INTERNATIONAL COURT OF JUSTICE

CERTAIN IRANIAN ASSETS

(ISLAMIC REPUBLIC OF IRAN v. UNITED STATES OF AMERICA)

COUNTER-MEMORIAL
SUBMITTED BY
THE UNITED STATES OF AMERICA

October 14, 2019

ANNEXES
VOLUME IV

Annexes 80 through 108

ANNEX 80

REPORTS OF INTERNATIONAL ARBITRAL AWARDS

RECUEIL DES SENTENCES ARBITRALES

Award in the arbitration regarding the delimitation of the maritime boundary between Guyana and Suriname, Award of 17 September 2007 -- Sentence arbitrale relative à la délimitation de la frontière maritime entre le Guyana et le Surinam, Sentence du 17 septembre 2007

17 September 2007 - 17 septembre 2007

VOLUME XXX pp.1-144

NATIONS UNIES - UNITED NATIONS

PART I

Award in the arbitration regarding the delimitation of the maritime boundary between Guyana and Suriname

Award of 17 September 2007

PARTIE I

Sentence arbitrale relative à la délimitation de la frontière maritime entre le Guyana et le Surinam

Sentence du 17 septembre 2007

Award in the arbitration regarding the delimitation of the maritime boundary between Guyana and Suriname

Sentence arbitrale relative à la délimitation de la frontière maritime entre le Guyana et le Surinam

Delimitation of the territorial sea—article 15 of the United Nations Convention on the Law of the Sea (UNCLOS) places primacy on median line in case of opposite or adjacent States—special circumstances that may affect a delimitation to be assessed on a case-by-case basis—special circumstances of established practice of navigation justify deviation from the median line from the starting point to the three nautical mile limit—no obligations created by uncompleted treaties—the three to twelve nautical mile limit line drawn, taking into account the special circumstance of determining such line from a point at sea fixed by historical arrangements, to the point at which the equidistance line established for the continental shelf and the exclusive economic zone intersects the 12 nautical mile point.

Determination of a continental shelf and the exclusive economic zone—concept of a single maritime boundary not found in UNCLOS, but in practice and case law–provisional equidistance line subject to adjustment in light of relevant circumstances in order to achieve equitable solution—certainty, equity, stability integral parts of process of delimitation—coastal geography may be relevant to the extent that it generates "the complete course" of the provisional equidistance line—angle bisector methodology rejected—international courts and tribunals dealing with maritime delimitation should be mindful of not remaking or wholly refashioning nature—absent an express or tacit agreement between the parties oil concessions and oil wells irrelevant to the delimitation of maritime boundary—boundary negotiations with a third State irrelevant—no factors rendering the provisional equidistance line inequitable.

Admissibility of claim of unlawful threat or use of force—Tribunal has jurisdiction under article 293 of UNCLOS to apply rules of international law not incompatible with the Convention—the incident to be considered in the context of the whole dispute—no obligation to engage in separate exchanges of views on threat or use of force–Tribunal's jurisdiction over disputes concerning a coastal State's enforcement of its sovereign rights with respect to non-living resources not excluded—no generally accepted definition of the doctrine of clean hands in international law—a violation must be ongoing for the doctrine of clean hands to apply—claims relating to the use of force in a disputed area not incompatible under UNCLOS with claim for maritime delimitation of that area.

Claim of unlawful threat or use of force—action taken by Suriname not a law enforcement activity but a threat of use of force in contravention of UNCLOS, the Charter of the United Nations and general international law—in international law force may be used in law enforcement activities provided such force is unavoidable,

reasonable and necessary—claim that action constituted a countermeasure precluding wrongfulness not accepted—countermeasures may not involve use of force.

State responsibility—no need to assess extent of Suriname's international responsibility—injury to Guyana "sufficiently addressed" by Tribunal's delimitation decision granting it undisputed title to the area of the incident.

Obligation under articles 74(3) and 83(3) of UNCLOS to make every effort to enter into provisional arrangements–duty to negotiate in good faith—obligation to "make every effort" to reach such arrangements.

Obligation under articles 74(3) and 83(3) of UNCLOS to make every effort not to jeopardize or hamper the reaching of final agreement—unilateral activity that might affect the other party's rights in a permanent manner not permissible—distinction drawn between activities leading to a permanent physical change, such as exploitation of oil and gas reserves, and those that do not, such as seismic exploration.

Remedy—declaratory relief.

Délimitation de la mer territoriale—article 15 de la Convention des Nations Unies sur le droit de la mer (CNUDM) donne primauté à la ligne médiane dans les cas concernant des États se faisant face ou adjacents—circonstances spéciales pouvant avoir un effet sur une délimitation considérées au cas par cas—circonstance spéciale concernant une pratique de navigation établie justifiant une déviation de la ligne médiane du point de départ fixé à la limite des trois milles marins—absence d'obligation résultant d'un traité incomplet—ligne tracé entre les limites des trois et douze milles marins, en prenant en considération les circonstances spéciales relevant de la détermination d'une telle ligne à partir d'un point en mer fixé par des arrangements historiques jusqu'au point d'intersection entre la ligne d'équidistance établie pour le plateau continental et la zone économique exclusive et le point situé à douze milles marins.

Délimitation du plateau continental et de la zone économique exclusive—Concept de frontière maritime unique ne figurant pas dans la CNUDM, mais présent dans la pratique et la jurisprudence—ligne provisoire d'équidistance étant sujette à ajustement, au regard des circonstances pertinentes aux fins d'aboutir à une solution équitable—certitude, équité et stabilité comme parties intégrantes du processus de délimitation—géographie côtière pouvant être pertinente dans la mesure où elle permet de générer « le tracé complet » de la ligne provisoire d'équidistance—rejet de la méthode de la bissectrice—juridictions internationales traitant de délimitations maritimes devant être attentives à ne pas refaire ou refaçonner entièrement la nature—concessions pétrolières et puits de pétrole non pertinents dans la délimitation de la frontière maritime, en l'absence d'accord exprès ou tacite entre les Parties—négociations frontalières avec un Etat tiers non pertinentes—absence de facteurs rendant la ligne provisoire d'équidistance inéquitable.

Recevabilité de la demande portant sur la menace ou l'emploi illicite de la force—Tribunal compétent en vertu de l'article 293 de la CNUDM pour appliquer des règles de droit international qui ne sont pas incompatibles avec celle-ci—incident à considérer dans le contexte du différend dans son ensemble—absence d'obligation d'initier des échanges de vues distincts concernant la menace ou l'emploi de la force—compétence du Tribunal sur les différends concernant la mise en œuvre par un Etat côtier de

ses droits souverains sur les ressources non biologiques n'étant pas exclue—absence de définition généralement acceptée de la doctrine des mains propres en droit international–violation devant être en cours pour que la doctrine des mains propres soit applicable—absence d'incompatibilité, en vertu de la CNUDM, des demandes fondées sur l'emploi de la force dans une zone en litige avec une demande de délimitation maritime de ladite zone.

Demande portant sur la menace ou l'emploi illicite de la force—mesure prise par le Surinam ne pouvant être qualifiée d'activité d'exécution de la loi, mais constituant une menace d'emploi de la force en violation de la CNUDM, de la Charte des Nations Unies et du droit international général—en droit international, possibilité de recourir à la force, selon le droit international, dans le cadre d'activités d'exécution de la loi, à condition qu'un tel recours soit inévitable, raisonnable et nécessaire—rejet de l'allégation selon laquelle la mesure constituait une contre-mesure excluant l'illicéité—contre-mesures ne pouvant pas impliquer l'emploi de la force.

Responsabilité de l'État—détermination de l'étendue de la responsabilité internationale du Surinam n'étant pas nécessaire—dommage subi par le Guyana étant « suffisamment traité » par la décision du Tribunal en matière de délimitation lui accordant un titre incontestable sur la zone de l'incident.

Obligation des États en vertu des articles 74(3) et 83(3) de la CNUDM de faire tout leur possible pour conclure des arrangements provisoires—devoir de négocier de bonne foi—obligation de « faire tout leur possible » pour conclure de tels arrangements.

Obligation des États en vertu des articles 74(3) et 83(3) de la CNUDM de faire tout leur possible pour ne pas compromettre ou entraver la conclusion de l'accord définitif—inadmissibilité de toute activité unilatérale susceptible d'affecter les droits de l'autre partie de manière permanente—distinction établie entre les activités conduisant à une modification physique permanente, telle que l'exploitation des réserves gazières et pétrolières et celles n'ayant pas un tel effet, comme l'exploration sismique.

Remède—constatation judiciaire valant satisfaction.

* * * * *

ARBITRAL TRIBUNAL CONSTITUTED PURSUANT TO ARTICLE 287, AND IN ACCORDANCE WITH ANNEX VII, OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

in the matter of an arbitration between:

GUYANA

and

SURINAME

AWARD OF THE ARBITRAL TRIBUNAL

The Arbitral Tribunal:

H.E. Judge L. Dolliver M. Nelson, President
Professor Thomas M. Franck
Dr. Kamal Hossain
Professor Ivan Shearer
Professor Hans Smit

Registry:

Permanent Court of Arbitration

The Hague, 17 September 2007

Agents, counsel and other representatives of the Parties

Guyana

— Hon. S.R. Insanally, O.R., C.C.H., M.P. Minister of Foreign Affairs
— Hon. Doodnauth Singh, S.C., M.P., Attorney General and Minister of Legal Affairs
— Ambassador Elisabeth Harper, Director General, Ministry of Foreign Affairs
— Mr. Keith George, Head, Frontiers Division, Ministry of Foreign Affairs
— Ambassador Bayney Karran, Ambassador of Guyana to the United States
— Ms. Deborah Yaw, First Secretary, Embassy of Guyana, Washington
— Mr. Forbes July, Second Secretary, Embassy of Guyana, Washington
— Sir Shridath Ramphal, S.C., Co-Agent for Guyana
— Mr. Paul S. Reichler, Foley Hoag LLP, Co-Agent for Guyana
— Professor Payam Akhavan, Associate Professor, Faculty of Law, McGill University, Co-Agent for Guyana
— Professor Philippe Sands, Q.C., Professor of Law, University College London
— Professor Nico Schrijver, Professor of Public International Law, University of Leiden
— Mr. Lawrence Martin, Foley Hoag LLP
— Mr. Andrew Loewenstein, Foley Hoag LLP
— Ms. Sarah Altschuller, Foley Hoag LLP
— Ms. Nienke Grossman, Foley Hoag LLP
— Ms. Clara Brillembourg, Foley Hoag LLP
— Ms. Blinne Ní Ghrálaigh, Matrix Chambers, London
— Dr. Galo Carrera, Scientific/Technical Expert
— Mr. Scott Edmonds, International Mapping Associates
— Mr. Thomas Frogh, International Mapping Associates

Suriname

— Hon. Lygia L.I. Kraag-Keteldijk, Minister of Foreign Affairs and Agent
— Mr. Caprino Allendy, Deputy Speaker of Parliament
— Mr. Henry Iles, Ambassador of Suriname
— Mr. Winston Jessurun, Member of Parliament
— Ms. Jennifer Pinas, Ministry of Foreign Affairs
— Mr. Krish Nandoe, Ministry of Justice and Police

— Mr. Hans Lim A Po, Co-Agent for Suriname
— Mr. Paul C. Saunders, Co-Agent for Suriname, Attorney, Cravath, Swaine & Moore LLP
— Professor Christopher Greenwood, CMG, QC, Professor of Law, Essex Court Chambers
— Mr. Stephen S. Madsen, Attorney, Cravath, Swaine & Moore LLP
— Mr. David A. Colson, Attorney, LeBoeuf, Lamb, Greene & MacRae LLP
— Professor Sean D. Murphy, Professor of International Law, The George Washington University Law School
— Professor Bernard H. Oxman, Professor of International Law, University of Miami School of Law
— Professor Donald M. McRae, Professor of International Law, University of Ottawa
— Professor Alfred H. A. Soons, Professor of Public International Law, Utrecht University
— Professor Alex Oude Elferink, Professor of Public International Law, Utrecht University
— Mr. Coalter Lathrop, Cartography Consultant, Sovereign Geographic, Inc. Boundary Consultation and Cartographic Services
— Mr. David Swanson, Cartography Consultant, David Swanson Cartography
— Mr. Brian J. Vohrer, Attorney, LeBoeuf, Lamb, Greene & MacRae LLP
— Ms. Michelle K. Parikh, Attorney, Cravath, Swaine & Moore LLP
— Ms. Rebecca R. Silber, Attorney, Cravath, Swaine & Moore LLP
— Mr. Matthew Pierce, Technology Consultant, Trial Team One
— Ms. Elaine Baird, Manager of Courtroom Systems, Cravath, Swaine & Moore LLP
— Ms. Brittany Olwine, Legal Assistant, Cravath, Swaine & Moore LLP
— Ms. Anika Rappleye, Legal Assistant, Cravath, Swaine & Moore LLP

TABLE OF CONTENTS

CHAPTER I. PROCEDURAL HISTORY 12

CHAPTER II. INTRODUCTION 32

A. Geography 32

B. Historical background 33

C. The Parties' claims 37

CHAPTER III. ARGUMENTS OF THE PARTIES 40

A. Submissions on jurisdiction 40

Guyana's position 40

Suriname's position 42

B. The Parties' interpretation of the factual record 46

Guyana's position 46

Suriname's position 51

C. Guyana' s delimitation claim 54

1. Applicable law and approach to delimitation 54

Guyana's position 54

Suriname's position 56

2. The role of coastal geography 58

Guyana's position 58

Suriname's position 60

3. Conduct of the Parties 61

Guyana's position 61

Suriname's position 62

4. Delimitation of the territorial seas 64

Guyana's position 64

Suriname's Position 66

5. Delimitation of the Continental Shelf and Exclusive Economic Zone 66

Guyana's position 66

Suriname's position 69

D. Guyana's third submission: alleged unlawful threat and use of force by Suriname 71

Guyana's position 71

Suriname's position 72

E. Guyana's Fourth Submission and Suriname's Submissions 2.C and 2.D: Breach of Articles 74(3) and 83(3) of the Convention 75

Guyana's position. 75
Suriname's position 75

CHAPTER IV. JURISDICTION TO DETERMINE THE MARITIME BOUNDARY 76

CHAPTER V. DELIMITATION IN THE TERRITORIAL SEA 77

A. The Parties' positions. 77

Suriname's N10°E Line to 12 nm 77
Special circumstances and historical evidence of an agreement 77
Evolution of historical territorial sea agreement from 3 to 12 nm 78
Application of the inter-temporal law 79
Guyana's N34°E line to 12 nm 79
Historical evidence of an agreement on an equidistance line . . 79
Absence of navigation by early 1960s 81
The N10°E Line, if it governed relations between the parties, did not exist beyond 3 nm 81
No justification for departure from the provisional equidistance line 81

B. The Tribunal's findings pertaining to the delimitation of the territorial sea. 82

Special circumstances and historical evidence of an agreement 82
The boundary between 3 and 12 nm 87

CHAPTER VI. DELIMITATION OF THE CONTINENTAL SHELF AND EXCLUSIVE ECONOMIC ZONES 91

A. Relevant coasts 95

The Parties' positions. 95
The Tribunal's findings 97

B. Coastal geography 97

C. The provisional equidistance line 99

The Parties' positions. 99
The Tribunal's findings 102

D. Conduct of the Parties. 105

E. Conclusion of the Tribunal. 109

CHAPTER VII. GUYANA'S THIRD SUBMISSION 111

A. JURISDICTION AND ADMISSIBILITY. 112

1. The Tribunal's jurisdiction over claims relating to the UN Charter and general international law. 112

2. The obligation to exchange views 113
3. Article 297 and the characterisation of Guyana's claim 114
4. Good faith and clean hands 115
5. The admissibility of a State responsibility claim in a maritime delimitation case 118
B. The threat or use of force 119
C. Law enforcement activities 124
D. State responsibility 127
CHAPTER VIII. GUYANA'S FOURTH SUBMISSION AND SURINAME'S SUBMISSIONS 2.C AND 2.D 128
A. Jurisdiction and admissibility 129
B. The obligations provided for by Articles 74(3) and 83(3) 130
1. Provisional arrangements of a practical nature 130
2. Hampering or jeopardising the Final Agreement 131
C. The Tribunal's findings on the duty to make every effort to enter into provisional arrangements of a practical nature 133
D. The Tribunal's findings on the duty not to hamper or jeopardise the reaching of a final agreement 137
1. Suriname's submission 2.C 137
2. Guyana's fourth submission 138
E. Declaratory relief 138
CHAPTER IX. DISPOSITIF 139
APPENDIX. TECHNICAL REPORT OF THE TRIBUNAL'S HYDROGRAPHER 140

MAPS*

Map 1. The Area in Dispute

Map 2. The Tribunal's Delimitation Line in the Territorial Sea

Map 3. The Tribunal's Delimitation Line in the Continental Shelf and Exclusive Economic Zone

Map 4. The Tribunal's Delimitation Line of the Maritime Boundary Between Guyana and Suriname

Map 5. Construction Lines of the Maritime Boundary Between Guyana and Suriname

* Secretariat note: the maps are located in the front pocket of this volume.

are drawn violates international law.[49] Moreover, Suriname disputes Guyana's argument that the Tribunal would have jurisdiction to make a partial delimitation from a point at 15 nm from coastal baselines should it not have jurisdiction to make a full delimitation, submitting that Guyana wrongly relies upon the *Gulf of Maine* case and fails to establish that such partial delimitations are possible in the instant case in which a starting point has not been agreed upon.[50]

182. Suriname contends that Guyana's second and third claims are inadmissible, as Guyana did not act in good faith and lacks clean hands.[51] Suriname maintains that the doctrine of clean hands has been recognized since the early jurisprudence of the Permanent Court of International Justice and that recent International Court of Justice ("ICJ") judgments and opinions leave it open to parties to invoke the doctrine.[52] In Suriname's view, even if these claims are found to be admissible, clean hands should be considered in determining the merits of Guyana's claims. According to Suriname, Guyana lacks clean hands as it authorized drilling in the disputed area, gave no notice to Suriname (press reports being insufficient), and failed to withdraw support for the activity following Suriname's first complaints.[53]

183. Suriname maintains that Guyana's second claim, that it engaged in a wrongful act by expelling the CGX vessel in June 2000, must fail as Suriname has not acquiesced in Guyana's claim to maritime territory[54] and Guyana cannot claim that it exercises lawful jurisdiction in the disputed area. Suriname points out that the ICJ has never in the same judgment awarded reparations for violation of State sovereignty in a case in which it was requested to delimit a boundary determining such sovereignty.[55] According to Guyana, such a claim would amount to an *ex post facto* application of Guyana's first claim and would encourage States in the future to engage in activity designed to create facts on the ground in support of their claims. Suriname asserts that based on the oil concession practice of the Parties, Guyana's actions were in breach of the 1989 *modus vivendi* and signalled an aggressive posture by Guyana.[56]

184. With respect to Guyana's third claim, Suriname contends that Guyana lacks clean hands and that the record demonstrates Guyana's failure

---

[49] Transcript, pp. 800–801.

[50] Suriname Rejoinder, paras. 2.62–2.69, citing *Gulf of Maine*, Judgment, *I.C.J. Reports 1984*, p. 246.

[51] Suriname Preliminary Objections, paras. 7.1–7.9; Suriname Rejoinder, paras. 2.81–2.120; Transcript, pp. 1100–1101.

[52] Suriname Rejoinder, paras. 2.91 -2.109.

[53] Suriname Rejoinder, paras. 2.110–2.115.

[54] Suriname Preliminary Objections, paras. 6.7–6.11.

[55] Suriname Rejoinder, paras. 2.84–2.90.

[56] Suriname Preliminary Objections, paras. 6.3–6.6.

to negotiate in good faith.[57] Suriname argues, with reference to the Parties' negotiating history since the June 2000 incident, that Guyana unreasonably demanded the reinstatement of the CGX operation while offering little in return, thereby jeopardizing resolution of the dispute and breaching Articles 74(3) and 83(3) of the Convention. Suriname further argues that Guyana withheld information regarding its oil concessions in bad faith and maintains that Guyana's core request, that exploration activities resume, amounted to a request that Suriname acquiesce in Guyana's prejudicial activity.[58]

185. Accordingly, Suriname requests that the Tribunal find that it does not have jurisdiction to determine Guyana's maritime delimitation claim and that Guyana's second and third claims are inadmissible.[59]

B. The Parties' interpretation of the factual record

Guyana's position

186. Guyana bases its claims in part on an account of the record of the practices of Guyana and Suriname and their colonial predecessors. Guyana refers to the work of the Mixed Boundary Commission, constituted by The Netherlands and the United Kingdom in 1934, and argues that the historical record demonstrates that the northerly point of the boundary it established, Point 61, was treated as the northern land boundary terminus between the colonies until the independence of Guyana and Suriname. It argues further that Point 61 has been recognized expressly by Guyana and Suriname since independence.[60]

187. Guyana refers to the work of the Mixed Boundary Commission and to the positions taken by The Netherlands and the United Kingdom at the time, and submits that the *de facto* delimitation of the territorial sea recommended by the Commission along an azimuth of N10°E from Point 61 was reached to accommodate The Netherlands' practical concern at the time that both navigable approaches to the mouth of the Corentyne River should remain under its authority to allow it to carry out its administration of shipping on the river. Guyana emphasized that this delimitation did not purport to follow an equidistance line, and was provisional and liable to change, being "motivated solely by considerations of administrative and navigational efficiencies."[61]

188. Guyana maintains that the attempts in 1939 by the United Kingdom and The Netherlands to draft a treaty settling the entire length of the boundary, based on a delimitation of the territorial waters along an azimuth

[57] Suriname Preliminary Objections, paras. 6.39–6.44.

[58] Suriname Rejoinder, paras. 2.116–2.120.

[59] Suriname Preliminary Objections, Chapter 8.

[60] Guyana Memorial, para. 3.10.

[61] Guyana Memorial, para. 3.16.

limitations set out in Article 297 and the optional exceptions specified in Article 298. Article 286 reads as follows:

> Subject to section 3, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section.

414. Thus, any dispute concerning the interpretation or application of the Convention which is not excluded by the operation of Part XV, Section 3 (Articles 297 and 298) falls under the compulsory procedures in Section 2. Article 297, paragraph 3(a), which is relevant here, reads as follows:

> Disputes concerning the interpretation or application of the provisions of this Convention with regard to fisheries shall be settled in accordance with section 2, *except that the coastal State shall not be obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise*, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations. [emphasis added]

415. Sovereign rights over non-living resources do not fall under this exception.

416. This Tribunal is therefore unable to entertain Suriname's argument that a dispute concerning a coastal State's enforcement of its sovereign rights with respect to non living resources lies outside its jurisdiction.

4. Good faith and clean hands

417. Suriname challenges the admissibility of Guyana's Third Submission on the grounds of lack of good faith and clean hands. It also argues in the alternative that the clean hands doctrine must be considered in deciding the merits of Guyana's Third Submission.

418. The doctrine of clean hands, as far as it has been adopted by international courts and tribunals, does not apply in the present case. No generally accepted definition of the clean hands doctrine has been elaborated in international law. Indeed, the Commentaries to the ILC Draft Articles on State Responsibility acknowledge that the doctrine has been applied rarely[476] and, when it has been invoked, its expression has come in many forms. The ICJ has

[476] James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, p. 162 (2002).

on numerous occasions declined to consider the application of the doctrine,[477] and has never relied on it to bar admissibility of a claim or recovery. However, some support for the doctrine can be found in dissenting opinions in certain ICJ cases, as well as in opinions in cases of the Permanent Court of International Justice (the "PCIJ"). For example, Judge Anzilotti's 1933 dissenting opinion in the *Legal Status of Eastern Greenland* case states that "an unlawful act cannot serve as the basis of an action at law".[478] In the *United States Diplomatic and Consular Staff in Tehran* case, in which the ICJ declined to consider the issue of clean hands, Judge Morozov wrote in his dissent that the United States had "forfeited the legal right as well as the moral right to expect the Court to uphold any claim for reparation". However, Judge Morozov went to great lengths to stress that "[t]he situation in which the Court has carried on its judicial deliberation in the current case has no precedent in the whole history of the administration of international justice either before this Court, or before any international judicial institution",[479] citing the United State's coercive and military measures against Iran which were carried out simultaneously with its application to the ICJ.[480] In the *Case Concerning the Arrest Warrant of 11 April 2000* (*Democratic Republic of Congo* v. *Belgium*), *ad hoc* Judge Van den Wyngaert states that the Democratic Republic of Congo ("DRC") did not come to the ICJ with clean hands, citing its violation of the Geneva Conventions in failing to prosecute a Government Minister suspected of breaching humanitarian law.[481] The finding with respect to clean hands was not however dispositive; it was merely included in Judge Van den Wyngaert's discussion of immunity under international law and her conclusion that a Minister's immunity does not extend to war crimes and crimes against humanity. The doctrine was therefore neither used as a bar to the admissibility of the DRC's claim, nor as a ground to deny recovery. These cases indicate that the use of the clean

[477] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion*, *I.C.J. Reports 2004*, p. 136 at para. 63; *Oil Platforms* (*Islamic Republic of Iran* v. *United States of America*), Judgment, *I.C.J. Reports 2003*, p. 161, at para. 100; *Legality of Use of Force* (*Serbia and Montenegro* v. *Belgium*), Preliminary Objections, Judgment, *I.C.J. Reports 2004*, p. 279: in this case Belgium raised the question of clean hands in its preliminary objections (Preliminary Objections of the Kingdom of Belgium, *Legality of Use of Force* (*Serbia and Montenegro* v. *Belgium*), (5 July 2000), available at http://www.icj-cij.org/docket/files/105/8340.pdf), but the Court did not address the argument in its judgment.

[478] *Legal Status of Eastern Greenland*, P.C.I.J. Series A/B, No. 53, p. 95 (Dissenting Opinion of Judge Anzilotti).

[479] *Diplomatic and Consular Staff*, Judgment, *I.C.J. Reports 1980*, p. 3, at p. 53 (Dissenting Opinion of Judge Morozov) [emphasis in original].

[480] *Diplomatic and Consular Staff*, Judgment, *I.C.J. Reports 1980*, p. 3, at p. 54 (Dissenting Opinion of Judge Morozov).

[481] *Arrest Warrant of 11 April 2000* (*Democratic Republic of Congo* v. *Belgium*), Judgment, *I.C.J. Reports 2002*, p. 3, at para. 35 (Dissenting Opinion of Judge *ad hoc* Van den Wyngaert).

hands doctrine has been sparse, and its application in the instances in which it has been invoked has been inconsistent.

