

December 2012

## Interferences with Property Under European Human Rights Law

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### Recommended Citation

Lopez-Escarcena, Sebastian (2012) "Interferences with Property Under European Human Rights Law," *Florida Journal of International Law*: Vol. 24: Iss. 3, Article 3.  
Available at: <https://scholarship.law.ufl.edu/fjil/vol24/iss3/3>

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## **INTERFERENCES WITH PROPERTY UNDER EUROPEAN HUMAN RIGHTS LAW**

*Sebastián López Escarcena\**

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### **I. INTRODUCTION**

The right of property is mostly protected by regional instruments of human rights. Among these, one provision stands out: Article 1 of the First Optional Protocol to the Convention for the Protection of Human

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Rights and Fundamental Freedoms.<sup>1</sup> Based on this provision, the European Commission and Court of Human Rights have developed an influential case-law on interferences with property. According to these institutions, the state is not prevented from interfering with the use of property: a measure that produces this result is justified when the correspondent authorities observe a balancing test between the interests of the individual and those of the community. For this purpose, a wide margin of appreciation is given to the state.<sup>2</sup> The European Commission and Court have recognized three related rules in this provision: interferences with the peaceful enjoyment of possessions, the deprivation of property, and the control on its use. These rules are found, respectively, in the first sentence of Article 1, in the second sentence of the same paragraph, and in its second paragraph.<sup>3</sup>

Distinguishing among these rules is not easy in practice. The European Court has construed the concept of expropriation restrictively.<sup>4</sup> The notion of control on the use of property, on the other hand, has been interpreted broadly.<sup>5</sup> In this context, the tribunal will consider other interferences only when it is not able to establish a deprivation or a control on the use.<sup>6</sup> From the three forms of interference that comprise Article 1, only deprivations require compensation to be considered lawful. In this respect, the state will enjoy a wide margin of appreciation at the moment of establishing the sum due, especially in cases of nationalization. As a general rule, the European Court requires an amount reasonably related with the property taken: full compensation, however, is not guaranteed for every taking.<sup>7</sup> If there is no formal extinction of legal rights, an indirect expropriation will require a substantial interference with the right of property. According to the tribunal, a taking occurs when the property is left with no possible use or economic value.<sup>8</sup>

In conformity with Article 1, measures that deprive an individual or legal entity of the use of his/hers/its possessions must be adopted in the public interest. "Public interest" is not defined in the First Protocol, but the European Court has identified it as "general interest" (in other words: public purpose, as it is commonly known in international law). This requires a fair balance between the welfare of the individual and

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1. EUROPEAN COURT OF HUMAN RIGHTS, EUROPEAN CONVENTION ON HUMAN RIGHTS (2002), amended by Protocols Nos. 1, 4, 6, 7, 12 & 13, available at <http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf>.

2. See *infra* Part IV.

3. See *infra* Part III.

4. See *infra* Part V.

5. See *infra* Part IX.

6. See *infra* Part XI.

7. See *infra* Parts IV & VIII.

8. See *infra* Part V.

the community. The European Court will respect the exercise of the sovereign right to expropriate. As a consequence, a wide margin of appreciation will also be given to the national authorities at the moment of judging the public interest of the respective measure.<sup>9</sup>

## II. THE EUROPEAN CONVENTION AND PROPERTY

The right of property has been dubbed “the problem child of the European family of rights and freedoms.”<sup>10</sup> The earliest list of basic civil and political rights considered by the first drafting committee of the European Convention on Human Rights included the right of property, but was later deleted on the suggestion that it was not a fundamental requirement of a democratic society.<sup>11</sup> According to Merrills and Robertson, it was then clear that the inclusion of property would only be acceptable to Western socialist governments if the relevant provision would not prevent states from nationalizing private property.<sup>12</sup> The Council of Europe’s Committee of Ministers decided not to defer the signature of the Convention until an agreement on an acceptable wording for this right, and those of education and to free elections, would be reached.<sup>13</sup> The right of property was, therefore, not included in the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>14</sup> The aim of this treaty was to “encourage a cohesive democratic bloc of countries [that would serve] as a buttress against the resurgence of national socialism and totalitarian communism.”<sup>15</sup> The Convention had to reflect the views of the

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9. See *infra* Part VII.

10. David Anderson, *Compensation for Interference with Property*, 4 EUR. HUM. RTS. L. REV. 543, 545 (1999).

11. See J. G. MERRILLS & A. H. ROBERTSON, *HUMAN RIGHTS IN EUROPE: A STUDY OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 7-9* (4th ed. 2001); DAVID HARRIS ET AL., *LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 655* (2d ed. 2009); Christian Tomuschat, *The European Court of Human Rights and Investment Protection* [hereinafter Tomuschat, *The European Court of Human Rights*], in *INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY 636, 638* (Christina Binder et al. eds., 2009) [hereinafter *INTERNATIONAL INVESTMENT LAW*].

12. See MERRILLS & ROBERTSON, *supra* note 11, at 12.

13. See *id.* at 12-13.

14. European Convention on Human Rights, Council of Europe, Nov. 4, 1950, 5-32, [http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/CONVENTION\\_ENG\\_WEB.pdf](http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/CONVENTION_ENG_WEB.pdf). This treaty entered into force in 1953. United Nations, *Treaty Series: Treaties and International Agreements Registered or Filed and Recorded with the Secretariat of the United Nations*, Cumulative Index No. 41, 14, <http://treaties.un.org/doc/Publication/Cumulative%20Index/UNTS%20Volume%20No%20202201-2250/cumindex.chrono.en.pdf> [hereinafter *U.N. Treaty Series*].

15. Helen Mountfield, *Regulatory Expropriations in Europe: The Approach of the European Court of Human Rights*, 11 N.Y.U. ENVTL. L.J. 136, 138 (2002).

members of the Council of Europe, which ranged from capitalist to socialist states. For this purpose, its drafters tried to include those core values that “create and maintain a democratic society,” while at the same time respecting the political, social and economic differences of the parties present at the moment of its signature.<sup>16</sup>

Two years later, however, an agreement on the wording of the protection of property was reached.<sup>17</sup> Incorporated in Article 1 of the First Optional Protocol to the European Convention, it said:

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

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.<sup>18</sup>

The difficulties that surrounded the introduction of the right of property, among those protected by the European Convention, explain that Article 1 neither mentions expropriation as such, nor expressly includes the right to be compensated. This right is only implied in the reference to general principles of international law regarding deprivations of property, a formula adopted as a compromise between those states in favor of mentioning compensation and those against it.<sup>19</sup> Despite these difficulties, the problem child did come of age: Article 1 is, at present, the second most frequently invoked guarantee of the European Convention on Human Rights.<sup>20</sup>

After its adoption, Article 1 was soon criticized in doctrine as an inadequate and excessively weak provision, establishing an economic and social entitlement rather than a proper right.<sup>21</sup> The European Court

16. *Id.* at 138-39.

17. EUROPEAN COURT OF HUMAN RIGHTS, *supra* note 1, at 33.

18. *Id.* Signed in 1952, the First Protocol came into force in 1954. *U.N. Treaty Series*, *supra* note 14.

19. Hélène Ruiz Fabri, *The Approach Taken by the European Court of Human Rights to the Assessment of Compensation for “Regulatory Expropriations” of the Property of Foreign Investors*, 11 N.Y.U. ENVTL. L.J. 148, 151 (2002).

20. Luzius Wildhaber & Isabelle Wildhaber, *Recent Case Law on the Protection of Property in the European Convention on Human Rights* [hereinafter Wildhaber & Wildhaber, *Recent Case Law*], in *INTERNATIONAL INVESTMENT LAW*, *supra* note 11, at 657.

21. Mountfield, *supra* note 15, at 139-40; see Anderson, *supra* note 10, at 545; 1 RICHARD CLAYTON & HUGH TOMLINSON, *THE LAW OF HUMAN RIGHTS* 1301-02 (2000).

of Human Rights, however, has not shared this vision. According to the European Court of Human Rights, by recognizing the right to the peaceful enjoyment of possessions, Article 1 is in substance guaranteeing the right of property of both tangible and intangible assets. The wording of the other official version, the French text, of the European Convention confirms the conclusion of the Court. In the French text, the first paragraph of Article 1 mentions “*biens*” and “*propriété*,” instead of “possessions.”<sup>22</sup> In this context, the European Commission and Court have interpreted “possessions” to include contractual rights,<sup>23</sup> company shares,<sup>24</sup> goodwill in a business,<sup>25</sup> fishing rights,<sup>26</sup> patents,<sup>27</sup> and planning permissions.<sup>28</sup>

As Luigi Condorelli explains, neither the Commission nor the Court identified with precision the contours of the right of property, thus allowing the progressive enlargement of this legal concept according to the needs of an evolving society.<sup>29</sup> But such an approach is not limitless.

22. See George Gretton, *The Protection of Property Rights*, in HUMAN RIGHTS AND SCOTS LAW 275, 276-77 (Alan Boyle et al. eds., 2002). The European Court, however, has not considered the right to acquire property as protected by the Convention. See *Marckx v. Belgium*, App. No. 6833/74, 31 Eur. Ct. H.R. (ser. A) § 63 (1979), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57534>; see also *Moskal v. Poland*, App. No. 10373/05, Eur. Ct. H.R. §§ 38, 40 (2009), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-94009>.

23. See *A., B. & Co. A.S. v. Germany*, App. No. 7742/76, 14 Eur. Comm'n. H.R. Dec. & Rep. 146 § 2 (1978), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-73799>.

24. See generally *Bramelid v. Sweden*, App. Nos. 8588/79 & 8589/79, 29 Eur. Comm'n. H.R. Dec. & Rep. 64 (1982), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-74445>.

25. See *Van Marle v. Netherlands*, App. Nos. 8543/79, 8674/79, 8675/79 & 8685/79, 101 Eur. Ct. H.R. (ser. A) §§ 39-42 (1986), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57590>.

