Iranian law. *Anglo-Iranian Oil v. Idemitsu Kosen Kabushiki Kaisha*, [1953] Int'l L. Rep. 305.

issue focused on the termination of an 1866 canal concession which had twelve years to run. President Nasser saw in Egyptian ownership of the Canal a means of financing the Aswan High Dam, but equally important was his expectation that a hostile act toward the West, especially against a last vestige of "imperialism," would improve his power position both in Egypt and in the Arab world.¹⁰⁷ For the United States, France and England an important waterway, affecting the economy of the Atlantic community, was perceived to be on the verge of falling under the control of a hostile power. Moreover, the power of England and France in the Middle East, measured in terms of their ability to have their way at Suez, was at stake. Thus, even though Egypt offered compensation,¹⁰⁸ the demands of the Western powers that Egypt not take control of the Canal and President Nasser's determination to do just that, generated a major crisis from the outset.

The Western powers did not base their claim on a lack of competence to terminate concession agreements, but on the argument that: (a) the Canal was "impressed with an international interest;"¹⁰⁹ and (b) the concession had been incorporated in an 1888 treaty which was designed to guarantee free use of the Canal for all times.¹¹⁰ Nor did the Western powers demand specific performance, insisting instead that the Canal be placed under international control with a "special" position and "substantial" revenues for Egypt.¹¹¹ The final outcome of the dispute was a transfer of the Canal to Egypt and a compensation agreement signed at Geneva July 14, 1958.¹¹²

Both the Suez and Anglo-Iranian cases demonstrate how claims that a state is without competence to terminate can encourage the use of coercive strategies when power is perceived to be at

¹⁰⁷ N.Y. Times, July 28, 1956, p. 16, col. 3.

¹⁰⁸ The offer was for payment of the price of stock on the Paris Exchange on the day before the taking. Huang, *Some International and Legal Aspects of the Suez Canal Question*, 51 Am. J. Int'l L. 277, 303 (1957); N.Y. Times, July 27, 1956, p. 1, col. 1.

¹⁰⁹ N.Y. Times, Aug. 3, 1956, p. 3, col. 3. A "Big Three" foreign ministers' statement.

¹¹⁰ Huang, *supra* note 108, at 286-87; see Delson, *Nationalization of the Suez Canal Company: Issues of Public and Private International Law*, 57 Colum. L. Rev. 755 (1957).

¹¹¹ N.Y. Times, Aug. 11, 1956, p. 1, col. 8.

¹¹² Agreement Between United Arab Republic and Compagnie Financière de Suez, 54 Am. J. Int'l L. 498 (1960).

stake in a termination. Britain's refusal to recognize this competence in the Iranian government produced a crisis from the very start:

both in Parliament, especially the Conservative opposition, and in the Conservative press a vociferous cry went up for the use of military force against the Iranians to protect British interests. Herbert Morrison, then Foreign Secretary, was under constant pressure to employ force not only to protect the lives of British nationals, but also the properties of the A.I.O.C., and he had to concede to the extent of several times sending a warship to the area.¹¹³

The crucial point from the standpoint of community policy is that pressures to use coercion against both Iran and Egypt would surely have been less had clear expectations existed that compensated terminations would be protected by international law.¹¹⁴

In sharp contrast to the post World War II trend of decision stands the 1958 arbitration, *Saudi Arabia v. Arabian American Oil Co.*,¹¹⁵ which grew out of a sixty year oil concession negotiated in 1923. Prior to 1954, Aramco had arranged through its buyers for all shipments of oil to foreign markets, but in that year Saudi Arabia entered an agreement with A. S. Onassis giving him, with certain qualifications, a "right of priority for the transport of oil for thirty years."¹¹⁶ Under this contract, Onassis was to help the Saudi government create a national fleet. He was to register a number of ships with Saudi Arabia, assist in the operation of a Saudi maritime school and employ graduates of the school and other Saudi nationals; the agreement also promised increased

¹¹³ Shwadran, *op. cit. supra* note 76, at 146. Intense economic pressure was also brought against the Iranians both to gain a favorable settlement for the concessionaire and to bring down the Mossadeq government. Cottam, *op. cit. supra* note 19, at 220; N.Y. Times, Sept. 14, 1951, p. 3, col. 6.

