

# PROPERTY RIGHTS AS DEFINED AND PROTECTED BY INTERNATIONAL COURTS

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## SYNOPSIS

International agreements have broad implications for property ownership and trade. Under international agreements, property is not limited to real property and intangible commodities but includes intellectual rights and any other right which have value. International conventions establishing rules expressly recognized by the contesting state must be applied by an international court when deciding disputes that are submitted to it. From this one may conclude that treaties are one of the principal sources of international law.

The role of the International Court of Justice (“ICJ”) in legal disputes is discussed. The right to property is recognized in the Universal Declaration of Human Rights. A review of the case law indicates that to bring oneself within the protocols of the Universal Declaration of Human Rights, one must establish the existence of a property right. In general, a state does not have a right to property under international law. The paper also discusses the United Kingdom’s decision to withdraw from the European Union. Once Brexit occurs, the ICJ and Britain will no longer have a formal legal relation. The paper concludes that property rights are protected by international treaties as a fundamental human right. Those rights belong to individuals not states.

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## I. PROPERTY RIGHTS AS DEFINED AND PROTECTED BY INTERNATIONAL COURTS

The right of an individual to own property may be traced to the French Revolution and the United States Bill of Rights. As American lawyers, we assume not only the right to own property but the right to compensation if that property is taken by the government. That process is known as eminent domain.

Eminent domain is the right of the sovereign to take your property. It is an inherent power of government that is necessary for the fulfillment of sovereign functions. The idea that the government has the power of eminent domain goes back in English history to Magna Carta in 1215. This was the first time that the idea was written into law. Magna Carta was the first official document in English history that required the monarch to obey the written laws of the government. Article 39 of Magna Carta says: "No freemen shall be taken or imprisoned or disseized or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land."<sup>1</sup> Indeed, one will find nothing in our American federal and state constitutions creating the power, only limitation on its exercise. That limitation is found within the Fifth Amendment to the United States Constitution: "[N]or shall private property be taken for public use, without just compensation."<sup>2</sup> These limitations are made applicable to the states by the Fourteenth Amendment. The Fifth Amendment to the United States Constitution was adopted on December 15, 1791. The New York State Constitution similarly provides, "private property shall not be taken for public use without just compensation."<sup>3</sup> There are similar protective provisions in place in the other forty-nine state constitutions.

### *A. Property Defined*

The U.S. Supreme Court has declared that:

The term "Property" as used in the Taking Clause includes the entire "group of rights inhering in the citizen's [ownership]." It

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1. MAGNA CARTA (1215) cl. 39.

2. U.S. CONST. amend. V.

3. N.Y. CONST. art. I, § 7(a).

is not used in the “vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. [Instead, it] denote[s] the group of rights inhering in the citizen’s relation to the physical thing, as the right to possess, use and dispose of it.” . . . The constitutional provision is addressed to every sort of interest the citizen may possess.

Rights in property are basic civil rights that are constitutionally protected.<sup>4</sup>

As one author stated,

What does “property” mean? Definitions vary, of course, but Black’s Law Dictionary offers a fairly standard version: “That which is peculiar or proper to any person; that which belongs exclusively to one.” It includes “everything which is the subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal; everything that has an exchangeable value or which goes to make up wealth or estate.” John Lewis, in his classic treatise on eminent domain, put it this way: “Property may be defined as certain rights in things which pertain to persons and which are created and sanctioned by law. These rights are the right of user, the right of exclusion and the right of disposition.” Unless “property” comes with a limiting adjective, then, it covers anything of value subject to an owner’s exclusive rights of use transfer.<sup>5</sup>

### *B. International Agreements and Their Effect upon U.S. Law*

The U.S. Constitution allocates primary responsibility for international agreements to the executive branch. In order for a treaty to become binding upon the United States, the Senate must provide its advice and consent to treaty ratification by a two-thirds majority.<sup>6</sup> In order to have domestic, judicially enforceable legal effect, the provisions of many treaties and executive agreements may require implementing legislation that provides the authority to enforce and comply with the international agreement’s provisions.<sup>7</sup>

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4. *Lynch v. Household Finance Co.*, 405 U.S. 538, 552 (1972) (citation omitted).