419. Judge Schwebel's dissenting opinion in the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, which Suriname characterises as "the strongest affirmation of the clean hands doctrine",[482] has also been relied on in support of the application of the clean hands doctrine.[483] In his dissent, Judge Schwebel reasoned that Nicaragua "had deprived itself of the necessary *locus standi*" to bring its claims, as it was itself guilty of illegal conduct resulting in deaths and widespread destruction.[484] In doing so, he relied heavily on Judge Hudson's individual opinion in the *Diversion of Water from the Meuse* case,[485] which states:

> It would seem to be an important principle of equity that where two parties have assumed an identical or reciprocal obligation, one party which is engaged in a *continuing* non-performance of that obligation should not be permitted to take advantage of a similar non-performance of that obligation by the other party.[486] [emphasis added]

420. An important aspect of Judge Hudson's expression of the doctrine is the continuing nature of the non-performance of an obligation. In the *Diversion of Water from the Meuse* case, The Netherlands was seeking an order for Belgium to discontinue its violation of a treaty between the two countries while The Netherlands itself was engaging in "precisely similar action, similar in fact and similar in law" at the time its claim was brought before the PCIJ.[487] The fact that a violation must be ongoing for the clean hands doctrine to apply is consistent with the doctrine's origins in the laws of equity and its limited application to situations where equitable remedies, such as specific performance, are sought. Indeed, Judge Hudson reminds us that it is a principle of international law that any breach leads to an obligation to make reparation, and that only special circumstances may call for the consideration of equitable principles.[488] Such circumstances arise, in his opinion, where a claimant is seeking not reparation for a past violation, but protection against a continuance of that violation in the future, in other words a "kind of specific performance of a recipro-

---

[482] Suriname Rejoinder, para. 2.102.

[483] *See, e.g., Case Concerning the Arrest Warrant of 11 April 2000* (*Democratic Republic of Congo* v. *Belgium*), n. 82 (Dissenting Opinion of Judge *ad hoc* Van den Wyngaert).

[484] *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America)*, Merits, Judgment, *I.C.J. Reports 1986*, p. 14, at para. 272 (Dissenting Opinion of Judge Schwebel) ("*Nicaragua*").

[485] *Nicaragua*, Merits, Judgment, *I.C.J. Reports 1986*, p. 14, at paras. 269–270 (Dissenting Opinion of Judge Schwebel).

[486] *Diversion of Water from the Meuse*, P.C.I.J. Series A/B, No. 70, p. 22, at p. 77 (Individual Opinion by Judge Hudson).

[487] *Diversion of Water from the Meuse*, p. 78 (Individual Opinion by Judge Hudson).

[488] *Ibid*.

cal obligation which the demandant itself is not performing".[489] Judge Hudson also stresses the limited applicability of the doctrine in more general terms:

> The general principle is one of which an international tribunal should make *a very sparing application*. It is certainly not to be thought that a complete fulfillment of all its obligations under a treaty must be proved as a condition precedent to a State's appearing before an international tribunal to seek an interpretation of that treaty. Yet, in a proper case, and with scrupulous regard for the limitations which are necessary, a tribunal bound by international law ought not to shrink from applying a principle of such obvious fairness.[490] [emphasis added]

421. The Tribunal holds that Guyana's conduct does not satisfy the requirements for the application of the doctrine of clean hands, to the extent that such a doctrine may exist in international law. First, Guyana is seeking, with respect to its Third Submission, reparations for an alleged past violation by Suriname. Guyana is therefore not seeking a remedy of the type to which the clean hands doctrine would apply, even if it were recognised as a rule of international law. Secondly, the facts on which Suriname bases its assertion that Guyana has unclean hands do not amount to an ongoing violation of Guyana's obligations under international law,[491] as in the *Case Concerning the Arrest Warrant of 11 April 2000, the United States Diplomatic and Consular Staff in Tehran case,* and the *Water from the Meuse* case. Guyana had not authorised any drilling activities subsequent to the CGX incident and was as a result not in violation of the Convention as alleged at the time it made its Third Submission to the Tribunal. Finally, Guyana's Third Submission claims that Suriname violated its obligation not to resort to the use or threat of force, while Suriname bases its clean hands argument on Guyana's alleged violation of a different obligation relating to its authorisation of drilling activities in disputed waters. Therefore, there is no question of Guyana itself violating a reciprocal obligation on which it then seeks to rely.

422. The Tribunal's ruling on this issue extends both to Suriname's admissibility argument based on clean hands and to its argument that clean hands should be considered on the merits of Guyana's Third Submission to bar recovery.

5. The admissibility of a State responsibility claim in a maritime delimitation case

423. The Tribunal does not accept Suriname's argument that in a maritime delimitation case, an incident engaging State responsibility in a disputed

[489] *Ibid*.

[490] *Ibid*., at p. 77.

[491] Suriname Rejoinder, paras. 2.110–2.115.

ANNEX 81

PCA Case No. AA 226

IN THE MATTER OF AN ARBITRATION BEFORE A TRIBUNAL CONSTITUTED IN ACCORDANCE WITH ARTICLE 26 OF THE ENERGY CHARTER TREATY AND THE 1976 UNCITRAL ARBITRATION RULES

- between -

HULLEY ENTERPRISES LIMITED (CYPRUS)

- and -

THE RUSSIAN FEDERATION

FINAL AWARD

---

18 July 2014

Tribunal
The Hon. L. Yves Fortier PC CC OQ QC, Chairman
Dr. Charles Poncet
Judge Stephen M. Schwebel

Mr. Martin J. Valasek, Assistant to the Tribunal
Mr. Brooks W. Daly, Secretary to the Tribunal
Ms. Judith Levine, Assistant Secretary to the Tribunal

Registry
Permanent Court of Arbitration

Representing Claimant:

Professor Emmanuel Gaillard
Dr. Yas Banifatemi
Ms. Jennifer Younan
SHEARMAN & STERLING LLP

Representing Respondent:

Dr. Claudia Annacker
Mr. Lawrence B. Friedman
Mr. David G. Sabel
Mr. Matthew D. Slater
Mr. William B. McGurn
Mr. J. Cameron Murphy
CLEARY GOTTLIEB STEEN & HAMILTON LLP

Mr. Michael S. Goldberg
Mr. Jay L. Alexander
Dr. Johannes Koepp
Mr. Alejandro A. Escobar
BAKER BOTTS LLP

TABLE OF CONTENTS

LIST OF DEFINED TERMS xiii

INTRODUCTION 1

I. PROCEDURAL HISTORY 2

A. COMMENCEMENT OF THE ARBITRATION 2

B. CONSTITUTION OF THE TRIBUNAL 3

C. PRELIMINARY PHASE ON JURISDICTION AND ADMISSIBILITY 4

D. BIFURCATION AND OTHER SCHEDULING MATTERS 5

E. DOCUMENT PRODUCTION AND CONFIDENTIALITY 6

F. HEARING ON THE MERITS 8

G. POST-HEARING PROCEDURES 11

II. FACTUAL BACKGROUND 12

A. THE PARTIES TO THESE PROCEEDINGS 13

1. Claimants and Related Entities 13

2. Respondent 13

B. OAO YUKOS OIL COMPANY 13

C. THE RUSSIAN LOW-TAX REGION PROGRAM 14

D. CRIMINAL PROCEEDINGS 16

E. ADDITIONAL MEASURES 17

1. Alleged Frustration of Merger Between Yukos and Sibneft 18

2. Tax Reassessments for Years 2000–2004 18

3. Auction of YNG 19

4. Bankruptcy Proceedings 20

5. Withdrawal of PwC's Audits 20

III. PARTIES' WRITTEN SUBMISSIONS 20

A. CLAIMANTS' SKELETON ARGUMENTS 21

B. RESPONDENT'S SKELETON ARGUMENTS 34

IV. PARTIES' REQUESTS FOR RELIEF 48

A. RELIEF REQUESTED BY CLAIMANTS 48

B. RELIEF REQUESTED BY RESPONDENT 48

V. APPLICABLE LAW 49
A. PROCEDURAL LAW 49
B. SUBSTANTIVE LAW 49
1. Energy Charter Treaty 49
2. Vienna Convention on the Law of Treaties 53
VI. SUMMARY OF WITNESS TESTIMONY 54
A. CLAIMANTS' WITNESSES 55
1. Mr. Jacques Kosciusko-Morizet 55
2. Mr. Vladimir Dubov 57
3. Mr. Frank Rieger 59
4. Dr. Andrei Illarionov 61
5. Mr. Leonid Nevzlin 64
6. Mr. Bruce Misamore 67
7. Mr. Steven Theede 69
8. Mr. Brent Kaczmarek 72
9. Mr. Philip Baker QC 73
10. Mr. Yuri Schmidt 74
11. Dr. Sergei Kovalev 75
B. RESPONDENT'S WITNESSES 76
1. Professor James Dow 76
2. Mr. Oleg Y. Konnov 78
3. Professor Reinier Kraakman 81
4. Professor H. David Rosenbloom 83
5. Professor Thomas Z. Lys 85
6. Ms. Felicity Cullen QC 87
7. Mr. Dale Hart 88
8. Mr. Polyvios Polyviou 89
9. Mr. John Ellison 90
10. Mr. Raymond Gross 91
11. Professor Dr. Albert Jan van den Berg 93

12. Professor Stef van Weeghel 94
C. THE SO-CALLED "EMPTY CHAIRS" 95
1. Individuals that Claimants Wished were Available for Examination 96
2. Individuals that Respondent Wished were Available for Examination 97
VII. ISSUES FOR ANALYSIS 98
VIII. ANALYSIS OF THE EVIDENTIARY RECORD 102
A. THE TAX OPTIMIZATION SCHEME 102
1. Introduction 102
2. The Structure of the Tax Optimization Scheme 103
3. The Legal Framework of the Tax Optimization Scheme 105
(a) The Low-Tax Region Program 105
(b) Anti-Abuse Decisions and Doctrines Promulgated by Russia's Federal Courts 107
4. The History of the Yukos Trading Entities before 2003 125
(a) Mordovia 125
(b) Kalmykia 138
(c) Lesnoy and Trekhgorny 140
(d) Sarov 158
(e) Baikonur 159
(f) Evenkia 160
5. Tribunal's Observations 164
B. THE TAX ASSESSMENTS STARTING IN DECEMBER 2003 170
1. Introduction 170
2. Chronology of the Tax Assessments and Related Decisions 174
(a) The 2000 Decision 175
(b) The 2001 Decision 183
(c) The 2002 Decision 186
(d) The 2003 Decision 189
(e) The 2004 Decision 191
(f) Observation 192
3. The Taxes Assessed Against Yukos 192

(a) Profit Tax and Other Revenue-based Taxes 192

(b) VAT 198

4. The Fines Assessed Against Yukos 201

5. Parties' Arguments and Tribunal's Observations 203

(a) Profit Tax and Other Revenue-Based Taxes 204

(b) VAT 219

(c) Fines 239

(d) Concluding Observations 255

C. HARASSMENT, INTIMIDATION AND ARRESTS 257

1. Introduction 257

2. Chronology of Facts 258

(a) Yukos Grows; Mr. Khodorkovsky Becomes More Politically Engaged; Yukos Leaders Receive Warnings 258

(b) Prosecutor General Launches Investigations Involving Searches and Seizures 260

(c) Arrest and Trial of Mr. Khodorkovsky; Flight from Russia of His Associates 263

(d) Complaints of Further Harassment and Intimidation of Yukos Executives, Employees, Lawyers and External Advisers 265

(e) Second Trial of Mr. Khodorkovsky; Allegations of Continuing Harassment and Intimidation 269

3. Parties' Arguments and Tribunal's Observations 270

(a) Are Claimants' Allegations about a Campaign of Harassment Credible? 271

(b) Were the Actions of the Russian Federation Justified as Legitimate Law Enforcement Measures? 274

(c) Did the Events Complained of Impact Claimants' Investments or was Yukos Able to Carry on Unaffected? 276

D. THE UNWINDING OF THE YUKOS–SIBNEFT MERGER 279

1. Introduction 279

2. Chronology 281

(a) Merger is Announced; NYSE Listing is Put on Hold; Steps are Taken to Complete Merger 281

(b) Mr. Khodorkovsky is Arrested; Yukos Continues with Merger; Sibneft has Second Thoughts 283

(c) Russian Courts Invalidate the Share Exchange Agreement 285

(d) Russian Federation Ultimately Acquires Sibneft via Gazprom 287

3. Parties' Arguments and Tribunal's Observations 287

(a) Was Yukos' NYSE Listing Put on Hold Because of the Yukos−Sibneft Merger or Fears of Exposing Yukos' Tax Optimization Scheme? 287

(b) Was the 2003 Interim Dividend a Component of the Yukos−Sibneft Merger or a Means to Siphon Funds out of Russia? 289

(c) Was the Unwinding of the Merger Caused by the Russian Federation? 292

E. ATTEMPTS TO SETTLE 298

1. Introduction 298

2. Yukos' Settlement Offers (and the Russian Federation's Replies) 300

(a) Proposals Made to the Bailiffs 302

(b) Proposals for a Global Settlement Conveyed by Mr. Chrétien 304

(c) Requests for a Deferral or Payment in Instalments 306

(d) Other Proposals 307

3. Parties' Arguments and Tribunal's Observations 308

(a) Did Yukos Contribute to its Own Demise by Failing to Discharge Tax Debt in the Amount of USD 9 Billion in the First Quarter of 2004? 308

(b) Did Yukos' Settlement Offers Constitute Real Alternatives to Enforcement? 312

F. THE AUCTION OF YNG 322

1. Introduction 322

2. Chronology 324

(a) Yukos' Shares in YNG are Seized and the Government Announces they will be Sold; Yukos Brings Unsuccessful Court Challenges 325

(b) YNG is Valued for Auction while its Tax Liabilities Rapidly Escalate 325

(c) Yukos Tries to Prevent the Auction; Preparations Proceed; an Entity Named Baikal is Created to Purchase YNG 327

(d) After a 10-Minute Auction, the Successful Bidder Baikal is Sold to State-Owned Rosneft; a "Monumental Bargain"; the "State, Looking After its Own Interests" 329

(e) Once it is State-Owned, YNG's Fate Improves, with Reductions in Tax Liabilities and a Dramatic Increase in Value 330

3. Parties' Arguments and Tribunal's Observations 331

(a) Did the Auction Price Reflect the True Value of YNG; If not, was Either Party Responsible for the Price Reduction? 332

(b) Who was Behind Baikal and were They a Front for the Russian State? 336

(c) What were Yukos' Prospects for Survival Once it Lost its Core Asset? 340

G. THE BANKRUPTCY OF YUKOS 342

1. Introduction 342

2. Chronology 343

(a) The Initiation of the Bankruptcy 343

(b) The Treatment of Bankruptcy Claims; the Creditors' Meeting; the Declaration of Yukos' Bankruptcy 349

(c) The Liquidation of Yukos' Remaining Assets 352

3. Parties' Arguments and Tribunal's Observations 355

(a) Why was the Bankruptcy Initiated and Who was Truly Behind It? 356

(b) Were the Bankruptcy Proceedings Conducted Properly and Fairly? 368

H. THE WITHDRAWAL OF PWC'S AUDIT OPINIONS 377

1. Introduction 377

2. Chronology 379

(a) PwC Serves as Both Auditor and Consultant to Yukos 379

(b) PwC Responds to the Massive Tax Reassessments against Yukos 380

(c) PwC Faces Mounting Pressure from the Russian Federation around the Same Time as Mr. Khodorkovsky's Second Trial Starts 382

(d) PwC's "Volte-Face" in Withdrawing the Yukos Audits; Improved Treatment and Continued Pressures in the Russian Federation 385

3. Parties' Arguments and Tribunal's Observations 389

(a) Did PwC Withdraw its Audits because it was under Pressure from the Russian Government? 389

(b) Were the Grounds Provided by PwC in its Withdrawal Letter Contrived or Credible? 391

(c) Concluding Observations 399

IX. PRELIMINARY OBJECTIONS 401

A. ARE ALL OR SOME OF THE CLAIMS BARRED BY THE "FORK-IN-THE-ROAD" PROVISION OF THE ECT? 402

1. Introduction 402

2. Parties' Positions 403

3. Tribunal's Decision 406

B. "UNCLEAN HANDS" (DID CLAIMANTS ACT ILLEGALLY SO AS TO DEPRIVE THEM OF PROTECTION UNDER THE ECT?) 406

1. Introduction 406

2. Claimants' Alleged "Unclean Hands" 408

(a) Conduct Related to the Acquisition of Yukos and the Subsequent Consolidation of Control over Yukos and its Subsidiaries 409

(b) Conduct Related to the Cyprus-Russia DTA 412

(c) Conduct Related to the Tax Optimization Scheme 416

(d) Actions Taken in Hindrance of the Enforcement of Russia's Tax Claims 416

3. Parties' Positions Regarding the Impact of Claimants' Allegedly "Unclean Hands" on this Arbitration 418

(a) Respondent's Position 418

(b) Claimants' Position 423

4. Tribunal's Decision 428

(a) Can a Clean Hands Principle or Legality Requirement be Read into the ECT? 429

(b) Does the "Clean Hands" Doctrine Constitute a "General Principle of Law Recognized by Civilized Nations"? 431

(c) Would any Instances of Claimants' Alleged "Bad Faith and Illegal" Conduct be Caught by a Legality Requirement Read into the ECT? 433

(d) Conclusion 435

C. RESPONDENT'S OBJECTIONS UNDER ARTICLE 21 OF THE ECT 435

1. Introduction 435

2. Claimants' Position 437

3. Respondent's Position 440

4. Tribunal's Decision 446

(a) Introduction 446

(b) First Reason: Assuming the Carve-Out Applies, So Does the Claw-Back, and Any Referral to the Competent Tax Authorities Would Clearly have been Futile 448

(c) Second Reason: The Carve-Out Does Not Apply 453

(d) Conclusion 457

X. LIABILITY 457

A. ATTRIBUTION 458

1. Claimants' Position 458

2. Respondent's Position 460

3. Tribunal's Decision on Attribution 462

B. ARTICLE 10 OF THE ECT 467

1. Introduction 467

2. Applicable Legal Standards under Article 10(1) of the ECT 468

(a) Claimants' Position 468

(b) Respondent's Position 472

3. Did Respondent Accord Claimants' Investments the Standard of Treatment Required by Article 10(1) of the ECT? 475

(a) Claimants' Position 475

(b) Respondent's Position 480

C. ARTICLE 13 OF THE ECT 481

1. Introduction 481

2. Applicable Legal Standards under Article 13 of the ECT 482

(a) Claimants' Position 482

(b) Respondent's Position 485

3. Did Respondent's Actions Constitute Expropriation (or "Measures Having Effect Equivalent to Nationalization or Expropriation") within the Meaning of Article 13(1) of the ECT? 488

(a) Claimants' Position 488

(b) Respondent's Position 489

4. If Respondent's Actions Constitute Expropriation, Has Respondent Met the Criteria for a Lawful Expropriation under Article 13(1) of the ECT? 492

(a) Claimants' Position 492

(b) Respondent's Position 493

D. TRIBUNAL'S DECISION ON BREACH OF THE ECT 495

E. CONTRIBUTORY FAULT 500

1. Introduction 500

2. Contributory Fault as Applied in Other Cases 502

3. Tribunal's Analysis 503
(a) Conduct of Yukos in Some of the Low-Tax Regions 503
(b) Conduct of Yukos under the Cyprus-Russia DTA 505
(c) Conduct of Yukos in Connection with YNG Auction 506
(d) Conduct of Yukos in Connection with its Bankruptcy (Non-Payment of the A Loan) 508
4. Tribunal's Decision on Contributory Fault 509
XI. INTEREST 510
A. CLAIMANTS' POSITION 510
B. RESPONDENT'S POSITION 512
C. THE LEGAL FRAMEWORK 513
1. Energy Charter Treaty 513
2. ILC Articles on State Responsibility 514
3. *RosInvestCo* and *Quasar* 514
4. Treatises 514
(a) General Issues 515
(b) Rate 515
(c) *Dies a quo* 517
(d) Simple or Compound 518
(e) Post-Award Interest 518
D. TRIBUNAL'S DECISION 519
XII. THE QUANTIFICATION OF CLAIMANTS' DAMAGES 522
A. CLAIMANTS' POSITION 522
1. Valuation Date 523
2. Causation 524
3. Calculations Performed by Claimants and Mr. Kaczmarek 524
(a) The "Scenarios" Presented by Claimants 524
(b) Methodology Used for Calculations Based on Scenarios 1 and 2 526
(c) Methodology Used for Calculations Based on Scenario 3 531
(d) Methodology Used for Calculations Based on 2012 Valuation Date 532
(e) Summary of Results of Claimants' Calculations 533

4. Failure of Claimants to Mitigate 533
5. Windfall and Double-Recovery 534
B. RESPONDENT'S POSITION 535
1. Valuation Date 535
2. Causation 536
3. Specific Aspects of the Calculations Performed by Claimants Criticized by Respondent 537
(a) Credibility of Claimants' DCF Analysis 537
(b) Claimants' Selection of Comparable Companies for Purposes of the Comparable Companies Analysis 538
(c) Claimants' Reliance on Comparable Transactions 539
(d) Claimants' Calculations of Hypothetical Cash Flows from Dividends 539
(e) Claimants' Calculations Based on the Loss of a Chance to Obtain a Listing on the New York Stock Exchange 540
(f) Claimants' Calculations Based on the Assumption of a Completed Yukos–Sibneft Merger 540
(g) Claimants' Scenarios 3a to 3d 540
(h) Claimants' Scenario 3e and the Valuation of YNG 541
(i) Claimants' Calculation of Pre-Award Interest 541
4. Failure of Claimants to Mitigate 541
5. Windfall and Double-Recovery 542
C. TRIBUNAL'S ANALYSIS AND DECISION 543
1. Valuation Date 543
(a) The Date of the Expropriation 543
(b) The Possibility for Claimants to Choose Between a Valuation as of the Date of Expropriation and a Valuation as of the Date of the Award 544
2. Causation 546
(a) Causation and Reliance on Multiple Actions 546
(b) Multiple Causes for the Same Damage 547
3. Failure of Claimants to Mitigate 548
4. The Methodology Followed by the Tribunal 548
(a) Valuation of Yukos 550

(b) Valuation of Lost Dividends 553

5. Application of the Methodology Followed by the Tribunal 560

(a) Calculations Based on 19 December 2004 Valuation Date 561

(b) Calculations Based on 2014 Valuation Date 562

(c) Comparison of the Results Based on the Two Different Valuation Dates 563

6. Deductions Due to Claimants' Contributory Fault 564

7. Windfall and Double Recovery 564

XIII. COSTS 564

A. INTRODUCTION 564

B. CLAIMANTS' POSITION 566

1. Claimants are Entitled to Recover All Costs Incurred in Connection with these Arbitrations 566

2. Claimants' Costs are Reasonable 568

3. Claimants' Comments on Respondent's Submission on Costs 570

C. RESPONDENT'S POSITION 571

1. Equal Apportionment is an Appropriate Exercise of the Tribunal's Discretion on Costs 571

2. Schedule of "Types of Costs" Incurred by Respondent 572

3. Respondent's Comments on Claimants' Submission on Costs 573

D. TRIBUNAL'S DECISION ON COSTS 574

1. Fixing and Allocation of Costs of the Arbitration Pursuant to Article 40(1) of the UNCITRAL Rules 574

2. Fixing and Allocation of Costs for Legal Representation and Assistance of the Parties Pursuant to Article 40(2) of the UNCITRAL Rules 575

3. Conclusion on the Award of Costs 576

XIV. DECISION 578

ANNEXES A-1

A. ANNEX A1: APPENDIX 1.1, APPENDIX J.1 AND APPENDIX J.2 TO SECOND DOW REPORT (MODIFIED AS DESCRIBED IN NOTE 2401 OF THE AWARD) A-1

(a) Appendix 1.1 ..... A-1

(b) Appendix J.1 New A-2

(c) Appendix J.2 New A-3

B. ANNEX A2: YUKOS COMPANY STRUCTURE (EXTRACT FROM EXH. R-3165, REFERRED TO IN NOTE 2413 OF THE AWARD) A-5

C. TABLES T1–T9 SHOWING THE TRIBUNAL'S DAMAGES CALCULATIONS A-6

1. Table T1: Calculation of Total Damages of Claimants as of 19 December 2004 (Date of Expropriation) vs. 30 June 2014 (Date of Award for Valuation Purposes) A-6

2. Table T2: Equity Value of Yukos Based on Adjustments Made by Professor Dow to Mr. Kaczmarek's Comparable Companies Calculations and the Evolution of the RTS Oil & Gas Index A-7

3. Table T3: Calculation of Dividends and Interest up to Valuation Date for Valuation as of 30 June 2014 ..... A-8

4. Table T4: FCFtE for Years 2012–2014 (Based on Mr. Kaczmarek's Figures) A-9

5. Table T5: Total Adjustment of Free Cash Flow to the Firm (Required to Obtain FCFtE value for Years 2012–2014 for Mr. Kaczmarek) A-10

6. Table T6: Change in Net Debt for Years 2012–2014 ..... A-11

7. Table T7: Interest Factors Based on Annual Rate of 3.389 percent (see Table T9) A-12

8. Table T8: RTS Oil and Gas Index Values from 1 January to 24 June 2014 ..... A-13

9. Table T9: 10-Year U.S. Sovereign Bond Rate 2005–2014 ..... A-16

- the passage of the Reply (mentioned at paragraph 1266 above) where Claimants state that they will deduct any payments they receive in the ECtHR proceedings from the amounts claimed in these arbitrations; and
- the Application for Just Satisfaction (mentioned at paragraph 1261 above), where Mr. Gardner characterized Claimants in these arbitrations as the "ultimate stakeholders" in Yukos.[1655]

1270. Finally, Respondent submits that Claimants' reliance on positions that the ECtHR has already finally rejected – namely that Respondent's taxation measures against Yukos were *mala fides*, briefed extensively in its Rejoinder,[1656] "creates a risk of conflicting determinations, one of the ills that Article 26(3)(b)(i) ECT is designed to avoid."[1657]

3. Tribunal's Decision

1271. Having considered the Parties' submissions and reviewed the reasons for its dismissal in the Interim Awards of Respondent's identical objection to jurisdiction pursuant to Article 26(3)(b)(i) of the ECT, the Tribunal sees no reason to reopen this issue and change its decision.

1272. Accordingly, Respondent's objection that the Tribunal lacks jurisdiction pursuant to Article 26(3)(b)(i) of the ECT is dismissed.

B. "UNCLEAN HANDS" (DID CLAIMANTS ACT ILLEGALLY SO AS TO DEPRIVE THEM OF PROTECTION UNDER THE ECT?)

1. Introduction

1273. As its second preliminary objection, Respondent submits that Claimants have come to this Tribunal with "unclean hands," with one or many of the following consequences: (a) the Tribunal does not have jurisdiction over Claimants' claims; (b) Claimants' claims are inadmissible; and/or (c) Claimants should be deprived of the substantive protections of the ECT. The Tribunal addresses this argument in the present chapter.

1274. Should the Tribunal reject the "unclean hands" argument as a preliminary objection,

---

1655 *Ibid.* ¶ 369.

1656 *Ibid.* ¶¶ 99–193.

1657 *Ibid.* ¶ 374.

Respondent also submits that some instances of Claimants' unclean hands should be treated as contributory fault and/or a failure to mitigate on the part of Claimants, and that any damages awarded to Claimants should be discounted on the basis of their unclean hands. These arguments are addressed in Chapters X.E and XII.C.

1275. Respondent initially made its "unclean hands" argument in the jurisdictional phase of these arbitrations. In Paragraph 3 of its Procedural Order No. 3 dated 31 October 2006, the Tribunal decided that it would be "appropriate to defer consideration of the Parties' contentions concerning 'unclean hands' [and] Respondent's 'criminal enterprise' contention . . . to the merits phase, if any."