¹¹⁴ An editorial of the New York Times four months before the Suez military intervention indicates how distorted was the common view of the situation: "One man's angry will cannot be allowed to destroy a whole economic fabric in which half the world is vitally concerned. . . . There has been a violent flouting of the whole principle of international agreement and the honoring of pledges given. . . . The U.N. must act not to arbitrate . . . but to rescue Egypt from the folly of her dictator." N.Y. Times, July 30, 1956, p. 20, col. 1; in the Afro-Asian and Communists worlds, however, the taking was perceived to be lawful. *Id.*, July 30, 1956, p. 3, col. 1; *Id.*, Aug. 7, 1956, p. 2, col. 3.

¹¹⁵ This case is the major authoritative decision supporting the "modern" view on concession termination. ". . . perhaps the most important arbitral award interpretative of international concessions ever rendered," Schwebel, *supra* note 7, at 272. "This Award is entitled to have, and will have, great weight," Ray, *supra* note 9, at 49.

¹¹⁶ *Saudi Arabia v. Arabian American Oil*, *supra* note 48.

revenue for the Saudi government.¹¹⁷ Aramco, fearing that the Onassis agreement would drive its customers to competitors,¹¹⁸ claimed that its 1933 concession gave it the exclusive right to decide who carried concession oil from Saudi Arabia. The arbitrators, accepting this interpretation of the agreement, held the Onassis agreement a violation of the Aramco concession and ordered specific performance. Although the government claimed the competence to interfere with the concession "by virtue of its sovereignty"¹¹⁹ and without any offer of compensation, the language of the award by clear implication rules out even compensated terminations or alterations.

The Concession has the nature of a constitution which has the effect of conferring acquired rights on the contracting parties. By reason of its very sovereignty within its territorial domain, the State possesses the legal power to grant rights which it forbids itself to withdraw before the end of the Concession. . . . Nothing can prevent a State in the exercise of its sovereignty, from binding itself irrevocably by the provisions of a concession and from granting to the concessionaire irrevocable rights. Such rights have the character of acquired rights.¹²⁰

It [the government] has guaranteed to the Company that it would not exercise its sovereignty in any way contrary to the obligations it has undertaken towards Aramco and to the rights it has granted. The Sovereignty of the State is not limited by some exterior cause; it is the State itself which undertakes the (negative) obligation not to impede the grantee's exercise of its rights. . . . The exclusive right of Aramco can no longer be modified without the Company's consent.¹²¹

This opinion should be compared with the justification given in the 1932 arbitration, *Czechoslovakia v. Radio Corporation of America*,¹²² a case with an identical holding and similar facts, except that Saudi Arabia's interest in developing a national fleet was worthier of community protection than the Czech interest in increasing revenue from its telegraph link. But this additional

¹¹⁷ *Ibid.*

¹¹⁸ *Id.* at 143.

¹¹⁹ *Id.* at 140-41.

¹²⁰ *Id.* at 168.

¹²¹ *Id.* at 212-13. The 1933 Concession did not include a government promise not to terminate during the term of the concession.

¹²² See note 72 *supra*.

fact, combined with over twenty-five years of change in community perspectives made *Aramco* a much harder case. Nevertheless, the *Czechoslovakia* opinion provided the framework for a rational inquiry into the policies at stake. The *Aramco* opinion rejected this course by refusing to admit there were conflicting interests that had to be accommodated. By relying on the concept of acquired rights and by refusing to discuss the possibility of a lawful termination under any circumstances, the Tribunal took the very rigid position that the investor's interests deserved complete protection at the expense of the state's interest. The opinion fails to convince because it gives no inkling of why this choice was made or under what circumstances a similar decision would be taken.

The trend of decision since the *Aramco* case indicates how divergent that decision is from community expectations generally. In 1958 the Indonesian government terminated a number of long-term Dutch concessions as a means of constraining the Netherlands to change its policy in West New Guinea. The lawfulness of these expropriations was raised by two Dutch and German cases in which a deprived concessionaire sought possession of expropriated tobacco which had found its way to these countries. In neither case did the concessionaires base their demands on the claim that states lacked the competence to terminate.¹²³ Nor did Lord McNair, in his article condemning the terminations, base his charge of unlawfulness on this ground.¹²⁴ Both the courts and Lord McNair implicitly recognized the state's competence, with the limitation that compensation must be paid.