5. Tom W. Bell, “*Property in the Constitution: The View From The Third Amendment*,” 20 WM. & MARY BILL RTS. J. 1243, 1250 (2012).

6. U.S. CONST. art. II, § 2.

7. MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., RL32528, INTERNATIONAL LAW AND AGREEMENTS: THEIR EFFECT UPON U.S. LAW (2015), <https://fas.org/sgp/crs/misc/RL32528.pdf>.

### *C. International Agreements*

Certainly, international agreements have broad implications for property ownership and trade. Indeed, the definition of property as expressed in international agreements takes on a more expansive definition. Property is not limited to real property and tangible commodities but includes intellectual rights and any other right which has value.

Considering the fundamental role of treaties in international relations and recognizing the importance of treaties as a source of international law, the Vienna Convention on the Law of Treaties was adopted in 1969. The Vienna Convention on the Law of Treaties regulates the conclusion and entry into force of treaties, the application and interpretation of treaties, as well as the amendment, invalidity and termination of treaties. According to Article 2 of this multilateral agreement, a “treaty” means “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.” A treaty concluded between one or more States and one or more international organizations, or between international organizations, can also be referred to as a treaty. According to Article 38 of the Statute of the International Court of Justice, “international conventions, whether general or particular, establishing rules expressly recognized by the contesting states” must be applied by the ICJ, when deciding disputes that are submitted to it. From this, one can conclude that treaties are one of the principal sources of public international law.<sup>8</sup>

### *D. The International Court of Justice*

According to its website, the International Court of Justice serves two functions.

First, it settles, in accordance with international law, legal disputes submitted to it by States. Such disputes may concern, in particular, land frontiers, maritime boundaries, territorial sovereignty,

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8. *Research Guides*, PEACE PALACE LIBRARY, <http://www.peacepalacelibrary.nl/research-guides> (last visited Jan. 6, 2017).

the non-use of force, violation of international humanitarian law, non-interference in the internal affairs of States, diplomatic relations, hostage taking, the right of asylum, nationality, guardianship, rights of passage, and economic rights.

Second, the ICJ gives advisory opinions on legal questions referred to it by duly authorized United Nations organizations and agencies. These opinions can clarify the ways in which such organizations may lawfully function, or strengthen their authority in relation to their member States.

The ICJ consists of 15 judges, all from different countries, who are elected for a period of nine years and can be re-elected. One third of the composition of the Court is renewed every three years. The President of the Court is elected by his peers every three years; the current President is Judge Ronny Abraham from France. The hearings of the ICJ are always public. French and English are the official languages of the Court.<sup>9</sup>

### *E. Recognizing the Right to Property*

A right to property is recognized in Article 17 of the Universal Declaration of Human Rights (“UDHR”) which provides as follows:

1. Everyone has the right to own property alone as well as in association with others.
2. No one shall be arbitrarily deprived of his property.<sup>10</sup>

The right to peaceful enjoyment is found in Article 1 of Protocol 1 of European Convention of Human Rights.

The European Court of Human Rights (“ECHR”) has held that Article 1 of Protocol 1 contains three rules:

- The first one establishes the protection of property. It is contained in the first sentence of Article 1 of Protocol 1. (“Every natural or legal person is entitled to the peaceful enjoyment of his possessions.”)

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9. *International Court of Justice*, PEACE PALACE, <https://www.vredespaleis.nl/jurisdiction/international-court-of-justice> (last visited Jan. 6, 2017).

10. *Universal Declaration of Human Rights*, G.A. Res. 217 (A), art. 17 (Dec. 10, 1948).

- The second rule concerns the deprivation of property. It sets out requirements and general principles for expropriations and is laid down in the second sentence of Article 1 of Protocol 1. (“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 third rule deals with the control of use of property. It clarifies that obligations, such as tax duties, may be tied to property in the interest of the public. This rule is contained in the second paragraph of Article 1 of Protocol 1. (“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>11</sup>

While the ECHR has held that Article 1 of Protocol 1 contains the above three rules, it has also determined that the rules should not be viewed as isolated but rather as forming one concept of property protection.