1276. In its Interim Awards, the Tribunal stated:

> The Tribunal is well aware of Respondent's argument that Claimant in this arbitration has "unclean hands" and that Claimant's corporate personality should be disregarded because it is an instrumentality of a "criminal enterprise." The Tribunal recalls that it addressed these issues in its Procedural Orders Nos. 2 and 3 on 8 September and 31 October 2006. Specifically, the Tribunal then decided to defer consideration of Respondent's arguments concerning the "unclean hands" of Claimant or Claimant being an instrumentality of a "criminal enterprise" to any merits phase of this arbitration. Accordingly, by finding, as it does, that Claimant qualifies as an Investor owning and controlling an Investment for the purposes of Articles 1(7) and (6) of the ECT, the Tribunal does not dispose of the issues argued by Respondent concerning the "unclean hands" of Claimant and Claimant being an instrumentality of a "criminal enterprise," which it will address during any merits phase of this arbitration.[1658]

1277. As anticipated in the Interim Awards, now with the benefit of a full presentation of the facts by the Parties on all aspects of the Yukos affair, the Tribunal addresses Respondent's "unclean hands" argument in this final Award.

1278. The Tribunal notes that, in their First Submission on Costs, Claimants argue that Respondent, after insisting on its "unclean hands" allegations and the assertion that Claimants are an instrumentality of a "criminal enterprise" in the jurisdictional phase of this arbitration and dedicating nearly two hundred pages of its Counter-Memorial and Rejoinder to the first of these two arguments, ultimately abandoned these arguments at the Hearing, pursuing only the allegations related to alleged abuse by Claimants of the Cyprus-Russia DTA.[1659] In its Reply Submission on Costs, Respondent confirmed that it had not abandoned its unclean hands defense. To the contrary, Respondent argued that Claimants had explicitly refused to join issue

[1658] Interim Awards ¶ 435 (Hulley); ¶ 436; (YUL); ¶ 492 (VPL).

[1659] Exh. C-916.

and submit rebuttal and Respondent had accordingly relied on its arguments as undisputed and accepted. According to Respondent, this alleviated the need to devote substantial hearing time to these points.[1660]

1279. Claimants correctly observe that at the merits hearing (and in their Post-Hearing Brief) Respondent expanded only on the Cyprus-Russia DTA abuses part of its "unclean hands" argument, making only passing reference to other aspects of this argument.[1661] However, in the Tribunal's view, this circumstance speaks only to Respondent's freedom to present its case as it chooses, and represents Respondent's strategic decision to focus on certain arguments instead of others in the limited time available to it at the Hearing and within the page limit for post-hearing submissions imposed by the Tribunal. The fact that Respondent did not repeat in full all of the arguments made in previous pleadings at the Hearing and in its Post-Hearing Brief does not mean that these arguments were abandoned.

1280. Below, the Tribunal first summarizes the factual allegations constituting the foundation of Respondent's "unclean hands" argument and then the Parties' arguments regarding the impact of the alleged facts on the Tribunal's jurisdiction, the admissibility of claims and the availability of the substantive protections of the ECT to Claimants. In the last section of this chapter, the Tribunal sets out its decision with respect to "unclean hands" as a preliminary objection.

2. Claimants' Alleged "Unclean Hands"

1281. Respondent lists 28 instances of alleged "illegal and bad faith conduct" by Claimants or "attributable to" Claimants involving a variety of actors and spanning over ten years, from the privatization of Yukos in the mid-1990s to its liquidation in November 2007. Claimants dispute that any of their conduct (or any conduct attributable to them) was illegal or in bad faith.

1282. Given the number and diversity of Respondent's allegations, the Tribunal presents them below in groups intended to facilitate its subsequent analysis. Where facts related to Respondent's "unclean hands" allegations fall outside the scope of the analysis of the factual background set out in Part VIII above, they are briefly summarized here.

1660 Respondent's Reply Submission on Costs ¶¶ 16–18

1661 *See e.g.* Transcript, Day 19 at 169–74, 179; Respondent's Post-Hearing Brief ¶¶ 146, 148.

(a) Conduct Related to the Acquisition of Yukos and the Subsequent Consolidation of Control over Yukos and its Subsidiaries

1283. The first eleven items of Respondent's list of "illegal and bad faith conduct" are dedicated to conduct related to the acquisition of Yukos by Bank Menatep; and the so-called "Oligarchs" and their subsequent consolidation of control and ownership over Yukos and its subsidiaries:

i. Violating the legal requirements governing the loans-for-shares program that allowed Menatep to gain its controlling interest in Yukos.

ii. Using shell company proxies to feign competition in the loans-for-shares auction and a simultaneous investment tender for Yukos shares.

iii. Precluding actual competitors from bidding on Yukos shares in the loans-for-shares auction and investment tender, including through the abuse of Menatep's role as auction organizer to disqualify Russian competitors.

iv. Rigging a subsequent auction for the Yukos shares that were being held as collateral following the initial loans-for-shares auction, which deprived the Russian Government of substantial revenue.

v. Conspiring with Yukos' pre-existing managers to facilitate the unlawful acquisition of Yukos by the Oligarchs, including by entering into an agreement whereby "Yukos Universal" committed to pay them compensation consisting of 15% of Menatep's beneficial interest in Yukos, ultimately worth billions of dollars, for "services rendered to 'Yukos'".

vi. Colluding with others to predetermine the post-privatization ownership of Yukos.

vii. Skimming profits from Yukos and its production subsidiaries for their own self-enrichment.

viii. Abusing Russian corporate law and principles of corporate governance by squeezing out minority shareholders in Yukos' production subsidiaries through ruthless and self-enriching share dilutions, asset stripping, and transfer pricing.

ix. Siphoning off huge sums for the benefit of the Oligarchs from Yukos' proceeds from the sale of oil and oil products, while concealing related-party transactions from Yukos' own auditor.

x. Further mistreatment of minority shareholders by manipulating shareholder meetings, pressuring the Russian Federal Securities Commission not to pursue its challenges against illegal misconduct, relying on fraudulently determined stock and asset values and deceiving those minority shareholders, the government, and domestic and foreign courts about the nature and control of offshore companies that were created to benefit Claimants and their cohorts.

xi. Manipulating Yukos' stock value to devalue and reacquire the interests of creditors to which Yukos stock had been pledged.[1662]

1284. As context to Respondent's allegations, it is useful to recall some of Yukos' early history. The Russian Federation created the company in 1993 as part of a large-scale reorganization of the Soviet oil production and processing industry into vertically integrated oil companies. Yukos remained largely state-run until 1995.[1663]

1285. Respondent recounts, based on a report by Professor Reinier Kraakman that, in March 1995, a consortium of Russian commercial banks, including Bank Menatep (the Chairman of which was Mr. Khodorkovsky), proposed to the Russian government that they would lend it money in exchange for the right to hold as collateral and manage shares of major state-owned companies such as Yukos.[1664] A presidential decree of August 1995 provided for the auctioning of the right to hold and manage shares of individual companies.[1665] Once the terms of the proposed management agreement expired, the government would have a choice between paying back the loan and reclaiming its shares, and allowing the lender to sell the shares, with the government keeping 70 percent of the difference between the sale price and the original amount of the loan.[1666] This mechanism became known as the "loans-for-shares program."

1286. In December 1995, the Russian Government retained Bank Menatep to organize the auction for the shares in Yukos.[1667]

1287. Respondent alleges that Bank Menatep "completely rigged the auction" by preventing potential competitors from participating, while using two front companies, Laguna and Regent, to formally comply with the requirements for bids.[1668] Respondent recounts that Laguna won the right to hold as collateral and manage a 45 percent stake in Yukos for a USD 159 million loan to the Russian government and an additional investment obligation of USD 200 million. According to Respondent, Laguna acquired an additional 33 percent stake in Yukos by pledging just over USD 150 million in investments at a simultaneously held "investment

1662 Rejoinder ¶¶ 1435–36.

1663 Counter-Memorial ¶ 19.

1664 *Ibid*.¶ 20.

1665 Decree of the President of the Russian Federation No. 889 On the Procedure for Putting the Federally Owned Shares in Pledge, 31 August 1995, Exh. R-7.

1666 Counter-Memorial ¶ 21.

1667 *Ibid*. ¶ 23.

1668 *Ibid*. ¶¶ 27–28.

tender."[1669] Bank Menatep acquired Laguna's rights to hold and manage Yukos shares immediately thereafter.[1670] Respondent further alleges that Bank Menatep then used "another rigged auction and another shell affiliate, named Monblan," to obtain full ownership of the stake in Yukos.[1671] Respondent also suggests that Bank Menatep was "an insider among insiders" and used Yukos' own funds to pay for its takeover of Yukos.[1672]

1288. Respondent makes additional allegations regarding Bank Menatep's and the Oligarchs' treatment of foreign and Russian investors holding minority shares in Yukos' main production subsidiaries—YNG, Samaraneftegaz and Tomskneft—in the aftermath of the privatization.[1673] Respondent alleges that from 1996 to 1999 Bank Menatep and the Oligarchs engaged in significant profit skimming and, in 1999 and 2000, abused Russian corporate law and principles of corporate governance to "squeeze out the minority shareholders through massive share dilutions, transfer pricing, and asset stripping,"[1674] until "the minority shareholders sold or swapped their shares on the Oligarchs' terms."[1675]

1289. Claimants do not engage with the detail of Respondent's allegations. They contend that these allegations "amount to little more than innuendo based upon a handful of sensationalized journalistic accounts."[1676] In particular, Claimants point out that Respondent is "unable to make out any failure by Bank Menatep to comply with the terms of the loans-for-shares program"[1677] and underline that it was the Russian government itself that had the authority to preclude foreign companies and individuals from bidding and to disallow bids.[1678] Claimants add that Respondent's "vague insinuations" as to the source of funds used to privatize Yukos do not prove that anything unlawful took place.[1679] Claimants suggest that Respondent's argument "amounts to nothing more than an attempt to shift blame for the actions of the

---

1669 *Ibid*. ¶ 28.

1670 Kraakman Report ¶ 20.

1671 Counter-Memorial ¶ 29.

1672 *Ibid*. ¶ 33.

1673 *Ibid*. ¶ 45.

1674 *Ibid*. ¶¶ 915, 946–49; *see* Kraakman Report ¶¶ 28–42.

1675 Counter-Memorial ¶¶ 916, 951–61, 75; *see* Kraakman Report ¶¶ 44–62.

1676 Reply ¶ 1142.

1677 *Ibid*. ¶ 1143.

1678 *Ibid*. ¶¶ 1144–45.

1679 *Ibid*. ¶ 1146.

Russian Government itself onto Bank Menatep."[1680]

1290. As regards the manner of the consolidation of Bank Menatep's ownership over Yukos, Claimants reply that Respondent's allegations are vague and "not only irrelevant, but also moot."[1681] Claimants point out that Respondent relies on share issuances and transfers that were ultimately cancelled and on an alleged dispute with a minority shareholder that was eventually settled.[1682]

(b) Conduct Related to the Cyprus-Russia DTA

1291. Next, Respondent complains of Claimants' use of the Cyprus-Russia DTA, listing the following "bad faith and illegal conduct":

> xii. Submitting fraudulent claims under, or otherwise abusing, the Russia-Cyprus Tax Treaty to evade hundreds of millions of dollars in Russian taxes payable on dividends involving Yukos shares, thereby also violating Russian and Cypriot criminal laws.
>
> xiii. Entering into hundreds of sham transactions involving the sale and repurchase of Yukos shares between Claimants and their affiliates, the sole purpose of which was to fraudulently suggest that Claimants beneficially owned dividends declared on Yukos shares, and thereby to further Claimants' fraudulent claims for favorable tax treatment under the Russia-Cyprus Tax Treaty.
>
> xiv. Evading hundreds of millions of dollars in Russian taxes on profits from transactions in and profits from sales of Yukos shares.
>
> [. . .]
>
> xvi. Diverting the proceeds of the Yukos tax evasion scheme into highly opaque Cypriot and British Virgin Islands entities and trusts to conceal the unlawful provenance of those proceeds, including through dividend distributions to undisclosed Cypriot parent companies of trading shells, thereby further abusing the Russia-Cyprus Tax Treaty.[1683]

1292. The Russia–Cyprus DTA, as stated in its preamble, serves the "avoidance of double taxation with respect to taxes on income and capital" and the promotion of "economic cooperation between the two countries." Article 10 of the DTA provides:

1680 *Ibid*. ¶ 1147.

1681 *Ibid*. ¶¶ 1149, 1151–53.

1682 *Ibid*. ¶¶ 1149–50.

1683 Rejoinder ¶¶ 1435–36.

1. Dividends paid by a company which is a resident of a Contracting State to a resident of the other Contracting State may be taxed in that other State.

2. However, such dividends may also be taxed in the State of which the company paying the dividends is a resident and according to the laws of that State, but if the beneficial owner of the dividends is a resident of the other State, the tax so charged shall not exceed:

5% of the gross amount of the dividends…."

1293. The Parties agree that Claimants Hulley and VPL obtained monetary benefits running in excess of USD 230 million under this provision by claiming the reduced withholding tax rate of 5 percent instead of the standard 15 percent rate of the Russian Federation.

1294. Respondent argues that, in so doing, Hulley and VPL fraudulently relied on the Russia–Cyprus DTA to evade Russian taxes, because they: (a) were not the "beneficial owners" of the dividend income but mere "conduits" for the Oligarchs, and (b) had a "permanent establishment" in Russia to which the dividend income was attributable.[1684] According to Respondent, Claimants' reliance on the DTA was a "complete perversion of the Treaty's purpose," and, as stated by Professor Rosenbloom, a "blatant example of tax treaty abuse."[1685] Respondent alleges that Claimants contrived a series of artificial sales and repurchases of Yukos shares by Hulley from YUL, and VPL parked shares in a UBS Moscow account at suspicious times, solely to benefit from the DTA. According to Respondent, Claimants offer no justification for this practice, aside from their expert, Mr. Baker, mischaracterizing it as a "standard arrangement."[1686]

1295. Respondent submits that the beneficial ownership requirement "should be construed in light of the object and purposes of the [DTA], including avoiding double taxation and the prevention of fiscal evasion and avoidance."[1687] According to Respondent, Hulley and VPL never had the full right to use or enjoy Yukos' dividends. In support, Respondent refers to the following documents:

- Hulley's and VPL's bank statements from 1 January 2000 to 31 December 2004, as well as GML's statement for 2004, which purportedly establish that the

[1684] Counter-Memorial ¶¶ 922–23; Rejoinder ¶ 1448.

[1685] Counter-Memorial ¶ 165; Rosenbloom Report ¶ 77.

[1686] Rejoinder ¶¶ 1488–90; Baker Report, ¶70.

[1687] *Ibid.* ¶ 1449, relying on the 2011 OECD Discussion Draft for the Model Tax Convention, Exh. R-1959.

dividends paid to Hulley and VPL by Yukos only stayed in their accounts for one or two days prior to going to YUL;[1688]

- Hulley's Articles of Association, which according to Respondent reserved to the "Oligarchs" any decision concerning the disposal of Hulley's assets;[1689] and
- the Deed of Appointment of Chiltern as a custodian trustee for VPL, which, according to Respondent, provides that all dividend income from VPL's Yukos shares "shall be paid" to YUL so long as Chiltern owns VPL.

1296. Respondent also argues that Claimants have contradicted their own arguments in the jurisdictional phase of these proceedings by acknowledging an "obligation to pass all future dividends" to YUL; this, argues Respondent, falls within even Claimants' narrow interpretation of the beneficial ownership limitation.[1690]

1297. Respondent further asserts that Hulley and VPL each had a "Russian permanent establishment."[1691] Respondent interprets Claimants' admission that Hulley and VPL were holding companies to mean that any activity necessary to conduct the business of holding Yukos shares had to be carried out in Russia through a "deemed permanent establishment" (Article 5(5) of the Cyprus-Russia DTA) or a "fixed place of business" (Article 5(2) of the Cyprus-Russia DTA).[1692] Respondent contends that Messrs. Lebedev and Kakorin, both Russian citizens and residents, carried out all the activities relating to Hulley's and VPL's Yukos shares from Russia.[1693]

1298. Respondent further submits that Claimants' alleged abuses violate both Russian and Cypriot criminal laws, as shown in the expert report of Mr. Polyviou.[1694]

1299. Finally, Respondent argues that Claimants' expert, Mr. Baker, fails to differentiate the "tolerated" practice of "treaty shopping" from the "universally condemned" practice of "round

---

1688 *Ibid.* ¶¶ 1457–65, referring to Exhs. R-334 to R-4154.

1689 *Ibid.* ¶¶ 1466–87, referring to Exh. R-236.

1690 *Ibid.* ¶¶ 1478–79.

1691 *Ibid.* ¶¶ 1491–501.

1692 *Ibid.* ¶ 1491.

1693 *Ibid.* ¶ 1500.

1694 Counter-Memorial¶ 927.

tripping," which Respondent alleges is what Claimants did.[1695] Accordingly, Respondent submits that, "at best," Hulley and VPL "perverted" the purposes of the Cyprus-Russia DTA, even if they satisfied its "literal requirements."[1696]

1300. Claimants protest that Respondent's allegations are unsubstantiated in fact and in law.

1301. Firstly, Claimants argue that the beneficial ownership limitation set forth in Article 10(2)(a) of the Cyprus-Russia DTA is a "narrow one targeted at nominees, agents and other conduits under an obligation to pass on the amount received as a dividend to another party."[1697] Hulley and VPL in the present case had the full right to use and enjoy the dividends they received from Yukos and were under no obligation to pass them on to another entity, as is evident from Clause 117 and Article 1 of their respective Articles of Association, which provide that the power to propose the declaration and payment of dividends lies solely with the directors of the respective companies.[1698]

1302. Claimants assert that shares "transferred to a company shortly before the dividend dates and transferred back after the dividend has been paid are lawful and a common feature in stock-lending, and also in the sale and repurchase of shares ('repos')."[1699]

1303. Secondly, Claimants assert that Hulley and VPL were holding companies, and that their business as such was not carried on in Russia. [1700] None of the cumulative conditions in Article10(4) of the DTA were made out to show that Hulley or VPL had a permanent establishment in Russia, as demonstrated by Mr. Baker's report.[1701]

1304. Thirdly, Claimants reject the fraudulent abuse analysis made by Respondent's expert Professor Rosenbloom, noting that there is no anti-abuse principle in the DTA.[1702] Claimants emphasize

---

1695 Rejoinder ¶ 1508.

1696 *Ibid.* ¶ 1509.

1697 Reply ¶ 1157.

1698 *Ibid.* ¶ 1158.

1699 *Ibid.* ¶ 1161.

1700 *Ibid.* ¶ 1163.

1701 *Ibid.* ¶¶ 1164–74.

1702 *Ibid.* ¶ 1176.

that 'treaty shopping' to minimize tax is permissible.[1703]

1305. Finally, Claimants submit that Hulley's and VPL's claims under the Cyprus-Russia DTA were consistent with the purpose of the DTA. Claimants recall that one purpose of double-taxation treaties is to promote the flow of investment, and argue that both countries have derived significant benefits from the DTA.[1704]

1306. In any event, Claimants submit that the claiming of benefits under a double-taxation treaty is a technical matter, for which specific mechanisms of redress are available under the treaty itself and domestic law. Accordingly, this Tribunal is not the proper forum to hear and decide such disputes.[1705]

(c) Conduct Related to the Tax Optimization Scheme

1307. Three items on Respondent's list of Claimants' "illegal and bad faith" conduct relate to Claimants' use of the low-tax regions of the Russian Federation to mitigate tax burdens:

> xv. Engineering through management installed and controlled by Claimants the massive Yukos tax evasion scheme to avoid paying hundreds of billions of rubles in Russian taxes.
>
> [. . .]
>
> xvii. Engaging in abusive corporate restructurings to conceal Yukos' affiliation with its trading shells, thereby preventing Russian authorities from identifying and addressing Yukos' tax abuses.
>
> xviii. Concealing Yukos' continued control of its trading shells by resorting to call options or other artifices and by fabricating corporate and other transactional documents.[1706]

1308. A detailed discussion of these allegations is found in Chapter VIII.A of this Award.

(d) Actions Taken in Hindrance of the Enforcement of Russia's Tax Claims

1309. The remaining ten items on Respondent's list of Claimants' "bad faith and illegal conduct" refer to actions allegedly taken to obstruct enforcement of Russia's tax claims against Yukos:

1703 *Ibid.* ¶ 1175, citing *MIL (Investments) S.A. v. Canada* [2006] 5 CTC 2552 (Tax Court of Canada), affirmed by Federal Court of Appeal of Canada.

1704 *Ibid.* ¶ 1177.

1705 *Ibid.* ¶ 1189.

1706 Rejoinder ¶¶ 1435–36.

xix. Repeatedly obstructing the conduct of the tax authorities' audits of Yukos by refusing to provide documents and information which would show the extent of Yukos' abuses, and by causing Yukos' producing subsidiaries and other related entities to be similarly obstructive.

xx. Failing to pay Yukos' tax liabilities for tax year 2000 and following years, despite having received ample notice that Yukos would be required to pay these amounts and despite the fact that Yukos had abundant resources to do so.

xxi. Dissipating assets to frustrate the Russian authorities' collection of the tax assessments, including by way of paying dividends of unprecedented amounts, making spontaneously accelerated loan "*prepayments*" to Oligarch-owned Moravel, and foisting upon YNG an upstream guarantee up to US$ 3 billion for the repayment of Yukos' alleged "*debts*" to Moravel.

xxii. Offering to the Russian authorities assets which Yukos knew to be tainted to settle its tax liabilities.

xxiii. Concealing the share registers of Yukos' subsidiaries to obstruct the bailiffs' enforcement of Yukos' tax obligations.

xxiv. Sabotaging the YNG auction through litigation threats and a spurious bankruptcy filing in the United States that effectively prevented all but one bidder from placing a bid at the auction and artificially depressed the amount of the auction proceeds.

xxv. Implementing asset-stripping measures by diverting Yukos' valuable assets to the *stichtings* managed by former Yukos officers and representatives of Claimants in anticipation of Yukos' bankruptcy.

xxvi. Failing to repay Yukos' debt to the SocGen syndicate and frustrating the banks' attempts to collect against Yukos' Dutch assets.

xxvii. In the process of all of the foregoing, lying to Yukos' auditors PwC about core aspects of their misconduct and, through PwC's certification of Yukos' financial statements based on this deception of Yukos' auditors, to Yukos' creditors and other members of the investing public who relied upon those financial statements and PwC's certification of them.

xxviii. Yukos management's shielding of Yukos' very substantial foreign assets behind the veil of two Dutch *stichtings*, to place those assets beyond the reach of Russian tax authorities, violated Dutch law.[1707]

1310. In sum, Respondent alleges that Yukos neither paid its tax debts in full immediately after these debts were assessed, nor made reasonable settlement offers; dissipated the assets it had on hand; lied to its auditors; obstructed the work of the bailiffs; and sabotaged the YNG auction. Each of these allegations is discussed by the Tribunal in Part VIII of this Award.

[1707] *Ibid.* ¶¶ 1435–36.

3. Parties' Positions Regarding the Impact of Claimants' Allegedly "Unclean Hands" on this Arbitration

1311. The Parties disagree as to whether any of the instances of alleged illegal or bad faith conduct enumerated above could serve as a complete bar to Claimants' claims under the ECT (whether as a matter of jurisdiction, admissibility or otherwise) by virtue of the application of some rule or principle of law.

1312. Between them, the Parties have dedicated to this controversy several hundreds of pages of pleadings in the merits phase alone, citing in the process dozens of arbitral awards and decisions rendered by the Permanent Court of International Justice (the "**PCIJ**"), the International Court of Justice ("**ICJ**") and mixed-claims commissions. Below, the Tribunal does not attempt to do justice to the full breadth of the Parties' arguments, but focuses instead on their most salient points.

(a) Respondent's Position

1313. Respondent submits that Claimants' "unclean hands" deprive the Tribunal of jurisdiction, render Claimants' claims inadmissible and/or deprive Claimants of the substantive protections of the ECT. This submission is based on two main principles.

1314. First, Respondent argues that "the ECT protects only *bona fide* and lawful investments and Respondent's consent to arbitrate only extends to such investments."[1708] Respondent emphasizes that, as provided by Article 31(1) of the VCLT, a treaty must be interpreted in good faith and in accordance with its object and purpose. According to Respondent, the object and purpose of the ECT does not include the promotion and protection of illegal investments.[1709] Rather, as stated in the Treaty's introductory note, "[t]he fundamental aim of the [ECT] is to strengthen the rule of law on energy issues." Respondent argues that several arbitral awards, including *Phoenix Action, Ltd. v. Czech Republic* ("***Phoenix***"), *SAUR International S.A. v. The Argentine Republic* and *Plama Consortium Limited v. Bulgaria* ("***Plama***") support the proposition that, even in the absence of an express legality requirement clause in an investment treaty, illegal investments will not be protected.[1710] With respect to *Plama*, in particular,

[1708] Respondent's Post-Hearing Brief ¶ 147.

[1709] Counter-Memorial ¶ 898.

[1710] Rejoinder ¶¶ 1551–52, 1527, 1563, 1566, referring to *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, Exh. C-994 (hereinafter "*Plama*"); *Phoenix Action Ltd. v. Czech Republic*,

Respondent notes that the tribunal dismissed the claimants' ECT claims in the merits phase on the grounds that: (a) the investment violated Bulgarian law and applicable principles of international law; (b) the claimant's conduct was not in good faith; and (c) to grant ECT protection would therefore have been contrary to the clean hands requirement.[1711]

1315. Second, Respondent argues that a claimant who is guilty of illegal conduct is deprived of the necessary *ius standi* to complain of corresponding illegalities by the State.[1712] This requirement of "clean hands," argues Respondent, is a "general principle of law" within the meaning of Article 38(1)(c) of the ICJ Statute.[1713] Respondent cites the ICJ's decision in the *Case Concerning the Gabčíkovo-Nagymaros Project* and various dissenting opinions by ICJ judges, as well as a number of decisions of mixed claims commissions rendered in cases of diplomatic protection.[1714] Regarding the latter set of cases, Respondent submits that the "unclean hands

---

ICSID Case No. ARB/06/5, Award, 15 April 2009, Exh. R-1078 (hereinafter "*Phoenix*"); *SAUR International S.A. v. Argentina*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, 6 June 2012, Exh. R-4186 (hereinafter "*SAUR*").

1711 *Ibid.* ¶ 1552.

1712 Counter-Memorial ¶ 892.

1713 *Ibid.* ¶ 893.