26. See generally *Baner v. Sweden*, App. No. 11763/85, 60 Eur. Comm'n H.R. Dec. & Rep. 128 (ser. A) (1989), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-992>.

27. See generally *Smith Kline v. Netherlands*, App. No. 12633/87, 66 Eur. Comm'n H.R. Dec. & Rep. 70 (1990), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-738>.

28. See generally *Pine Valley Devs., Ltd. v. Ireland*, App. No. 12742/87, 222 Eur. Ct. H.R. (ser. A) (1991), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57711>. See CLAYTON & TOMLINSON, *supra* note 21, at 1305-07; HARRIS ET AL., *supra* note 11, at 656-62; ROBIN C.A. WHITE ET AL., JACOBS, WHITE AND OVEY: THE EUROPEAN CONVENTION ON HUMAN RIGHTS 481-88 (5th ed. 2010); Tomuschat, *The European Court of Human Rights*, *supra* note 11, in INTERNATIONAL INVESTMENT LAW, *supra* note 11, at 646-47; Wildhaber & Wildhaber, *Recent Case Law*, *supra* note 20, in INTERNATIONAL INVESTMENT LAW, *supra* note 11, at 659-64.

29. Luigi Condorelli, *Premier Protocole Additionnel: Article 1*, in LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME 971, 975 (Louis-Edmond Pettiti et al. eds., 1999). See also Ursula Kriebaum, *Is the European Court of Human Rights an Alternative to Investor-State*

The European Court, for example, did not consider the enjoyment of aesthetic or environmental qualities of possessions as guaranteed under Article 1.<sup>30</sup>

The meaning given by the European Court to the term possessions is an autonomous one.<sup>31</sup> Consequently, the determination of its existence in a specific situation is not affected by the non-recognition of an interest as a right or its legal qualification, when recognized, under the relevant municipal law.<sup>32</sup> Nevertheless, the correspondent applicant must demonstrate that his interest has an economic value. That is to say, what Richard Clayton and Hugh Tomlinson call, “a legal right to some benefit, even if it be contingent upon satisfaction of certain conditions.”<sup>33</sup>

### III. EXPECTATIONS AND THE THREE RULES

Expectations are generally not regarded as possessions because they lack the necessary degree of certainty or concreteness.<sup>34</sup> In some cases, the European Court has considered them within this concept, if they have a sufficient basis in national law.<sup>35</sup> “Legitimate expectation[s] . . . must be of a nature more concrete than a mere hope.”<sup>36</sup> Licenses to

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*Arbitration?* [hereinafter Kriebaum, *Is the European Court of Human Rights an Alternative*], in HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 219, 232-33 (Pierre-Marie Dupuy et al. eds., 2009) [hereinafter HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW].

30. CLAYTON & TOMLINSON, *supra* note 21, at 1307. See also YUTAKA ARAI ET AL., THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 865-66 (Pieter van Dijk et al. eds., 4th ed. 2006).

31. Gasus Dosier v. Netherlands, App. No. 15375/89, 306-B Eur. Ct. H.R. (ser. A) § 53 (1995), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57918>. See generally Broniowski v. Poland, App. No. 31443/96, 2005-IX Eur. Ct. H.R. (2005), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-70326>.

32. See CLAYTON & TOMLINSON, *supra* note 21, at 1304; Fabri, *supra* note 19, at 153; HARRIS ET AL., *supra* note 11, at 658; Kriebaum, *Is the European Court of Human Rights an Alternative*, *supra* note 29, in HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW, *supra* note 29, at 233; Wildhaber & Wildhaber, *Recent Case Law*, *supra* note 20, in INTERNATIONAL INVESTMENT LAW, *supra* note 11, at 658.

33. CLAYTON & TOMLINSON, *supra* note 21, at 1305. See also Kriebaum, *Is the European Court of Human Rights an Alternative*, *supra* note 29, in HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW, *supra* note 29, at 233.

34. HARRIS ET AL., *supra* note 11, at 657-58.

35. See Depalle v. France, App. No. 34044/02, 2010 Eur. Ct. H.R. § 63, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-97978>.

36. See Sierpinski v. Poland, App. No. 38016/07, 2009 Eur. Ct. H.R. § 65, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-95590>.

serve alcoholic beverages<sup>37</sup> or to extract gravel,<sup>38</sup> among others, are considered to be included in Article 1 only if their lasting nature can be reasonably expected by the license-holder.<sup>39</sup> From this perspective, claims can also be considered possessions.<sup>40</sup> This is, for instance, how the European Court construed in *Pressos* the legitimate expectation that an unresolved claim will be decided in accordance with the general law.<sup>41</sup> In sum, as the European Court observed in *Kopecky*:

“Possessions” can be either “existing possessions” or assets, including claims, in respect of which the applicant can argue that he or she has at least a “legitimate expectation” of obtaining effective enjoyment of a property right. By way of contrast, the hope of recognition of a property right which it has been impossible to exercise effectively cannot be considered a “possession” within the meaning of Article 1 of Protocol No. 1, nor can a conditional claim which lapses as a result of the non-fulfilment of the condition.<sup>42</sup>

It took some time before the first case on Article 1 was decided by

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37. See *Tre Traktörer Aktiebolag v. Sweden*, App. No. 10873/84, 159 Eur. Ct. H.R. (ser. A) § 55 (1989), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57586>.

38. See *Fredin v. Sweden* (No. 1), App. No. 12033/86, 192 Eur. Ct. H.R. (ser. A) §§ 8-31 (1991), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57651>.

39. CLAYTON & TOMLINSON, *supra* note 21, at 1305.

40. See, e.g., *Stran Greek Refineries v. Greece*, App. No. 13427/87, 301-B Eur. Ct. H.R. (ser. A) § 62 (1994), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57913>; *Gratzinger v. Czech*, App. No. 39794/98, 2002-VII Eur. Ct. H.R. § 69, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-22710>; *Stretch v. United Kingdom*, App. No. 44277/98, Eur. Ct. H.R. § 32 (2003), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61173>.

41. See *Pressos Compania Naviera S.A. v. Belgium*, App. No. 17849/91, 332 Eur. Ct. H.R. (ser. A) § 31 (1995), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58056>; see also Anderson, *supra* note 10, at 546.

42. *Kopecky v. Slovakia*, App. No. 44912/98, 2004-IX Eur. Ct. H.R. § 35 (2004), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-66758>; see also *Viasu v. Romania*, App. No. 75951/01, Eur. Ct. H.R. § 58 (2008), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-90065>; *Bulves AD v. Bulgaria*, App. No. 3991/03, Eur. Ct. H.R. §§ 53, 57 (2009), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-90792>. On legitimate expectations and the European Court, see generally Ursula Kriebaum, *Regulatory Takings: Balancing the Interests of the Investor and the State*, 8 J. WORLD INV. & TR. 717, 734 (2007) [hereinafter Kriebaum, *Regulatory Takings*]; Pasquale De Sena, *Economic and Non-Economic Values in the Case Law of the European Court of Human Rights* [hereinafter De Sena, *Economic and Non-Economic Values*], in HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW, *supra* note 29, at 210; Wildhaber & Wildhaber, *Recent Case Law*, *supra* note 20, in INTERNATIONAL INVESTMENT LAW, *supra* note 11, at 661-62.



the European Court.<sup>43</sup> The increasingly complex regulations, derived from the market-oriented policies favored in the continent during the last decades, and the establishment of the individual right of petition before the Court by Protocol 11 of the European Convention,<sup>44</sup> prompted a large and authoritative case-law on Article 1.<sup>45</sup>

In conformity with this provision, state measures can interfere with the peaceful enjoyment of possessions in three different degrees. Deprivations, controls on the use of property, and other interferences have been identified by the European Court of Human Rights as distinct, but somehow connected rules.<sup>46</sup> The fact that these rules are related explains the general approach of the European Court when considering cases under Article 1. Because the second and third rules (deprivations and controls on the use) are particular instances of the first rule (other interferences),<sup>47</sup> the tribunal will start by establishing whether a deprivation or a control on the use of property has taken place.<sup>48</sup> Only if neither has occurred, will it study whether the state has

43. See *Handyside v. United Kingdom*, App. No. 5493/72, 24 Eur. Ct. H.R. (ser. A) §§ 60-63 (1976), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57499>. The first case decided by the European Court concerning an interference with the property of a foreigner was *AGOSI*. See generally *AGOSI v. United Kingdom*, App. No. 9118/80, 108 Eur. Ct. H.R. (ser. A) (1986), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57418>; see also Kriebaum, *Regulatory Takings*, *supra* note 42, at 717.

44. In force since 1998. COUNCIL OF EUROPE, *Convention for the Protection of Human Rights and Fundamental Freedoms: Protocol No. 11*, available at <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=155&CM=4&CL=ENG>.

45. See Gretton, *supra* note 22, at 291.

46. This test was first applied by the European Court in 1982. See *Sporrong v. Sweden*, App. Nos. 7151/75 & 7152/75, 52 Eur. Ct. H.R. (ser. A) § 61 (1982), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57580>; see also *Holy Monasteries v. Greece* (just satisfaction), App. Nos. 13092/87 & 13984/88, 301-A Eur. Ct. H.R. (ser. A) § 56 (1994), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57906>; *Carbonara v. Italy*, App. No. 24638/94, 2000-VI Eur. Ct. H.R. § 58, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58595>; *Jahn v. Germany*, App. Nos. 46720/99, 72203/01 & 72552/01, 2005-VI Eur. Ct. H.R. § 78, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-69560>; see generally CLAYTON & TOMLINSON, *supra* note 21, at 1302-03; MERRILLS & ROBERTSON, *supra* note 11, at 235; Fabri, *supra* note 19, at 152; ARAI ET AL., *supra* note 30, at 864; HARRIS ET AL., *supra* note 11, at 666; Wildhaber & Wildhaber, *Recent Case Law*, *supra* note 20, in INTERNATIONAL INVESTMENT LAW, *supra* note 11, at 658; WHITE ET AL., *supra* note 28, at 478.

