Nationality and the Protection of Property under the European Convention on Human Rights

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I. Introduction

Article 1 of the European Convention on Human Rights (ECHR) provides that the Contracting Parties have to secure the rights and freedoms protected by the substantive norms of the Convention and its Protocols for everyone within their jurisdiction. Therefore, the States parties to the Convention have to guarantee the right to peaceful enjoyment of one’s possession as enshrined in Article 1 of the Additional Protocol (AP-1) to the European Convention to everyone within their jurisdiction irrespective of the nationality of the owner of the property. The Commission recognised this repeatedly:

' [...] it [the State party] undertakes to secure these rights and freedoms not only to its own nationals and those of other High Contracting Parties but also to nationals of States not parties to the Convention and to stateless persons, as the Commission itself has expressly recognised in previous decisions'.

Therefore, to have a certain nationality is not a requirement for the enjoyment of the protection of property under the Convention. This approach is certainly an advantage compared to general international law and international investment law.

Furthermore, international investment law and general international law only protect foreign property against expropriation without compensation. By contrast, the European Convention of Human Rights does not exclude from the jurisdiction of the European Court of Human Rights (‘the Court’) disputes between Contracting States and their own nationals. Rather than being excluded, such disputes form the large majority of cases before the Court.

Therefore the question arises whether the nationality of the property owner targeted by an interference with property rights is totally irrelevant with regard to the protection of property under the European Convention on Human Rights.

Article 1 of the AP-1 to the ECHR refers, in case of an expropriation, to the conditions provided for by the general principles of international law. There, the nationality of the targeted person could be of importance. The aim of this contribution is to analyze


the meaning of the reference to the general principles of international law in Article 1 of the AP-1 to the ECHR and to portray the manner in which the Court dealt with the issue of compensation in its case-law. Finally, this paper analyses the case-law dealing with interferences with foreigners’ property.

II. The Reference to the General Principles of International Law

Article 1 of the Additional Protocol to the European Convention does not contain any explicit reference to the nationality of the property owner. It refers, however, to the conditions provided for by the general principles of international law:

‘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 first question which arises in this context is what is meant by the ‘general principles of international law’? This formula is not found in the list of sources of international law in Article 38 of the Statute of the International Court of Justice. The interpretation provided by the European Commission of Human Rights’ case-law is not very helpful to identify the meaning of this clause. It simply stated that

‘the general principles of international law, referred to in Article I, are the principles which have been established in general international law concerning the confiscation of the property of foreigners’.4

First, this statement is circular. Second, it is problematic, since confiscation is often used as an expression for an unlawful expropriation.5 This would mean that only the rules applicable in case of an illegal act would be applied. Instead of compensation, owed in case of lawful expropriation, damages would be due.6 This cannot possibly be the true meaning of this provision.

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3 Emphasis added.


6 See also I. Marboe, ‘Compensation and Damages in International Law. The Limits of “Fair Market Value”’, 7 The Journal of World Investment & Trade 723 (2006).
In its case-law, the Court did not take a position concerning the content of the clause. It simply repeated the assertion of the applicants:7

“The applicants argued in the alternative that the reference in the second sentence of Article 1 (P1-1) to ‘the general principles of international law’ meant that the international law requirement of, so they asserted, prompt, adequate and effective compensation for the expropriation of property of foreigners also applied to nationals.”8

Brownlie states that “the rubric may refer to rules of customary law, to general principles of law as in Article 38(1)(c), or to logical propositions resulting from judicial reasoning on the basis of existing international law and municipal analogies”.9

What apparently was meant by the reference to the general principles of international law was the traditional customary international law rule that in respect of the expropriation of foreign property the payment of prompt, adequate and effective compensation is required. Statements made both during the deliberations (1951, 1952) which led to the adoption of the text of the Protocol as well as in reaction to a reservation by Portugal (1979) clearly show that:

‘[..], the phrase ‘subject to the conditions provided for … by the general principles of international law’ would guarantee compensation to foreigners, even if it were not paid to nationals.”10

Similar language was included in the Committee of Ministers’ Resolution (52) of 19 March 1952:

‘[..] Recognising that, as regards Article 1, the general principles of international law in their present connotation entail the obligation to pay compensation to non-nationals in case of expropriation, [..].”11

In 1979, Portugal made the following reservation concerning the obligation to compensate in case of an expropriation:

‘[..] Article 1 of the Protocol will be applied subject to Article 82 of the constitution of the Portuguese Republic, which provides that expropriations of large landowners, big property owners and entrepreneurs of shareholders may be subject to no compensation under the conditions to be laid down by law.”12