1714 Counter-Memorial ¶¶ 894–95, referring to *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, 25 September 1997, ICJ Reports 1997, p. 7 ¶ 133, Exh. C-948 (hereinafter "*Gabčíkovo-Nagymaros*"); *Samuel Brannan v. Mexico*, U.S.-Mexico Mixed Claims Commission, Opinion of the Umpire, 1868, *in* HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE U.S. HAS BEEN A PARTY, Vol. 3 (John Bassett Moore, ed. 1898), p. 2757, 2758, Exh. R-1056; *The "Lawrence" Case*, U.S.-Great Britain Mixed Claims Commission, Judgment of the Umpire, 4 January 1855, Hornby's Report 397, 1856, p. 398, Exh. R-1057; *William Whitty v. The United States*, U.S.-British Claims Commission, Decision of the Commissioners, *in* HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE U.S. HAS BEEN A PARTY, Vol. 3 (John Bassett Moore, ed. 1898), p. 2820, 2823, Exh. R-1058; *Frederick G. Fitch v. Mexico*, U.S.-Mexico Mixed Claims Commission, Opinion of the Umpire, 21 June 1876, *in* HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE U.S. HAS BEEN A PARTY, Vol. 4 (John Bassett Moore, ed. 1898), p. 3476, 3477, Exh. R-1059; *Jarvis Case*, U.S.-Venezuela Mixed Claims Commission, Opinion of the Commissioner, UNRIAA, 1903–1905, Vol. 9, p. 208, 212, Exh. R-1060; *Cucullu's case*, U.S.-Mexico Mixed Claims Commission, Opinion of Mr. Palacio, 1868, *in* HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE U.S. HAS BEEN A PARTY, Vol. 4 (John Bassett Moore, ed. 1898), p. 3477, 3480, Exh. R-1061; *Case of the Brig "Mary Lowell"*, U.S.-Spain Claims Commission, Opinion of the Umpire, 9 December 1879, Spain-U.S. Claims Commission, *in* HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE U.S. HAS BEEN A PARTY, Vol. 3 (John Bassett Moore, ed. 1898), p. 2772, 2775, 2777, Exh. R-1062; *Robert Eakin v. United States*, No. 118, U.S.-Great Britain Claims Commission, PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, Vol. 3 (Washington Government Printing Office, 1874), p. 15, Exh. R-1063; *Clark Case ("The Medea and The Good Return")*, U.S.-Ecuador Claims Commission, 1862, Opinion of Mr. Hassaurek, *in* HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE U.S. HAS BEEN A PARTY, Vol. 3 (John Bassett Moore, ed. 1898), p. 2729, 2738–39, Exh. R-1064; *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, 27 June 1986, Dissenting Opinion of Judge Schwebel, ICJ Reports 1986, p. 259 ¶¶ 268, 272, Exh. R-1071; *Case Concerning Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, 14 February 2002, Dissenting Opinion of Judge van den Wyngaert, ICJ Reports 2002, p. 137 ¶ 84, Exh. R-1072; *Legal Status of Eastern Greenland (Denmark v. Norway)*, Judgment, 5 April 1933, Dissenting Opinion of Judge Anzilotti, PCIJ Series A/B No. 53, p. 76, 95, Exh. R-1073; *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Second Phase, Advisory Opinion, 18 July 1950, Dissenting Opinion of Judge Read, ICJ Reports 1950, p. 231, 244, Exh. R-1074. *See also* Rejoinder ¶¶ 1529–40, citing *Case Concerning the*

principle has [an even] greater role with respect to claims brought directly by private parties, including in investor-State arbitration, than in the context of diplomatic protection."[1715] Respondent also relies on *Barcelona Traction* for the proposition that in international law the corporate "veil is lifted" to "prevent the misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance . . . or to prevent the evasion of legal requirements or of obligations."[1716] Finally, Respondent argues that if the "unclean hands" doctrine was not included in the ILC Articles on State Responsibility and Articles on Diplomatic Protection of the International Law Commission, it is only "because it corresponded to the doctrine of inadmissibility" and did not fall within the projected scope of both sets of ILC Articles.[1717]

1316. With respect to Claimants' contention that the instances of "unclean hands" referred to by Respondent can have no impact on this arbitration because they are collateral illegalities unrelated to either the making of Claimants' investments or their claims in these arbitrations,[1718] Respondent argues that it is "unsupported both by the investment treaty awards on which [Claimants rely], and by common sense and good faith."[1719]

1317. With respect to post-investment conduct, Respondent submits that the awards in *Gustav FW Hamester GmbH & Co KG v. Ghana* ("***Hamester***") and *AG Frankfurt Airport Services Worldwide v. Philippines* ("***Fraport***") recognize the relevance of such misconduct to the merits of an investment treaty claim.[1720]

1318. As regards illegalities pre-dating the acquisition of the investment, Respondent relies on the award in *Anderson v. Costa Rica* ("***Anderson***").[1721] Respondent submits that the tribunal in that

---

Barcelona Traction Light and Power Company Limited (Belgium v. Spain) (New Application: 1962), Second Phase, Judgment, 5 February 1970, ICJ Reports 1970, p. 3, Exh. C-930; *Mavrommatis Palestine Concessions (Greece v. Great Britain)*, Judgment, 30 August 1924, PCIJ Series A No. 2, p. 6, 13, Exh. R-1043; ILC, Provisional Summary Record of the 2844th Meeting held 25 May 2005, A/CN.4/SR.2844, Agenda Item 2, 6 June 2005, p. 4, 7, Exh. R-4191.

[1715] Rejoinder ¶ 1538.

[1716] *Case Concerning the Barcelona Traction Light and Power Company Limited (Belgium v. Spain) (New Application: 1962)*, Second Phase, Judgment, 5 February 1970, ICJ Reports 1970, p. 3 ¶ 56, Exh. C-930.

[1717] Rejoinder ¶¶ 1543, 1545–47.

[1718] Reply ¶¶ 1134–38.

[1719] Rejoinder ¶ 1568.

[1720] *Ibid.* ¶¶ 1569–70, referring to *Gustav F W Hamester GmbH & Co KG v. Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, Exh. R-1079 (hereinafter "*Hamester*"); *Fraport AG Frankfurt Airport Services Worldwide v. Philippines*, ICSID Case No. ARB/03/25, Award, 16 August 2007, Exh. R- 1006 (hereinafter "*Fraport*").

[1721] Resondent's Rejoinder ¶ 1571, referring to *Anderson v. Costa Rica*, ICSID ARB(AF)/07/3, Award, 19 May 2010, Exh. R-4204 (hereinafter "*Anderson*").

case dismissed claims brought by Canadian individuals who had invested in a "Ponzi scheme" for lack of jurisdiction *ratione materiae*. Respondent highlights that tribunal's finding that the entire underlying transaction was illegal and, by that fact, "it follows that the acquisition by each [c]laimant of the asset resulting from that transaction was also not in accordance with the law of Costa Rica."[1722] Respondent submits that the finding of the *Anderson* tribunal applies in the present case, highlighting that:

> where an investment is simply transferred by the same ultimate owner from one investment vehicle to another, the concept of the unity of the investment requires that the process of the making and operation of the investment by the ultimate owner and the owner's investment vehicle be considered as a whole for purposes of determining the legality of the investment, even if the acquisition of the investment by the claimant, standing alone, is not illegal.[1723]

1319. To hold otherwise, argues Respondent, would extend investment treaty protection to claimants who shift investments through several layers of ownership and control in order to launder their illegal investments into legal ones qualifying for treaty protection.[1724]

1320. In response to Claimants' assertion that 'in accordance with the law' requirements should be limited to domestic laws regulating the admission of foreign investment, Respondent submits a number of counter-arguments, including the following:

- Claimants' reliance on the "isolated 2010 dictum" in *Mr. Saba Fakes v. the Republic of Turkey* ("***Saba Fakes***") to limit the substantive scope of the 'in accordance with the law' requirement is "unpersuasive and contrary to a consistent line of arbitral awards that have applied 'in accordance with the law' clauses to domestic legislation other than laws governing the admission of investments."[1725]

- the illegalities "infecting" Claimants' investments are "quintessential breaches of 'fundamental principles'" and were "central to the profitability of and dividend flow from Claimants' investments."[1726]

1722 *Ibid.*, quoting *Anderson* ¶ 55.

1723 *Ibid.* ¶ 1572.

1724 *Ibid.*

1725 *Ibid.* ¶ 1577, referring to *Mr Saba Fakes v. The Republic of Turkey*, ICSID ARB/07/20, Award, 17 July 2010, Exh. C-1537 (hereinafter "*Saba Fakes*").

1726 *Ibid.* ¶ 1582.

- Claimants' attempt to exclude minor violations from the scope of 'in accordance with the law' clauses is unavailing, as none of the illegalities of which Respondent complains are minor.[1727]

1321. In response to Claimants' contention that they were not the relevant actors in the context of Respondent's allegations regarding Yukos' tax optimization scheme and the obstruction of the enforcement of tax claims against Yukos by the Russian Federation, Respondent submits that Claimants are "essential instrumentalities of illegal acts, through Claimants' control of Yukos and its management,"[1728] noting that during the relevant period, "Claimants owned a majority of Yukos shares and appointed the totality of the members of its board of directors, including . . . Mikhail Khodorkovsky."[1729]

1322. Respondent also states that it is not estopped from invoking Claimants' unclean hands in this arbitration by any failure to take prompt action.[1730] Respondent submits that Claimants have failed to satisfy the legal standard for estoppel.[1731] This standard, argues Respondent, was confirmed by the ICJ in the *North Sea Continental Shelf Cases*:

> [I]t appears to the Court that only the existence of a situation of estoppel could suffice to lend substance to this contention, -- that is to say if the Federal Republic were now precluded from denying the applicability of the conventional regime, by reason of part conduct, declarations, etc., which not only clearly and consistently evinced acceptance of that regime, but also had caused Denmark or the Netherlands, in reliance on such conduct, detrimentally to change position or suffer some prejudice. Of this there is no evidence whatever in the present case.[1732]

1727 *Ibid.* ¶ 1580.

1728 Counter-Memorial ¶ 909.

1729 *Ibid.* ¶ 933.

1730 Rejoinder ¶ 1597.

1731 *Ibid.* ¶¶ 1588–98.

1732 *Ibid*. ¶ 1589, quoting *North Sea Continental Shelf (Federal Republic of Germany/Denmark and Federal Republic of Germany/Netherlands*), Judgment, 20 February 1969, ICJ Reports 1969, p. 3 ¶ 30, Exh. R-4208; *see also* ¶¶ 1590–92, citing *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/U.S.)*, Judgment, 12 October 1984, ICJ Reports 1984, p. 246 ¶ 145, Exh. R-4209; *Case of the Land and Maritime Boundary (Cameroon/Nigeria)*, Preliminary Objections, Judgment, 11 June 1998, ICJ Reports 1998, p. 275 ¶ 57, Exh. R-4210; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, Application by Nigeria for Permission to Intervene, Judgment, 13 September 1990, ICJ Reports 1990, p. 92 ¶ 63, Exh. R-4211; *Aerial Incident of 10 August 1999 (Pakistan v. India*), Jurisdiction of the Court, Judgment, 21 June 2000, ICJ Reports 2000, p. 12 ¶ 45, Exh. R-4212; *Legality of Use of Force (Serbia and Montenegro v. Canada)*, Preliminary Objections, Judgment, 15 December 2004, ICJ Reports 2004, p. 429 ¶ 42, Exh. R-4213; WTO, Guatemala—Definitive Anti-Dumping Measures On Grey Portland Cement From Mexico, Report of the Panel, 24 October 2000 ¶¶ 8.23–8.24, Exh. R-4214; WTO, Argentina—Definitive Anti-Dumping Duties On Poultry From Brazil, Report of the Panel, 22 April 2003 ¶ 7.39, Exh. R-4215; *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Interim Award, 26 June 2000 ¶ 111, Exh. C-953.

1323. Respondent submits that Claimants have failed to identify an unequivocal representation by Respondent. In that regard, Respondent argues that Claimants' reliance on Respondent's alleged failure to challenge illegalities earlier does not amount to an unequivocal representation. Respondent also submits that Claimants have failed to establish that they changed their conduct to their detriment in reliance on said representation. Particularly regarding the alleged abuses of the Cyprus-Russia DTA, Respondent contends it raised its objection to Hulley's and VPL's alleged violations in these arbitrations as early as October 2006, and thus, argues Respondent, "Claimants' further suggestion that Respondent might be estopped because it did not also raise these abuses 'in an appropriate forum' is absurd."[1733]

1324. Respondent adds that informal or *contra legem* acceptance of an investment by the host State's authorities that is illegal under the host State's domestic law, or based on covert arrangements unknown to the host State, cannot provide a basis for estoppel. In support, Respondent relies on the *Fraport* award.[1734]

1325. Finally, Respondent rejects Claimants proportionality argument, stating that it is based on "rules governing countermeasures by an injured State in inter-State relations."[1735] In the words of Respondent: "the legality requirement excludes illegal investments from the scope of ECT protection. As a result it is not that a host State is not justified in breaching obligations with respect to illegal investments, but instead that it has no treaty obligations in the first instance."[1736]

(b) Claimants' Position

1326. Claimants object that their "unclean hands," even if proven by Respondent, could have no impact on their claims in these arbitrations because: (a) the ECT does not contain any principle of "unclean hands"; (b) no principle of "unclean hands" has been recognized as a general principle of law; and (c) the instances of "unclean hands" alleged by Respondent are "collateral illegalities" that do not fall within the parameters of any "unclean hands" doctrine.

1327. Claimants assert that it is "impossible to find any textual basis in the [ECT] for the

---

1733 *Ibid*. ¶¶ 1593–95.

1734 *Ibid.* ¶ 1596, referring to *Fraport* ¶ 347.

1735 *Ibid.* ¶¶ 1584–7.

1736 *Ibid.* ¶ 1586.

Respondent's contention."[1737] They add that the introductory note to the ECT—a note which Claimants contend is not an official document or interpretation of the ECT—confers an obligation to strengthen the rule of law on States parties, rather than on the investor.[1738] Claimants highlight that Respondent chose not to quote the remainder of the note, which goes on to state that the ECT's aim of strengthening the rule of law on energy issues is to be accomplished "by creating a level playing field of rules to be observed by all participating governments, thus minimising the risks associated with energy-related investments and trade."[1739] In this regard, Claimants contend that denying a claimant access to a forum for resolving its claims altogether would violate, rather than support, the rule of law.[1740]

1328. Claimants seek to distinguish the *Phoenix* and *Hamester* ICSID awards relied upon by Respondent. Claimants highlight that the statement relied on by Respondent to infer that a jurisdictional requirement of compliance with host State laws is implicit, even when not stated, is *obiter dictum* on account of the BIT provisions being applied by those tribunals.[1741] Similarly, Claimants submit that any reliance on the *Plama* award to insert a jurisdictional requirement of "clean hands" into the relevant treaty is incorrect. Claimants submit that in the *Plama* decision on jurisdiction, the tribunal considered and rejected an argument that the illegality of the investment could affect its capacity to hear the dispute.[1742]

1329. Further, Claimants emphasize that the bar for recognition of general principles of international law is set "extremely high".[1743] Claimants assert that Respondent's "unclean hands" theory fails to meet this high threshold.

1330. Claimants allege that neither the PCIJ nor the ICJ have ever endorsed "unclean hands" as a general principle of law.[1744] They also argue that the inter-state cases relied on by Respondent are inapposite to this arbitration as they concern "situations in which two sovereign States have

---

1737 Reply ¶ 1029.

1738 *Ibid.* ¶ 1100.

1739 *Ibid.* ¶ 1101.

1740 *Ibid.* ¶ 1102.

1741 *Ibid.* ¶ 1098, referring to *Phoenix* ¶ 101, Exh. R-1078; *Hamester* ¶ 123–24, Exh. R-1079.

1742 *Ibid.* ¶ 1099, referring to *Plama*, Exh. C-994.

1743 *Ibid.* ¶ 1039.

1744 *Ibid.* ¶¶ 1040–55.

assumed an identical or reciprocal obligation."[1745] Claimants further argue that the awards of mixed claims commissions are of little guidance, as they deal mostly with diplomatic protection and are of "ancient vintage." In support, Claimants cite the *Saba Fakes v. Turkey* ICSID award, in which the tribunal held that the "rules of customary international law applicable in the context of diplomatic protection do not apply as such to investor-State arbitration."[1746]

1331. Claimants note that the ILC Articles on State Responsibility and Articles on Diplomatic Protection do not contain a principle of "unclean hands."[1747] They also argue that most scholars reject the existence of an "unclean hands" general principle altogether, while its proponents argue that it should be subject to certain well-defined limits.[1748]

1332. Claimants also submit that the investment tribunal awards relied on by Respondent in support of a general principle of "unclean hands" were decided on other grounds and that Respondent's analysis of these awards is incomplete and misleading.[1749] According to Claimants, in each of the ICSID awards cited by Respondent—*Plama*, *Phoenix*, *Hamester* and *Inceysa Vallisoletana, S.L. v. Republic of El Salvador* ("***Inceysa***")—the tribunal's decision rested on a clause in the relevant BIT conditioning jurisdiction on compliance by the investor with the laws of the host State.[1750]

1333. Furthermore, Claimants argue that even if Respondent can make the case for a general principle of "unclean hands" or a legality requirement under the ECT, Respondent's theory as applied to this case rests on allegations of collateral illegalities unrelated to either the making of

---

1745 *Ibid.* ¶¶ 1040, 1055.

1746 *Ibid.* ¶¶ 1056–67, referring to *Saba Fakes* ¶ 69, Exh. C-1537.

1747 *Ibid.* ¶¶ 1068–71.

1748 *Ibid.* ¶¶ 1072–77. For scholars rejecting the principle, Claimants cite to: Jean Salmon, ed., DICTIONNAIRE DE DROIT INTERNATIONAL PUBLIC, 2001, pp. 677–78, Exh. C-1613 ; Luis Garcia-Arias, *La doctrine des «Clean Hands» en droit international public*, 1960, 30 *Annuaire des anciens auditeurs de l'académie de droit* 14, p. 18, Exh. R-1075; ILC, Sixth report on diplomatic protection by John Dugard, Special Rapporteur, 57th Session, 2 May – 5 August 2005, U.N. Doc. A/CN.4/546 ¶ 15, Exh. C-1678; Charles Rousseau, DROIT INTERNATIONAL PUBLIC, TOME V, LES RAPPORTS CONFLICTUELS ¶ 170, Exh. C-1612. For proponents of the principle, with limits, Claimants cite to: Bin Cheng, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS, pp. 157–58, Exh. R-1054; Sir Gerald Fitzmaurice, *The General Principles of International Law Considered From the Standpoint of the Rule of Law*, 1957, 92 Collected Courses of the Hague Academy of International Law 1, p. 119, Exh. R-1053.

1749 *Ibid.* ¶ 1094.

1750 *Ibid.* ¶ 1094–1105, referring to *Plama*, Exh. C-994; *Inceysa Vallisoletana, S.L. v. El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006, Exh. R-1083 (hereinafter "*Inceysa*"); *Phoenix*, Exh. R-1078; *Hamester*, Exh. R-1079.

Claimants' investments or their claims in these arbitrations.[1751]

1334. Claimants submit that even when interpreting treaty provisions expressly requiring compliance with host State laws as a condition of jurisdiction, investment tribunals have strictly construed such provisions.[1752] Claimants submit that investment tribunals have only subjected the initial making of the investment to a legality test. They also assert that the limited temporal scope employed by investment tribunals renders alleged pre-investment conduct irrelevant,[1753] and limits its substantive scope, *e.g.*, by extending only to host State laws "governing the admission of foreign investments in its territory."[1754] Claimants emphasize that misconduct unrelated to the making of an investment, or which concerns minor violations, has been disregarded by investment tribunals.[1755]

1335. Claimants also submit that Anglo-American jurisprudence confirms that alleged illegalities must have an "immediate" and "necessary" relation to a claimant's cause of action.[1756]

1336. It follows, argue Claimants, that none of Respondent's allegations are covered by any principle of "unclean hands". The actions complained of by Respondent with respect to the acquisition of Yukos pre-date Claimants' investments, depriving the Tribunal of jurisdiction *ratione temporis* over those actions.[1757] The alleged abuses of the Cyprus-Russia DTA do not, according to Claimants, have the required "immediate" or "necessary" relation to Claimants' claims.[1758] Claimants argue that to bar Hulley and VPL permanently from bringing claims under the ECT for having claiming benefits under the Cyprus-Russia DTA to which they were not entitled rests on an "impossibly broad interpretation" of the "unclean hands" concept.[1759]

1337. Claimants also point out that only the allegations of DTA abuses concern the conduct of Claimants themselves, while the other 24 allegations concern the conduct of persons other than Claimants. Claimants contend that Respondent provides no basis on which the conduct of these

---

1751 *Ibid.* ¶¶ 1134–38.

1752 *Ibid.* ¶ 1105.

1753 *Ibid.* ¶¶ 1106–12.

1754 *Ibid.* ¶¶ 1118–19.

1755 *Ibid.* ¶ 1120.

1756 *Ibid.* ¶¶ 1105, 1078, 1134.

1757 *Ibid.* ¶ 1135.

1758 *Ibid.* ¶ 1137.

1759 *Ibid.*

third parties could render Claimants' hands "unclean".[1760]

1338. Claimants further assert that, even if any principle of "unclean hands" is potentially applicable in the situation at hand, Respondent is estopped from raising matters in these arbitrations of which it has long been aware, but has never challenged.[1761] Claimants argue that acquiescence, or the silence or absence of protest in circumstances which generally call for a positive reaction signifying an objection, may "in and of itself" result in estoppel, where the other elements of estoppel are not made out.[1762]

1339. In particular, Claimants reject Respondent's allegations with respect to the creation and original acquisition of Yukos in 1995. Claimants submit that it was Respondent that "planned, organized, conducted and completed the privatization of the Russian Federation's property through the loans-for-shares program, including the privatization of Yukos."[1763] Similarly, Claimants highlight that Respondent did not take legal action against Claimants for any of the alleged violations of the Cyprus-Russia DTA by Hulley and VPL. Claimants underline that Respondent must have had knowledge of many, if not all, of the alleged violations "as early as October 2003, through the searches and seizures of documents at the Moscow premises of GML MS, or at least as early as October 6, 2006 when the Respondent first raised the matter in these arbitrations."[1764]

1340. Claimants also submit that, even if an "unclean hands" general principle existed, it would not confer upon States the right to violate investors' rights.[1765] Drawing an analogy to counter-measures, Claimants refer to Articles 49 and 54 of the ILC Articles on State Responsibility and to the ILC Commentary on the provisions, which states that such measures "are not intended as a form of punishment for wrongful conduct, but as an instrument for achieving compliance with the obligations of the responsible State."[1766]

1341. The ILC Commentary further emphasizes that proportionality is a stand-alone requirement, such that even where a counter-measure is carried out for a permissible purpose, it must still be

---

1760 *Ibid.* ¶ 1136.

1761 *Ibid.* ¶ 1181.

1762 *Ibid.* ¶ 1183.

1763 *Ibid.* ¶ 1188.

1764 *Ibid.* ¶ 1189.

1765 *Ibid.* ¶ 1191.

1766 *Ibid.* ¶ 1194.

proportionate to the original breach.[1767]

1342. Claimants submit that the need to weigh the proportionality of Respondent's response to the illegalities it alleges against Claimants provides further reason for rejecting Respondent's "unclean hands" objection to jurisdiction/admissibility. In Claimants' own words: "it is for the tribunal to assess such allegations . . . in its consideration of the merits of the investor's claims, bearing in mind that any response by the host State to any alleged illegality must comport with its international obligations."[1768]

4. Tribunal's Decision

1343. Article 26(6) of the ECT provides that "[a] tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law."

1344. Article 31 of the VCLT, which is widely recognized as reflecting customary international law, provides in its first paragraph that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

1345. Looking first at the text of the ECT, the Tribunal observes that it does not contain any express reference to a principle of "clean hands." Nor, unlike some other investment treaties, does the ECT contain an express requirement that investments be made in accordance with the laws of the host country.[1769] These points are not disputed by the Parties.

1346. In the absence of any specific textual hook, the Tribunal must consider whether, given the need to interpret treaties in good faith and take account of their object and purpose, the ECT as a whole may be understood as conditioning the protection of investments on their legality, or on the good faith of the investor. The Tribunal addresses this question in subsection (a) below.

1767 *Ibid.* ¶ 1195.

1768 *Ibid.* ¶ 1197.

1769 *See e.g.* the bilateral investment treaties applied in *Fraport*, Exh. R-1006 (Germany–Philippines BIT: "[t]he term investment shall mean any kind of asset accepted in accordance with the respective laws and regulations of either Contracting State"); *Inceysa*, Exh. R-1083 (Spain–El Salvador BIT: "[e]ach Contracting Party shall protect in its territory investments made, in accordance with its legislation"; "[the BIT shall] apply to investments made . . . in accordance with the laws"); *Phoenix*, Exh. RE-1078 (Israel–Czech Republic BIT: "[t]he term 'investment' shall comprise any kinds of asset invested . . . in accordance with the respective laws and regulations."

1347. In addition to any potential limitation on the protection of investments inherent in the ECT, a principle of "clean hands" could be relevant to this arbitration pursuant to Article 26(6) of the ECT if it were an "applicable rule[. . .] or principle[. . .] of international law." The Parties dispute whether "clean hands" exists as a "general principle of international law recognized by civilized nations" in the meaning of Article 38(1)(c) of the Statute of the ICJ. The Tribunal addresses this question in subsection (b) below.

1348. Finally, in subsection (c) below, the Tribunal considers whether any of the 28 instances of "bad faith and illegal conduct" of which Respondent accuses Claimants fall within the scope of any "unclean hands" or similar principle applicable in the ECT context.

(a) Can a Clean Hands Principle or Legality Requirement be Read into the ECT?

1349. The Tribunal notes that there is support in the decisions of tribunals in investment treaty arbitrations for the notion that, even where the applicable investment treaty does not contain an express requirement of compliance with host State laws (as is the case with the ECT), an investment that is made in breach of the laws of the host State may either: (a) not qualify as an investment, thus depriving the tribunal of jurisdiction; or (b) be refused the benefit of the substantive protections of the investment treaty.

1350. The *Plama* tribunal, deciding a case under the ECT, thus stated that the "substantive protections of the ECT cannot apply to investments made contrary to law."[1770] It acknowledged that the ECT "does not contain a provision requiring the conformity of the Investment with a particular law," but stated that "[t]his does not mean . . . that the protections provided for by the ECT cover all kinds of investments, including those contrary to domestic and international law."[1771] The tribunal explained that, in that case, granting the claimant protection would have "be[en] contrary to the principle *nemo auditor propriam turpitudinem allegans*" and "the basic notion of international public policy—that a contract obtained by wrongful means (fraudulent misrepresentation) should not be enforced by a tribunal."[1772]

1351. Other arbitral tribunals have stated in *obiter dicta* that the principle that an investment "will not be protected if it has been created in violation of national or international principles of good

[1770] *Plama*, Exh. C-994 ¶ 139.

[1771] *Ibid.* ¶ 138.

[1772] *Ibid.* ¶ 143.

faith" or "of the host State's law" is a "general principle[. . .] that exist[s] independently of specific language" in an investment treaty.[1773]

1352. The Tribunal agrees with this proposition. In imposing obligations on States to treat investors in a fair and transparent fashion, investment treaties seek to encourage legal and *bona fide* investments. An investor who has obtained an investment in the host State only by acting in bad faith or in violation of the laws of the host state, has brought itself within the scope of application of the ECT through wrongful acts. Such an investor should not be allowed to benefit from the Treaty.

1353. For reasons that will become apparent further in this chapter, the Tribunal does not need to decide here whether the legality requirement it reads into the ECT operates as a bar to jurisdiction or, as suggested in *Plama*, to deprive claimants of the substantive protections of the ECT.