The 1962 General Assembly debate on the draft resolution of the Commission on Permanent Sovereignty Over Wealth and Natural Resources¹²⁵ provides an important insight into community expectations. The Commission's proposed draft resolu-

¹²³ The claims in each instance related to the absence of compensation and the purpose (discriminatory and power) of the taking. The two German decisions which held the terminations non-discriminatory cannot be supported on any ground; they are reported in English. 28 Int'l L. Rep. 16, 24 (1959) and in Domke, *Indonesian Nationalization Measures before Foreign Courts*, 54 Am. J. Int'l L. 305 (1960). The two Dutch decisions holding the terminations unlawful are reported in English in Professor Domke's article. A diplomatic settlement of the Dutch claims has not yet been reached.

¹²⁴ McNair, *supra* note 63, at 218.

¹²⁵ This Commission was established by the General Assembly in 1958 to conduct a survey and to make recommendations. Delegates from Afghanistan, Chile, Guatemala, Netherlands, Philippines, Sweden, U.S.S.R., U.A.R. and the U.S.A. served on the Commission. Yearbook of the United Nations: 1962 499.

tion¹²⁶ contained no reference to agreements, but in the Second Committee debate the United States and Britain each submitted corrective amendments. Most disturbing to the British and American delegates were paragraphs 2 and 3 which clearly implied that any arrangements for the "exploration, development and disposition" of natural resources could be changed at the will of the government.¹²⁷ Mr. Unwin (U.K.) explained that these paragraphs "could be interpreted" as authorizing interference with the rights acquired under agreements if the government no longer considered them "necessary or desirable," and since "that was assuredly not the Commission's intention,"¹²⁸ he proposed that both paragraphs be amended to the effect that: "Agreements freely entered into shall be faithfully observed."¹²⁹ The U.S. delegate proposed a separate paragraph stating: "In the exercise of permanent sovereignty over their wealth and natural wealth and resources, peoples and nations shall faithfully observe agreements freely entered into. . . ."¹³⁰

These and other amendments which would have embodied the theory of the "modern" view on concessions received such a cool reception that all were withdrawn or revised. Only when the reference to agreements was removed from the context of expropriation or the exercise of state sovereignty could sufficient support to carry an amendment be mustered. As finally approved by the Second Committee and later by a plenary session of the General Assembly, paragraph 8 of the resolution states:

Foreign investment agreements freely entered into by or between sovereign states shall be observed in good faith. States and international organizations shall strictly and conscientiously respect the sovereignty of peoples and nations over their natural wealth and resources in accordance with the Charter and the principles set forth in the present resolution.¹³¹

¹²⁶ U.N. DOC. NO. (/C. 2/L 654 (1962).

¹²⁷ *Ibid.*

¹²⁸ U.N. GEN. ASS. OFF. REC. 17th Sess., 2nd Comm. 228 (A/C.2/SR. 794-878) (1963).

¹²⁹ U.N. DOC. NO. A/C 2/L 669 (1962).

¹³⁰ U.N. DOC. NO. A/C. 2/L 688 (1962).

¹³¹ General Assembly Resolution 1803 (XVII) Dec. 14, 1962; the vote was 87-2-12 with France and the Union of South Africa against, the Communist states, Ghana, Cuba and Burma abstaining. Yearbook of the United Nations: 1962 504.

This ambiguous¹³² compromise did not, however, satisfy a substantial bloc of capital importing states who insisted that the reference to agreements in paragraph 8 be explicitly limited to agreements "between sovereign states."¹³³ This amendment was defeated 47-33-11, but the considerable support for it,¹³⁴ in the face of strong U.S. opposition, raises serious questions about the chances of ever developing a substantial consensus on the "modern" view. In strong contrast, the requirement of compensation as a limitation on state competence to terminate, was challenged in debate only by the communist delegates.