47. See, e.g., *AGOSI*, 108 Eur. Ct. H.R. (ser. A) § 48; see also *James v. United Kingdom*, App. No. 8793/79, 98 Eur. Ct. H.R. (ser. A) § 37 (1986), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57507>; *Adzhigovich v. Russia*, App. No. 23202/05, Eur. Ct. H.R. § 25 (2009), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-94869>. Deprivations and controls on use—the second and third rules—cover the three main legislative powers: the taking of private property for public use, the regulation of its use, and taxation. CLAYTON & TOMLINSON, *supra* note 21, at 1302-03.

48. In both cases there has to be a reasonable and foreseeable national legal basis for the measure. Mountfield, *supra* note 15, at 141.

interfered with this right in any other way.<sup>49</sup>

The European Court has recently stated, “[T]he genuine, effective exercise of the right protected by Article 1 of Protocol No. 1 does not depend merely on the State’s duty not to interfere, but may give rise to positive obligations.”<sup>50</sup> In this sense, governments must act “in an appropriate manner and with utmost consistency” so that their measures are implemented “with reasonable clarity and coherence, in order to avoid, in so far as possible, legal uncertainty and ambiguity for the persons concerned by [them].”<sup>51</sup> As the Court has expressly recognized, these positive duties of the state comprise a larger obligation: good governance.<sup>52</sup>

#### IV. SOME COMMON PRINCIPLES

Under Article 1, the state can justify interferences with the right of property “in the public interest,” in relation with the second rule, and “in the general interest,” in relation with the third rule. It is unlikely that any particular distinction was intended between public and general interest. The European Court has not attempted to distinguish them either.<sup>53</sup> Moreover, the tribunal has applied a single test for the three rules at the moment of establishing whether interference is justified or not. Each will require the achievement of a fair balance between the interests of the community and those of the affected person. For this purpose, the objectives of the correspondent measure must be proportional to the means actually used for their fulfillment. The idea is to avoid an excessive burden on the protected persons.<sup>54</sup> In this regard, the Court explained in *Forminster*:

[T]he character of interference, the aim pursued, the nature of property rights interfered with, and the behaviour of the applicant and the interfering State authorities are among the principle factors material to the assessment whether the contested measure

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49. See TOM ALLEN, PROPERTY AND THE HUMAN RIGHTS ACT 1998, 110-12 (2005); WHITE ET AL., *supra* note 28, at 347.

50. Sierpinski v. Poland, App. No. 38016/07, 2009 Eur. Ct. H.R. § 68, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-95590>.

51. *Id.* §§ 71-72.

52. See, e.g., Moskal v. Poland, App. No. 10373/05, Eur. Ct. H.R. §§ 51, 72 (2009), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-94009>.

53. Gretton, *supra* note 22, at 281.

54. SANTIAGO MONTT, STATE LIABILITY IN INVESTMENT TREATY ARBITRATION: GLOBAL CONSTITUTIONAL AND ADMINISTRATIVE LAW IN THE BIT GENERATION 220 (2009). This author, however, only considers the fair balance test to be applicable to the first and third rules (*i.e.*, to lesser interferences and controls on the use). See *id.* at 200, 220.

respects the requisite fair balance and, notably, whether it imposes a disproportionate burden on the applicants.<sup>55</sup>

In the application of this test, the state has consistently been given a wide margin of appreciation—not only to identify the public or general interest involved, but also to assess if it prevails over that of individuals or legal entities.<sup>56</sup> This margin is wider in cases falling under the third rule.<sup>57</sup> The Court has declared that “regional planning and environmental conservation policies, where the community's general interest is pre-eminent, confer on the State a margin of appreciation that is greater than when exclusively civil rights are at stake.”<sup>58</sup> However wide the margin, the European Court has expressly said that it is not limitless—otherwise, the protection embodied in Article 1 would become illusory.<sup>59</sup> The margin, therefore, has to be construed—in the wording of this tribunal—“so as to guarantee to individuals that the essence of their rights is protected.”<sup>60</sup> The payment of compensation will generally play an important role in the determination of the proportionality of an interference with property.<sup>61</sup> The European Court openly declared so in *James*: “Clearly, compensation terms are material to the assessment whether the contested legislation respects a fair balance between the various interests at stake and, notably, whether it does not impose a disproportionate burden on the applicants.”<sup>62</sup>

Given the common analytical approach adopted by this tribunal to all interventions with property, the practical relevance of the distinction among deprivations, controls on use, and other interferences lies in the payment of compensation.<sup>63</sup> According to the case-law of the European

55. *Forminster Enters., Ltd. v. Czech*, App. No. 38238/04 & 38238/04, Eur. Ct. H.R. (2008), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-88813>.

56. CLAYTON & TOMLINSON, *supra* note 21, at 1314.

57. That is to say, controls on the use. See *Sporrong v. Sweden*, App. Nos. 7151/75 & 7152/75, 52 Eur. Ct. H.R. (ser. A) § 69 (1982), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57580>; see also *Holy Monasteries v. Greece*, App. Nos. 13092/87 & 13984/88, 301-A Eur. Ct. H.R. (ser. A) § 70 (1994), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57906>; *Velosa Barreto v. Portugal*, App. No. 18072/91, 334 Eur. Ct. H.R. (ser. A) § 36 (1995), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57967>; see generally CLAYTON & TOMLINSON, *supra* note 21, at 1303 & 1314.

58. *Depalle v. France*, App. No. 34044/02, 2010 Eur. Ct. H.R. § 84, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-97978>.

59. *Družstevní záložna Pria v. Czech*, App. No. 72034/01, Eur. Ct. H.R. § 91 (2008), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-96873>.

60. *Id.* § 93.

61. Anderson, *supra* note 10, at 548. See also Tomuschat, *The European Court of Human Rights*, *supra* note 11, in INTERNATIONAL INVESTMENT LAW, *supra* note 11, at 652-53.

62. *James v. United Kingdom*, App. No. 8793/79, 98 Eur. Ct. H.R. (ser. A) § 54 (1986), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57507>.

63. Anderson, *supra* note 10, at 554.

Commission and Court, controls on the use of property and other interferences do not create a right to compensation. If these are considered unlawful, however, the Court has repeatedly stated that they should be repaired, “putting the applicant . . . in the position in which it would have been had the violation not occurred.”<sup>64</sup> Only in exceptional circumstances will the European Court conclude that a total lack of compensation is justifiable.<sup>65</sup> In the case of deprivation, the Commission and the Court have considered that the protection of Article 1 would be ineffective in the absence of a compensatory principle equivalent to that of European comparative law.<sup>66</sup> Full compensation is, nevertheless, not guaranteed in all circumstances.<sup>67</sup>

## V. EXPROPRIATION IN THE EUROPEAN CONVENTION

In conformity with the second sentence of Article 1, deprivations of property are permitted if the respective state measure is adopted in the public interest, subject to the conditions provided by national law, and by the general principles of international law. Expropriations, as such, are not mentioned in this provision. Nevertheless, the European Court

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64. *Zlinsat v. Bulgaria* (just satisfaction), App. No. 57785/00, Eur. Ct. H.R. § 39 (2008), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-84315>. See Kriebaum, *Is the European Court of Human Rights an Alternative*, *supra* note 29, in *HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW*, *supra* note 29, at 243. According to the European Court, the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by an applicant. See, e.g., *Hentrich v. France*, App. No. 13616/88, 296-A Eur. Ct. H.R. (ser. A) (1994), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57903>; *Bulves AD v. Bulgaria*, App. No. 3991/03, Eur. Ct. H.R. (2009), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-90792>.

65. Wildhaber & Wildhaber, *Recent Case Law*, *supra* note 20, in *INTERNATIONAL INVESTMENT LAW*, *supra* note 11, at 659. *But cf.* Tomuschat, *The European Court of Human Rights*, *supra* note 11, in *INTERNATIONAL INVESTMENT LAW*, *supra* note 11, at 654.

66. See, e.g., *Pinnacle Meat Processors Co. v. United Kingdom*, App. No. 33298/96, 27 Eur. Comm’n H.R. Dec. & Rep 217 (1998), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-4429>; *Baner v. Sweden*, App. No. 11763/85, 60 Eur. Comm’n H.R. Dec. & Rep. 128 (ser. A) § 5 (1989), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-992>; *Lithgow v. United Kingdom*, App. No. 9006/80, 102 Eur. Ct. H.R. § 120 (ser. A) § 120 (1986), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57526>; see also Rosalyn Higgins, *The Taking of Property by the State: Recent Developments in International Law*, in 176 *COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW (RECUEIL DES COURS)* 259, 360 (1982); CLAYTON & TOMLINSON, *supra* note 21, at 1311-13; *Mountfield*, *supra* note 15, at 141-42.