1354. However, the Tribunal does need to address Respondent's contention that the right to invoke the ECT must be denied to an investor not only in the case of illegality in the *making* of the investment but also in its *performance*. The Tribunal finds Respondent's contention unpersuasive.

1355. There is no compelling reason to deny altogether the right to invoke the ECT to any investor who has breached the law of the host State in the course of its investment. If the investor acts illegally, the host state can request it to correct its behavior and impose upon it sanctions available under domestic law, as the Russian Federation indeed purports to have done by reassessing taxes and imposing fines. However, if the investor believes these sanctions to be unjustified (as Claimants do in the present case), it must have the possibility of challenging their validity in accordance with the applicable investment treaty. It would undermine the purpose and object of the ECT to deny the investor the right to make its case before an arbitral tribunal based on the same alleged violations the existence of which the investor seeks to dispute on the merits.

[1773] *Hamester* ¶¶ 123–24, Exh. R-1079. *See also Phoenix* ¶ 101, Exh. R-1078 ("it is the Tribunal's view that this condition – the conformity of the establishment of the investment with the national laws – is implicit even when not expressly stated in the relevant BIT"); *SAUR* ¶ 308, Exh. R-4186 ("[the tribunal] is aware that the finality of the investment arbitration system is to protect only lawful and bona fide investments. Whether or not the BIT between France and Argentina mentions the requirement that the investor act in conformity with domestic legislation does not constitute a relevant factor. The condition of not committing a serious violation of the legal order is a tacit condition, inherent to any BIT as, in any event, it is incomprehensible that a State offer the benefit of protection through arbitration if the investor, in order to obtain such protection, has acted contrary to the law.")

1356. Respondent has not been able to cite any apposite authority in support of its contention. The statements of investment tribunals it relies on were all made *obiter* and are too vague to allow any certain conclusions to be drawn as to their intended meaning. For example, the statement in *Fraport* that illegal acts in the course of an investment "might be a defense to claimed substantive violations" appears to suggest that, in some cases, the State's actions will have been justified as an appropriate response to the investor's violations of national law.[1774] As is clear from the decision, the statement by the *Fraport* tribunal does not imply the unavailability of the substantive protections of the treaty, but rather concludes that the respondent State has not incurred any liability under the treaty.

(b) Does the "Clean Hands" Doctrine Constitute a "General Principle of Law Recognized by Civilized Nations"?

1357. Since the Tribunal will not read into the ECT any legality requirement with respect to the conduct of the investment, it must consider Respondent's more general proposition that a claimant who comes before an international tribunal with "unclean hands" is barred from claiming on the basis of a "general principle of law."

1358. The Tribunal is not persuaded that there exists a "general principle of law recognized by civilized nations" within the meaning of Article 38(1)(c) of the ICJ Statute that would bar an investor from making a claim before an arbitral tribunal under an investment treaty because it has so-called "unclean hands."

1359. General principles of law require a certain level of recognition and consensus. However, on the basis of the cases cited by the Parties, the Tribunal has formed the view that there is a significant amount of controversy as to the existence of an "unclean hands" principle in international law.

1360. Respondent has demonstrated that certain principles associated with the "clean hands" doctrine, such as *exceptio non adimpleti contractus* and *ex iniuria ius non oritur* have been endorsed by the PCIJ and the ICJ.[1775] However, the Tribunal notes that Judge Simma in his separate opinion

---

[1774] *Fraport*, Exh. R-1006 ¶¶ 395, 345. The Tribunal notes that the Chairman, Mr. Fortier, was the Chairman of the Fraport tribunal.

[1775] *See The Diversion of Water from the Meuse (Netherlands v. Belgium)*, Judgment, 28 June 1937, Individual Opinion of Judge Hudson, PCIJ Series A/B No. 70, p. 73, 77, Exh. C-1502 ("[i]t would seem to be an important principle of equity that where two parties have assumed an identical or reciprocal obligation, one party which is engaged in continuing non-performance of that obligation should not be permitted to take advantage of a similar non-performance of that obligation by the other party"); *Gabčíkovo-Nagymaros*, ¶ 133 Exh. C-948 ("[t]he Court, however, cannot

in the *Application of the Interim Accord of 13 December 1995* raises doubt as to the continuing existence of the *exceptio non adimpleti contractus* principle.[1776]

1361. With regard to the "unclean hands" doctrine proper, Respondent has referred to the dissenting opinion of Judge Schwebel (a member of this Tribunal) in the *Military and Paramilitary Activities in and against Nicaragua* ICJ case, where he concluded that Nicaragua's claims against the United States should fail because Nicaragua had "not come to Court with clean hands."[1777] Respondent also referred to other dissenting ICJ and PCIJ opinions where the principle of "unclean hands" was invoked (albeit often without referring to it by name).[1778]

1362. However, as Claimants point out, despite what appears to have been an extensive review of jurisprudence, Respondent has been unable to cite a single majority decision where an international court or arbitral tribunal has applied the principle of "unclean hands" in an inter-State or investor-State dispute and concluded that, as a principle of international law, it operated as a bar to a claim.

1363. The Tribunal therefore concludes that "unclean hands" does not exist as a general principle of international law which would bar a claim by an investor, such as Claimants in this case.

---

disregard the fact that the Treaty has not been fully implemented by either party for years, and indeed that their acts of commission and omission have contributed to creating the factual situation that now exists. Nor can it overlook that factual situation . . . when deciding on the legal requirements for the future conduct of the Parties. This does not mean that facts—in this case, facts which flow from wrongful conduct—determine the law. The principle *ex injuria jus non oritur* is sustained by the Court's finding that the legal relationship created by the 1977 Treaty is preserved and cannot in this case be treated as voided by unlawful conduct.")

1776 *Application of the Interim Accord of 13 December 1995 (the Former Yugoslav Republic of Macedonia v. Greece)*, Judgment, 5 December 2011, Separate Opinion of Judge Simma, ICJ Reports 2011, p. 695 ¶¶ 19–20, Exh. C-1545.

1777 *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, 27 June 1986, Dissenting Opinion of Judge Schwebel, ICJ Reports 1986, p. 259 ¶ 268, Exh. R-1071.

1778 *Legal Status of Eastern Greenland (Denmark v. Norway)*, Judgment, 5 April 1933, Dissenting Opinion of Judge Anzilotti, PCIJ Series A/B No. 53, p. 76, 95, Exh. R-1073; *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (Second Phase), Advisory Opinion, 18 July 1950, Dissenting Opinion of Judge Read, ICJ Reports 1950, p. 231, 244, Exh. R-1074; *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment, 24 May 1980, Dissenting Opinion of Judge Morozov, ICJ Reports 1980, p. 51 ¶ 3, Exh. R-1087; *Case Concerning Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, 14 February 2002, Dissenting Opinion of Judge van den Wyngaert, ICJ Reports 2002, p. 137 ¶ 84, Exh. R-1072 ("The Congo did not come to the Court with clean hands").

(c) Would any Instances of Claimants' Alleged "Bad Faith and Illegal" Conduct be Caught by a Legality Requirement Read into the ECT?

1364. To summarize, the Tribunal accepts that a claimant may be barred from seeking relief under the ECT if its investment was made in bad faith or in violation of the laws of the host state.

1365. It follows that the alleged instances of "unclean hands" listed in Subsections IX.B.2(b), (c) and (d) above—specifically, the instances related to the alleged abuse of the Russia–Cyprus DTA, the tax optimization scheme and the obstruction of Russia's enforcement of tax claims against Yukos, all of which relate to actions that were taken after the making of Claimants' investment, cannot have any impact on the availability of ECT protection for Claimants.

1366. This leaves for the Tribunal's consideration Respondent's allegations of bad faith and illegal conduct in the acquisition of Yukos and the subsequent consolidation of control and ownership over Yukos and its subsidiaries, set out in Subsection IX.B.2(a) above.

1367. It is common ground between the Parties that these actions were taken before Claimants became shareholders of Yukos in 1999, 2000 and 2001 and, consequently, were not taken by Claimants themselves, but by other actors, such as Bank Menatep and the Oligarchs.[1779] Claimants submit that these actions are thus irrelevant to these arbitrations, as the conduct complained of was not that of Claimants' themselves and, in any event, pre-dates Claimants' investment.[1780]

1368. Respondent replies that, on the contrary, the process of the acquisition of the Yukos shares by Claimants should not be seen in isolation but as an integral part of the "making of the investment" by Claimants. Respondent's argument was most convincingly put by Dr. Claudia Annacker during the Hearing. Dr. Annacker argued as follows:

> Contrary to Claimants' position, the serious illegalities that infect the entire process of the acquisition of the Yukos shares by Claimants cannot simply be ignored because the transfer of the shares to the Claimants . . . viewed in isolation, is asserted to be legal. These illegalities cannot somehow be cured through multiple transfers within this network of the oligarchs' offshore companies from one shell company to another.
>
> Indeed, the making of an investment is often a process rather than an instantaneous act, and often comprises a number of diverse transactions. These transactions must be treated as an

[1779] *See* Counter-Memorial ¶¶ 910–13, explaining the alleged illegal conduct of Bank Menatep and the Oligarchs in the acquisition of Yukos shares by the Oligarchs in 1995 and 1996.

[1780] *See* Reply ¶¶ 1135–36.

> integrated whole. The transactions may have a separate legal existence, but they have a common economic aim . . .
>
> Indeed, it would be incompatible with economic reality and undermine the integrity of the legal process if serious irregularities – illegalities – infecting the process of the making of the investment would not affect the availability of investment treaty protection, whether or not a specific transaction, part of the process, if viewed in isolation, might be legal.
>
> Now, this conclusion applies a fortiori where a claimant is not unrelated to the persons or entities that committed these illegalities, but is an investment vehicle owned and controlled by the same persons who committed the illegalities . . . Otherwise, investment treaty protection could be achieved simply by shifting investments through layers of ownership and control to launder illegal investments . . .
>
> While Claimants' acquisition of their shares may be a separate legal transaction, there is a common economic aim pursued by the same oligarchs . . .[1781]

1369. The Tribunal agrees with Respondent that an examination of the legality of an investment should not be limited to verifying whether the last in a series of transactions leading up to the investment was in conformity with the law. The making of the investment will often consist of several consecutive acts and all of these must be legal and *bona fide*.

1370. In the present case, however, Respondent has failed to demonstrate that the alleged illegalities to which it refers are sufficiently connected with the final transaction by which the investment was made by Claimants. The transactions by which each Claimant acquired its investment were their purchases of Yukos shares. As established in the Interim Award, these purchases were legal and occurred starting in 1999.[1782] On the other hand, the alleged illegalities connected to the acquisition of Yukos through the loans-for-shares program occurred in 1995 and 1996, at the time of Yukos' privatization. They involved Bank Menatep and the Oligarchs, an entity and persons separate from Claimants, one of which—Veteran—had not even come into existence.[1783] With respect to Respondent's other allegations, regarding profit skimming and the oppression of minority shareholders, it is also clear to the Tribunal that they are not part of the transaction or transactions by which each Claimant acquired their interest in Yukos.

1371. Respondent relies on *Anderson* for the proposition that "illegalities infecting an investment that pre-date a claimant's acquisition of the investment are not irrelevant or outside the tribunal's jurisdiction *ratione temporis*."[1784] However, the tribunal in that case examined and found to be

---

[1781] Transcript, Day 19 at 171–174 (Respondent's closing).

[1782] Interim Awards ¶¶ 431 (YUL); 430 (Hulley); 474 (VPL).

[1783] VPL was incorporated in 2001 (Interim Award ¶ 44 (VPL).

[1784] Rejoinder ¶ 1571, referring to Anderson, Exh. R-4204.

illegal the very transaction through which the claimants obtained their investment, not any prior transactions made by other persons. [1785]

1372. While it is true that the claimants in *Anderson* were not blamed for the illegality that tainted their investment, nevertheless it is the very transaction by which their respective investments were obtained that was considered illegal by the tribunal, and led it to decline jurisdiction.

(d) Conclusion

1373. The Tribunal concludes that Respondent's "unclean hands" argument fails as a preliminary objection. It does not operate to deprive the Tribunal of its jurisdiction in this arbitration, render inadmissible any of the Claimants' claims or otherwise bar Claimants' from invoking the substantive protections of the ECT.

1374. However, as will be seen in Chapter X.E and Part XII, some of the instances of Claimants' "illegal and bad faith" conduct complained of by Respondent in the context of this preliminary objection, could have an impact on the Tribunal's assessment of liability and damages.

C. RESPONDENT'S OBJECTIONS UNDER ARTICLE 21 OF THE ECT

1. Introduction

1375. Another important threshold issue in this arbitration arises from Respondent's objection under Article 21 of the ECT. Respondent argues that, pursuant to this complex provision (containing a "carve out" *from* the ECT for "Taxation Measures" at Article 21(1) and a "claw back" *for* Article 13 of the ECT in relation to "taxes" at Article 21(5)), the Tribunal lacks jurisdiction over claims with respect to "Taxation Measures" other than those based on expropriatory "taxes".[1786] Claimants argue that the objection is without merit since, *inter alia*, Article 21 does not apply to actions—including expropriations—carried out "under the guise of taxation."[1787]

[1785] *Ibid.*

[1786] *See e.g.*, Respondent's Post-Hearing Brief ¶¶ 162–72.

[1787] *See e.g.*, Claimants' Post-Hearing Brief ¶¶ 203–30.

ANNEX 82

Oxford Public International Law

Clean Hands, Principle

Stephen M Schwebel

Content type: Encyclopedia entries
Article last updated: March 2013

Product: Max Planck Encyclopedias of International Law [MPIL]
Module: Max Planck Encyclopedia of Public International Law [MPEPIL]

Subject(s):

International organizations, practice and procedure — Equity — Settlement of disputes

Published under the auspices of the Max Planck Foundation for International Peace and the Rule of Law under the direction of Rüdiger Wolfrum.

1 The principle of 'clean hands' has its roots in Roman law. It finds expression in maxims of Roman law: *ex dolo malo non oritur actio, nullus commodum capere potest de iniuria sua propria,* and *ex iniuria ius non oritur* (→ *Estoppel*).

2 The most notable exposition and application of the principle (or more precisely, of an allied principle) in modern international law is found in opinions rendered by the → *Permanent Court of International Justice (PCIJ)* in *the → Meuse, Diversion of Water Case (Netherlands v Belgium)*. The Netherlands and Belgium maintained that acts of the opposing party in the extraction and use of waters of the River Meuse were inconsistent with governing treaty obligations. In an individual opinion, Judge Hudson observed that:

> It would seem to be an important principle of equity that where two parties have assumed an identical or a reciprocal obligation, one party which is engaged in continuing non-performance of that obligation should not be permitted to take advantage of a similar non-performance of that obligation by the other party. The principle finds expression in the so-called maxims of equity which exercised great influence in the creative period of the development of Anglo-American law …. '[A] court of equity refuses relief to a plaintiff whose conduct in regard to the subject-matter of the litigation has been improper'. (citation omitted) A very similar principle was received into Roman Law …. The *exceptio non adimpleti contractus* required a claimant to prove that he had performed or offered to perform his obligation (citations omitted) (*Meuse Water Case [Individual Opinion of M Hudson] 77*).

In a dissenting opinion in the same case, Judge Anzilotti expressed his conviction:

> that the principle underlying this submission (*inadimplenti non est adimplendum*) is so just, so equitable, so universally recognized, that it must be applied in international relations also. In any case, it is one of these 'general principles of law recognized by civilized nations' which the Court applies in virtue of Article 38 of its Statute (*Meuse Water Case [Dissenting Opinion of M Anzilloti]* 49; see also → *Equity in International Law*).

Dr C Wilfred Jenks observed that: 'Judge Hudson's view that this principle was applicable was shared by the majority of the Court … and by Judge Anzilotti' (Jenks 326, 30). The court held: 'In these circumstances, the Court finds it difficult to admit that the Netherlands are now warranted in complaining of the construction and operation of a lock of which they themselves set an example in the past' (*Meuse Water Case [Judgment]* 25).

3 More recent and direct invocation of the principle of clean hands before the → *International Court of Justice (ICJ)* has not produced clear-cut results. Whether indeed the principle of clean hands is a principle of contemporary international law is a question on which opinion is divided.

4 Sir Gerald Fitzmaurice, then the Legal Adviser of the Foreign and Commonwealth Office, subsequently a judge of the ICJ, in lectures at the → *Hague Academy of International Law* in 1957, maintained that:

> 'He who comes to equity for relief must come with clean hands.' Thus a State which is guilty of illegal conduct may be deprived of the necessary *locus standi in judicio* for complaining of corresponding illegalities on the part of other States, especially if these were consequential on or were embarked upon in order to counter its own illegality—in short were provoked by it (Fitzmaurice 119).

5 In the dissenting opinion Judge Schwebel concluded, in reliance on the above and other authority, that the clean hands doctrine should be applied against Nicaragua:

> Nicaragua has not come to Court with clean hands. On the contrary, as the aggressor, indirectly responsible—but ultimately responsible—for large numbers of deaths and widespread destruction

> in El Salvador apparently much exceeding that which Nicaragua has sustained, Nicaragua's hands are odiously unclean. Nicaragua has compounded its sins by misrepresenting them to the Court. Thus both on the grounds of its unlawful armed intervention in El Salvador, and its deliberately seeking to mislead the Court about the facts of that intervention through the false testimony of its Ministers, Nicaragua's claims against the United States should fail (*Military and Paramilitary Activities in and against Nicaragua [Nicaragua v United States of America] [Dissenting Opinion of Judge Schwebel]* [1986] ICJ Rep 259 para. 268)

While the Court did not directly address the invocation of the principle of clean hands, it did not sustain Judge Schwebel's position. It did not do so in its appraisal of the facts and it did not take any position on the principle.

6 In oral argument in some of the cases brought by Yugoslavia against members of the → *North Atlantic Treaty Organization (NATO)* concerning the legality of the use of force (→ *Yugoslavia, Cases and Proceedings before the ICJ*), several respondents argued that the injunctions sought by Yugoslavia should not be granted because Yugoslavia did not come to the Court with clean hands (see *Legality of Use of Force [Serbia and Montenegro v Canada]* ICJ Pleadings CR/99/16; *Legality of Use of Force [Serbia and Montenegro v Germany]* ICJ Pleadings CR/99/18; *Legality of Use of Force [Serbia and Montenegro v Portugal]* ICJ Pleadings CR/99/21; *Legality of Use of Force [Serbia and Montenegro v United Kingdom]* ICJ Pleadings CR/99/23; *Legality of Use of Force [Yugoslavia v United States of America]* ICJ Pleadings CR/99/24). The cases were dismissed, however, on other grounds.

7 In the → *Arrest Warrant Case (Democratic Republic of the Congo v Belgium*), dissenting Judge ad hoc van den Wyngaert held that: 'The Congo did not come to the Court with clean hands. In blaming Belgium for investigating and prosecuting allegations of international crimes that it was obliged to investigate and prosecute itself, the Congo acts in bad faith.' (*Arrest Warrant of 11 April 2000 [Democratic Republic of the Congo v Belgium][Dissenting Opinion of Judge Van den Wyngaert]* [2002] ICJ Rep 137 para. 35).

8 In the → *Gabčíkovo-Nagymaros Case (Hungary/Slovakia*), the Court—in a judgment evocative of that of the PCIJ in *River Meuse*–upheld the application of the principle *ex iniuria ius non oritur* in the following measure:

> The Court, however, cannot disregard the fact that the Treaty has not been fully implemented by either party for years, and indeed that their acts of commission and omission have contributed to creating the factual situation that now exists. Nor can it overlook that factual situation—or the practical possibilities and impossibilities to which it gives rise—when deciding on the legal requirements for the future conduct of the Parties. This does not mean that facts—in this case, facts which flow from wrongful conduct—determine the law. The principle ex iniuria jus non oritur is sustained by the Court's finding that the legal relationship created by the 1977 Treaty is preserved and cannot in this case be treated as voided by unlawful conduct ([1997] ICJ Rep 7 para. 133).

9 In the → *LaGrand Case (Germany v United States of America)*, the United States ('US') argued that it would be contrary to basic principles of administration of justice and equality of the parties to apply to the US alleged rules that Germany appeared not to accept for itself (a contention denied by Germany). The court did not pass upon the principle, holding that the evidence adduced by the US did not sustain the conclusion that Germany's own practice failed to meet the standards it demanded from the US (LaGrand [Germany v United States of America] [Judgment] [2001] ICJ Rep 466 paras 61–63).

10 In the → *Oil Platforms Case (Iran v United States of America*), the US raised an argument of a 'preliminary character' in which it asked the Court to dismiss the claims of the Islamic Republic of Iran because of the latter's unlawful conduct. Iran construed the US contention as a 'clean hands' argument

which, Iran maintained, was irrelevant in direct State-to-State claims as contrasted with claims of → *diplomatic protection*. The court did not pass on that contention, finding it unnecessary to deal with the US argument (Case concerning Oil Platforms [Iran v United States of America] [Merits] [2003] ICJ Rep 161 paras 27–30).

11 The most recent invocation of a clean hands argument before the Court was by → *Israel* in the advisory-proceedings on the legal consequences of the construction of a wall in the occupied Palestinian territories (→ *Israeli Wall Advisory Opinion [Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*]). Israel argued that → *Palestine*, in view of its responsibility for acts of violence against Israel and its population which the wall is aimed at addressing, 'cannot seek from the Court a remedy for a situation resulting from its own wrongdoing .... [G]ood faith and the principle of "clean hands" provide a compelling reason that should lead the Court to refuse the General Assembly's request' (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory [Advisory Opinion] [2004] ICJ Rep 136 para. 63; → *Good Faith [Bona fide]*). The court did not consider Israel's argument to be 'pertinent' on the ground that its opinion was to be given to the UN General Assembly (→ *United Nations, General Assembly*) and not to a specific State or entity (ibid para. 64; see also → *Arab–Israeli Conflict*; → *Israel, Occupied Territories*; → *Jerusalem*).

12 The following conclusions may be drawn from the foregoing cases in which an argument of clean hands has been invoked:

a) A number of States have maintained the vitality and applicability of the principle of clean hands in inter-State disputes; and

b) The ICJ has not rejected the principle though it has generally failed to apply it. In the *Meuse Water Case*, the PCIJ embraced a related principle, and in the *Case concerning the Gabčíkovo-Nagymaros Project*, the ICJ gave expression to the principle *ex iniuria ius non oritur*.

13 Learned opinion is divided. That of Fitzmaurice has been quoted above. Charles Rousseau does not consider it to be an element of → *customary international law*. A recent and relatively comprehensive survey by a Special Rapporteur of the → *International Law Commission (ILC)*, John Dugard, finds 'the evidence in favour of the clean hands doctrine' to be inconclusive (Special Rapporteur of the International Law Commission 'Sixth Report on Diplomatic Protection' 8).

Select Bibliography

G Fitzmaurice 'The General Principles of International Law, Considered from the Standpoint of the Rule of Law' (1957) 92 RdC 2 1–227.
CW Jenks *The Prospects of International Adjudication* (Stevens London 1964).
C Rousseau *Droit International Public* vol 5 (Sirey Paris 1983).
A Shapovalov 'Should a Requirement of "Clean Hands" be a Prerequisite to the Exercise of Diplomatic Protection? Human Rights Implications of the International Law Commission's Debate' (2005) 20 American UInternlLRev 4 829–866.

Select Documents

Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia) (Judgment) [1997] ICJ Rep 7.
J Dugard, Special Rapporteur of the International Law Commission 'Sixth Report on Diplomatic Protection' (2004) UN Doc A/CN.4/546.

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Rep 136.
The Diversion of Water from the Meuse (Netherlands v Belgium)(Judgment) PCIJ Rep Series A/B No 70.

ANNEX 83

Equity and Law:

a Comparative Study

by

Ralph A. Newman

Professor of Law, The American University

Oceana Publications, Inc.

80 Fourth Avenue

New York City

ing from the acts done in execution of the contract, and not (within the meaning of the statute) upon the contract itself." [7] But the equities are just as strong in an action at law; for example where an ageing housekeeper has devoted the later years of her life in the service of a master who has orally promised to make her his heir. In this case neither equity nor the law will relieve from the operation of the Statute of Frauds, because of the absence of substitutional proof. If, however, there is proof of an oral contract for the sale of land, and the purchaser has entered into possession and has made substantial improvements, equity will enforce the contract in his behalf in practically all common law jurisdictions, but if he sues at law for damages, he cannot recover over the bar of the statute.[8] Nowhere outside of the Anglo-American domain is a commercial sale unenforceable for want of a writing.[9]

The French counterpart of the Statute of Frauds may not be used as a defense unless the defendant, if called upon, is willing to take an oath that he did not make the contract.[10]

The Equitable Defense of Unclean Hands in Contracts

Regarded generally, this defense includes the concepts of overreaching and insistence on reaping the benefits of the defendant's mistake, hard bargains, or supervening frustration. In the stricter sense the defense of unclean hands should be restricted in meaning to conduct which, although falling short of a violation of the legal rights of the defendant, is nevertheless ethically reprehensible. The application of the doctrine in this restricted sense turns on how closely the plaintiff's immorality is related to the rights of the defendant. In Weeghman v. Killifer[11] the defendant had been employed by the Philadelphia Ball Club under a con-

[7] Maddison v. Alderson, L.R. 8 A.C. 467, 475 (1883).

[8] See Mayo, The Statute of Frauds—Part Performance in Relation to Damages, 6 Austr. L. Jour. 283 (1932); 16 Minn. L. Rev. 446, 447 (1932); 59 ALR 1305 (1929); O'Herlihy v. Hedges, 1 Sch. & Sel. 123 (Ir. 1803); "The ground on which a Court of Equity goes in cases of part-performance, is that sort of fraud which is cognizable in Equity only." See Stevens, A Plea for the Extension of Equitable Principles and Remedies, 41 Cor. L. Quar. 351 (1956).

[9] Rabel, The Statute of Frauds and Comparative Legal History, 63 L. Quar. Rev. 174, 187 (1947). Rabel adds that "the Statute essentially belongs to distant times, far removed from the conditions of modern life."

[10] Stevens, Ethics and the Statute of Frauds, 37 Cor. L. Quar. 355, 379 (1952). Note 2 by Professor Schlesinger cites Cass. Civ. July 3, 1889, D.P. 90.1.249.

[11] 215 F. 289 (CA6, 1914).

tract which gave the club an option to renew at a salary to be agreed upon. After the club announced that it elected to exercise the option, but before any salary had been agreed upon, the plaintiff, knowing the facts, induced the defendant to enter into a contract to play for a Chicago club. In a suit for an injunction the court, although admitting that the Philadelphia contract was invalid, refused an injunction, leaving the plaintiff to his remedy at law. In Shikes v. Babelnick,[12] a Massachusetts case, the plaintiff made false representations about neighboring rents, and as to the volume of his own business, to induce the defendant to rent him a store. The landlord did not rely on the representations, the court found, but specific performance was refused nevertheless. The court said that "the agreement could not be rescinded because the sellers did not rely on his fraud . . . while he can recover damages . . . he should not be allowed to have specific performance of a contract, in securing which he resorted to inequitable conduct. . . . He does not come into court with clean hands." This may be a try-and-get-it case, where the court well knew that a jury would not be sympathetic to the plaintiff in calculating the damages.