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7 James and Others v. United Kingdom, Judgement of 21 February 1986, ECHR (Ser. A) No. 98, para. 58; Lithgow v. United Kingdom, Judgement of 8 July 1986, ECHR (Ser. A) No. 102, para. 111.
8 James and Others v. United Kingdom, supra note 7, para. 58.
9 Brownlie, supra note 5, at 18.
10 Commentary by the Secretariat-General on the draft Protocol of 18 September 1951, Doc. DH (57) 10, at 157.
11 Tenth Session of the Committee of Ministers of 19 March 1952, Doc. DH (67) 10, at 169.
The United Kingdom, France as well as the Federal Republic of Germany all declared that this reservation cannot affect the general principles of international law, which require the payment of prompt, adequate and effective compensation in respect of the expropriation of foreign property:

' [...] I have been instructed to re-affirm the view of the Government of the United Kingdom that the general principles of international law require the payment of prompt, adequate and effective compensation in respect of the expropriation of foreign property.'

In the opinion of the French Government, this reservation cannot affect the general principles of international law which require prompt, adequate and effective compensation in respect of the expropriation of foreign property.

'The reservation made by Portugal cannot affect the general principles of international law which require prompt, adequate and effective compensation in respect of the expropriation of foreign property.'

The statements in the travaux préparatoires to Article 1 of the Protocol to the Convention predate UN General Assembly Resolution 3171 of 1973 as well as the Charter of Economic Rights and Duties of States of 1974. Both provide that the expropriating

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16 Permanent Sovereignty over Natural Resources, UN. Doc. A/RES/3171 (XXVIII) 3. Affirms that the application of the principle of nationalization carried out by States, as an expression of their sovereignty in order to safeguard their natural resources, implies that each State is entitled to determine the amount of possible compensation and the mode of payment, and that any disputes which might arise should be settled in accordance with the national legislation of each State carrying out such measures. (Emphases added).
2. Each State has the right:
[...] (c) To nationalize, expropriate or transfer ownership of foreign property in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means. (Emphases added).
State is entitled to determine the amount of possible compensation in accordance with its national law. Both were highly controversial.18

By contrast, the declarations of the United Kingdom, France and Germany concerning the Portuguese reservation of 1979 were made after these UN General Assembly resolutions had been passed at a time, when at a universal level, there was no longer agreement on the requirement to pay prompt, adequate and effective compensation in case of an expropriation of foreign property. This is all the more remarkable given the fact that in 1951 the delegates of the UK were the strongest opponents to the inclusion into the text of the Protocol of a general requirement of compensation in case of an expropriation.19 Therefore, contrary to the development on the global level, the States parties to the ECHR apparently stuck to the classical formula of customary international law.

Who can rely on the general principles of international law mentioned in Article 1 of the AP-1 to the ECHR? The Commission20 and the Court21 stated that the nationals of the interfering State cannot profit from these principles. For this interpretation, the Court relied on Article 31 of the Vienna Convention on the Law of Treaties: the ordinary meaning of the text would not suggest extending the applicability of the principles to nationals. The Court also relied on the travaux préparatoires of the Protocol which confirmed this interpretation. Therefore, the Court treats the reference to the general principles of international law as including not only their substantive protection but also the requirement of foreign nationality for their application. In other words, according to the Court foreigners are protected by these general principles of international law while nationals are not.22


18 During the vote article by article in the Second Committee of the UN General Assembly 104 States voted in favour of art. 2(2)c, 16 (Austria, Belgium, Canada, Denmark, France, FRG, Ireland, Italy, Japan, Luxembourg, Netherlands, Norway, Spain, Sweden, United Kingdom and United States) voted against and six (Australia, Barbados, Finland, Israel, New Zealand and Portugal) abstained.

19 See, e.g., Draft Report of the Committee of Experts to the Committee of Ministers of 22 February 1951, Doc. DH (57) 10, 130:

[...] Differences of view were expressed on the question whether the Convention should establish the principle of compensation in the case of expropriation in the public interest. The majority of the Committee were in favour of establishing this principle. Only the Delegation of the United Kingdom categorically opposed to this viewpoint.

20 Gudmundsson v. Island, supra note 4, at 423 et seq.; X v. BRD, supra note 4, at 226.

21 James and Others v. United Kingdom, supra note 7, paras. 59-66; Lithgow v. United Kingdom, supra note 7, paras. 111-119.

III. The Proportionality Principle and the Requirement of Compensation in Case of an Expropriation

After all this, one could expect that States may expropriate their nationals without compensation and would not violate the Convention by doing so. One could therefore expect that the nationality of an expropriated person would have a major impact on the obligation of a State party to compensate for an expropriation. But this is not so.