67. See, e.g., *Holy Monasteries v. Greece* (just satisfaction), App. Nos. 13092/87 & 13984/88, 301-A Eur. Ct. H.R. (ser. A) § 71 (1994), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57906>; *J.A. Pye, Ltd. v. United Kingdom*, App. No. 44302/02, 2007-III Eur. Ct. H.R. § 54, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-82172>; see also Wildhaber & Wildhaber, *Recent Case Law*, *supra* note 20, in *INTERNATIONAL INVESTMENT LAW*, *supra* note 11, at 659.

has considered the notion of deprivation to cover not only direct takings of property but also measures that amount to them.<sup>68</sup> The tribunal explained in *Sporrong*:

In the absence of a formal expropriation, that is to say a transfer of ownership, the Court . . . must look behind the appearances and investigate the realities of the situation complained of . . . Since the Convention is intended to guarantee rights that are “practical and effective” . . . it has to be ascertained whether that situation amounted to a de facto expropriation.<sup>69</sup>

According to Clare Ovey and Robin White, the extinction of the rights of the owner will be the main criterion at the moment of determining whether a deprivation has taken place.<sup>70</sup> Ursula Kriebaum points to a more accurate factor: there must not be any possible use or economic value of the property remaining.<sup>71</sup> However, not all acts producing this result will necessarily constitute an expropriation, for they may be treated as a control on the use of property.<sup>72</sup> Within this context, the destruction of property will be tantamount to a deprivation.<sup>73</sup> Temporary seizures of property will merely amount to a control on the use.<sup>74</sup> In any case, a deprivation requires the taking of the whole bundle of rights. If only some of these are taken, the Court’s analysis will fall under the third and first rules (*i.e.*, as controls on the use, or other interferences).<sup>75</sup> The European Court has been cautious in finding that a measure amounts to a deprivation when there is no formal extinction of legal rights, because the second rule requires a substantial interference with the enjoyment of possessions.<sup>76</sup> For this reason, a

68. *Fredin v. Sweden* (No. 1), App. No. 12033/86, 192 Eur. Ct. H.R. (ser. A) § 42 (1991), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57651>.

69. *Sporrong v. Sweden*, App. Nos. 7151/75 & 7152/75, 52 Eur. Ct. H.R. (ser. A) § 63 (1982), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57580>. This is the first description of an indirect taking given by the European Court. Wildhaber & Wildhaber, *Recent Case Law*, *supra* note 20, in *INTERNATIONAL INVESTMENT LAW*, *supra* note 11, at 667.

70. WHITE ET AL., *supra* note 28, at 488.

71. Kriebaum, *Is the European Court of Human Rights an Alternative*, *supra* note 29, in *HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW*, *supra* note 29, at 238-39.

72. CLAYTON & TOMLINSON, *supra* note 21, at 1308.

73. See, e.g., *Akdivar v. Turkey*, App. No. 21893/93, 1996-IV Eur. Ct. H.R. § 88 (1996), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58062>.

74. See, e.g., *Handyside v. United Kingdom*, App. No. 5493/72, 24 Eur. Ct. H.R. (ser. A) § 63 (1976), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57499>.

75. Wildhaber & Wildhaber, *Recent Case Law*, *supra* note 20, in *INTERNATIONAL INVESTMENT LAW*, *supra* note 11, at 659.

76. CLAYTON & TOMLINSON, *supra* note 21, at 1308. The approach of the European Court of Justice to the problem of indirect takings has been similar to that of the European Court of Human Rights. See ALLEN, *supra* note 49, at 15-16; Bruno De Witte, *Balancing of Economic*

restriction of rights will not constitute an expropriation, though it might be considered a type of interference, under the residual category of Article 1.<sup>77</sup>

One of the cases where the European Court of Human Rights did find a deprivation of property, in the form of an indirect expropriation, is *Papamichalopoulos*. The dispute related to the transfer of the applicants' land to a Navy fund in Greece. Although such property was not available for state disposal under Greek law at that moment, the Navy constructed a base and a holiday resort in the area. The applicants obtained domestic judicial recognition of their titles to the land, but could not enforce these judgments. Different attempts were made to obtain land of equal value in exchange from the authorities, but all failed. The applicants further claimed damages for the land transfers without success in the Greek courts.

The European Court found in *Papamichalopoulos* an interference with the applicants' right of property. Although the applicants were never formally expropriated, since the property was in fact transferred to the Navy, they were "unable either to make use of their property or to sell, bequeath, mortgage or make a gift of it."<sup>78</sup> The European Court concluded that this interference was not for the purpose of controlling the use of property and

that the loss of all ability to dispose of the land in issue, taken together with the failure of the attempts made so far to remedy the situation complained of, entailed sufficiently serious consequences for the applicants de facto to have been expropriated in a manner incompatible with their right to the peaceful enjoyment of their possessions.<sup>79</sup>

An indirect taking was also found by the European Court in relation with a different kind of state measure. In *Hentrich*, the applicants bought land in France, over which the tax authorities of Alsace exercised later a right of pre-emption based on a French law, then in force. This norm allowed the state to offer the owners to pay the price specified in the contract of sale and a ten percent premium provided for by law when the sale price was considered to be too low by the

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*Law and Human Rights by the European Court of Justice*, in HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW, *supra* note 29, at 199-201. See also, e.g., Case 4-73, *J. Nold v. Comm'n of the Eur. Comtys.*, 1974 E.C.R. 492; Case 44/79, *Hauer v. Land RheinlandPfalz*, 1979 E.C.R. 3729.

77. See, e.g., *Matos e Silva, Ltd. v. Portugal*, App. No. 15777/89, 1996-IV Eur. Ct. H.R. §§ 79, 85, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58063>.

78. *Papamichalopoulos v. Greece*, App. No. 14556/89, 260-B Eur. Ct. H.R. (ser. A) § 43 (1993), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57836>.

79. *Id.* § 45.

government. The purpose of this right was to prevent tax evasion. The applicants unsuccessfully challenged the measure adopted by the French authorities in domestic courts, before turning to the European Court in search of redress. The application of the fair balance test to this case led this tribunal to find a violation of Article 1, mainly because: “as a selected victim of the exercise of the right of pre-emption, Mrs Hentrich ‘bore an individual and excessive burden’ which could have been rendered legitimate only if she had had the possibility -- which was refused her -- of effectively challenging the measure taken against her.”<sup>80</sup>

Another example of an indirect expropriation is *Pressos*. In this case, the applicants’ ships were involved in collisions in territorial waters of Belgium and the Netherlands as a result of the negligence of Belgian pilots on board. Some of the applicants initiated legal proceedings against the Belgian state, and others against a private company offering pilot services. None were successful on account of a Belgian law that retroactively exempted the state and other organizers of pilot services from their liability for negligent acts.<sup>81</sup> The European Court declared that this law “simply extinguished, with retrospective effect going back thirty years and without compensation, claims for very high damages that the victims of the pilot accidents could have pursued against the Belgian State or against the private companies concerned, and in some cases even in proceedings that were already pending.”<sup>82</sup>

The tribunal found in *Pressos* that a fair balance between the individual and collective interests was not kept. Therefore, an interference with the applicants’ right of property had taken place. The Court concluded that a violation of Article 1 was committed, because

[t]he financial considerations cited by the Government and their concern to bring Belgian law into line with the law of neighbouring countries could warrant prospective legislation in this area to derogate from the general law of tort.

Such considerations could not justify legislating with retrospective effect with the aim and consequence of depriving the applicants of their claims for compensation.<sup>83</sup>

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80. Hentrich v. France, App. No. 13616/88, 296-A Eur. Ct. H.R. (ser. A) § 49 (1994), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57903>.

81. *Pressos Compania Naviera S.A. v. Belgium*, App. No. 17849/91, 332 Eur. Ct. H.R. (ser. A) § 34 (1995), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58056>.

82. *Id.* § 39.

83. *Id.* § 43.

## VI. DEPRIVATIONS AND GOOD GOVERNANCE

*Guiso-Gallisay* is yet another case in which the European Court found a deprivation, this time under the second rule. The applicants were Italian nationals who had inherited plots of building land in Nuoro, Sardinia. A project to build low-rent housing and leisure structures on this land was approved by the regional authorities. This project involved the possession of the applicants' land with a view to its expropriation in five years. After the authorities took physical possession of their land, the applicants brought an action for damages before a domestic court against the local municipality, claiming that the occupation of the land was illegal and that the construction work had been completed without a formal taking of the land and the correspondent payment of compensation. The Nuoro court considered that the applicants had been deprived of their property, by virtue of its irreversible alteration, on the date on which the possession had ceased to be legal. The local tribunal ordered the municipality to pay compensation, which it did.

The applicants claimed before the European Court that they had been deprived of their land, as a result of its occupation and alteration, without proper compensation. The Court concluded that, in the absence of a formal expropriation order, the final judgment of the local tribunal in Nouro, declaring the unlawful character of the occupation of the land by the municipality, "had the effect of depriving the applicants of their property within the meaning of the second" rule.<sup>84</sup> In this case, the European Court reiterated its views on lawfulness. It declared that this principle "presupposes that the provisions of domestic law are sufficiently accessible, precise and foreseeable in their application."<sup>85</sup> The tribunal considered legal certainty as an element of the rule of law.<sup>86</sup>

In 2009, the European Court expressly related the concept of deprivation with that of good governance in *Moskal*. The applicant was a Polish national who had a son suffering from poor respiratory conditions. Ms. Moskal filed an application with a local social-security board asking for an early-retirement pension for persons raising children with serious health problems, who required constant care. The social-security board granted this pension to the applicant but later revoked it because of doubts about the accuracy of the medical certificate attached to Ms. Moskal's application for the pension. Ms. Moskal appealed against this decision before regional and national courts, where the measure of the local social-security board was upheld. After that, she

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84. *Guiso-Gallisay v. Italy*, App. No. 58858/00, Eur. Ct. H.R. §§ 79, 96 (2005), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-71551>.

85. *Id.* § 82.

86. *See id.* §§ 82, 93.



complained before the European Court, claiming an unjustified deprivation of property derived from the revocation of her acquired right to an early-retirement pension. The Court started its analysis by recognizing that:

[i]f . . . a Contracting State has in force legislation providing for the payment as of right of a welfare benefit -whether conditional or not on the prior payment of contributions- that legislation must be regarded as generating a proprietary interest falling within the ambit of Article 1 of Protocol No. 1 for persons satisfying its requirements.