A plaintiff who misrepresents her age cannot sue in equity to enjoin interference with a contract made by her later on, after disaffirmance, with another employer;[13] but if she is dismissed from the subsequent job she can recover damages against the same defendant for having caused the breach of the second contract.[14] The enforcement of the contract made by the plaintiff under a misrepresentation of her age, at law, nullifies the refusal to protect it against interference, by the court of equity.[15] As was stated in a case in the United States Court of Appeals, "it is the moral intent of a person . . . rather than any actual injury done, which determines whether he has come into court with clean hands."[16] As was said by Lord Chief Baron Eyre,[17] the

---

[12] 273 Mass. 201, 173 N. E. 495 (1930).

[13] Carmen v. Fox Films Corporation, 269 F. 928 (CA2, 1920).

[14] *Ibid*, 198 N.Y.S. 66 (1923).

[15] In Hall v. Wright, 125 F. Supp. 269 (DCSD Cal. 1954) an unfair competition cause of action was dismissed because of the plaintiff's unclean hands, but the patent infringement cause of action was retained and decided because of the public interest.

[16] Bishop v. Bishop, 257 F. 2d 495, 501 (CA 3, 1958).

[17] In Dering v. Earl of Winchelsea (1787), 1 Cox Eq. 318, 319.

clean hands doctrine "must have an immediate and necessary relation to the equity sued for."

The doctrine that courts will refuse to entertain actions because of the creditor's immorality stems from Roman law, and was so well established at the time of the enactment of the Napoleonic Code that there was no need for a provision in the Code itself. According to Ripert [18] it rests on a moral principle, and relief will be refused to one who is trying to get the court to give him relief based on a shameful act. Most of the foreign codes contain express provisions.[19]

Consideration

Pound lists six situations in which equity will enforce promises in the absence of common law consideration.[20] The doctrine of

---

[18] Ripert, La regle morale dans le droit francais positif (4th ed. 1949) No. 97, 102.

[19] Swiss Code of Obligations Article 66; German Civil Code Article 817; Spanish Civil Code Article 1305; Austrian Civil Code Article 1174; Portuguese Civil Code Article 692; Belgium, by judicial decision, Cass. Belge, 4 June 1903, Pas. Belge, 1903, 1. 276; Russian Civil Code Article 147.

Two early examples of the application of the unclean hands doctrine in Chinese customary law are cited in Van Gulik, Under the Pear-tree 97, Case 15 B. In re Cheng Tse, a petition for admission to the examination for promotion, the candidate, a Prefectural Judge, had been serving in a distant province and had not known of his father's death. Officials in mourning had to resign for three years. Held: although not a case of concealment of the parent's death to retain office, the petitioner's failure to inquire after his father for three years was unfilial behavior which required his dismissal from office. (11th century); CYKC (Che-Yu-Kuei-Chien) c. 4, p. 56; IYC (I-yu-chi) c. 8, No. 168; YP (T'ang-yin-pi-shih yuan-pien) No. 50. In Case 55, op. cit. p. 156 (10th century) per Chang Hsi-ch'ung, the plaintiff, an adopted son, had conspired with relatives to divide his father's property with them by pretending that he was the real son of the deceased, in order to defeat the claim of the eldest son, the legitimate heir. The plaintiff had been sent away when he reached manhood because he was wayward and disobedient. No decision could be reached after several hearings. Held: Case dismissed. Even if the plaintiff was really the eldest son, he was guilty of rebellious behavior, and therefore had gravely offended against the Confucianist ethics. The case was decided during the later T'ang Dynasty, a period of moral revival in the Chinese law. CYKC c. 8, p. 126; IYC c. 3, No. 64.

CYKC was compiled by the Northern Sung official Cheng K'o. It is an enlarged version of IYC. YP was compiled by Kuli Wan-jung in 1211 A.D. during the Southern Sung Dynasty, 1127-1279 A.D.; see Van Gulick, Parallel Cases from under the Pear-tree (1956). The IYC was written by the tenth century scholar Ho Ning (898-955 A.D.), who served as an official under five different dynasties.

[20] Consideration in Equity, 13 Ill. L. Rev. 667 (1919):

1. Gratuitous declarations of trust without delivery of possession.

2. Covenants to hold real property in trust in consideration of love and affection.

ANNEX 84

SNELL'S EQUITY

Annex 84

SNELL'S EQUITY

SNELL'S EQUITY THIRTY-THIRD EDITION

JOHN MCGHEE **QC M.A. (Oxon)**
of Lincoln's Inn, Barrister

CONTRIBUTORS

STUART BRIDGE **M.A. (Cantab)**
One of Her Majesty's Circuit Judges; Bencher of the Middle Temple; Life Fellow of Queens' College, Cambridge; Law Commissioner for England and Wales 2001–2008

MATTHEW CONAGLEN **LL.B.(Hons) (Auck.); LL.M. (Mich.); Ph.D. (Cantab.)**
Professor of Equity and Trusts, University of Sydney; Academic Barrister, New South Wales and Door Tenant at XXIV Old Buildings

PAUL S. DAVIES **M.A. (Cantab)**,
Associate Professor in Law, University of Oxford; Fellow and Tutor of St Catherine's College, Oxford; of Lincoln's Inn, Barrister

STEVEN ELLIOTT **B.A.(Hons), J.D.(Hons), D.Phil (Oxon)**
of Lincoln's Inn, Barrister

DAVID FOX **Ph.D. (Cantab.)**
of Lincoln's Inn, Barrister and Fellow in Law, St John's College, Cambridge

BEN MCFARLANE **M.A. (Oxon), B.C.L.**
Professor of Law, University Collge London

RICHARD NOLAN **M.A. (Cantab)**;
Professor of Law, University of York; Barrister of the Middle Temple and Door Tenant at Erskine Chambers, Lincoln's Inn, London

JANET O'SULLIVAN **M.A., Ph.D. (Cantab)**;
University Senior Lecturer, Faculty of Law, University of Cambridge; Fellow and Director of Studies in Law, Selwyn College, Cambridge.

SWEET & MAXWELL

THOMSON REUTERS

Annex 84

Published and typeset in 2015 by Thomson Reuters (Professional) UK Limited
Trading as Sweet & Maxwell, Friars House, 160 Blackfriars Road, London, SE1 8EZ
(Registered in England & Wales, Company No.1679046. Registered Office and address for service:
2nd floor, Aldgate House, 33 Aldgate High Street, London, EC3N 1DL)

For further information on our products and services, visit www.sweetandmaxwell.co.uk

Printed and bound by CPI Group (UK) Ltd, Croydon, CR0 4YY

No natural forests were destroyed to make this product; only farmed timber was used and re-planted.

A CIP catalogue record for this book is available from the British Library.

ISBN 978-0-414-03445-7

PART II—MAXIMS AND DOCTRINES

3.— Where there is Equal Equity, the Law shall Prevail

4.— Where the Equities are Equal, the First in Time shall Prevail: qui prior est tempore, potior est jure

These two maxims govern questions of the priority of rival claimants to the same in equity. They are discussed in the previous chapter. **5-008**

5.— He Who Seeks Equity Must Do Equity

This maxim is again expressed at a highly abstract level and does little to assist in the development of concrete principle. It has therefore been said that the maxim "decides nothing in itself; for you must first inquire what are the equities which the Defendant must do, and what the Plaintiff ought to have".[29] For instance, in *TSB Bank Plc v Camfield*,[30] one question was whether a charge given by a wife as a consequence of misrepresentation ought to be rescinded entirely or on terms that the wife pay the amount that she thought she was securing (£15,000). A previous case had invoked the maxim to justify such partial relief.[31] Despite acknowledging "the morality, perhaps the justice in an abstract sense, of the solution"[32] the Court of Appeal rejected this approach and permitted recission of the charge in its entirety. **5-009**

There are, however, other examples in equity where the enforcement of B's right, or the granting of relief to B, has been made conditional upon performance of some duty by B,[33] or on B's recognition that the same basic principles that justify relief for B also require that the relief be limited to protect A.[34] The point here is that the condition on B's relief is not based simply on a general moral sense of what B ought to do, but is rather closely linked to the very reasons for which B seeks that relief.

6.— He Who Comes into Equity Must Come with Clean Hands

This maxim is clearly similar to the previous one: it differs as it looks to the past rather than the future. Again, the question is not whether any general moral culpability can be attributed to B,[35] the party seeking relief, but is rather whether relief should be denied because there is a sufficiently close connection between B's alleged misconduct and the relief sought.[36] The maxim is therefore applicable **5-010**

---

[29] *Neesom v Clarkson* (1845) 4 Hare 97 at 101, per Wigram V.C.; and see *Oxford v Provand* (1868) 5 Moo.P.C.(NS) 150 at 179.

[30] *TSB Bank Plc v Camfield* [1995] 1 W.L.R. 430 (CA).

[31] *Bank Melli Iran v Samadi-Rad* (Ch.D., February 9, 1994).

[32] [1995] 1 W.L.R. 430 (CA) at 437 per Nourse L.J.

[33] For example, if B claims that proprietary estoppel operates and binds A to honour a non-contractual agreement between the parties, B may be required to perform B's side of that agreement if B's right is to be enforced against A: see e.g. *Herbert v Doyle* [2008] EWHC 1950 (Ch) at [73].

[34] As where, for example, rescission is available to B only if B provides counter-restitution to A: see para.15-014, or on terms that share between A and B a loss caused by a fall in the value of the property acquired by A: see e.g. *Cheese v Thomas* [1994] 1 W.L.R. 129 (CA), discussed at para.8-038.

[35] See e.g. *Loughran v Loughran* 292 U.S. 216 at 229 (1934) per Brandeis J.: "Equity does not demand that its suitors shall have led blameless lives".

[36] In *Grobbelaar v News Group Newspapers* [2002] UKHL 40, [2002] 1 W.L.R. 3024 (HL), Lord

only in relation to conduct of B which has "an immediate and necessary relation to the equity sued for",[37] and is not balanced by any mitigating factors.[38]

This maxim is closely related to the common law maxim ex turpi causa non oritur actio ("no action can arise from a bad cause").[39] At common law this maxim has been rightly criticised: it is not a principle but a policy and, moreover, the policy applies differently in different contexts and is subject to exceptions.[40] The same can be said of the equitable maxim. For instance, where a transaction is against public policy, the fact that B does not have a clean record in the matter is no bar to B's obtaining equitable relief. An action may be maintained for delivery up of an instrument which is void on the ground of public policy, even if B was a party to the illegality.[41] Moreover, B can succeed in enforcing an equitable interest in property obtained as a result of an illegal transaction so long as it is not necessary to rely on the illegality in order to establish B's right[42] or if the illegal purpose has not been carried into effect.[43]

Although the maxim, like its equivalent at common law, must be viewed with great caution, the instances of its application serve as useful illustrations of the circumstances where particular policy considerations have been sufficient to deny recovery which would otherwise have been permitted. For example, "Infants have no Privilege to cheat Men",[44] and so if an infant, fraudulently misrepresenting himself to be of age, thereby obtains from his trustees a sum to which he is entitled only on coming of age, neither he nor his assigns can compel the trustees to pay

---

Scott at 3075 stated that it is ultimately a factual question as to whether or not there is a sufficiently close connection between the parties' alleged misconduct and the relief sought. For a helpful discussion of the relevant authorities, see the analysis of Aikens L.J. in *Royal Bank of Scotland Plc v Highland Financial Partners LP* [2013] EWCA Civ 328 at [158]–[172]. It was concluded there that the first instance judge had been correct to use the "unclean hands" of the applicant as a basis to deny the grant of an anti-suit injunction. See too *Murphy v Rayner* [2011] EWHC (Ch) 1 at [351], where it was found that the misconduct of a proprietary estoppel claimant, in lying as to her supposed reliance on the defendant's assurances, had such immediate and necessary relation to the claim as to prevent the claimant having clean hands (although on the facts the maxim did not have to be applied, as the claim was in any case unsuccessful). Compare *Terceira v Terceira* [2011] SC (Bda) 6 Civ, (2010) 13 I.T.E.L.R. 717 at [81]–[82]: the claimant's unreasonable conduct whilst acting as his father's executor did not prevent his invoking a proprietary estoppel, the ingredients of which had arisen before his father's death.

37 *Dering v Earl of Winchelsea* (1787) 1 Cox Eq. 318 at 319, 320 per Eyre C.B.; *Moody v Cox* [1917] 2 Ch. 71 at 87; *Duchess of Argyll v Duke of Argyll* [1967] Ch. 302 at 332; *Grobbelaar v News Group Newspapers* [2002] UKHL 40; [2002] 1 W.L.R. 3024 (HL).

38 See *Singh v Singh* (1985) 15 Fam. Law 97. Note that the hardship caused to a party by a denial of equitable relief is a relevant factor in considering if the maxim should disentitle that party to equitable relief: see e.g. *Royal Bank of Scotland Plc v Highland Financial Partners LP* [2012] EWHC 1278 (Comm) at [182].

39 In *Royal Bank of Scotland Plc v Highland Financial Partners LP* [2012] EWHC 1278 (Comm) Burton J. at [176] referred to the maxim as "just a branch, but an important one, being available wherever an equitable remedy is sought, of the principle that abuse of the court process can lead to the court depriving a party of a remedy already obtained (e.g. a freezing order obtained as a result of non-disclosure) or which would otherwise be granted".

40 *Gray v Thames Trains* [2009] UKHL 33, [2009] 3 W.L.R. 167, 177 at [30] per Lord Hoffmann. For a recent demonstration of the difficulties caused by the "ex turpi" principle see e.g. *Patel v Mirza* [2014] EWCA Civ 1047.

41 *Lord St John v Lady St John* (1805) 11 Ves. 256 at 535; *Lound v Grimwade* (1888) 39 Ch.D. 605.

42 *Tinsley v Milligan* [1994] 1 A.C. 340 (HL) (see below para.22–066); and see *Rowan v Dann* (1992) 64 P. & C.R. 202 (CA); *McDonald v Myerson* [2001] EWCA Civ 66. Thus a person who has put money into the acquisition or improvement of a house may be entitled to an equitable interest in it notwithstanding that this money was obtained by him as a result of a fraud effected on a third party: *Mortgage Express v Robson* [2001] EWCA Civ 887.

43 *Tribe v Tribe* [1996] Ch. 107 (CA).

44 *Evroy v Nicholas* (1733) 2 Eq.Ca.Abr. 488 at 489 per Lord King L.C.

his entitlement when in fact he attains full age.[45] Similarly, a tenant who has entered under an agreement for a lease cannot obtain specific performance of it if he is in breach of the covenants to be contained in the lease.[46] Again, a tenant whose lease has been forfeited for non-payment of rent cannot expect relief against the forfeiture if he has been using the premises as a disorderly house.[47] Similarly, an occupier may be debarred from setting up an equitable licence if his conduct in relation to the property has been very damaging to the legal owner.[48]

7.— DELAY DEFEATS EQUITIES, OR, EQUITY AIDS THE VIGILANT AND NOT THE INDOLENT[49]

5-011 This maxim must also be treated with caution. It can be seen as underpinning, in a general sense, the doctrine of laches,[50] which acts as a bar to equitable relief. That doctrine is not based, however, on the mere fact of delay.[51] Something more than mere delay, more even than extremely lengthy delay,[52] is required before B will be denied equitable rights under the doctrine of laches,[53] as the question is whether the lapse of time has given rise to circumstances that now mean it would not be inequitable to deny relief to B. The principal example occurs where, perhaps as a result of having relied on a mistaken belief that B has no relevant right, A would now suffer an irreversible detriment, as a result of B's delay, if B were permitted relief.[54] The doctrine will therefore apply if the delay has resulted in the destruction or loss of evidence by which B's claim might have been resisted,[55] or if B can be said to have released or abandoned any right.[56] There can be no abandonment of a right without full knowledge, legal capacity and free will,

---

45 See para.8-008.

46 *Coatsworth v Johnson* (1886) 54 L.T. 520.

47 See *Gill v Lewis* [1956] 2 Q.B. 1 (CA) at 13, 14, 17.

48 *Williams v Staite* [1979] Ch. 291 (CA) where, however, the conduct was not sufficiently grave. For other examples, see *Hubbard v Vosper* [1972] 2 Q.B. 84 (CA), followed in *Church of Scientology of California v Kaufman* [1973] R.P.C. 627; *Roanway Properties Ltd v Gold* (1973) 228 E.G. 2269.

49 2 Co.Inst. 690; and see Wingate's *Maxims* (1658) p.672; *Fenwicke v Clarke* (1862) 4 De G.F. & J. 240 at 245.

50 For a discussion of the technical meaning of the term (pronounced "laitches"), see *Partridge v Partridge* [1894] 1 Ch. 351 at 359, 360; J. Brunyate, *Limitation of Actions in Equity* (London: Stevens & Sons,1932), p.188.

51 See e.g. *Re Eustace* [1912] 1 Ch. 561; *Weld v Petre* [1929] 1 Ch. 33 (CA); *Rochefoucauld v Boustead* [1897] 1 Ch. 16 (CA); *Lazard Bros & Co Ltd v Fairfield Properties Co (Mayfair) Ltd, The Times*, October 13, 1977; *Jones v Stones* [1999] 1 W.L.R. 1739 (CA); *Terceira v Terceira* [2011] SC (Bda) 6 Civ; (2010) 13 I.T.E.L.R. 717, where the claimant's unreasonable delay did not lead to laches as it caused no prejudice to the defendants. See also the cogent discussion in *Western Areas Exploration Pty Ltd v Streeter No.3* [2009] W.A.S.C. 213, 431–454. cf. *P & O Nedlloyd BV v Arab Metals Co* [2006] EWCA Civ 1717; [2007] 1 W.L.R. 2288 at 2312 [61] leaving this point open. Note that delay by itself may of course trigger the application of a statutory limitation period.

52 *Burroughs v Abott* [1922] 1 Ch. 86 (12 years), *Weld v Petrie* [1929] 1 Ch. 33 (CA) (26 years).

53 As a result, great caution must be used when considering broad statements such as that of Lord Camden L.C. in *Smith v Clay* (1767) 3 Bro.C.C. 639n. at 640n: a court of equity "has always refused its aid to stale demands, where a party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this court into activity, but conscience, good faith, and reasonable diligence; where these are wanting, the Court is passive, and does nothing".

54 See e.g. *Fisher v Brooker* [2009] UKHL 41; [2009] 1 W.L.R. 1764, 1781 at 64 per Lord Neuberger: "some sort of detrimental reliance is usually an essential ingredient of laches".

55 *Reimers v Druce* (1857) 23 Beav. 145 (CA); *Bourne v Swan & Edgar Ltd* [1903] 1 Ch. 211 at 219, 220.

56 *Allcard v Skinner* (1887) 36 Ch.D. 145; *Butlin-Sanders v Butlin* (1985) 15 Fam. Law 126. For the

ANNEX 85

Federal Act on the Amendment of the Swiss Civil Code

(Part Five: The Code of Obligations)

of 30 March 1911 (Status as of 1 April 2017)

The Federal Assembly of the Swiss Confederation,

having considered the Dispatches of the Federal Council dated 3 March 1905 and 1 June 1909[1]

decrees:

Division One: General Provisions

Title One: Creation of Obligations

Section One: Obligations arising by Contract

Art. 1

A. Conclusion of the contract

I. Mutual expression of intent

1. In general

[1] The conclusion of a contract requires a mutual expression of intent by the parties.

[2] The expression of intent may be express or implied.

Art. 2

2. Secondary terms

[1] Where the parties have agreed on all the essential terms, it is presumed that the contract will be binding notwithstanding any reservation on secondary terms.

[2] In the event of failure to reach agreement on such secondary terms, the court must determine them with due regard to the nature of the transaction.

[3] The foregoing is subject to the provisions governing the form of contracts.

AS **27** 317 and BS **2** 199

1 BBl **1905** II 1, **1909** III 747, **1911** I 695

Art. 63

II. Payment in satisfaction of a non-existent obligation

1 A person who has voluntarily satisfied a non-existent debt has a right to restitution of the sum paid only if he can prove that he paid it in the erroneous belief that the debt was owed.

2 Restitution is excluded where payment was made in satisfaction of a debt that has become time-barred or of a moral obligation.

3 The provisions of federal debt collection and bankruptcy law governing the right to the restitution of payments made in satisfaction of non-existent claims are unaffected.

Art. 64

B. Scope of restitution

I. Obligations of the unjustly enriched party

There is no right of restitution where the recipient can show that he is no longer enriched at the time the claim for restitution is brought, unless he alienated the money benefits in bad faith or in the certain knowledge that he would be bound to return them.

Art. 65

II. Rights in respect of expenditures

1 The recipient is entitled to reimbursement of necessary and useful expenditures, although where the unjust enrichment was received in bad faith, the reimbursement of useful expenditures must not exceed the amount of added value as at the time of restitution.

2 He is not entitled to any compensation for other expenditures, but where no such compensation is offered to him, he may, before returning the property, remove anything he has added to it provided this is possible without damaging it.

Art. 66

C. Exclusion of restitution

No right to restitution exists in respect of anything given with a view to producing an unlawful or immoral outcome.

Art. 67

D. Time limits

1 A claim for restitution for unjust enrichment becomes time-barred one year after the date on which the injured party learned of his claim and in any event ten years after the date on which the claim first arose.

2 Where the unjust enrichment consists of a claim against the injured party, he may refuse to satisfy the claim even if his own claim for restitution is time-barred.

ANNEX 86

Bundesministerium der Justiz und für Verbraucherschutz

Bundesamt für Justiz

Übersetzung des Bürgerlichen Gesetzbuches durch ein Übersetzer-Team des Langenscheidt Übersetzungsservice. Laufende Aktualisierung der Übersetzung durch Neil Mussett und in seiner Nachfolge durch Samson Übersetzungen GmbH, Dr. Carmen v. Schöning.

Translation provided by the Langenscheidt Translation Service. Translation regularly updated by Neil Mussett and most recently by Samson Übersetzungen GmbH, Dr. Carmen v. Schöning.

Stand: Die Übersetzung berücksichtigt die Änderung(en) des Gesetzes durch Artikel 4 Abs. 5 des Gesetzes vom 1. Oktober 2013 (BGBl. I S. 3719).

Version information: The translation includes the amendment(s) to the Act by Article 4 para. 5 of the Act of 1 October 2013 (Federal Law Gazette I p. 3719).

Zur Nutzung dieser Übersetzung lesen Sie bitte den Hinweis unter "Translations".

For conditions governing use of this translation, please see the information provided under "Translations".

German Civil Code

BGB

Full citation: Civil Code in the version promulgated on 2 January 2002 (Federal Law Gazette [*Bundesgesetzblatt*] I page 42, 2909; 2003 I page 738), last amended by Article 4 para. 5 of the Act of 1 October 2013 (Federal Law Gazette I page 3719)

This statute serves to transpose into national law the following directives:

1. Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ L 39 of 14 February 1976, p. 40),

2. Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses (OJ L 61 of 5 March 1977, p. 26),

3. Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (OJ L 372 of 31

December 1985, p. 31),

4. Council Directive 87/102/EEC for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit (OJ L 42 of 12 February 1987, p. 48, last amended by Directive 98/7/EC of the European Parliament and of the Council of 16 February 1998 amending Directive 87/102/EEC for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit (OJ L 101 of 1 April 1998, p. 17),

5. Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (OJ L 158 of 23 June 1990, p. 59),

6. Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ L 95 of 21 April 1993, p. 29),

7. Directive 94/47/EC of the European Parliament and of the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis (OJ L 280 of 29 October 1994, p. 82),

8. Directive 97/5/EC of the European Parliament and of the Council of 27 January 1997 on cross-border credit transfers (OJ L 43 of 14 February 1997, p. 25),

9. Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (OJ L 144 of 4 June 1997, p. 19),

10. Articles 3 to 5 of Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems (OJ L 166 of 11 June 1998, p. 45),

11. Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (OJ L 171 of 7 July 1999, p. 12),

12. Articles 10, 11 and 18 of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ("Directive on electronic commerce" OJ L 178 of 17 July 2000, p. 1),

13. Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions (OJ L 200 of 8 August 2000, p. 35).

table of contents

Book 1
General Part

table of contents

Division 1
Persons

table of contents

Title 1

Right to inspect documents

A person who has a legal interest in inspecting a document in the possession of another person may demand from its possessor permission to inspect it if the document was drawn up in his interests or if in the document a legal relationship existing between himself and another is documented or if the document contains negotiations on a legal transaction that were engaged in between him and another person or between one of the two of them and a joint intermediary.

table of contents

Section 811
Place of presentation, risk and costs

(1) Presentation must, in the cases of sections 809 and 810, be made at the place where the thing to be presented is located. Each party may demand to have it presented at another place if there is a compelling reason for doing so.

(2) Risk and costs must be borne by the person demanding presentation. The possessor may refuse presentation until the other party advances the costs and provides security for the risk.

table of contents

Title 26
Unjust enrichment

table of contents

Section 812
Claim for restitution

(1) A person who obtains something as a result of the performance of another person or otherwise at his expense without legal grounds for doing so is under a duty to make restitution to him. This duty also exists if the legal grounds later lapse or if the result intended to be achieved by those efforts in accordance with the contents of the legal transaction does not occur.

(2) Performance also includes the acknowledgement of the existence or non-existence of an obligation.

table of contents

Section 813
Performance notwithstanding defence

(1) Restitution of performance rendered to perform an obligation may also be demanded if the claim was subject to a defence by means of which assertion of the claim has been permanently excluded. The provisions of section 214 (2) are unaffected.

(2) If an obligation due on a specific date is performed early, then the claim for return is excluded and reimbursement of interim interest may not be demanded.

table of contents

Section 814

Knowledge that debt is not owed

Restitution of performance rendered for the purpose of performing an obligation may not be demanded if the person who rendered the performance knew that he was not obliged to do so or if the performance complied with a moral duty or consideration of decency.

table of contents

Section 815
Non-occurrence of result

A claim for return for the non-occurrence of a result intended by an act of performance is excluded if the occurrence of the result was impossible from the outset and the person who rendered the performance prevented the result from occurring in bad faith.

table of contents

Section 816
Disposition by an unauthorised person

(1) If an unauthorised person disposes of an object and the decision is effective against the authorised person, then he is obliged to make restitution to the authorised person of what he gains by the disposal. If the disposition is gratuitous, then the same duty applies to a person who as a result of the disposition directly gains a legal advantage.

(2) If performance is rendered to an unauthorised person that is effective in relation to the authorised person, then the unauthorised person is under a duty to make restitution of the performance.

table of contents

Section 817
Breach of law or public policy

If the purpose of performance was determined in such a way that that the recipient, in accepting it, was violating a statutory prohibition or public policy, then the recipient is obliged to make restitution. A claim for return is excluded if the person who rendered performance was likewise guilty of such a breach, unless the performance consisted in entering into an obligation; restitution may not be demanded of any performance rendered in fulfilment of such an obligation.

table of contents

Section 818
Scope of the claim to enrichment

(1) The duty to make restitution extends to emoluments taken as well as to whatever the recipient acquires by reason of a right acquired or in compensation for destruction, damage or deprivation of the object obtained.

(2) If restitution is not possible due to the quality of the benefit obtained, or if the recipient is for another reason unable to make restitution, then he must compensate for its value.