## II. *BEYELER V. ITALY*

*Beyeler v. Italy* was a case involving a Van Gogh painting, *Portrait of a Young Peasant*, purchased by Ernst Beyeler, a well-known Swiss art collector. The sale took place in Italy, which has laws protecting historical and artistic interest. The sale was reported to the Italian Ministry of Cultural Heritage. The Ministry showed interest in acquiring the painting. However, it had a limited budget for this purpose. The Ministry exercised its right of preemption, which was challenged by Mr. Beyeler. All challenges in Italian Courts resulted in dismissal. Mr. Beyeler then applied to the European Court of Human Rights arguing that there had been a violation of Article 1 of Protocol 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms which guarantee the peaceful enjoyment of ownership rights. The ECHR held there was a

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11. *The Right to Property—Introduction*, ECHR-ONLINE, <http://echr-online.info/right-to-property-article-1-of-protocol-1-to-the-echr/introduction/> (last visited Aug. 24, 2017).

violation and ordered the Italian State to pay Mr. Beyeler an amount of €1,355,000.

The litigation took over thirteen years. The case raised the interesting question of whether Italy had a legitimate public interest in acquiring a painting created by a Dutch artist in France.<sup>12</sup>

One commentator noted that before one can even begin to bring oneself within Article 1 of Protocol 1, one must establish the existence of a property right. It is well established that this can include “existing possessions” or assets, including claims that have at least a “legitimate expectation” of obtaining effective enjoyment of a property right.<sup>13</sup>

#### *A. The State’s Right to Property Under International Law*

In general, a State does not have a general right to property under international law. There is no question that individuals have a general right to property under international law. The issue in the case of *Timor-Leste v. Australia* arose when agents of the Australian secret intelligence service seized privileged documents belonging to Timor-Leste on the premises of Timor-Leste’s legal advisors in Australia. Timor-Leste sued Australia in the International Court of Justice.<sup>14</sup> There was no question that Australia had taken the documents. The International Court of Justice ruled that when a State interferes with any other type of property belonging to another State, no cause of action arises.<sup>15</sup>

Ursula Kriebaum and Christoph Schreuer, in their article, *The Concept of Property in Human Rights Law and International Investment Law*,<sup>16</sup> noted that property ownership may be compared to a bundle of sticks, each representing a distinct and separate right.

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12. *Beyeler v. Italy*, Eur. Ct. H.R. 2000-I 57.

13. Jessica Simor, *Key Developments in Human Rights in Judicial Review*, MATRIX LAW UK (June 18, 2012), [http://www.matrixlaw.co.uk/wp-content/uploads/2016/03/01\\_12\\_2014\\_01\\_03\\_41\\_Judicial-review-and-regulatory-proceedings-conference.pdf](http://www.matrixlaw.co.uk/wp-content/uploads/2016/03/01_12_2014_01_03_41_Judicial-review-and-regulatory-proceedings-conference.pdf).

14. Questions Relating to the Seizure and Detention of Certain Documents and Data (*Timor-Leste v. Australia*), Verbatim Record, 2014 I.C.J. 156 (Jan. 20).

15. Peter Tzeng, *The State’s Right to Property Under International Law*, 125 YALE L.J. 1805 (2016).

16. Ursula Kriebaum & Christoph Schreuer, *The Concept of Property in Human Rights Law and International Investment Law*, in HUMAN RIGHTS DEMOCRACY AND THE RULE OF LAW: LIBER AMICORUM LUZIUS WILDHABER 743, 757 (Stephan Breitenmoser et al. eds., 2007).

The issue was whether someone who owns only one or several, but not all sticks, enjoys property protection. The question was answered in the affirmative.

The authors presented three cases to support the conclusion.

In *Iatridis v. Greece*,<sup>17</sup> the ECHR accepted the good will of cinema as a “possession” within the meaning of Article 1, 1st Protocol. The case concerned the eviction of the operator of a cinema who owned the cinema equipment but had only leased the cinema site. The ECHR said in this respect: “[B]efore the applicant was evicted, he had operated the cinema for eleven years under a formally valid lease without any interference by the authorities, as a result of which he had built up a clientele that constituted an asset.”<sup>18</sup>

The second case pertained to someone who owns real estate or an enterprise, i.e., the whole bundle of sticks, and is deprived only of one or several of them but not all of them. Is the deprivation of one of the sticks to be considered an expropriation of this single right or only a limitation of the whole bundle? In the first case, the second sentence of paragraph one of Article 1, 1st Protocol (deprivation of possession) would be applicable, whereas in the second case, paragraph two of Article 1, 1st Protocol (control of the use of property) would govern the situation. As will be illustrated, the ECHR did not look at single rights in isolation.