The most recent termination dispute of importance resulted from the Argentine government's decision of November 15, 1963 to expropriate fourteen foreign and Argentine oil concessions which had been granted in 1958.¹³⁵ During the 1963 Presidential campaign, both the legality of the concessions and the desirability of terminating them became an issue. President Illia who had campaigned on a promise to terminate, took office on October 12 and the next month the nationalization was announced. At the time of the taking, the expectation in Argentine political circles was that President Illia would not remain in power two months if the contracts were not terminated.¹³⁶

The expropriation brought the immediate intervention of the U.S. government which demanded either compensation or a new agreement with the U.S. concessionaires. President Kennedy publicly stated that: "We can insist that there be equitable standards for compensating those whose property is taken away from them." But neither Washington nor the U.S. companies

¹³² Explaining his vote, the Australian delegate noted that "agreements between two States were not fundamentally different from those deriving from contracts between a State and a private individual or company. A State was free to terminate a contract but should do so only in exceptional cases, as such action did not encourage co-operation." The U.S. delegate then expressed his pleasure that "the Committee had affirmed the binding nature of agreements concerning foreign investment, including agreements by States with private investors." U.N. GEN. ASS. OFF. REC. 17th Sess., 2nd Comm. 396 (A/C. 2/SR. 794-878) (1963).

¹³³ U.N. DOC. NO. A/C. 2/L 654 (1962).

¹³⁴ For the amendment besides the Communist states were: Sudan, Syria, Tanganyika, Uganda, U.A.R., Afghanistan, Algeria, Burma, Cambodia, Ceylon, Cuba, Ethiopia, Guinea, Indonesia, Iraq, Laos, Lebanon, Libya, Mali, Mauritania, Morocco and Saudi Arabia. Abstaining were Tunisia, Venezuela, Bolivia, Costa Rica, Ghana, Guatemala, Iran, Liberia, Mexico, Nepal and Peru. U.N. GEN. ASS. OFF. REC. 17th Sess., 2nd Comm. 389 (A/C. 2/SR. 794-878) (1963).

¹³⁵ N.Y. Times, Nov. 10, 1963, p. 34, col. 1.

¹³⁶ N.Y. Times, Nov. 14, 1963, p. 49, col. 1.

questioned Argentina's "right" to cancel her oil contracts with American companies.¹³⁷ By the summer of 1964, agreement in principle was reached that the government would repay the capital invested by the U.S. companies, although interest rates and claims for past oil deliveries were still in dispute.¹³⁸

Even though community expectations about how future termination disputes will be settled are far from settled, it is clear: (a) that the trend of decision is toward recognition of state competence to terminate; and (b) that the *Aramco* decision and the large body of doctrinal opinion supporting the "modern" view constitute a distinct countertrend, which is no doubt fortified by the strong demands for recognition of this competence. To suggest that the decisions of the past twenty-five years were "influenced by political considerations,"¹³⁹ or do not form a "consistent pattern,"¹⁴⁰ or represent "diplomatic expediency"¹⁴¹ and not the law, obscures the significance of these cases in providing us the best available view into the future and the clearest anticipation of what the law will be.

IV. Conclusion

It is submitted, that the community policy recommended here is better able and more likely to promote the common interest than the "modern" view, which denies the competence of states to terminate their concession agreements. For this reason it offers greater promise of eliminating concession terminations as a source of friction between states. First, the policy protecting state competence to terminate works a more reasonable compromise between the conflicting interests at stake. It protects the exclusive interests of the state and the investor, but also requires some compromise from each; it minimizes the risk of coercion and is capable of maintaining a flow of foreign investment. Second, because of this reasonableness, the chances are greater that the recommended policy, rather than the "modern" view, will become international law. No policy can be "recognized by international

¹³⁷ N.Y. Times, Nov. 16, 1963, p. 1, col. 1.

¹³⁸ N.Y. Times, June 30, 1964, p. 41, col. 2.

¹³⁹ Carlston, *supra* note 10, at 276.

¹⁴⁰ Committee on the Study of Nationalization, *supra* note 2 at 373.

¹⁴¹ Ray, *supra* note 9, at 19.

law"¹⁴² without broad community support, flowing from a conviction that it represents a reasonable accommodation of conflicting interests. But because of the one-sided balance struck by the policy denying competence to terminate, it holds little prospect of gaining substantial international support. Thus, even if one accepts the argument that terminating governments do not, and never have, paid enough compensation to maintain a flow of foreign investment, international consensus can be expected to develop more rapidly for a policy of adequate compensation than for a policy of specific performance. Consequently, the recommended policy offers a greater chance not only of protecting the exclusive interests of the terminating government but also of maintaining a flow of international investment.