According to the Court’s interpretation of Article 1 of AP-1, the payment of compensation as a necessary condition for the lawful taking of property of anyone within the jurisdiction of a Contracting State is implied by the article itself. It is by now well established in the Court’s case-law that the terms of compensation are an important factor in assessing whether an interference imposed a disproportionate burden on the applicant.\(^{23}\)

The Court has developed this requirement out of the proportionality principle, which it found to be inherent in the Convention as a whole and also reflected in the structure of Article 1 of the Additional Protocol. In addition, the Court relied on the national legal systems of the Contracting States. It observed in that context:

'[T]hat under the legal systems of the Contracting States, the taking of property in the public interest without payment of compensation is treated as justifiable only in exceptional circumstances ... As far as Article 1 (P1-1) is concerned, the protection of the right of property it affords would be largely illusory and ineffective in the absence of any equivalent principle. 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.\(^\text{24}\)

As far as the amount of compensation required is concerned, the Court regularly states that in principle it must be reasonably related to the value of the property taken:\(^\text{25}\)

\[\text{‘T}he\text{aking of property without payment of an amount reasonably related to its value would normally constitute a disproportionate interference which could not be considered justifiable under Article 1 (P1-1). Article 1 (P1-1) does not, however, guarantee a right to full compensation in all circumstances.’}\(^\text{26}\)

\[\text{W}hile\text{ it is true that even in many cases of lawful expropriation, such as a distinct taking of land for road construction or other public purposes, only full compensation may be regarded as reasonably related to the value of the property, this rule is not without exceptions.}\(^\text{27}\)

There are exceptions to this rule if there is a special interest of the State to expropriate and if, at the same time, less compensation than the fair market value causes no excessive burden for the individual.\(^\text{28}\) However, a total lack of compensation is only justifiable in exceptional circumstances.\(^\text{29}\) Furthermore, just like in international

\(^{24}\) James and Others v. United Kingdom, supra note 7, para. 54.


\(^{26}\) James and Others v. United Kingdom, supra note 7, para. 54.


\(^{28}\) For cases where the Court found that there is such an exceptional situation see, e.g., James and Others v. United Kingdom, supra note 7, para. 54; Lithgow v. United Kingdom, supra note 7, para. 121; The Former King of Greece and Others v. Greece, supra note 27, para. 78; Senkspiel v. Germany, Decision of 12 January 2006, Application No. 77207/01.

\(^{29}\) For cases where the Court found the compensation to be disproportionately low see, e.g., Platakou v. Greece, supra note 23, paras. 56, 57; Pinčová and Pinc v. Czech Republic, supra note 25, para. 61; Scorlino v. Italy (no. 1), Grand Chamber, Judgment of 29 March 2006, Application No. 36813/97, paras. 103, 104.

\(^{20}\) The Holy Monasteries v. Greece, supra note 23, para. 71; see also, e.g., Pressos Compania Naviera S.A. and Others v. Belgium, supra note 23, para. 38; The Former King of Greece and Others v. Greece, supra note 23, para. 89; Malama v. Greece, supra note 23, para. 48; Zvolský and Zvolska v. Czech Republic, supra note 23, para. 70; Broniowski v. Poland, supra note 25, para. 176; I.R.S. v. Turkey, Judgment of 20 July 2004, Application No. 26338/95, para. 49;
investment law and general international law the Court distinguishes between lawful and unlawful expropriations:\(^3\)

"The unlawfulness of such a dispossession inevitably affects the criteria to be used for determining the reparation owed by the respondent State, since the pecuniary consequences of a lawful expropriation cannot be assimilated to those of an unlawful dispossession."\(^3\)

In case of an unlawful expropriation, the person concerned has to be put in a situation equivalent to the one in which it would have been in had a breach of Article 1 of the Additional Protocol not occurred.\(^3\)

The Court bases the compensation requirement in case of an expropriation on the concept of proportionality inherent in the substantive guarantees of the Convention. This concept was developed in cases where nationals of the intervening State were targeted by the expropriation. For this reason, it is by now undisputed that, in principle, states cannot expropriate their nationals without offering compensation. Lack of compensation will in most cases constitute a violation of Article 1 of AP-1 to the ECHR.

This development in the case-law of the Court mitigates any potential impact of the nationality of an expropriated person on the requirement of compensation for an expropriation. A comparison between the approach of the Court with regard to compensation for expropriations of nationals with the general international law rules applicable to expropriations of foreigners' shows that a difference arise only in cases of lawful expropriations. Even then, the difference arises only in those exceptional situations where two conditions are met: 1. There is a special interest of the State to expropriate and at the same time. 2. Less than full compensation does not cause an excessive burden for the expropriated individual. In general international law and international investment law no such exception exists. Both require always full compensation in case of an expropriation. However, general international law and

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international investment law do not protect nationals against expropriations without compensation.