(3) The liability to undertake restitution or to reimburse the value is excluded to the extent that the recipient is no longer enriched.

(4) From the time when the action is pending onwards, the recipient is liable under the general provisions of law.

table of contents

Section 819
Increased liability in case of knowledge and breaches of law or public policy

(1) If the recipient, at the time of receipt, knows of the defect in the legal basis or if he learns of it later, then he is obliged to make restitution from the moment of receipt or of obtaining knowledge of the defect to make restitution as if the claim for restitution had been pending from this time on.

(2) If the recipient, in accepting the performance, violates a statutory prohibition or public policy, then he is likewise under the same obligation from receipt of payment onwards.

table of contents

Section 820
Increased liability where the result is uncertain

(1) If the performance was intended to produce a result whose occurrence, according to the contents of the legal transaction, was regarded as uncertain, then, if the result does not occur, the recipient is under a duty of restitution in the same way as if the claim for restitution had been pending at the time of receipt. The same applies if the performance has been rendered for a legal reason which according to the contents of the legal transaction was regarded as likely to lapse and the legal reason ceases to exist.

(2) The recipient must only pay interest from the time when he learns that the result has not occurred or that the legal reason has ceased to exist; he is not obliged to make restitution of emoluments to the extent that he is no longer enriched at this time.

table of contents

Section 821
Enrichment defence

A person who enters into an obligation without legal grounds to do so may also refuse fulfilment if the claim to release from the obligation is statute-barred.

table of contents

Section 822
Restitution duty of third parties

If the recipient bestows the gains on a third person at no charge, then that third person is obliged to make restitution as if he had received the disposition from the creditor without legal grounds, to the extent that as a result of the bestowal the duty of the recipient to make restitution of the enrichment is excluded.

table of contents

Annex 86

ANNEX 87

GENERAL PRINCIPLES OF LAW

as applied by

INTERNATIONAL COURTS AND TRIBUNALS

BY

BIN CHENG, PH.D., LICENCIÉ EN DROIT
Lecturer in International Law
University College, London

WITH A FOREWORD BY

GEORG SCHWARZENBERGER, PH.D., DR.JUR.
Reader in International Law in the University of London;
Vice-Dean of the Faculty of Laws, University College, London

CAMBRIDGE
GROTIUS PUBLICATIONS LIMITED
1987

C.3

SALES & ADMINISTRATION GROTIUS PUBLICATIONS LTD.
PO BOX 115, CAMBRIDGE CB3 9BP, UK

This work was first published by Stevens & Sons Limited in 1953, under the auspices of the London Institute of World Affairs, as Number 21 in the series "The Library of World Affairs" (Editors: George W. Keeton and Georg Schwarzenberger). It is now reprinted from the original with the kind permission of Sweet and Maxwell Limited and the London Institute of World Affairs.

International Standard Book Number: 0 949009 067

Reprinted by The Burlington Press (Cambridge) Ltd., Foxton, Cambridge

CHAPTER 4

GOOD FAITH IN THE EXERCISE OF RIGHTS (THE THEORY OF ABUSE OF RIGHTS)

THE principle of good faith which governs international relations controls also the exercise of rights by States. The theory of abuse of rights (*abus de droit*), recognised in principle both by the Permanent Court of International Justice [1] and the International Court of Justice,[2] is merely an application of this principle to the exercise of rights.

A. The Malicious Exercise of a Right

The prohibition of malicious injury is an important aspect of the theory of abuse of right as it has been applied in most Continental legal systems.[3] In the international sphere, attention may be drawn to the following extract from the proceedings of the Fur Seal Arbitral Tribunal (1892), which clearly shows that the President of the Tribunal entertained no doubt as to its applicability in international law and that counsel for Great Britain was not indisposed to admit it. The question raised was whether the United States had a right to complain of the hunting of fur seals by British fishermen in that part of the Behring Sea adjacent to the American Pribilof Islands.

" Sir CHARLES RUSSELL: Where is the right that is invaded by that pelagic sealing? . . . It is not enough to prove that their industry (if I must use that phrase) may be less profitable to them because other persons, in the exercise of the right of sealing on the high seas, may intercept seals that come to them—that may be what lawyers

[1] *Cf. infra*, pp. 123, 127.

[2] *Anglo-Norwegian Fisheries Case* (1951), U.K./Norway, *ICJ Reports, 1951*, p. 116, at p. 142. See *infra*, p. 134, note 42. The theory of abuse of rights has been frequently referred to by judges of the I.C.J. in their separate and dissenting opinions. See *ICJ Reports, 1947-1948*, pp. 69, 71, 79 *et seq.*, 91, 92, 93, 103, 115; *ICJ Reports, 1949*, pp. 46, 47 *et seq.*, 75, 129 *et seq.*; *ICJ Reports, 1950*, pp. 14 *et seq.*, 19, 20, 29, 148, 348, 349; *ICJ Reports, 1951*, pp. 149 *et seq.*; *ICJ Reports, 1952*, pp. 56, 128, 133, 135.

[3] *Cf.* H. C. Gutteridge, " Abuse of Rights," 5 *Cambridge L.J.* (1933), p. 22.

call a damnum, but it is not an injuria . . . . ; but a damnum does not give a legal right of action. . . .

" The PRESIDENT: Unless done maliciously.

" Sir CHARLES RUSSELL: You are good enough, Mr. President, to anticipate the very next topic. . . . They would have a right to complain . . . if it could be truly asserted that any class or set of men had, for the malicious purpose of injuring the lessees of the Pribilof Islands and not in regard to their own profit and interest and in exercise of their own supposed rights, committed a series of acts injurious to the tenants of the Pribilof Islands, I agree that that would probably give a cause of action; and, therefore, they have the further right (what I might call the negative right) of being protected against malicious injury. . . ." [4]

The exercise of a right—or supposed right, since the right no longer exists—for the sole purpose of causing injury to another is thus prohibited. Every right is the legal protection of a legitimate interest. An alleged exercise of a right not in furtherance of such interest, but with the malicious purpose of injuring others can no longer claim the protection of the law.[5] *Malitiis non est indulgendum.*[6]

B. The Fictitious Exercise of a Right

I. EVASION OF THE LAW

Ex re sed non ex nomine is a principle of good faith.[7] By looking to the real state of things and not attaching decisive importance to the legal denominations which the parties may give to their actions, this principle inter alia precludes the form of the law from being used to cover the commission of what in fact is an unlawful act. If international law prescribes respect for private property, but allows expropriation for

[4] *Fur Seal Arbitration* (1893) G.B./U.S., 1 *Int.Arb.*, p. 755, at pp. 889–890. *Cf.* American contention that the high seas were " free only for innocent and inoffensive use, not injurious to the just interests of any nation which borders upon it " (p. 839). See also *ibid.*, p. 892.

[5] *Cf.* PCIJ: *German Interests Case* (Merits) (1926), Speech of German Agent (Ser. C. 11-I, pp. 136 *et seq.*) and German Memorial (pp. 375 *et seq.*), where the German Government admitted that the exercise of no right can be unlimited, and that the exercise of a right for no serious motive except the purpose of injuring others constituted an abuse of right.

[6] *Digest*: VI.i. *De rei vindic*, 38.

[7] *Cf.* PCIJ: *Chorzów Factory Case* (Merits) (1928), D.O. by Ehrlich, A. 17, p. 87. See *supra*, p. 39.

reasons of public utility [8] it is not permissible for a State to go through the forms of an expropriation procedure in order to seize private property not for public purposes, but for the use of some individuals for private profit. This occurred in the *Walter F. Smith Case* (1929) and the act was considered contrary to the principle of good faith and held to be unlawful.[9]

II. EVASION OF TREATY OBLIGATIONS

By application of the same principle, international law prohibits the evasion of a treaty obligation under the guise of an alleged exercise of a right. In the *Free Zones Case* (Jgt.) (1932), France was under treaty obligations to maintain certain frontier zones with Switzerland free from customs barriers. The Permanent Court of International Justice while recognising that France had the sovereign and undoubted right to establish a police cordon at the political frontier, for the control of traffic and even for the imposition of fiscal taxes other than customs duties, held that:—

> " A reservation must be made as regards the case of abuses of a right [*"les cas d'abus de droit"*], since it is certain that France must not evade the obligation to maintain the zones by erecting a customs barrier under the guise of a control cordon." [10]

The principle of good faith thus requires every right to be exercised honestly and loyally. Any fictitious exercise of a right for the purpose of evading either a rule of law or a contractual obligation will not be tolerated. Such an exercise constitutes an abuse of the right, prohibited by law.

C. Interdependence of Rights and Obligations

I. RIGHTS AND TREATY OBLIGATIONS

When a State assumes a treaty obligation, those of its rights which are directly in conflict with this obligation are, to that extent, restricted or renounced. Thus, if Great Britain agrees

[8] *Supra*, p. 37.
[9] *Supra*, p. 39.
[10] A/B. 46, p. 167. See also the Court's Order of December 6, 1930, in the same case, A. 24, p. 12; and *Oscar Chinn Case* (1934), A/B. 63, p. 86 (see *supra*, p. 117).

that inhabitants of the United States shall have the right to fish in certain of her territorial waters, she has to that extent deprived herself of the right to prohibit foreigners from fishing in those waters. But the other rights of Great Britain, for example, her right as local sovereign to legislate for the protection and preservation of fisheries, are apparently not considered as having been affected by this obligation. Thus in the *North Atlantic Coast Fisheries Case* (1910) where the facts were as related above, the Permanent Court of Arbitration said:—

". . . the line by which the respective rights of both parties accruing out of the treaty are to be circumscribed, can refer only to the right granted by the treaty; that is to say the liberty of taking, drying, and curing fish by the American inhabitants in certain British waters in common with British subjects, and not to the exercise of rights of legislation by Great Britain not referred to in the treaty.

". . . a line which would limit the exercise of sovereignty of a State within the limits of its own territory, can be drawn only on the ground of express stipulation, and not by implication from stipulations concerning a different subject-matter." [11]

The non-limitation of the right is, however, only apparent. It is submitted that, in reality, with the assumption of every obligation, all the rights of the State suffer a limitation to a greater or lesser extent. When a State assumes a treaty obligation, the principle of good faith—which governs the performance of treaty obligations—imposes a general limitation on every right of the State so that none may be exercised in a manner incompatible with the bona fide execution of the obligation assumed. Thus in the same decision, the Permanent Court of Arbitration added:—

"The line in question is drawn according to the principle of international law that treaty obligations are to be executed in perfect good faith, therefore excluding the right to legislate *at will* concerning the subject-matter of the treaty, and *limiting the exercise of sovereignty of the State bound by a treaty with respect to that subject-matter to such acts as are consistent with the treaty.*" [12]

[11] 1 H.C.R., p. 141, at p. 169.
[12] *Ibid.*, at p. 169. Italics added.

In other words,

"The exercise of that right [*i.e.*, to legislate] by Great Britain is, however, limited by the said treaty in respect of the said liberties therein granted to the inhabitants of the United States in that such regulations must be made bona fide and must not be in violation of the said treaty.

"Regulations which are (1) appropriate or necessary for the protection and preservation of such fisheries, or (2) desirable or necessary on grounds of public order and morals without unnecessarily interfering with the fishery itself, and in both cases equitable and fair as between local and American fishermen, and not so framed as to give unfairly an advantage to the former over the latter class, are not inconsistent with the obligation to execute the treaty in good faith and are therefore reasonable and not in violation of the treaty." [13]

Whatever the limits of the right might have been before the assumption of the obligation, from then onwards, the right is subject to a restriction. Henceforth, whenever its exercise impinges on the field covered by the treaty obligation, it must be exercised bona fide, that is to say reasonably. A reasonable and bona fide exercise of a right in such a case is one which is appropriate and necessary for the purpose of the right (*i.e.*, in furtherance of the interests which the right is intended to protect). It should at the same time be fair and equitable as between the parties and not one which is calculated to procure for one of them an unfair advantage in the light of the obligation assumed. A reasonable exercise of the right is regarded as compatible with the obligation. But the exercise of the right in such a manner as to prejudice the interests of the other contracting party arising out of the treaty is unreasonable and is considered as inconsistent with the bona fide execution of the treaty obligation, and a breach of the treaty. In this way, the principle of good faith establishes an interdependence between the rights of a State and its obligations. By weighing the conflicting interests covered by the right and the obligation, it delimits them in such a way as to render the exercise of the right compatible with the spirit of the obligation.

Another, though more complicated, example, illustrating the interdependence of rights and treaty obligations, is to be found

[13] *Ibid.*, at p. 171.

in the *German Interests Case* (Merits) (1926). The relevant facts may be briefly recalled. The case was concerned inter alia with the nitrate factory at Chorzów, Polish Upper Silesia. Both the factory and the territory formerly belonged to the German Empire. By the Treaty of Versailles, Germany agreed that a plebiscite should be held in Upper Silesia and in advance renounced in favour of Poland all rights and titles over that portion of Upper Silesia lying beyond the frontier line to be fixed by the Principal Allied and Associated Powers as the result of the plebiscite (Art. 88). Article 256 of the Treaty provided that Powers to which German territory was to be ceded were to acquire the property and possessions situated therein belonging to the German Empire. The value of such acquisitions was to be fixed by the Reparation Commission, and paid to the latter by the State acquiring the territory, to be credited to the German Government on account of the sums due in respect of reparations. Poland, however, was not entitled to reparations. The Treaty was signed on June 28, 1919, but did not come into force between Germany and Poland until January 10, 1920. On December 24, 1919, *i.e.*, between the date of signature of the Treaty and its coming into force, a series of legal instruments were signed and legalised in Berlin. By these instruments a private company was formed and to it the Reich sold the factory at Chorzów. Ownership was transferred only on January 28–29, 1920, at a time when the Treaty had already come into force. After that part of Upper Silesia in which the factory was situated had been allotted to Poland (October 20, 1921), Poland, considering the sale to be null and void, declared that the factory had become Polish State property in accordance with Article 256 of the Treaty of Versailles. Germany contested the legality of this measure.

In the opinion of the Permanent Court of International Justice, Article 88 of the Treaty of Versailles merely contemplated the possible renunciation of sovereignty over the territories in question and Article 256 did not operate in this case until the effective transfer of sovereignty. It held that:—

"Germany undoubtedly retained until the actual transfer of sovereignty the right to dispose of her property." [14]

[14] A. 7, p. 30.

The treaty obligations assumed by Germany did not, therefore, directly affect her proprietary rights, including the right of alienating property in the plebiscite area. The Court added, however:—

"And only a misuse of this right could ['*ce n'est qu'un abus de ce droit ou un manquement au principe de la bonne foi qui pourraient*'] endow an act of alienation with the character of a breach of the Treaty." [15]

It follows, therefore, that a legitimate exercise of the right of alienation was compatible with the treaty obligations, while an abuse of this right, *i.e.*, an exercise of the right contrary to the principle of good faith, would be incompatible therewith.

In considering "whether Poland can rely as against Germany on the contention that there has been a misuse of the right ['*un abus du droit*'] possessed by the latter to alienate property situated in the plebiscite area, before the transfer of sovereignty," [16] the Court arrived at the conclusion that:—

"Such misuse ['*un tel abus*'] has not taken place in the present case. The act in question does not overstep the limits of the normal administration of public property and was not designed to procure for one of the interested Parties an illicit advantage and to deprive the other of an advantage to which he was entitled." [17]

In the opinion of the Court, "the abandonment by the Reich of an enterprise showing a serious deficit, by means of a sale under conditions offering a reasonable guarantee that the capital invested would eventually be recovered" "appears in fact to have fulfilled a legitimate object of the administration," and no sufficient reasons had been shown why the transaction should not be regarded as genuine.[18]

"Again, the Court cannot regard the alienation as an act calculated to prejudice Poland's rights. At the time when the alienation took place (*Auflassung* and entry in the land register, January 28–29, 1920), the Treaty of Versailles was already in force. *An opinion must therefore be formed regarding the good faith of the Government of the Reich in the light of the obligations arising out of this*

[15] *Ibid.*, at p. 30. The French text is authoritative.
[16] *Ibid.*, at p. 37.
[17] *Ibid.*, at pp. 37–38.
[18] *Ibid.*, at p. 38.

Treaty, and not on the basis of other international agreements—such as for instance the Geneva Convention—which did not exist at that date and the conclusion of which could not even be foreseen. Now, under the Treaty of Versailles, Germany could only foresee two possibilities, either that Poland would claim the factory as Reich property, or that she would claim the right to liquidate it as belonging to a company controlled by German nationals, such as the Oberschlesische. The advantage for Poland of the former alternative over the latter would have consisted in the possibility of directly acquiring the ownership under Article 256, at a price to be fixed by the Reparation Commission instead of obtaining it by application of the liquidation procedure referred to in Article 297. This difference, however, cannot suffice to justify the view that the alienation was contrary to the obligations arising under the Treaty of Versailles and that it was even null and void or contrary to the principles of good faith." [19]

This case, and especially the last quotation from the judgment, shows the intimate, one might almost say the intricate, interdependence of a State's rights and obligations, established by the principle of good faith. On the one hand, there was the undoubted right of Germany to dispose of her property in the plebiscite area until the actual transfer of sovereignty. On the other, there were the obligations assumed by Germany under the Treaty of Versailles. These obligations did not prohibit Germany from alienating her property. With the assumption of these obligations, however, the right of disposition implicitly suffered certain restrictions. It could no longer be exercised at will. While the bona fide exercise of the right would be compatible with Germany's treaty obligations, its exercise contrary to the principle of good faith would constitute an abuse of right and a breach of these obligations, *i.e.*, an unlawful act. In such cases, in deciding whether or not the right was exercised in good faith, an international tribunal must examine whether the exercise of the right was in pursuit of the legitimate interests protected by it [20] and whether, in the light of the obligations assumed by the State, the exercise of

[19] *Ibid.*, at pp. 38–39. Italics added.

[20] It must be remembered that, in this case, the right of disposition is merely an attribute of the right of ownership, which determines the object of the right.

the right was calculated to prejudice the rights and legitimate interests of the other party under the Treaty.

In this way, the principle of good faith governing the exercise of rights, sometimes called the theory of abuse of rights, while protecting the legitimate interests of the owner of the right, imposes such limitations upon the right as will render its exercise compatible with that party's treaty obligations, or, in other words, with the legitimate interests of the other contracting party. Thus a fair balance is kept between the respective interests of the parties and a line is drawn delimiting their respective rights. Any overstepping of this line by a party in the exercise of his right would constitute a breach of good faith, an abuse of right, and a violation of his obligation.

II. RIGHTS AND OBLIGATIONS UNDER GENERAL INTERNATIONAL LAW

The Mexican-United States General Claims Commission (1923) in the *North American Dredging Co. of Texas Case* (1926) said:—

"If it were necessary to demonstrate how legitimate are the fears of certain nations with respect to abuses of the right of protection and how seriously the sovereignty of those nations within their own boundaries would be impaired if some extreme conceptions of this right were recognised and enforced, the present case would furnish an illuminating example." [21]

Speaking of the "world-wide abuses either of the right of national protection or of the right of national jurisdiction," the Commission declared:—

"The present stage of international law imposes upon every international tribunal the solemn duty of seeking for a proper and adequate balance between the sovereign right of national jurisdiction, on the one hand, and the sovereign right of national protection of citizens on the other. No international tribunal should or may evade the task of *finding such limitations of both rights as will render them compatible with the general rules and principles of international law.*" [22]

[21] *Op. of Com. 1927*, p. 21, at p. 29.
[22] *Ibid.*, at p. 23. Italics added.

This approach to the problem of the limitation of rights clearly shows that what has so far been said regarding the interdependence of rights and obligations applies not only to treaty obligations but also to obligations derived from the general law. Every right is subject to such limitations as are necessary to render it compatible both with a party's contractual obligations and with his obligations under the general law.

This process of adjusting the rights and obligations of a State may also be illustrated by the Trail Smelter Arbitration (1935). In this case, there was, on the one hand, the right of a State to make use of its own territory, and, on the other hand, the duty of a State at all times " to protect other States against injurious acts by individuals from within its jurisdiction." [23] Taking into account the conflicting interests at stake [24] and analogous cases in municipal law,[25] the Arbitral Tribunal arrived at the conclusion that:—

" No State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence." [26]

Thus, instead of recognising and enforcing some extreme views concerning the use of territory, the Tribunal struck a proper balance between a State's rights and obligations. Any overstepping of this limit would constitute an abuse of right, a violation of the obligation to protect other States from injuries emanating from its territory and an unlawful act.

The recognition of the interdependence of a person's rights and obligations is one of the most important features of the principle of good faith governing the exercise of rights. The rights enjoyed by a person become correlated with his obligations. Generally, each right suffers such limitations as would render its exercise compatible with the obligations arising from the general rules and principles of the legal order. Its limits vary, therefore, with the changing contents of these rules and

[23] *Award II* (1941), 3 UNRIAA, p. 1905, at p. 1963.
[24] *Cf. ibid.*, at pp. 1938, 1939.
[25] *Ibid.*, at pp. 1963 *et seq.*
[26] *Ibid.*, at p. 1965.

principles. As a society becomes more integrated more obligations are laid upon its members and the rights of each subject of law become also more restricted. Whenever the owner of the right contracts additional obligations, these place further limitations upon its exercise, even though this may not be expressly laid down. The right may no longer be exercised in a manner incompatible with the bona fide performance of these obligations. Hence the exact limits of a right may differ from person to person, according to the amount and contents of each person's obligations. In this sense, rights can no longer be regarded as absolute,[27] but are essentially relative.[28]

Good faith in the exercise of rights, in this connection, means that a State's rights must be exercised in a manner compatible with its various obligations arising either from treaties or from the general law. It follows from this interdependence of rights and obligations that rights must be reasonably exercised. The reasonable and bona fide exercise of a right implies an exercise which is genuinely in pursuit of those interests which the right is destined to protect and which

[27] *Cf. North American Dredging Co. of Texas Case* (1926), *Op. of Com. 1927*, p. 21 at p. 26. What the Commission here wished to refute appears to be not so much the law of nature, but the view that certain rights are "inalienable," or "uncurtailable."

[28] *Cf.* ICJ: *Admission of a State to the U.N.* (1948) Adv.Op., Ind.Op. by Azevedo, *ICJ Reports, 1947–1948*, p. 57, at p. 79. See also p. 80. It is believed, however, that the learned judge used the term "relativity of rights" in the sense generally employed by writers, *i.e.*, rights must be exercised in conformity with the social purpose of the rule of law which creates them. (See, *e.g.*, L. Josserand, *De l'esprit des lois et de leur relativité; Théorie de l'abus de droit*, 1927).

Among international publicists, the view is quite widely held that an abuse of right is an anti-social exercise of the right. See *e.g.*, Politis, "Le problème des limitations de la souveraineté et la théorie de l'abus des droits dans les rapports internationaux," 6 *Recueil La Haye* (1925), p. 1, at p. 81 *et passim*, and following him, Lauterpacht, *The Function of Law in the International Community*, 1933, pp. 286 *et seq.* T. Selea, in his *La notion de l'abus du droit dans le droit international*, 1940, though in substance following closely the above-cited work of Politis, went further and considered as an abuse of right any exercise of a right which deviates from the social function or social purpose of the right (pp. 57 *et seq.*, 101 *et seq.*, 177). This, however, is going too far. Money thrown into the sea would presumably not be fulfilling its destined social function, but it is doubtful whether a State acting in this way would be legally chargeable with an abuse of right. The functional criterion is above all inadequate. It affords no juridical explanation why an unsocial or anti-social exercise of a right is unlawful. It fails completely to explain such cases of abuse of right as those envisaged by the *German Interests Case* (Merits) (1926) and the *Free Zones Case* (Jgt.) (1932). The correlation is, therefore, in the writer's opinion, between a person's rights and his obligations, and not between rights and the public interest. The existence of the obligation explains the illegality of the abusive exercise of the right.

is not calculated to cause any unfair prejudice to the legitimate interests of another State, whether these interests be secured by treaty or by general international law. The exact line dividing the right from the obligation, or, in other words, the line delimiting the rights of both parties is traced at a point where there is a reasonable balance between the conflicting interests involved. This becomes the limit between the right and the obligation, and constitutes, in effect, the limit between the respective rights of the parties. The protection of the law extends as far as this limit, which is the more often undefined save by the principle of good faith. Any violation of this limit constitutes an abuse of right and a breach of the obligation—an unlawful act. In this way, the principle of good faith, by recognising their interdependence, harmonises the rights and obligations of every person, as well as all the rights and obligations within the legal order as a whole.

D. Abuse of Discretion

In the complexities of human society, either of individuals or of nations, law cannot precisely delimit every right in advance. Certain rights may indeed be rigidly circumscribed, as, for instance, the right of self-defence in the territory of a friendly State. This right is limited to the taking of the only available means of self-defence imperatively demanded by the circumstances.[29] But, in a great number of cases, the law allows the individual or the State a wide discretion in the exercise of a right. Thus we have seen, when examining the principle of self-preservation, that the State enjoys a wide discretion in the exercise of its right of expropriation and requisition, its right to admit and expel aliens, and, generally speaking, all its rights of self-preservation in territory subject to its authority. This discretion extends to the determination of the nature, extent and duration of the State's requirements and the methods best calculated to meet the various contingencies.[30]

But wherever the law leaves a matter to the judgment of the person exercising the right, this discretion must be exercised in good faith, and the law will intervene in all cases where this

[29] *Supra*, pp. 83 *et seq.*
[30] See *supra*, pp. 67–68, and references therein.

discretion is abused.[31] As Judge Azevedo said in one of his individual opinions:—

"Any legal system involves limitations and is founded on definite rules which are always ready to reappear as the constant element of the construction, whenever the field of action of discretionary principles, adopted in exceptional circumstances, is overstepped. This is a long-established principle, and has served, during centuries, to limit the scope of the principle of *qui suo jure utitur neminem laedit.*" [32]

Thus in cases concerning the expulsion of aliens, an international tribunal would normally accept as conclusive the reasons of a serious nature adduced by the State as justifying such action.[33] It would, however, regard as unlawful measures of expulsion those which are arbitrary,[34] or accompanied by unnecessary hardship.[35] Where private property is taken for public use, although it is primarily for the State to decide what are its needs, as well as their extent and duration,[36] international tribunals would intervene when the need is plainly not one of a public character,[37] or when the property is retained clearly beyond the time required by the public need.[38] Furthermore, while it is left to the State conducting military operations to determine what are military necessities, international tribunals are entitled to intervene in cases of manifest abuse of this discretion, causing wanton destruction or injury.[39] Again, while a State taking reprisals against another is not bound to relate its measures closely to the offence,[40] it has been held that "reprisals out of all proportion to the act which had prompted them ought certainly to be considered as excessive and hence unlawful." [41]

Whenever, therefore, the owner of a right enjoys a certain discretionary power, this must be exercised in good faith, which

[31] See *supra*, p. 68, and references therein.
[32] ICJ: *Admission of a State to the U.N.* (1948), Adv.Op., *ICJ Reports, 1947–1948*, p. 57, at p. 80.
[33] *Supra*, pp. 34–35.
[34] *Supra*, p. 35, note 9, and p. 36.
[35] *Supra*, p. 36.
[36] *Supra*, pp. 39, 40–41, 43–45.
[37] *Supra*, p. 39.
[38] *Supra*, p. 44.
[39] *Supra*, pp. 65 *et seq.*
[40] *Supra*, p. 98.
[41] *Supra*, p. 98.

means that it must be exercised reasonably, honestly, in conformity with the spirit of the law and with due regard to the interests of others. But since discretion implies subjective judgment, it is often difficult to determine categorically that the discretion has been abused. Each case must be judged according to its particular circumstances by looking either at the intention or motive of the doer or the objective result of the act, in the light of international practice and human experience. When either an unlawful intention or design can be established, or the act is clearly unreasonable,[42] there is an abuse prohibited by law.