. . . .  
The mere fact that a property right is subject to revocation in certain circumstances does not prevent it from being a “possession” within the meaning of Article 1 of Protocol No. 1, at least until it is revoked.<sup>87</sup>

In this context, the tribunal had no problem in finding that Ms. Moskal had a property right generated by the evaluation by the local social-security board of her dossier attached to the pension application. It also had no problem in judging that there was an interference with Ms. Moskal’s property, which was provided by law and in the public interest.<sup>88</sup> The European Court concluded, however, that the applicant had suffered an excessive burden as a result of this interference, particularly because she was faced with the total loss of her sole source of income, which originated from an application lodged in good faith and a state decision based on an error of assessment.<sup>89</sup> In reaching this conclusion, the tribunal related the notion of fair balance to that of good governance, defined by the Court as a principle that “requires that where an issue in the general interest is at stake it is incumbent on the public authorities to act in good time, in an appropriate manner and with utmost consistency.”<sup>90</sup> The tribunal went on to state that

[i]t is desirable that public authorities act with the utmost scrupulousness, in particular when dealing with matters of vital importance to individuals, such as welfare benefits and other property rights. In the instant case, the Court considers that having discovered their mistake the authorities failed in their duty

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87. Moskal v. Poland, App. No. 10373/05, Eur. Ct. H.R. §§ 38, 40 (2009), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-94009>.

88. *Id.* §§ 53, 57, 63.

89. *Id.* §§ 68-69, 74.

90. *Id.* § 51.

to act in good time and in an appropriate and consistent manner.<sup>91</sup>

## VII. PUBLIC OR GENERAL INTEREST

Directly related with the fair balance test is the notion of public interest. In conformity with the second sentence of Article 1, the measure resulting in a deprivation must be aimed at this objective. Although there is no conventional definition of such a term, the European Court has considered it to be similar to that of general interest, known in international law as public purpose.<sup>92</sup> This condition will require a balancing of the individual and collective concerns.<sup>93</sup> The object of the test is to differentiate—as Rosalyn Higgins worded it—“takings for purely private gain on the part of the ruler, from those for reasons related to the economic preferences of the country concerned.”<sup>94</sup>

The European Court has given the state great autonomy when adopting measures that interfere with the right of property. For the tribunal there is almost a presumption that a national measure is in the public interest.<sup>95</sup> This explains its reluctance to review the identification of the collective interest involved made by the state adopting the respective measure.<sup>96</sup> In early cases related with takings of property, the European Commission and Court held that states had an unlimited right to determine the necessity of such deprivation.<sup>97</sup> This almost absolute right has been replaced by the wide margin of appreciation illustrated in *James*.

In *James*, the applicants were trustees, acting under a will, of an area in central London where a large estate was developed. A leasehold law conferred rights of acquisition to the occupants of the estate. A number of them exercised this right and deprived the trustees of their ownership in a number of properties. The applicants claimed that this compulsory transfer gave rise to a violation of Article 1. In essence, the applicants were complaining against the terms and conditions of the contested legislation, not against the manner of execution of the law by a state

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91. *Id.* § 72.

92. Fabri, *supra* note 19, at 158. See also Higgins, *supra* note 66, at 371; Anderson, *supra* note 10, at 547; De Sena, *Economic and Non-Economic Values*, *supra* note 42, in HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW, *supra* note 29, at 212.

93. WHITE ET AL., *supra* note 28, at 491.

94. Higgins, *supra* note 66, at 371.

95. WHITE ET AL., *supra* note 28, at 492.

96. See CLAYTON & TOMLINSON, *supra* note 21, at 1315; Mountfield, *supra* note 15, at 140; ARAI ET AL., *supra* note 30, at 879-81; HARRIS ET AL., *supra* note 11, at 667; WHITE ET AL., *supra* note 28, at 492.

97. Fabri, *supra* note 19, at 158.

authority.<sup>98</sup> From this perspective, the European Court started its analysis of the situation by declaring:

[A] deprivation of property effected for no reason other than to confer a private benefit on a private party cannot be “in the public interest.” Nonetheless, the compulsory transfer of property from one individual to another may, depending upon the circumstances, constitute a legitimate means for promoting the public interest.<sup>99</sup>

The Court declared in *James* that a taking of property, in pursuance of a policy calculated to enhance social justice within the community, can be properly described as being in the public interest.<sup>100</sup> It even stated that an expropriation adopted in pursuance of a legitimate policy may be in such an interest, even if the community at large has no direct use or enjoyment of the property taken.<sup>101</sup> The Court’s general view on the margin of appreciation was clearly expressed in this case. It provides a clear guideline on how to approach other cases involving deprivations of property for public purpose:

Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is “in the public interest”. Under the system of protection established by the Convention, it is thus for the national authorities to make the initial assessment both of the existence of a problem of public concern warranting measures of deprivation of property and of the remedial action to be taken . . . .

Furthermore, the notion of “public interest” is necessarily extensive. In particular, as the Commission noted, the decision to enact laws expropriating property will commonly involve consideration of political, economic and social issues on which opinions within a democratic society may reasonably differ widely. The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature’s judgment as to what is “in the public interest” unless

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98. *James v. United Kingdom*, App. No. 8793/79, 98 Eur. Ct. H.R. (ser. A) § 36 (1986), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57507>.

99. *Id.* § 40.

100. *Id.* § 41.

101. *Id.* §§ 41, 45.

that judgment be manifestly without reasonable foundation.<sup>102</sup>

In other words, national authorities know the needs of their societies better.<sup>103</sup> This extensive conception of public purpose makes it difficult for a tribunal to deny the general interest claimed by the state adopting a measure that deprives someone of his or her property.<sup>104</sup> On this basis, for instance, the European Court found that the leasehold law involved in *James* was compatible with Article 1. This margin, although considerable, is not without restrictions. As the European Court declared in *Broniowski*, “the exercise of the State’s discretion, even in the context of the most complex reform of the State, cannot entail consequences at variance with Convention standards.”<sup>105</sup> Hélène Ruiz Fabri concludes that “[t]he Court’s review is limited in practice to verifying whether, in the abstract, the deprivation of property has pursued a legitimate aim in the public interest. This means that any probing judicial review will focus on other criteria.”<sup>106</sup>

### VIII. CONDITIONS PROVIDED BY LAW

In conformity with the second sentence of Article 1, an expropriated measure must be subject to the conditions established by municipal law. This means that any taking in breach of domestic norms amounts to a violation of Article 1: the act of deprivation adopted by the state must have a basis in municipal rules.<sup>107</sup> The European Court has considered this condition not merely to refer back to domestic norms, but also to the quality of these rules, “requiring it to be compatible with the rule of law, which is expressly mentioned in the preamble to the Convention.”<sup>108</sup>

National law should, therefore, be “adequately accessible and sufficiently precise.”<sup>109</sup> In addition, it must have foreseeable consequences, and the taking itself should be surrounded by basic

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102. *Id.* § 46.

103. Fabri, *supra* note 19, at 158.

104. *Id.* at 159.

105. *Broniowski v. Poland*, App. No. 31443/96, 2005-IX Eur. Ct. H.R. § 183 (2005), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-70326>.

106. Fabri, *supra* note 19, at 159.

107. *White et al.*, *supra* note 28, at 491.

108. *Malone v. United Kingdom*, App. No. 8691/79, 82 Eur. Ct. H.R. (ser. A) § 67 (1984), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57533>.

109. *Lithgow v. United Kingdom*, App. No. 9006/80, 102 Eur. Ct. H.R. § 120 (ser. A) § 110 (1986), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57526>.

procedural safeguards.<sup>110</sup> Whether the deprivation is subject to the conditions provided by municipal law requires a case-by-case analysis, where the European Court will only look for manifest violations of domestic norms.<sup>111</sup> However, it will not examine the correct application of national law. In this respect, the European Court will refer to the judgment of the relevant domestic court in order not to function as a “fourth instance.”<sup>112</sup>

The second sentence of Article 1 also provides that any taking in breach of the general principles of international law will amount to a violation. These principles entitle non-nationals to protection against arbitrary expropriations by the host state in the form of compensation for the loss of their property.<sup>113</sup> Ruiz Fabri explains that a special reference to those principles was the result of a compromise between states, which refused any mention of compensation, and states which desired such a mention.<sup>114</sup> The case-law of the Court generally describes a form of protection that is very close to the requirements of the principles of international law.<sup>115</sup> Nevertheless, the standard of compensation is only incorporated for cases of deprivation, not for those related with controls on the use or other interferences with property.<sup>116</sup> As a consequence, Article 1 would strongly imply that there is no such duty for normal state regulation.<sup>117</sup> Unjustified expropriations, however, should be compensated.<sup>118</sup>

The European Court has concluded that a reference to the general principles of international law does not entitle nationals of the expropriating state to this protection.<sup>119</sup> While such an approach conforms to the minimum standard enjoyed by foreigners under

110. Hentrich v. France, App. No. 13616/88, 296-A Eur. Ct. H.R. (ser. A) § 42 (1994), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57903>. E.g., the availability of procedural remedies to prevent the arbitrary adoption and exercise of state measures. See De Sena, *Economic and Non-Economic Values*, supra note 42, in HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW, supra note 29, at 215-16.

111. Fabri, supra note 19, at 159. See, e.g., ALLEN, supra note 49, at 95.

112. ARAI ET AL., supra note 30, at 885.

113. See WHITE ET AL., supra note 28, at 492; see also Anheuser-Busch Inc. v. Portugal, App. No. 73049/01, 2007-I Eur. Ct. H.R. § 9 (Caflisch & Cabral Barreto, J.J., dissenting), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-78981>.

114. Fabri, supra note 19, at 151.

115. *Id.* at 173.

116. See Higgins, supra note 66, at 360; CLAYTON & TOMLINSON, supra note 21, at 1313; Mountfield, supra note 15, at 141-42.

117. Katia Yannaca-Small, *Indirect Expropriation and the Right to Regulate: How to Draw the Line?*, in ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES 445, 452 (Katia Yannaca-Small ed., 2010).

118. Kriebaum, *Is the European Court of Human Rights an Alternative*, supra note 29, in HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW, supra note 29, at 240.