IV. Interferences With Property Rights which target Foreigners

Only a handful of cases so far decided by the Court and the Commission targeting foreigners, concerned interferences with property rights.\textsuperscript{33}

The Commission and the Court disposed of these cases in three ways. In one group the Court refused to decide whether the interference was an expropriation (first paragraph, second sentence of Article 1 of the Additional Protocol), a control of use (second paragraph of Article 1) or another interference into property rights (first paragraph, first sentence of Article 1). In another group the Court held that the interferences were ‘control of use’ and not expropriations. In a third group the Commission decided that an expropriation of a foreigner had occurred but the Court held that the measure corresponded to ‘securing the payment of taxes’, which falls under the rule in the second paragraph of Article 1. The Court elaborated on the consequences of the reference to the general principles of international law in two cases which concerned expropriations of nationals.

In none of the cases did the Court find that a foreigner had been expropriated. Therefore, it never applied the nationality element inherent in the reference to the general principles of international law in practice. The Commission held in one case that a foreigner had been expropriated but strangely enough was of the opinion that the general principles of international law were not applicable to the case at issue.

A. Refusal to Classify

In the case \textit{Beyeler v. Italy}\textsuperscript{34} the applicant, a Swiss national, bought a Vincent Van Gogh painting in 1977 through an intermediary, a Rome antiques dealer, from an art collector living in Rome. In 1954, the painting had been declared a work of historical and

\textsuperscript{33} But see also the judgement in \textit{Anheuser-Busch v. Portugal} (Anheuser-Busch Inc. v. Portugal, ECHR, Grand Chamber, Judgment of 11 January 2007, Application No. 77049/01). There the Grand Chamber of the Court found that the applicant company’s legal position as an applicant for the registration of a trade mark came within Article 1 of Protocol No. 1, since it gave rise to interests of a proprietary nature recognised under Portuguese law, even though they could be revoked under certain conditions (paras. 66-78). However, rather surprisingly, the Grand Chamber did not find that any interference into the rights guaranteed by Article 1 of Protocol No. 1 of the ECHR had occurred although the trade mark was not registered. It therefore held that no violation had taken place. Judges Callisch and Cabral Barreto in their dissenting opinion were of the opinion that an interference had occurred. They stressed in that context, that the fact that the applicant is a foreigner and therefore protected by the ‘general principles of international law’ should not be disregarded. They hinted at the applicability of the principle of non-discrimination and the rule requiring prompt, adequate and effective compensation (para. 87).

\textsuperscript{34} Beyeler v. Italy, Judgment of 5 January 2000, 2000-I ECHR.
artistic interest within the meaning of the applicable Italian Law of 1939. This 1939 law provided for a right of pre-emption for the Italian Ministry of Cultural Heritage with a two-month time limit. The applicant did not disclose to the vendor that the painting was being purchased on his behalf. The obligatory declaration of sale filed with the Italian Ministry of Cultural Heritage did not mention Mr. Beyeler as the purchaser. In 1983, the Ministry learned that Mr. Beyeler was the actual purchaser. Only in November 1988 did Italy exercise its right of pre-emption and purchased the painting at the 1977 sales price. The Italian Courts, where the applicant had challenged the exercise of the right to pre-emption by the Italian State, characterized the exercise of the right to pre-emption as amounting to an expropriation. Nevertheless, the Italian Courts did not remedy the situation, since they did not grant an adjustment of the sum paid in 1988. The European Court, however, instead of classifying the interference in a precise category (expropriation/control of use/other interference) decided to examine the case under the general principles set forth in the first sentence of Article 1 (other interference – a ‘catch all clause’) because of the complexity of the factual and legal position:

'[T]he Court does not consider it necessary to rule on whether the second sentence of the first paragraph of Article 1 applies in this case. The complexity of the factual and legal position prevents its being classified in a precise category. ... Nor does the Court need to rule on the issue whether under Italian law the applicant should be considered the real owner of the painting (...). Moreover, the situation envisaged in the second sentence of the first paragraph of Article 1 is only a particular instance of interference with the right to peaceful enjoyment of property as guaranteed by the general rule set forth in the first sentence (...). The Court therefore considers that it should examine the situation complained of in the light of that general rule.'