*Tre Traktörer v. Sweden*<sup>19</sup> concerned the revocation of a license to serve alcoholic beverages. The ECHR accepted the economic interest in the running of the restaurant as a “possession” within the meaning of Article 1, 1st Protocol. It said:

[T]he Court takes the view that the economic interests connected with the running of Le Cardinal were “possessions” for the purpose of Article 1 of the Protocol. Indeed, the Court has already found that the maintenance of the license was one of the principal conditions for the carrying on of the applicant company’s business, and that its withdrawal had adverse effects on the goodwill and value of the restaurant.<sup>20</sup>

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17. *Iatridis v. Greece*, 1999-II Eur. Ct. H.R. 75 (1999).

18. *Id.* at ¶ 54. Reference omitted.

19. *Tre Traktörer Aktiebolag v. Sweden*, 159 Eur. Ct. H.R. (ser. A) 7 (1989).

20. *Id.* at ¶ 53. Reference omitted.

Nevertheless the ECHR did not regard the interference in *Tre Traktörer v. Sweden* as expropriation as the measure did not take away all the rights of the bundle, but it instead considered the case under the second paragraph of Article 1 of the Protocol (control of the use of property). The ECHR said in this respect:

Severe though it may have been, the interference at issue did not fall within the ambit of the second sentence of the first paragraph. The applicant company, although it could no longer operate Le Cardinal as a restaurant business, kept some economic interests represented by the leasing of the premises and the property assets contained therein, which it finally sold in June 1984. There was accordingly no deprivation of property in terms of Article 1 of the Protocol.<sup>21</sup>

The case of *Fredin v. Sweden*<sup>22</sup> concerned the revocation of the applicant's permit to extract gravel. When assessing whether the measure amounted to a *de facto* expropriation, the ECHR took into account the effects of the revocation on the surrounding properties also owned by the applicant. It said: "Nothing indicates, however, that the revocation directly affected these other properties. Viewing the question from this perspective, the Court does not find it established that the revocation took away all meaningful use of the properties in question."<sup>23</sup>

### B. Brexit

Brexit from the European Union was approved by referendum on June 23, 2016. The U.K. government has two years to negotiate a withdrawal from the EU. Until then it remains an EU member State. On June 28, 2016, the leaders of the European Union's twenty-seven other nations made it clear to Prime Minister David Cameron that his country would not enjoy the benefits of membership like access to Europe's single market while sloughing off its burdens.<sup>24</sup>

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21. *Id.* at ¶ 55. Reference omitted.

22. *Fredin v. Sweden*, 192 Eur. Ct. H.R. (ser. A) (1991).

23. *Id.* at ¶ 45. Reference omitted.

24. Andrew Higgins & James Kanter, *A Blunt Message after Brexit: Bolting Will Carry a Heavy Price*, N.Y. TIMES, June 29, 2016, at A11.

The Vienna Convention on the Law of Treaties establishes that a party may withdraw “in conformity with the provisions of the treaty,”<sup>25</sup> which in this case is Article 50 of the Treaty on European Union.<sup>26</sup> Once this has been invoked, the EU and the United Kingdom will negotiate an agreement setting out the arrangements for withdrawal. The agreement will set out the arrangements for its withdrawal, taking into account the framework for its future relationship with the Union. According to an article in *The New York Times*, trade talks on quitting the bloc could last a decade, and even then might fail.<sup>27</sup> Great Britain’s civil servants were instructed to draw up plans, which is apparently proving chaotic because no one knows what kind of deal the government is aiming at.