119. See Anderson, supra note 10, at 549.

international law, it contradicts the equal application of human rights law in the host-state. It also runs counter the European Convention itself, for Article 14 expressly prohibits discrimination in the enjoyment of its substantive rights on grounds of national origin. The reason for this position was explained in *James* in the following terms:

Especially as regards a taking of property effected in the context of a social reform, there may well be good grounds for drawing a distinction between nationals and non-nationals as far as compensation is concerned. To begin with, non-nationals are more vulnerable to domestic legislation: unlike nationals, they will generally have played no part in the election or designation of its authors nor have been consulted on its adoption. Secondly, although a taking of property must always be effected in the public interest, different considerations may apply to nationals and non-nationals and there may well be legitimate reason for requiring nationals to bear a greater burden in the public interest than non-nationals.<sup>120</sup>

The tribunal confirmed their exclusion from Article 1 by referring to the *travaux préparatoires* of the Protocol.<sup>121</sup> Consequently, there would be no compensation for the deprivations of the property of nationals of the host state, at least in theory. But due to the application of the fair balance test, their position is rarely (if ever) less favorable than that of non-nationals.<sup>122</sup> The sum paid as compensation is part of the proportionality assessment of the state measure.<sup>123</sup> As the European Court declared in *Holy Monasteries*: “[T]he taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference and a total lack of compensation can be considered justifiable under Article 1 . . . only in

120. *James v. United Kingdom*, App. No. 8793/79, 98 Eur. Ct. H.R. (ser. A) § 63 (1986), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57507>. See also *Lithgow v. United Kingdom*, App. No. 9006/80, 102 Eur. Ct. H.R. § 120 (ser. A) § 111-19 (1986), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57526>. Interestingly enough, the European Court had not found an expropriation of a foreigner by 2009. See Kriebaum, *Is the European Court of Human Rights an Alternative*, *supra* note 29, in HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW, *supra* note 29, at 241-42.

121. *James*, 98 Eur. Ct. H.R. (ser. A) § 64.

122. Anderson, *supra* note 10, at 549; De Sena, *Economic and Non-Economic Values*, *supra* note 42, in HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW, *supra* note 29, at 214, 217; Tomuschat, *The European Court of Human Rights*, *supra* note 11, in INTERNATIONAL INVESTMENT LAW, *supra* note 11, at 652-53.

123. Kriebaum, *Is the European Court of Human Rights an Alternative*, *supra* note 29, in HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW, *supra* note 29, at 240-41. See also Wildhaber & Wildhaber, *Recent Case Law*, *supra* note 20, in INTERNATIONAL INVESTMENT LAW, *supra* note 11, at 672-73.

exceptional circumstances.”<sup>124</sup>

Regarding the standard of compensation in case of deprivation, the Court has not followed international law. While according to the latter, the alien is entitled to a prompt, adequate, and effective compensation of the value of his or her property taken, Article 1 requires neither this standard nor the same level of compensation for every category of deprivation.<sup>125</sup> In principle, the corresponding amount must be reasonably related to the value of the property taken.<sup>126</sup> Nevertheless, the European Court will give the state a wide margin of appreciation when it comes to this.<sup>127</sup> That is to say, it will respect the judgment of the domestic authorities on the terms and conditions of the compensation, unless it is manifestly without reasonable foundation.<sup>128</sup> For this purpose, the European Court will distinguish between nationalizations and other forms of takings, as the state’s margin of appreciation appears to be wider in the former.<sup>129</sup> The tribunal explained its view on the subject in *Lithgow*: “Article 1 (P1-1) does not . . . guarantee a right to full compensation in all circumstances, since legitimate objectives of ‘public interest’, such as pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value.”<sup>130</sup>

The proportionality test is not used in European human rights law to decide whether an expropriation has occurred but to establish a fair balance between the interests of the state and the affected person.<sup>131</sup> As a result, the application of this test can lead to the payment of an amount which is less than the fair market value of the respective property.<sup>132</sup> In any case, compensation must be adequate. That is, it should take into account the damage arising from the length of the deprivation, and be paid within a reasonable time.<sup>133</sup> Excessive delays in receiving final compensation by those deprived of their property will amount to a

124. *Holy Monasteries v. Greece* (just satisfaction), App. Nos. 13092/87 & 13984/88, 301-A Eur. Ct. H.R. (ser. A) § 71 (1994), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57906>.

125. HARRIS ET AL., *supra* note 11, at 681.

126. Kriebaum, *Is the European Court of Human Rights an Alternative*, *supra* note 29, in HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW, *supra* note 29, at 240.

127. Fabri, *supra* note 19, at 165.

128. *Id.* at 166.

129. *Id.*

130. *Lithgow v. United Kingdom*, App. No. 9006/80, 102 Eur. Ct. H.R. § 120 (ser. A) § 121 (1986), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57526>. See also Fabri, *supra* note 19, at 166, 170; HARRIS ET AL., *supra* note 11, at 682.

131. CLAYTON & TOMLINSON, *supra* note 21, at 282.

132. See Kriebaum, *Is the European Court of Human Rights an Alternative*, *supra* note 29, in HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW, *supra* note 29, at 241.

133. *Guillemin v. France*, App. No. 19632/92, 1997-I Eur. Ct. H.R. § 54 (1997), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58019>.

breach of the fair balance requirement.<sup>134</sup>

## IX. CONTROLS ON THE USE OF PROPERTY

The second paragraph of Article 1 refers to state measures that fall short of deprivation but interfere with the right of property to a higher degree than those established in the first sentence of this provision. The power of the state to enforce those laws that are necessary to control the use, enjoyment, or disposition of property in conformity with the general interest,<sup>135</sup> or to secure the payment of taxes,<sup>136</sup> is wide. So is its margin of appreciation to judge the necessity of the measure adopted, from the standpoint of the principle of fair balance.<sup>137</sup> This means that the review of the state action by the European Court will focus on the establishment of a reasonable relationship of proportionality between the means employed and the aim sought to be realized.<sup>138</sup>

Compensation will not always be payable for controls on use of property. Its availability, however, will be one of the factors taken into account in the assessment of the balance test, and its payment should normally support a finding of non-violation of Article 1.<sup>139</sup> This criterion of fair balance is flexible: a measure will be disproportionate when the public interest could have been satisfied without imposing an excessive burden on someone.<sup>140</sup> In practice, the European Court will not easily conclude that a fair balance between the individual and community interest was lacking.<sup>141</sup> *Chassagnou* and *Hutten-Czapska* are rare examples of cases in which the Court found state authorities

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134. *Almeida Garrett v. Portugal*, App. Nos. 29813/96 & 30229/96, 2000-I Eur. Ct. H.R. § 54 (2000), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58417>.

135. See ALLEN, *supra* note 49, at 119.

136. *Id.*

137. CLAYTON & TOMLINSON, *supra* note 21, at 1317.

138. *Jacobsson v. Sweden* (No. 1), App. No. 10842/84, 163 Eur. Ct. H.R. (ser. A) § 55 (1989), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57423>. See also *AGOSI v. United Kingdom*, App. No. 9118/80, 108 Eur. Ct. H.R. (ser. A) § 52 (1986), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57418>; *Mellacher v. Austria*, App. Nos. 10522/83, 11011/84 & 11070/84, 169 Eur. Ct. H.R. (ser. A) § 48 (1989), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57616>; *Spadea v. Italy*, App. No. 12868/87, 315-B Eur. Ct. H.R. (ser. A) § 33 (1995), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57937>.

139. Nevertheless, in several cases the European Commission and Court have concluded that the challenged measure was proportionate, notwithstanding the failure to compensate the affected applicant for the reduction in the value of his property. *Anderson*, *supra* note 10, at 550-51.

140. ALLEN, *supra* note 49, at 286.

141. See *id.* at 119; ARAI ET AL., *supra* note 30, at 888-89.



failed the proportionality test when controlling the use of property.<sup>142</sup>

*Chassagnou* was referred by the European Commission to the Court and was based on an application lodged by ten French nationals claiming that the compulsory transfer of the hunting rights over their land to a municipal hunters association constituted a violation of Article 1.<sup>143</sup> The claimants were forced to tolerate the presence of armed men and gun dogs on their land every year, even though they did not want to hunt on their land, and objected on ethical grounds to the fact that others might come to it and do so.<sup>144</sup> Although the Court noted that the claimants had not been deprived of their right of property, it also noted that the compulsory transfer of their hunting rights prevented them from using these rights which are directly linked to that of property.<sup>145</sup>

The tribunal did recognize in *Chassagnou* a general interest in a law aimed at avoiding unregulated hunting and encouraging the rational management of game stocks.<sup>146</sup> Nonetheless, it concluded that the result of the concrete measure established by such a law<sup>147</sup> placed the claimants in a situation which upset the fair balance between the protection of the right of property and the requirements of the general interest.<sup>148</sup> As a consequence, the European Court found the control on use to constitute a violation of Article 1.<sup>149</sup>

*Hutten-Czapska* also originated in an application lodged with the European Commission, later transferred to the Court when Protocol 11 to the European Convention came into force.<sup>150</sup> The claimant complained about the situation created by the implementation of laws which imposed tenancy agreements and set an inadequate level of chargeable rent on her property in Poland.<sup>151</sup> These measures were implemented as part of special lease-schemes applied during the communist regime and temporarily after its demise.<sup>152</sup> As in

142. Another case in which a control of the use was found is *Immobiliare Saffi*. See generally *Immobiliare Saffi v. Italy*, App. No. 22774/93, 1999-V Eur. Ct. H.R., available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58292>.

143. See generally *Chassagnou v. France*, App. Nos. 25088/94, 28331/95 & 28443/95, 1999-III Eur. Ct. H.R., available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58288>.

144. *Id.* § 72.

145. *Id.* § 74.

146. *Id.* § 79.

147. This is compelling small landowners to transfer hunting rights over their land so that others can make use of it in a way which is totally incompatible with their beliefs.

148. *Chassagnou*, 1999-III Eur. Ct. H.R. § 85.