This unwillingness to decide on the nature of the interference was rightly criticized in doctrine. By applying this approach, the Court deprived Beyeler, a foreigner, of the protection granted to foreign nationals by the rule on expropriation, namely the reference to the ‘general principles of international law’. As a consequence the Court did not even mention that Beyeler was a foreigner in its deliberations on the merits.

As regards the compensation actually awarded, this approach apparently did not create any disadvantages for Beyeler. His claim for restitution was rejected since the Court pointed out that the pre-emption had not been unlawful as such. The Court had held, however, that the conditions in which the right of pre-emption had been exercised violated the Convention. It decided that Beyeler should be compensated for the loss sustained as a result of being paid the same price without any adjustment in 1988 as he had paid in 1977, as well as for the ancillary costs he had incurred between 1984 and 1988 in determining the legal position with regard to the painting.

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35 Ibid., paras. 51, 102.
36 Ibid., para. 106.
The Court applied the same approach in *Sovtransavto Holding v. Ukraine*. The applicant was a Russian company. It held 49% of the shares in a Ukrainian company. The applicant alleged that the managing director of the Ukrainian company had unlawfully increased the company’s share capital three times, thereby reducing the applicant’s shareholding from 49% to 20.7%. As a result, the applicant lost some of the powers it exercised as a shareholder, namely its ability to run the company and control its assets. The applicant unsuccessfully brought proceedings in the Ukrainian courts to have the amendments to the Articles of Association and the decisions approving them declared null and void. The applicant alleged violations of Article 1 of Protocol No. 1, contending that it had lost control over the management and assets of the Ukrainian company. It contended that the compensation it had received after the liquidation of the company was not commensurate with its original share in the Ukrainian company’s share capital.

The Court considered it impossible to classify the interference but examined it in the light of the catch all clause derived from the general rule set forth in the first sentence of Article 1 A

'article: 

‘In the light of the circumstances of the case and having regard to the special nature of the applicant company’s possessions, the Court considers that owing to the factual and legal complexity of the present case it cannot be classified in any specific category within Article 1 of Protocol No. 1. Accordingly, it considers it necessary to examine the case in the light of the general rule set out in that Article.’

Therefore, the Court once again did not decide whether the interference was an expropriation and again potentially deprived a foreign company of the special protection granted to foreigners by the reference to the ‘general principles of international law’. The Court held that the Ukraine had violated its positive obligation under Article 1 of the Additional Protocol. The manner in which the proceedings in issue had been conducted in the Ukraine and the uncertainty faced by the applicant company had upset the required fair balance between the general interest and the need to protect the applicant company’s right to the peaceful enjoyment of its possessions.

In its judgement on just satisfaction, the Court held that because of the nature of the violation, the compensation due could not be directly based on the value of the shares but that the applicant had suffered a loss of opportunities. To assess the amount due the Court took into consideration the value of the shares and the situation of the applicant resulting from the loss of control:

‘La nature de la violation constatée par la Cour du droit de la requérante au respect de ses biens se répercute par la force des choses sur les critères à employer pour déterminer la réparation due par l’Etat défenseur. D’un côté, la Cour ne saurait spéculer

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sur ce qu’eût été l’issue du procès si l’Etat avait respecté ses obligations positives sous l’angle de l’article 1 du Protocole n° 1. Par conséquent, le montant de la réparation ne peut se fonder directement sur la valeur des actions que détenait la requérante. D’un autre côté, compte tenu de la gravité des violations intervenues dans la procédure litigieuse, la Cour n’estime pas déraisonnable de penser que la requérante a subi une perte de chances réelles [...].

Dès lors, la Cour, constatant qu’une perte de chances réelles ne peut être évaluée, d’une façon directe, sur la base de la valeur des actions que détenait la requérante, prendra en compte cette valeur comme référence.

La Cour prendra également en compte la situation dans laquelle s’est trouvée la requérante à la suite de la diminution de sa participation au capital de Sovtransavto-Lougansk.41

There is no indication that the amount granted as damages by the Court was less than full compensation. However, the Court did not apply the reference to the general principles of international law as it did not consider the interference to be an expropriation. Therefore it ignored that a foreigner’s property was the object of the violation of the Ukraine’s positive obligations under Article 1 of the Additional Protocol.

Even if in the result the applicants were apparently not disadvantaged by the approach chosen by the Court, the two cases were a missed opportunity for the Court to elaborate on the content of the general principles of international law in relation to foreigners. Furthermore, the Court set a bad precedent by not deciding whether an expropriation had occurred. As will become clear from the elaboration on the Gasus case below, the decision whether the interference was an expropriation or not could have made a big difference in a case where a foreigner was targeted by the interference, if the reference to the general principles of international law had been applied correctly by the Commission.