As was written by Heather McRobie in *Novara Wire*, “Brexit: What it Does and Doesn’t Mean for Human Rights,” discussing which human rights instruments would be affected by Brexit:

This is the subject of some debate and much media noise, particularly over the 1998 Human Rights Act, which the Conservatives pledged to scrap in the last general election. As an Act of Parliament, the Human Rights Act stitched the European Convention on Human Rights (ECHR) into British law: like any other piece of legislation it can be removed at any time by a new Act of Parliament. The European Convention on Human Rights—like the European Court of Human Rights, to which it is attached—emerged out of the Council of Europe system, which is separate from the European Union. The removal of the Human Rights Act, whilst likely to come in tandem with Brexit, is neither dependent on Brexit nor Brexit upon it.

The European Court of Justice (ECJ) is, on the other hand, an EU body that draws upon the case law of the European Court of Human Rights, and its Convention, so Brexit would entail Britain formally cutting the link between the ECJ and the UK (the legal relationship between the ECJ and the ECHR, (<http://jurist.org/datetime/2013/09/elena-butti-lisbon-treaty.php>) and how this

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25. Vienna Convention on the Law of Treaties art. 54, May 23, 1969, 1155 U.N.T.S. 311.

26. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community art. 50, Dec. 13, 2007, 2007 O.J. (C 306) 1.

27. Stephen Castle, ‘Brexit’ Talks Could Stretch 10 Years, *British Officials Warn*, N.Y. TIMES (Dec. 15, 2016), <http://www.nytimes.com/2016/12/15/world/europe/brexit-talks-could-stretch-10-years-british-official-warns.html>.

affects the UK as a non-standard member of the EU, has been complicated further by the Treaty of Lisbon).<sup>28</sup>

One thing is certain, Brexit will make London a far less attractive place to do business. According to an article published in *Bloomberg* on October 24, 2016, Brexit would cost banks and related companies in the United Kingdom almost forty-nine billion dollars in lost revenue and put seventy thousand jobs at risk.<sup>29</sup>

The apparent immediate concern is the impact for intellectual property rights. In an article published in *The National Law Review* on June 22, 2016, Laura Ganoza wrote:

A UK exit from the EU will likely have a major effect on EUTMs. Currently, IP owners engaged in business in the UK have access to national protections through the UK Intellectual Property Office as well as EU-wide rights via the European Union Intellectual Property Office. Following Brexit, however, EUTMs would not be valid in the UK. Consequently, current trademark-holders would have to register for national trademark protections in order to maintain their rights in the UK. Furthermore, existing registrations that had been used only in the UK could become the subject of revocation for non-use post-Brexit, because their owners would not be able to prove use in the EU.<sup>30</sup>

According to Ms. Ganoza, Brexit will have a large impact on intellectual property enforcement and litigation. There will be a significant downside in the loss of U.K. courts' ability to grant EU wide injunctive relief for infringement of IP rights. Enforcement proceedings against European defendants would have to be brought in both the European Union and the United Kingdom. Once the United Kingdom has officially left the EU, property owners requiring protection of their rights will have to file separate applications in the United Kingdom and EU for trademarks and designs.

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28. Heather McRobie, *Brexit: What it Does and Doesn't Mean for Human Rights*, NOVARA MEDIA (Mar. 11, 2016), <http://novaramedia.com/2016/03/11/brexit-what-it-does-and-doesnt-mean-for-human-rights/>.

29. Gavin Finch, *What Brexit Means for Banks*, BLOOMBERG (Oct. 20, 2016, 12:07 AM), <https://www.bloomberg.com/news/articles/2016-10-20/what-brexit-means-for-banks>.

30. Laura Ganoza, *Impact of UK's Brexit for Intellectual Property Rights*, NAT'L L. REV. (June 22, 2016), <http://www.natlawreview.com/article/impact-uk-s-brexit-intellectual-property-rights>.

Perhaps this enormous change brought about by Brexit has justified the statement, “City law firms are preparing for a bonanza as clients seek guidance on the complex legal implications of Brexit.”<sup>31</sup>

#### CONCLUSION

Property rights are protected by international treaty as a fundamental human right. The right belongs to individuals, not States. Property rights are broadly defined and may consist of partial enjoyment of a benefit. It is also clear that Brexit will cause the United Kingdom to suffer an extended period of uncertainty and contract disputes.

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31. Jane Croft, *Lawyers Prepare for Brexit Bonanza*, FIN. TIMES (June 24, 2016), <https://www.ft.com/content/7c08a07a-3a02-11e6-9a05-82a9b15a8ee7>.