149. *Id.*

150. See generally *Hutten-Czapska v. Poland*, App. No. 35014/97, Eur. Ct. H.R. (2005), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-68364>.

151. *Id.* § 154.

152. *Id.* § 152.

*Chassagnou*, the European Court noted that the claimant never lost her right to sell her property and that the authorities did not apply any measures resulting in the transfer of her ownership.<sup>153</sup> Nevertheless, it acknowledged the fact that

[she] could not exercise her right of use in terms of physical possession as the house had been occupied by the tenants and that her rights in respect of letting the flats, including her right to receive rent and to terminate leases, had been subject to a number of statutory limitations . . .<sup>154</sup>

In *Hutten-Czapska*, the Court again recognized a general interest in the laws enacted and implemented by the state. In this case, laws aimed at securing the social protection of tenants and ensuring the gradual transition from state-controlled rent to a fully negotiated contractual rent, during the period of reform after the collapse of a communist regime.<sup>155</sup> The Court, however, found that the laws enacted and implemented by the state entailed a disproportionate and excessive burden on the claimant, one which cannot be justified by any legitimate interest of the community pursued by it.<sup>156</sup>

## X. LAWFULNESS AND MEASURES OF CONTROL

Even though Article 1 does not expressly require controls on the use of property to be in conformity with law, the European Court has considered itself competent to review the lawfulness of these measures.<sup>157</sup> According to the Court:

a norm cannot be regarded as a “law” within the meaning of the Convention unless it is formulated with sufficient precision to enable the citizen to regulate his conduct; an individual must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail . . . . A law may still satisfy the requirement of foreseeability even if the person concerned has to take appropriate legal advice to assess, to a degree that is

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153. *Id.* § 160.

154. *Id.* § 160.

155. *Id.* § 178. The Court had no jurisdiction over the facts that occurred before the ratification of Poland of the First Protocol to the European Convention in 1994. *See id.* § 140.

156. *Id.* § 188.

157. ARAI ET AL., *supra* note 30, at 890-91.

reasonable in the circumstances, the[se] consequences . . .<sup>158</sup>

This requirement of lawfulness presupposes, among other things, the existence of procedural guarantees affording the individual or legal entity a reasonable opportunity to challenge the respective measure before an independent body.<sup>159</sup> The tribunal will respect the legislature's judgment on the general interest involved in cases of control on the use, unless that appraisal is manifestly not in accordance with domestic law<sup>160</sup> or without reasonable foundation.<sup>161</sup> In this context, purposes considered to be in the general interest are, for instance, social and economic policies related with town planning,<sup>162</sup> alcohol consumption,<sup>163</sup> housing,<sup>164</sup> the protection of nature<sup>165</sup> and the environment,<sup>166</sup> and the combat of international drugs trafficking.<sup>167</sup>

Regarding taxes, contributions, and penalties, the European Commission has declared that taxation measures will adversely affect the guarantee established in the second paragraph of Article 1 only if they place an excessive burden on the person concerned or fundamentally interfere with his financial position.<sup>168</sup> In relation with measures taken by the state to enforce tax obligations, the European

158. *Forminster Enters., Ltd. v. Czech*, App. Nos. 38238/04 & 38238/04, Eur. Ct. H.R. § 65 (2008), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-88813>. See also *Sun v. Russia*, App. No. 31004/02, Eur. Ct. H.R. § 27 (2009), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-91128>.

159. *Družstevní záložna Pria v. Czech*, App. No. 72034/01, Eur. Ct. H.R. § 91 (2008), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-96873>.

160. *Tre Traktörer Aktiebolag v. Sweden*, App. No. 10873/84, 159 Eur. Ct. H.R. (ser. A) § 58 (1989), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57586>.

161. *Mellacher v. Austria*, App. Nos. 0522/83, 11011/84 & 11070/84, 169 Eur. Ct. H.R. (ser. A) § 45 (1989), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57616>.

162. *Jacobsson v. Sweden (No. 1)*, App. No. 10842/84, 163 Eur. Ct. H.R. (ser. A) § 55 (1989), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57423>.

163. See *Tre Traktörer Aktiebolag*, 159 Eur. Ct. H.R. (ser. A) § 58.

164. See *Mellacher*, 169 Eur. Ct. H.R. (ser. A) § 45.

165. See generally *Fredin v. Sweden (No.1)*, App. No. 12033/86, 192 Eur. Ct. H.R. (ser. A) (1991), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57651>.

166. See *Pine Valley Devs., Ltd. v. Ireland*, App. No. 12742/87, 222 Eur. Ct. H.R. (ser. A) (1991), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57711>.

167. See generally *Air Canada v. United Kingdom*, App. No. 18465/91, 316-A Eur. Ct. H.R. (ser. A) (1995), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57939>.

168. See generally *Svenska Mgmt. Grp. AB v. Sweden*, App. No. 11036/84, 45 Eur. Comm'n H.R. Dec. & Rep. 211 (1985), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-72454>; *Wasa Liv Ömsesidigt v. Sweden*, App. No. 13013/87, 58 Eur. Comm'n H.R. Dec. & Rep. 163 (1988), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-319>; *Travers v. Italy*, App. No. 15117/89, 80-B Eur. Comm'n H.R. Dec. & Rep. 5 (1995), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-86548>.

Court has held that it will respect the authorities' assessment unless it is devoid of reasonable foundation.<sup>169</sup> As a result, the second paragraph of Article 1 allows national authorities an almost unlimited power to impose restrictions on the use of property in accordance with the general interest.<sup>170</sup>

In contrast with the narrow reading given by the European Court to the notion of deprivation, the concept of control on the use of property has received a wider one.<sup>171</sup> Clayton and Tomlinson point out that the elimination of one of the bundle of rights comprising ownership, for instance, will usually not be enough to deprive someone of his or her ownership, but this infringement may amount to a control on the use of property.<sup>172</sup> However, not all interferences short of deprivation will necessarily be considered such an act by the European Court.<sup>173</sup>

A state may control the use of property by requiring certain actions or imposing certain restrictions on the activities of individuals and legal entities.<sup>174</sup> The European Court has a longstanding tendency to classify as controls on use, measures that by most ordinary standards would be considered deprivations.<sup>175</sup> The seizure of obscene publications;<sup>176</sup> refusal to register as certified accountants;<sup>177</sup> withdrawal of licenses;<sup>178</sup> rent controls;<sup>179</sup> planning restrictions;<sup>180</sup> temporary seizure of property in criminal proceedings;<sup>181</sup> temporary seizure of an aircraft for drugs

169. *Gasus Dosier v. Netherlands*, App. No. 15375/89, 306-B Eur. Ct. H.R. (ser. A) § 60 (1995), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57918>.

170. *ARAI ET AL.*, *supra* note 30, at 887.

171. *See* CLAYTON & TOMLINSON, *supra* note 21, at 1309.

172. *Id.*

173. *HARRIS ET AL.*, *supra* note 11, at 686.

174. *See* CLAYTON & TOMLINSON, *supra* note 21, at 1309; *HARRIS ET AL.*, *supra* note 11, at 687.

175. *ANDERSON*, *supra* note 10, at 553.

176. *See* *Handyside v. United Kingdom*, App. No. 5493/72, 24 Eur. Ct. H.R. (ser. A) §§ 60-63 (1976), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57499>.

177. *See* *Van Marle v. Netherlands*, App. Nos. 8543/79, 8674/79, 8675/79 & 8685/79, 101 Eur. Ct. H.R. (ser. A) § 15 (1986), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57590>, § 15.

178. *See* *Tre Traktörer Aktiebolag v. Sweden*, App. No. 10873/84, 159 Eur. Ct. H.R. (ser. A) § 11 (1989), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57586>. *See also* *Fredin v. Sweden* (No. 1), App. No. 12033/86, 192 Eur. Ct. H.R. (ser. A) § 20 (1991), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57651>.

179. *See* *Mellacher v. Austria*, App. Nos. 0522/83, 11011/84 & 11070/84, 169 Eur. Ct. H.R. (ser. A) § 10 (1989), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57616>.

180. *See* *Pine Valley Devs., Ltd. v. Ireland*, App. No. 12742/87, 222 Eur. Ct. H.R., §§ 10-12 (ser. A) (1991), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57711>.

181. *See* *Raimondo v. Italy*, 281-A Eur. Ct. H.R. (ser. A) §§ 12-13 (1994).

enforcement;<sup>182</sup> retrospective tax legislation;<sup>183</sup> and a sequestration measure;<sup>184</sup> are all examples of control on the use of property. Under the second paragraph of Article 1, states are even entitled to adopt measures which affect the execution of contracts in force.<sup>185</sup>

## XI. OTHER INTERFERENCES

The European Court of Human Rights first distinguished state interferences with property, different from deprivations or controls on its use, in the most widely cited judgment under Article 1 of the Protocol.<sup>186</sup> In *Sporrong*, the Swedish government had granted long-term expropriation permits to the city of Stockholm.<sup>187</sup> Although not depriving the applicants' rights by themselves, these permits gave the authorities the power to do so in the future.<sup>188</sup> The city of Stockholm then adopted prohibitions on construction on the applicants' properties.<sup>189</sup> After being in force for twenty three and eight years, respectively, Mr. Sporrong and Mr. Lönnroth complained that these permits made it impossible to sell or build anything in these properties and difficult to invest or obtain mortgages for them.<sup>190</sup> The applicants argued that this situation amounted to an interference with their right to a peaceful enjoyment of their possessions.<sup>191</sup> The European Commission of Human Rights found no violation of Article 1, and concluded that the measures were enforced in the general interest and were thus justifiable.<sup>192</sup>

The approach of the European Court in this case was both different and novel. Before *Sporrong*, it was generally assumed that claims related with Article 1 should take the form of either a deprivation or a

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182. See *Air Canada v. United Kingdom*, App. No. 18465/91, 316-A Eur. Ct. H.R. (Ser. A) § 5 (1995), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57939>.