B. Control of Use

The three cases analysed in this group concerned typical foreign investments.42 In Rosenzweig v. Poland43 the applicants were a German national and his company. The Polish authorities deprived the applicant company of a licence to run a bonded warehouse and of a permit to export merchandise. The Court held that the withdrawal

41 Ibid., paras. 55-57.
42 Two other cases also concerned foreign property: Agosi v. United Kingdom, Judgment of 22 September 1986, ECHR (Ser. A) no. 108 and Air Canada v. United Kingdom, Judgment of 5 May 1995, ECHR (Ser. A) no. 316-A. In both cases foreign property was seized to enforce an import prohibition of illegal goods. In both cases foreign property was seized to enforce an import prohibition of illegal goods. In both cases the Court held that no expropriation had occurred. It did not address the issue that the companies were foreign companies and did not apply the reference to the general principles of international law.
of valid permits to run a business was not an expropriation but a measure of control of the use of property. The Court held that there had been a violation of Article 1 of Protocol No. 1 and reserved the question of just satisfaction to a later date. Once again, since the Court did not find that an expropriation had occurred, it did not address the issue that Mr. Rosenzweig was a German national and hence a foreigner and so did not apply the reference to the general principles of international law.

In Zlinsat, Spol. S.R.O. v. Bulgaria the applicant was a foreign limited liability company incorporated under Czech law. In May 1997, the applicant company entered into a contract for the purchase of a hotel from the Sofia City Council. The Sofia City Prosecutor’s Office ordered the suspension of the contract in July 1997 because of an alleged breach of the Privatisation Act. At that time, the Council had already handed over possession of the hotel to the applicant company. The Prosecutor’s Office considered that the Council was in breach of the law. It ordered the police to evict the company from the hotel and to seize its paperwork. The applicant company learned of the Prosecutor’s Office decision only when the police arrived at the hotel to enforce the decision. The Prosecutor’s Office brought a civil action against the Council and the applicant company seeking the annulment of the contract. The action was dismissed by the City Court and the Prosecutor’s Office’s appeals were finally rejected by the Supreme Court of Cassation. In October 1999, the Prosecutor’s Office notified the police that, following the Supreme Court of Cassation’s judgment, its decisions were no longer enforceable. The enforcement was stopped. The applicant was unable to use the hotel until 5 October 1997 i.e. for two years. The European Court of Human Rights was of the opinion that this interference was a control of the use of the property and no expropriation as the restriction was only temporary:

‘The Court notes that the company’s eviction from the hotel amounted to a temporary restriction on its use and did not entail a transfer of ownership. It does not therefore consider that the case involves a deprivation of property.

[I]t amounted to a control of the use of property. It is therefore the second paragraph of Article 1 of Protocol No. 1 which is applicable in the present case [...]’

The Court found that the interference was unlawful and that there had been a violation of Article 1 of Protocol No. 1. It held that the minimum degree of legal protection to which individuals and legal entities are entitled under the rule of law in a democratic society was lacking. Having found that the interference was unlawful the Court granted the claimant damages in an amount of 300.000€. The Court considered that ‘the reparation should aim at putting the applicant company in the position in which it would have

44 Ibid., para. 49.
46 Ibid., paras. 95, 96.
been had the violation not occurred’.\textsuperscript{47} This is the standard applied by the PCIJ in its judgement in Chorzów Factory which is by now the accepted standard of reparation in cases of a violation of international law.\textsuperscript{48} Yet again, the Court did not address the issue that the applicant company was a foreigner and did not apply the reference to the general principles of international law as it considered the interference not to be an expropriation. However, the fact that the Court did not consider the interference to be an expropriation and did not raise the issue of the owner’s nationality and therefore did not apply the reference to the general principles of international law was apparently of no practical consequence.

In \textit{Bimer S.A. v. Moldova},\textsuperscript{49} it is unclear whether the Court would have been willing to apply the reference to the general principles of international law had it found the existence of an expropriation. The reason for the doubt is that the applicant, Bimer S.A., was a company incorporated in the Republic of Moldova. However, from the moment of incorporation its shares were owned by Moldovan, American and Bahamian investors. Bimer S.A. qualified as a company owned by foreign investors and thus benefited from special incentives and guarantees under the Moldavian Law on Foreign Investments.\textsuperscript{50} The applicant was prevented by an order of the Customs Department from continuing to operate its duty-free business for which it had previously obtained a licence. The licence to carry on duty-free business was thereby terminated.

In accordance with its case-law, the Court held the interference to be a measure of control of use of property.\textsuperscript{51} It observed that the interference with the applicant’s property in the present case was unlawful and that there was therefore a violation of Article 1 of Protocol No. 1.\textsuperscript{52} Once again, the Court did not raise the issue of the owner’s nationality and hence the relevance of the general principles of international law.