Another possible argument against the policy recommended here is that: (a) it will encourage termination; and (b) in the face of increased terminations, potential investors who equate any government taking with confiscation will keep their money at home, as will investors who prefer performance to damages. The first part of this argument overlooks the reason why most governments respect their agreements; it also overemphasizes the role of international law in deterring terminations. Governments in Africa, Asia and South America have a strong *national* interest in respecting their agreements. The Indian delegation to the U.N., for example, has pointed out that:

The matter was not only one of principle but also one of expediency, because a country which nationalized foreign investments could hardly expect to attract them. Since the development of the underdeveloped countries would take many years, they had much to gain by importing foreign capital on mutually acceptable and honorable terms.¹⁴³

The same governments, demanding freedom to terminate if they so desire, also understand that even if sufficient compensation is paid to maintain a flow of investment, nations which respect their agreements have a better chance of attracting the available capital

¹⁴² Stephen Schwebel foresees a significant deterrent effect on termination when the unlawfulness of all termination is recognized by international law. See note 12 *supra* and text accompanying.

¹⁴³ U.N. GEN. ASS. OFF. REC., 17th Sess., 2nd Comm. 235 (A/C. 2/SR. 794-878) (1963).

on the best terms. It is, however, an anticipated injury from the investment market, not from the international legal process, which serves as the major constraint on states not to expropriate.

Because the potential loss of foreign capital is normally so important, the promised gain from termination must be great in order to tip the decision in that direction. The disputes of the last fifteen years have demonstrated that: (a) the government's internal power position must usually be at stake to influence its decision in favor of termination; and (b) when this value is significantly involved even the threat of military force will not produce specific performance.¹⁴⁴ It is concluded, therefore, that the non-legal constraint which serves the major task of promoting respect for concessions will function as well under a community policy recognizing competence to terminate, while community coercion on behalf of the "modern" view will not significantly deter important terminations and will increase the risk of crisis in post termination enforcement actions.

No doubt a community policy protecting terminated compensations would deter those investors who perceive every taking of alien property to be a confiscation or theft, whether it is compensated or not.¹⁴⁵ But can it be seriously suggested that international law should refuse to recognize an important state interest because of investor ignorance? Finally, there is the investor who prefers performance to compensation. Will he not be constrained to keep his money at home by the policy recommended here? First, the decisions of this investor should have little effect on the flow of investment if the perceived risk of termination does not increase, and it is, of course, his anticipated reaction which constrains governments to perform their agreements. Second, compensated contract terminations are protected

¹⁴⁴ Mr. Schwebel characterizes any non-economic reason for termination as "emotional," the implication being that such a reason is not worthy of community protection. See note 12 *supra* and text.

¹⁴⁵ "Expropriation has the connotation of confiscation to the United States interests; . . . Historically experience has shown that reasonable minds may differ in a substantial degree about what is fair compensation in these cases, how quickly it should be paid and in what currency it should be paid. Thus the United States enterpriser feels that if expropriation procedures become operative the effect is an ouster with an inadequate compensation." Galvin, *Some Comments on the Oil and Gas Entrepreneur and Mineral Concessions in Latin America*, 52 *Am. Soc'y Int'l L. Proc.* 217, 220 (1958).

in most municipal legal systems¹⁴⁶ without serious harm to the national economy. Do not businessmen in intrastate contracts also prefer performance to damages? Third, the function of international law is not merely to promote investment and to protect investors, but to accommodate all interests competing in a termination dispute. Viewed this way, a slightly detrimental effect on the international economy and on the position of investors can be tolerated as a means of promoting the common good, which includes the protection of both exclusive and inclusive interests.

¹⁴⁶ See, 5 Corbin, *Contracts* 610-11 (1951); Amos and Walton, Introduction to French Law 179-82 (2d ed. 1963); Szladits, *The Concept of Specific Performance in Civil Law*, 4 Am. J. Comp. L. 206 (1955); Dawson, *Specific Performance in France and Germany*, 57 Mich. L. Rev. 495 (1959).