183. See *Nat'l & Provincial Bldg. v. United Kingdom*, Eur. Ct. H.R., § 22 (Oct. 23, 1997).

184. See *Ismayilov v. Russia*, App. No. 30352/03, Eur. Ct. H.R., §§ 30, 33 & 35 (2008); *Sun v. Russia*, App. No. 31004/02, Eur. Ct. H.R. § 24-25 (2009), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-91128>.

185. *Mellacher v. Austria*, App. Nos. 0522/83, 11011/84 & 11070/84, 169 Eur. Ct. H.R. (ser. A) § 51 (1989), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57616>.

186. *Yannaca-Small*, *supra* note 117, at 463.

187. Under the 1972 Expropriation Act. See *Sporrong v. Sweden*, App. Nos. 7151/75 & 7152/75, 52 Eur. Ct. H.R. (ser. A) § 11-36 (1982), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57580>.

188. See *id.* § 11-36.

189. *Id.*

190. *Id.*

191. *Id.*

192. See *Higgins*, *supra* note 66, at 344.

control on the use of property. In this case, the European Court declared that the state can interfere with the peaceful enjoyment of possessions by measures that do not amount to deprivations or controls on its use. Applying the fair balance test between the individual and community interests, the Court concluded that a violation of the rule established in the first sentence of Article 1 had taken place.<sup>193</sup>

*Loizidou* is another example of a finding on other interferences. This case originated in an application against Turkey lodged with the European Commission by a Cypriot national.<sup>194</sup> Mrs. Loizidou owned land in northern Cyprus before the Turkish occupation.<sup>195</sup> After it, she was prevented from returning and enjoying her property.<sup>196</sup> The Court considered the continuous denial of access to Mrs. Loizidou's land by Turkish military personnel as an interference with her rights under Article 1.<sup>197</sup> However, it did not regard the violation as a deprivation or a control on the use of property.<sup>198</sup> The tribunal regarded the breach to "clearly fall . . . within the meaning of the first sentence of that provision . . . as an interference with the peaceful enjoyment of possessions" and observed "that hindrance can amount to a violation of the Convention just like a legal impediment."<sup>199</sup>

The European Court also dealt with other interferences in one of the numerous cases involving claims of restitution of property from central and eastern European states.<sup>200</sup> *Broniowski* relates to the re-drawing of the eastern border of Poland after the Second World War along the Bug River.<sup>201</sup> Polish nationals living in those territories beyond it were then repatriated and had to abandon their property.<sup>202</sup> Poland took upon itself the obligation to compensate these people.<sup>203</sup> As other repatriates, Mr. Broniowski was entitled to buy land from the state and have the value of his abandoned property considered in the purchase price.<sup>204</sup> Because of the number of persons involved in this scheme, Poland decided to reduce the pool of land available to them by excluding state agricultural

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193. See generally *Sporrong*, App. Nos. 7151/75, 52 Eur. Ct. H.R. (ser. A) § 11-36.

194. See generally *Loizidou v. Turkey*, Dec. 18, 1996, Eur. Ct. H.R., § 1.

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.* § 63.

200. For more on these types of cases, see Wildhaber & Wildhaber, *Recent Case Law*, *supra* note 20, in INTERNATIONAL INVESTMENT LAW, *supra* note 11, at 668-70.

201. See generally *Broniowski v. Poland*, App. No. 31443/96, 2005-IX Eur. Ct. H.R. (2005), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-70326>.

202. *Id.*

203. *Id.*

204. *Id.*

and military property.<sup>205</sup> The Polish state was therefore unable to fulfill its obligation of compensation.<sup>206</sup> When this exclusion was later declared unconstitutional, Poland considered its duty to be discharged towards all those repatriates that had been somehow compensated.<sup>207</sup> Mr. Broniowski was in this situation: he had received approximately two percent of the value of the house and land abandoned by his grandmother.<sup>208</sup> Applying the fair balance test, however, the European Court concluded that the applicant “as an individual . . . had to bear a disproportionate and excessive burden which cannot be justified in terms of the legitimate general community interest pursued by the authorities.”<sup>209</sup> A violation of Article 1 was thus found.<sup>210</sup>

Although the condition of public or general interest is not expressly mentioned in the first sentence of Article 1, the European Court has considered it applicable to any interference by the host-state within this provision. In *Beyeler*, the tribunal declared:

The principle of a “fair balance” inherent in Article 1 of Protocol No. 1 itself presupposes the existence of a general interest of the community . . . it should be reiterated that the various rules incorporated in Article 1 are not distinct in the sense of being unconnected and that the second and third rules are concerned only with particular instances . . . One of the effects of this is that the existence of a “public interest” required under the second sentence, or the “general interest” referred to in the second paragraph, are in fact corollaries of the principle set forth in the first sentence, so that an interference with the exercise of the right to the peaceful enjoyment of possessions within the meaning of the first sentence of Article 1 must also pursue an aim in the public interest.<sup>211</sup>

The distinction between deprivations and controls on the use of possessions is not always easy. When property is clearly affected by a state measure and it is not possible to identify a deprivation or a control on its use, the European Court will decide the respective case in

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205. From 1944 to 1953, 1,240,000 persons were repatriated. *Id.* § 12.

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.* § 187.

210. *Id.*

211. *Beyeler v. Italy*, (App. no. 33202/96), Eur. Ct. H.R. § 111 (2000). *See, e.g.,* *Viașu v. Romania*, App. No. 75951/01, Eur. Ct. H.R. § 73 (2008), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-90065>.

conformity with the rule laid down in the first sentence of Article 1.<sup>212</sup> Other interferences are, therefore, a residual category in this provision.<sup>213</sup>

The Court has adopted a broad approach to the notion of the control on the use of property, leaving comparatively few cases to be considered under this rule. The European Commission and Court had found violations to the residual type of Article 1, for instance, in the refusal of a housing license to an applicant to live in his own house;<sup>214</sup> the provisional transfer of the applicants' land to other landowners as part of a consolidation plan;<sup>215</sup> the annulment by law of an arbitration award in favor of the applicants;<sup>216</sup> an urban development scheme which impeded the development of the applicant's property for many years;<sup>217</sup> and public interest declarations;—issued as a preliminary expropriation—and prohibitions to build or change the use of certain parcels of land.<sup>218</sup> More recently, cases dealing with governmental and administrative partiality and arbitrariness have been solved in conformity with the first rule.<sup>219</sup> In all, David Anderson observes that other interferences: “[have] been applied to both restrictions which are consistent with Article 1 and might just as well have been characterized as controls of use, and to particularly blatant interferences which could easily have been described as deprivations.”<sup>220</sup>

## XII. CONCLUSION

Article 1 of the First Optional Protocol recognizes three different, but related, rules. To all of these, the European Court applies a single balancing-test to establish if the measure interfering with the right of property is justifiable or not. National authorities have a wide margin of appreciation at the moment of establishing whether this test is fulfilled

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212. See ALASTAIR MOWBRAY, *CASES AND MATERIALS ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 924 (Oxford Univ. Press ed. 2007).

213. ANDERSON, *supra* note 10, at 546; see also Gretton, *supra* note 22, at 278.

214. See *Wiggins v. United Kingdom*, (App. no. 7456/76), Eur. Comm'n H.R. Dec. & Rep. 40, 42 (1979).

215. See generally *Ekner v. Austria*, (App. No. 9616/81), Eur. Ct. H.R. (1987).

216. See *Stran Greek Refineries v. Greece*, App. No. 13427/87, 301-B Eur. Ct. H.R. (ser. A) § 32 (1994), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57913>.

217. In fact, more than 16 years. See *Phocas v. France*, Apr. 23, 1996, Eur. Ct. H.R., §§ 8-9, 11, 14-15 (1996).

218. See *Matos e Silva, Ltd. v. Portugal*, App. No. 15777/89, 1996-IV Eur. Ct. H.R. §§ 79, 85, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58063>.

219. Wildhaber & Wildhaber, *Recent Case Law*, *supra* note 20, in *INTERNATIONAL INVESTMENT LAW*, *supra* note 11, at 674-76. See generally *Intersplav v. Ukraine*, Eur. Ct. H.R., §§ 29, 32-33; *Smirnov v. Russia*, Eur. Ct. H.R., §§ 53, 55, 59.

220. ANDERSON, *supra* note 10, at 551-52.



or not. A measure that interferes with the right of property to a higher degree than the residual category, but falls short of a deprivation, is a control on the use. The state may exercise this control by requiring certain actions or imposing certain restrictions in the activities of persons. In this respect, the power of the state is almost unlimited. The European Court will respect the judgment of the national authorities regarding the general interest involved, unless this assessment is manifestly not in accordance with law or without reasonable foundation. As with other interferences, the control on the use of property does not create a right to compensation for those affected by the respective measure, as long as the interference is not considered unlawful.

The expropriated measure must be based in domestic norms that are compatible with the rule of law. An international minimum standard is recognized in this regard, within the limits of the wording of Article 1: non-nationals affected by the measure adopted by the respective state are entitled to compensation. In practice, both nationals and foreigners are compensated for deprivations. As a general rule, the amount required by this provision should be reasonably related with the value of the taken property. Nevertheless, facts that would normally be classified as deprivations might be considered controls on use by this tribunal, or even other interferences. This situation, and the lack of an absolute standard of compensation for the deprivation of property, allows the European Court to take into account not only the interests of the protected individual or legal entity, but also those of the state, in case of an interference with the right of property.

Recently, the European Court has related Article 1 of the First Optional Protocol with the notion of good governance. This obligation of the state involves certain positive duties, such as acting timely, with reasonable clarity and utmost consistency. Its aim is to avoid, as far as possible, legal uncertainty and ambiguity. To this effect, domestic laws must be sufficiently accessible, precise, and foreseeable in their application, and state measures must be implemented with coherence. In the Court's view, good governance is an essential element of the rule of law.