There is no indication that the amount granted\textsuperscript{53} by the Court as damages was less than full compensation. Thus the fact that the Court did not consider the interference to be an expropriation and did not raise the issue of the owner’s nationality and therefore did not apply the reference to the general principles of international law was apparently of no practical consequence.

\textsuperscript{47} Zlínsat, Spol. S.R.O. v. Bulgaria, ECHR, Judgment on just satisfaction of 10 January 2008, Application No. 57785/00, para. 39

\textsuperscript{48} There the PCIJ held that: The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by decision of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. (Factory at Chorzów, Indemnity, Judgment of 13 September 1928, 1928 PCIJ (Ser. A) No. 17, Order, at 47). See, I. Marboe, ‘Compensation and Damages in International Law, The Limits of “Fair Market Value”’, \textit{7 The Journal of World Investment & Trade}, at 732 et seq. (2006).

\textsuperscript{49} Bimer S.A. v. Moldova, supra note 32.

\textsuperscript{50} \textit{Ibid.}, para. 7.

\textsuperscript{51} \textit{Ibid.}, para. 51.

\textsuperscript{52} \textit{Ibid.}, paras. 59, 60.

\textsuperscript{53} \textit{Ibid.}, paras. 70, 71.
This judgment can serve as example for a case in which the European Convention on Human Rights served as an efficient investment protection instrument even though the Court did not apply the reference to the general principles of international law.

C. Expropriation of a Foreigner but the General Principles of International Law Still not Applied

A further case which concerned an interference with property rights of a foreigner was Gasus Fördertechnik GmbH v. The Netherlands. The application was lodged by a limited liability company possessing legal personality under German law. It sold a concrete-mixer and ancillary equipment to a Netherlands company but retained ownership of the goods delivered until all amounts due were settled in full. The machine was installed on the premises of the Netherlands company by Gasus. Gasus had not received full payment by the Netherlands company. The Netherlands Tax Bailiff seized all the movable assets on the premises of the Netherlands company for forced sale in pursuance of three writs of execution issued by the Netherlands Collector of Direct Taxes. Notice of the seizure was served on the Netherlands company but not on Gasus. All legal remedies in the Netherlands failed and Gasus obtained neither its outstanding money due nor the concrete-mixer’s restitution. The Commission held that the property right of a foreign company had been expropriated in the case at issue:

‘This measure falls under the second sentence of the first paragraph of Article 1 of Protocol No. 1 (P1-1), and the Commission must therefore determine whether the conditions laid down in that provision were satisfied or, in other words, whether the deprivation of property was effected in the public interest and subject to the conditions provided for by law and by the general principles of international law.’

The Commission determined that the expropriation was in the public interest, lawful and justified. With regard to the fact that property rights of a foreign company had been targeted, the Commission stated that the deprivation of property at issue was not the same as an expropriation of foreign property covered by the general rules of international law which require adequate compensation:

‘It is true that in the present case the property right at issue was that of a foreign company. Nevertheless, the deprivation of property which occurred cannot be compared to those measures of confiscation, nationalisation or expropriation in regard to which international law provides special protection to foreign citizens and companies.’

Why the expropriation of a concrete-mixer should not be covered by the protection against uncompensated expropriations in international law remains unclear. ICSID

55 Ibid., para. 57.
56 Ibid., para. 63.
57 International Centre for Settlement of Investment Disputes.
awards as well as the case-law of the Iran-US Claims Tribunal clearly show that the expropriation of individual objects is covered by the property protection of public international law.58

The Court did not address this issue. It held that the interference complained of was undertaken in the exercise of the powers of the tax authorities to secure the payment of taxes and was therefore no expropriation.59 The Court came to the conclusion that the requirement of proportionality had been satisfied and that the Convention had not been violated.60 Since it was of the opinion that no expropriation had occurred it once again did not raise the issue of the owner’s nationality and the relevance of the general principles of international law.

This case shows the importance of the decision which of the three types of interference (expropriation, ‘control of use’ or other interference) occurred in cases where foreign property is targeted. Since the Court denied the occurrence of an expropriation it did not need to tackle the issue of the applicability of the general principles of international law to foreign property. The finding of the Commission that the general principles do not cover the facts at issue is absolutely unconvincing and it would therefore have been useful had the Court at least commented on the issue in an obiter dictum.

D. The Court’s View on the General Principles of International Law

The European Court of Human Rights has stated twice that the reference to the general principles of international law is not superfluous. It did so in the James and Lithgow cases.61 Both concerned takings of property of nationals in the context of large scale social or economic reforms. The Court set out that in this context a differentiation between foreigners and nationals with regard to the compensation due can be justified.

As mentioned above,62 the Court requires in its case-law that in principle the amount of compensation for an expropriation must be reasonably related to the value of the

60 Ibid., paras. 66-74.
61 James and Others v. United Kingdom, supra note 7; Lithgow v. United Kingdom, supra note 7. See on these judgments, Seidl-Hohenveldern, supra note 22, at 181-193.
62 See, p. 655.
property taken.63 The judgements in James and Lithgow both concerned cases where
the Court found that the takings occurred in a situation justifying an exception to this
rule. This is the case if there is a special interest of the State to expropriate and if at
the same time compensation less than the fair market value causes no excessive burden for
the individual.64 As regards the issue of nationality of the expropriated person, the Court
stated in these judgments that in cases of a taking of property in the context of large scale
social or economic reforms there can be reasons for a distinction between nationals and
foreigners. It justified this, by observing that foreigners are more vulnerable since they
are not involved in the political process. Furthermore, there may be legitimate reasons
for imposing a greater burden in the public interest on nationals than on foreigners:

‘Especially as regards a taking of property effected in the context of a social reform [or
an economic restructuring]65, 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.’66

The first reason invoked by the Court can at best be valid as an explanation in
the European context of the Convention. It can hardly be argued that it is valid
on a global level. There are too many countries where nationals have no possi-
bility to participate in meaningful elections and are perhaps even less consulted
than some foreign investors on measures adopted by the national government.

The Court made no explicit statement on the content of the general principles of
international law on issues of expropriation of foreign nationals. Nevertheless, in view

63 See, e.g., James and Others v. United Kingdom, supra note 7, para. 54; Lithgow v. United
Kingdom, supra note 7, para. 121; The Holy Monasteries v. Greece, supra note 23, para.
71; Pressos Compania Naviera S.A. and Others v. Belgium, supra note 23, para. 38;
The Former King of Greece and Others v. Greece, supra note 23, para. 89; Lallement v.
France, supra note 23, para. 18; Motais de Narbonne v. France, supra note 25, para. 19;
Pincová and Pine v. Czech Republic, supra note 25, para. 53 Broniowski v. Poland, supra
note 25, para. 176; Jahn and Others v. Germany, supra note 23, para. 94; Strain and
Others v. Rumania, supra note 23, para. 52; Draon v. France, supra note 23, para. 79.

64 For cases where the Court found that there is such an exceptional situation see, e.g., James
and Others v. United Kingdom, supra note 7, para. 54; Lithgow v. United Kingdom, supra
note 7, para. 121; The Former King of Greece and Others v. Greece, supra note 27, para. 78;
Senspiel v. Germany, supra note 28.

For cases where the Court found the compensation to be disproportionately low see, e.g.,
Platakou v. Greece, supra note 23, paras. 56, 57; Pincová and Pine v. Czech Republic, supra
note 25, para. 61; Scordino v. Italy, supra note 28, paras. 103, 104.

65 The formula in square brackets was only used in Lithgow v. United Kingdom, supra note 21.

66 James and Others v. United Kingdom, supra note 7, para. 63; Lithgow v. United Kingdom,
supra note 7, para. 116.
of what has been said earlier, the States Parties to the European Convention on Human Rights, contrary to the development on a global level, apparently still understand prompt, adequate and effective compensation by this formula.

The conclusion which can be drawn from the statements of the Court in these two cases is that the reference to the general principles of international law is of particular importance in cases where there is a special interest of the State to expropriate and to pay less compensation than the fair market value. Apparently whilst this exception is applicable to nationals in such a situation, it would either not apply at all, or to a lesser extent, to foreigners.

V. Conclusions

As has been demonstrated the nationality of a property owner is neither a requirement for successful applications nor has the nationality of a person deprived of his or her property had any practical influence on the outcome of a case so far. Nevertheless, the case-law also shows that especially in cases where the Court allows for less than full compensation because of a special interest of the expropriating state in the interfering measure, the nationality of the person targeted might be of relevance. The Court expressly stated that in such cases there may be legitimate reasons for imposing less economic burden on foreigners than the sacrifice required from nationals in the public interest. Furthermore, the cases show that the decision whether a particular interference is an expropriation or not can be of crucial importance in the case of a foreigner. A non-liquet, and as a consequence, a sidestep to the general catch all clause in such situations should therefore be avoided. It is unlikely that the Court would have reached the same result in the Gásus-case, had it considered the interference to be an expropriation.