In some cases, however, the existence of an abuse is particularly difficult to determine. This is well illustrated by the case contemplated in the first Advisory Opinion delivered by the International Court of Justice. The question put to the Court was whether a member of the United Nations which was called upon, in virtue of Article 4 of the Charter, to vote, either in the Security Council or in the General Assembly, on the admission of a State to membership in the United Nations, was juridically entitled to make its consent to the admission dependent on conditions not expressly provided by paragraph I of the said Article. A majority of nine judges considered that the conditions laid down in Article 4 I of the Charter were the only conditions to be taken into account,[43] while a minority of six considered that these were merely the indispensable conditions of admission.[44] In determining whether or not a particular condition is fulfilled by an applicant, the State which is called upon to vote naturally enjoys freedom of judgment. But it follows from the above Advisory Opinion that, in the view of the Court, this freedom is to be exercised within the scope of the prescribed conditions of Article 4 I, while in the opinion of the dissenting Judges this freedom is not so circumscribed,

[42] See also the application of the test of " reasonableness " and " moderation " by the I.C.J. in the *Anglo-Norwegian Fisheries Case* (1951) in determining whether Norway committed a " manifest abuse " in delimiting the base line of the Lopphavet Basin (*ICJ Reports, 1951*, p. 116, at pp. 141–142; *cf.* pp. 150. 153, 156, 167 *et seq.*) See also ICJ: *United States Nationals in Morocco Case* (1952), *ICJ Reports, 1952*, p. 176, at p. 212.

[43] *Admission of a State to the U.N.* (1948), Adv.Op., *ICJ Reports 1947–1948*, p. 57, at p. 65.

[44] *Ibid.*, at pp. 90, 104, 109 *et seq.*

but may be exercised within the general purposes and principles of the Charter of the United Nations.[45]

But, as was pointed out by some of the dissenting Judges, however circumscribed, the exercise of this discretion is extremely difficult, if not impossible, to control.[46] For the only result of its exercise is a vote of "yes" or "no," and there is no rule of law which obliges a member, in casting his vote, to give his reasons. Even if the reasons may be gathered from the discussions preceding the vote, a member might change his views between the time of the discussions and the time of the vote. Furthermore, whatever juridical limits may have been set to the type of consideration that may be taken into account, there is no means of verifying whether the reasons advanced during the discussion are genuine and decisive, and, even if they are, whether they are the exclusive ones. As one of the Judges said in an individual opinion "all kinds of prejudices, and even physical repugnance will find a way of influencing the decision, either by an act of the will or even through the action of the subconscious." [47]

It is especially on account of this difficulty of controlling the exercise of discretionary powers that the Judges, whether they were of the opinion that the discretion should be exercised within the limits of Article 4 I or within the wider limits of the general purposes and principles of the United Nations Charter, all agreed in stressing that the discretion inherent in the right to vote must be exercised in good faith.[48] Good faith in the exercise of the discretionary power inherent in a right seems thus to imply a genuine disposition on the part of the owner of the right to use the discretion in a reasonable, honest and sincere manner in conformity with the spirit and purpose, as well as the letter, of the law. It may also be called a spontaneous sense of duty scrupulously to observe the law. In this present case, there is practically no means of controlling the exercise of the discretion. It is, therefore, essential that it should be possible to place reliance on the State's own sense of respect for the law.

[45] *Ibid.*, at pp. 91–2, 93, 103, 115.
[46] *Ibid.*, at pp. 102 *et seq.*, 111 *et seq.*
[47] Judge Azevedo, *ibid.*, at p. 78.
[48] *Ibid.*, at pp. 63, 71, 79 *et seq.*, 91, 92, 93, 103, 115.

The present instance clearly shows how important, and indeed how indispensable, it is to any legal system for the discretionary power inherent in every right to be exercised in good faith.[49] For, unless this discretion is normally exercised by every subject of law spontaneously in a bona fide manner well within the limit beyond which the exercise may be regarded as an abuse, even if the law is able ultimately to prevent certain manifest abuses, the legal system will be strained to breaking point.

In the preceding pages we have seen the various ways in which the principle of good faith governs the exercise of rights. Where the right confers upon its owner a discretionary power, this must be exercised honestly, sincerely, reasonably, in conformity with the spirit of the law and with due regard to the interests of others. All rights have to be exercised reasonably and in a manner compatible with both the contractual obligations of the party exercising them and the general rules and principles of the legal order. They must not be exercised fictitiously so as to evade such obligations or rules of law, or maliciously so as to injure others. Violations of these requirements of the principle of good faith constitute abuses of right, prohibited by law. It follows, however, from the general presumption of good faith that abuses of right cannot be presumed.[50]

The importance of the principle of good faith governing the exercise of rights naturally goes beyond the prohibition of abuses. In recognising the interdependence of rights and obligations, it reconciles conflicting interests, establishes the proper limits of rights, and secures harmony in the legal order. By infusing such qualities as honesty, sincerity, reasonableness and moderation into the exercise of rights, it promotes the smooth and proper functioning of the legal system.

[49] See also ICJ: *United States Nationals in Morocco Case* (1952), *ICJ Reports, 1952*, p. 176, at pp. 207–212, especially p. 212.

[50] PCIJ: *German Interests Case* (Merits) (1926), A. 7, p. 30; *Id.*: *Free Zones Case* (Second Phase: Order) (1930), A. 24, p. 12; Same Case (Jgt.) (1932), A/B 46, p. 167.

plea on the ground that: "It does not even appear that the bondholders could have effectively asserted their rights earlier than they did, much less that there is any ground for concluding that they deliberately surrendered them." [43] Conduct, in order to constitute an admission, must not, therefore, be due to an impossibility of acting otherwise.

Finally, it should be added that declarations, admissions, or proposals made in the course of negotiations which have not led to an agreement do not constitute admissions which could eventually prejudice the rights of the party making them.[44]

D. Nullus Commodum Capere De Sua Injuria Propria

"No one can be allowed to take advantage of his own wrong," declared the Umpire in *The Montijo Case* (1875).[45]

A State may not invoke its own illegal act to diminish its own liability. Commissioner Pinkney, in *The Betsy Case* (1797), called it "the most exceptionable of all principles, that he who does wrong shall be at liberty to plead his own illegal conduct on other occasions as a partial excuse." [46]

The Permanent Court of International Justice, in its Advisory Opinion No. 15 (1928), said that "Poland could not avail herself of an objection which . . . would amount to relying upon the non-fulfilment of an obligation imposed upon her by an international agreement," [47] and in the *Chorzów Factory Case* (Jd.) (1927), the Court held:—

"It is, moreover, a principle generally accepted in the jurisprudence of international arbitration, as well as by municipal courts, that one party cannot avail himself of the fact that the other has not fulfilled some obligation or has not had recourse to some means of redress, if the former party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open, to him." [48]

[43] A. 20/21, p. 39.
[44] PCIJ: *Chorzów Factory Case* (Jd.) (1927), A. 9, p. 19; (Merits) (1928), A. 17, pp. 51, 62. Rum.-Hung. M.A.T.: *Emeric Kulin Case* (Jd.) (1927), 7 T.A.M., p. 138, at p. 149.
[45] 2 *Int.Arb.*, p. 1421; at p. 1437.
[46] Jay Treaty (Art. VII) Arb. (1794): 4 *Int.Adj.*, M.S., p. 179, at p. 277.
[47] PCIJ: *Jurisdiction of the Danzig Courts* (1928), Adv.Op., B. 15, pp. 26–27. Poland could not "contend that the Danzig courts could not apply the provisions of the *Beamtenabkommen* because they were not duly inserted in the Polish national law."
[48] A. 9, p. 31.

The application of this principle is well illustrated by the *Chorzów Factory Case* (Jd.) (1927). The Polish Government had appropriated the Chorzów Factory in virtue of her laws of July 14, 1920, and June 16, 1922, without following the procedure laid down in the Geneva Convention of 1922.[49] As regards procedure, the Convention had provided that no dispossession should take place without prior notice to the real or apparent owner, thus affording him an opportunity of appealing to the Germano-Polish Mixed Arbitral Tribunal (Art. 19). Poland, by failing to follow the procedure laid down in the Geneva Convention, had illegally deprived the other party of the opportunity of appealing to the Mixed Arbitral Tribunal. The Permanent Court held that Poland could not now prevent him, or rather his home State, from applying to the Court, on the ground that the Mixed Arbitral Tribunal was competent and that, since no appeal had been made to that Tribunal, the Convention had not been complied with.[50]

Another instance where the same principle was applied is *The Tattler Case* (1920), where the Tribunal held that:—

"It is difficult to admit that a foreign ship may be seized for not having a certain document when the document has been refused to it by the very authorities who required that it should be obtained." [51]

The refusal was wrongful.

In the *Frances Irene Roberts Case,* the United States-Venezuelan Mixed Claims Commission (1903), in rejecting a plea of prescription in a case which, though diligently prosecuted by the claimants for over 30 years, had not yet been settled, held:—

"The contention that this claim is barred by the lapse of time would, if admitted, allow the Venezuelan Government to reap advantage from its own wrong in failing to make just reparation to Mr. Quirk at the time the claim arose." [52]

No one should be allowed to reap advantages from his own wrong.

The situation is slightly different where a State's acquiescence in a breach of its own law amounts to connivance. In such a

[49] Martens, III (16) N.R.G., p. 645.
[50] *Loc. cit.*, p. 31.
[51] Brit.-U.S. Cl.Arb. (1910): Nielsen's *Report*, p. 489, at p. 493.
[52] *Ven.Arb. 1903*, p. 142, at p. 144. See also Mex.-U.S. G.C.C. (1923): *G. W. Cook Case* (Dock. 663) (1927), *Op. of Com. 1927*, p. 318, at p. 319.

case the State is prevented from invoking the breach to the disadvantage of the other party either to found a right or as a defence.[53]

A fortiori, where a State has directly requested another to do a certain thing it may not subsequently put forward a claim against the latter founded on this very act. Thus, if the President of a State has requested the naval authorities of another State to help capture a rebel, declared to be a pirate, his State may not afterwards present a claim in respect of his capture. As Commissioner Wadsworth of the Mexican-United States Claims Commission (1868) held, the State would be "estopped."[54] This kind of estoppel is but an application of the principle *nullus commodum capere de sua injuria propria*.[55]

In the Advisory Opinion on the *Interpretation of Peace Treaties* (2nd Phase) (1950), Judge Read, in a dissenting opinion used the term "estoppel" in the same sense and was of the view that "in any proceedings which recognised the principles of justice," no government would be allowed to raise an objection which would "let such a government profit from its own wrong."[56]

The International Court of Justice, in that case, was concerned with the interpretation of the following provision of the Peace Treaties of 1947[57]:—

". . . any dispute concerning the interpretation or execution of the Treaty, which is not settled by direct diplomatic negotiations, shall be referred to the Three Heads of Mission acting under Article

[53] *Shufeldt Case* (1930) 2 UNRIAA, p. 1079. Guatemala cancelled a concession to extract chicle. One of the contentions put forward when the case was submitted to arbitration was that the claimants used machetes instead of a scratcher to bleed the chicle, in violation of Guatemalan law and fiscal regulations. Held: "The Government never having taken any steps to put a stop to this practice which they must have known existed either under the law or by arbitration under the contract, and never having declared the contract cancelled therefor, and having recognised the contract all through, and thus making themselves *particeps criminis* in such breach (if any) of the law, cannot now in my opinion avail themselves of this contention" (p. 1097).
See also Brit.-U.S. Cl.Arb. (1910): *Yukon Lumber Co. Case* (1913) Nielsen's *Report*, p. 438, at p. 442. *Cf.* also *The Montijo* (1875) 2 *Int.Arb.* p. 1421.

[54] *Marin Case*, 3 *Int.Arb.*, p. 2885, at p. 2886.

[55] See Broom's *Legal Maxims*, 1939, under *nullus commodum capere potest de sua injuria propria*.

[56] *ICJ Reports 1950*, p. 221, at p. 244.

[57] Art. 36 of the Treaty with Bulgaria, to which correspond *mutatis mutandis* Art. 40 of the Treaty with Hungary and Art. 38 of the Treaty with Rumania. Italics added.

35. . . . Any such dispute not resolved by them within a period of two months shall, unless the parties to the dispute mutually agree upon another means of settlement, be referred at the request of either party to the dispute to a Commission composed of one *representative* of each party and a third member [*un tiers membre*] selected by mutual agreement of the two *parties* from nationals of a third country [*un pays tiers*]. Should the two *parties* fail to agree within a period of one month upon the appointment of the third member [*ce tiers membre*], the Secretary-General of the United Nations may be requested by either party to make the appointment."

The majority of the Court, from whom Judge Read and Judge Azevedo differed, was of the opinion that:—

" If one party fails to appoint a representative to a Treaty Commission under the Peace Treaties . . . where that party is obligated to appoint a representative . . . , the Secretary-General . . . is not authorised to appoint the third member of the Commission upon the request of the other party to a dispute." [58]

It is submitted that a different interpretation of the Peace Treaties is possible, without recourse to the principle that no one can benefit from his own wrong, invoked by Judge Read.

The Court considered that " the text of the Treaties [did] *not* admit " of the interpretation,

" that the term ' third member ' is used here simply to distinguish the neutral member from the two Commissioners appointed by the parties without implying that the third member can be appointed only when the two national Commissioners have already been appointed, and that therefore the mere fact of the failure of the parties, within the stipulated period, to select the third member by mutual agreement satisfies the condition required for the appointment of the latter by the Secretary-General." [59]

But the Court also conceded that " the text in its literal sense does not completely exclude the possibility of the appointment of the third member before the appointment of both national Commissioners." [60] This interpretation could indeed

[58] *ICJ Reports 1950*, p. 221, at p. 230.
[59] *Loc. cit.*, p. 227.
[60] *Loc. cit.*, p. 227.

have been upheld as being more in accordance with both the letter and the spirit of the provision. Contrary to the opinion of the Court,[61] the literal interpretation of the text does not disclose any contemplated "sequence" in the appointment of the three members. Nor, it is submitted, can such a "sequence" be regarded as "natural and ordinary" in view of the "normal practice of arbitration"; for it has possibly been overlooked that the Treaty Commission is by no means a "normal" arbitral commission, where the national Commissioners are appointed as independent arbitrators and not as national representatives.[62] In the case of the Treaty Commission, they are expressly stated to be "representatives" of their respective Governments. Consequently, their position, even though they have the right to vote, is more akin to that of agents than judges, while the neutral member fulfils the function of a sole arbitrator rather than an umpire. Although it may be the normal practice to appoint first the arbitrators and then the umpire, it is equally normal first to select the sole arbitrator before appointing the agents. Moreover, as contemplated by the Peace Treaties, the Treaty Commission is the last resort to break any deadlock which might arise between the parties in case of a dispute and it represents a machinery to be set in motion essentially by unilateral action "at the request of either party." This is so with regard to the reference of the dispute to the Commission, and also to the eventual appointment of the third member by the Secretary-General. The intention is that this ultimate means of settlement should not fail on account of either the indifference or the recalcitrance of one of the parties.

It is submitted, therefore, that the interpretation: "the mere fact of the failure of the parties, within the stipulated period, to select the third member by mutual agreement satisfies the condition required for the appointment of the latter by the Secretary-General," besides being in strict conformity with the terms of the provision, would be more in accordance with the intention of the parties, and with the principles of good faith,[63] and more in the interest of the rule of law in international

[61] *Loc. cit.*, p. 227. See also the French (authoritative) text of the Adv.Op.
[62] See *infra*, pp. 279 *et seq.*, esp. pp. 280 *et seq.*
[63] See *supra*, pp. 105 *et seq.*

relations.[64] If this interpretation were accepted, the failure of one of the parties to appoint its representative to the Commission would not affect the power of the Secretary-General to make the appointment. That the defaulting party may or may not have thereby violated a treaty obligation thus becomes immaterial and there is, therefore, no occasion for applying the principle *nullus commodum capere de sua injuria propria.*

The problem of the application of this principle might have arisen, however, if the condition required by the Peace Treaties for the appointment of the neutral member by the Secretary-General is not the failure of the *parties* to agree upon the appointment, but the failure of the two *national Commissioners.* In such a case, if one of the parties refuses to appoint its national Commissioner, albeit unlawfully, *i.e.*, in violation of its treaty obligations, it would be necessary to agree with the Court, though perhaps for different reasons, that " nevertheless, such a refusal cannot alter the conditions contemplated in the Treaties for the exercise by the Secretary-General of his power of appointment."[65]

The Court was not altogether explicit as to the reasons for this statement. It is submitted that the reason is not that the principle that no one can benefit from his own wrong cannot be applied, but that the Secretary-General cannot, on the basis of his power of appointment, assume the right to pass judgment upon the violation *vel non* by States of their international obligations. It was pointed out by the United States before the Court that in the municipal law of the great majority of nations, " provision is made for the appointment of an arbitrator (*often by the court*) if one of the parties to a dispute refuses or fails to appoint its arbitrator under an arbitration agreement."[66] It is submitted that this is possible principally because, generally speaking, a municipal court has jurisdiction over the parties. It can determine their responsibility for any violation of their contractual obligations and has also the power to order relief *in natura.*[67] Similarly, an international tribunal would also have the power, if it has jurisdiction over the issue,

[64] *Cf.* Schwarzenberger, " Trends in the Practice of the World Court," 4 C.L.P. (1951), p. 1, at pp. 11 *et seq.*
[65] *Loc. cit.*, p. 228.
[66] *Interpretation of Peace Treaties* (1950), *ICJ Pleadings*, pp. 235, 294, 360.
[67] See *ibid.*, p. 294.

both *ratione personae* and *ratione materiae*. In such a case, should the defaulting party object that one of the conditions required by the treaty had not been fulfilled, the tribunal would and should hold, as Judge Read said, "that it was estopped from alleging its own treaty violation in support of its own contention." [68]

EX DELICTO NON ORITUR ACTIO

Another manifestation of the principle *nullus commodum capere de sua injuria propria* is that

"an unlawful act cannot serve as the basis of an action in law." [69]

The principle *ex delicto non oritur actio* is generally upheld by international tribunals [70] and it may be of interest to illustrate it with a case which lasted nearly 70 years from the date the events occurred, going through four different international tribunals, *viz.*, the case of Capt. Clark, known also as *The Medea* and *The Good Return Cases*.

Capt. Clark was a citizen of the United States, who in 1817, obtained a letter of marque from Oriental Banda (as Uruguay was then called) in the war then being fought between Portugal and Spain on the one side and Oriental Banda and Venezuela on the other. Some of the Spanish vessels captured by Clark were seized by Venezuela. Venezuela later combined with New Granada to form the Republic of Colombia, which, in turn, split into three separate States, New Granada, Venezuela and Ecuador.

When claims commissions were constituted between the United States on the one hand and New Granada, Ecuador and

[68] *ICJ Reports 1950*, p. 221, at p. 244. N.B. in advisory procedure, the Court does not and should not pass judgment on an actual dispute without the consent of the parties, PCIJ: *Eastern Carelia Case* (1923), B. 5, pp. 27–9; ICJ: *Interpretation of Peace Treaties* (1st Phase) (1950), *ICJ Reports 1950*, p. 65, at p. 72: "The legal position of the parties to these disputes cannot be in any way compromised by the answers that the Court may give to the questions put to it." See also p. 71.

[69] PCIJ: *Eastern Greenland Case* (1933), D.O. by Anzilotti, A/B. 53, p. 95.

[70] *e.g.*, Brit.-U.S. Cl.Com. (1853): *The Lawrence* (1855), Hornby's *Report*, p. 397. Seizure of ship engaged in slave trade, act prohibited by the law of the claimant's own State and by the law of nations. "The owners of the 'Lawrence' could not claim the protection of their own Government, and, therefore, in my judgment, can have no claim before this commission" (p. 398). Mex.-U.S. Cl.Com. (1868): *Brannan Case*, 3 *Int.Arb.*, p. 2757, at p. 2758: "The Umpire cannot believe that this international commission is justified in countenancing a claim founded upon the contempt and infraction of the laws of one of the nations concerned." Claim arising out of unneutral services rendered in violation of the laws of the claimant's own State.

ANNEX 88

THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY

Introduction, Text and Commentaries

JAMES CRAWFORD

CAMBRIDGE
UNIVERSITY PRESS

PUBLISHED BY THE PRESS SYNDICATE OF THE UNIVERSITY OF CAMBRIDGE
The Pitt Building, Trumpington Street, Cambridge, United Kingdom

CAMBRIDGE UNIVERSITY PRESS
The Edinburgh Building, Cambridge CB2 2RU, UK
40 West 20th Street, New York, NY 10011-4211, USA
477 Williamstown Road, Port Melbourne, VIC 3207, Australia
Ruiz de Alarcón 13, 28014 Madrid, Spain
Dock House, The Waterfront, Cape Town 8001, South Africa

http://www.cambridge.org

First published 2002

Printed in the United Kingdom at the University Press, Cambridge

Typeface Times 9/11 pt *System* LaTeX 2ε [TB]

A catalogue record for this book is available from the British Library

ISBN 0 521 81353 0 hardback
ISBN 0 521 01389 5 paperback

CHAPTER V
CIRCUMSTANCES PRECLUDING WRONGFULNESS

(1) Chapter V sets out six circumstances precluding the wrongfulness of conduct that would otherwise not be in conformity with the international obligations of the State concerned. The existence in a given case of a circumstance precluding wrongfulness in accordance with this Chapter provides a shield against an otherwise well-founded claim for the breach of an international obligation. The six circumstances are: consent (article 20), self-defence (article 21), countermeasures (article 22), *force majeure* (article 23), distress (article 24) and necessity (article 25). Article 26 makes it clear that none of these circumstances can be relied on if to do so would conflict with a peremptory norm of general international law. Article 27 deals with certain consequences of the invocation of one of these circumstances.

(2) Consistently with the approach of the present articles, the circumstances precluding wrongfulness set out in Chapter V are of general application. Unless otherwise provided,[324] they apply to any internationally wrongful act whether it involves the breach by a State of an obligation arising under a rule of general international law, a treaty, a unilateral act or from any other source. They do not annul or terminate the obligation; rather they provide a justification or excuse for non-performance while the circumstance in question subsists. This was emphasised by the International Court in the *Gabčíkovo-Nagymaros Project* case. Hungary sought to argue that the wrongfulness of its conduct in discontinuing work on the Project in breach of its obligations under the 1977 Treaty was precluded by necessity. In dealing with the Hungarian plea, the Court said:

> "The state of necessity claimed by Hungary — supposing it to have been established — thus could not permit of the conclusion that . . . it had acted in accordance with its obligations under the 1977 Treaty or that those obligations had ceased to be binding upon it. It would only permit the affirmation that, under the circumstances, Hungary would not incur international responsibility by acting as it did."[325]

Thus a distinction must be drawn between the effect of circumstances precluding wrongfulness and the termination of the obligation itself. The circumstances in Chapter V operate as a shield rather than a sword. As Fitzmaurice noted, where one of the circumstances precluding wrongfulness applies, "the non-performance is not only justified, but 'looks towards' a resumption of performance so soon as the factors causing and justifying the non-performance are no longer present . . ."[326]

(3) This distinction emerges clearly from the decisions of international tribunals. In the *Rainbow Warrior* arbitration, the Tribunal held that both the law of treaties and the law of State responsibility had to be applied, the former to determine whether the treaty was still in force, the latter to determine what the consequences were of any breach of the treaty while

324 E.g., by a treaty to the contrary, which would constitute a *lex specialis* under article 55.
325 *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), I.C.J. Reports 1997*, p. 7, at p. 39, para. 48.
326 Fitzmaurice, "Fourth Report on the Law of Treaties", *Yearbook . . . 1959*, vol. II, p. 41.

it was in force, including the question whether the wrongfulness of the conduct in question was precluded.[327] In the *Gabčíkovo-Nagymaros Project* case, the Court noted that:

> "even if a state of necessity is found to exist, it is not a ground for the termination of a treaty. It may only be invoked to exonerate from its responsibility a State which has failed to implement a treaty. Even if found justified, it does not terminate a reaty; the Treaty may be ineffective as long as the condition of necessity continues to exist; it may in fact be dormant, but – unless the parties by mutual agreement terminate the Treaty – it continues to exist. As soon as the state of necessity ceases to exist, the duty to comply with treaty obligations revives."[328]

(4) While the same facts may amount, for example, to *force majeure* under article 23 and to a supervening impossibility of performance under article 61 of the Vienna Convention on the Law of Treaties,[329] the two are distinct. *Force majeure* justifies non-performance of the obligation for so long as the circumstance exists; supervening impossibility justifies the termination of the treaty or its suspension in accordance with the conditions laid down in article 61. The former operates in respect of the particular obligation, the latter with respect to the treaty which is the source of that obligation. Just as the scope of application of the two doctrines is different, so is their mode of application. *Force majeure* excuses non-performance for the time being, but a treaty is not automatically terminated by supervening impossibility: at least one of the parties must decide to terminate it.

(5) The concept of circumstances precluding wrongfulness may be traced to the work of the Preparatory Committee of the 1930 Hague Conference. Among its Bases of Discussion,[330] it listed two "Circumstances under which States can decline their responsibility", self-defence and reprisals.[331] It considered that the extent of a State's responsibility in the context of diplomatic protection could also be affected by the "provocative attitude" adopted by the injured person (Basis of Discussion No. 19) and that a State could not be held responsible for damage caused by its armed forces "in the suppression of an insurrection, riot or other disturbance" (Basis of Discussion No. 21). However, these issues were not taken to any conclusion.

(6) The category of circumstances precluding wrongfulness was developed by the International Law Commission in its work on international responsibility for injuries to aliens[332] and the performance of treaties.[333] In the event the subject of excuses for the non-performance of treaties was not included within the scope of the Vienna Convention on the Law of Treaties.[334] It is a matter for the law on State responsibility.

327 *Rainbow Warrior (New Zealand/France), R.I.A.A.*, vol. XX, p. 217 (1990), at pp. 251-252, para. 75.
328 *I.C.J. Reports 1997*, p. 7, at p. 63, para. 101; see also p. 38, para. 47.
329 Vienna Convention on the Law of Treaties, 23 May 1969, *U.N.T.S.*, vol. 1155, p. 331.
330 *Yearbook*... 1956, vol. II, pp. 223-225.
331 Ibid., pp. 224-225. Issues raised by the Calvo clause and the exhaustion of local remedies were dealt with under the same heading.
332 *Yearbook*... 1958, vol. II, p. 72. For the discussion of the circumstances by García Amador, see his "First Report on State responsibility", *Yearbook*... 1956, vol. II, pp. 203-209 and his "Third Report on State responsibility", *Yearbook*... 1958, vol. II, pp. 50-55.
333 Fitzmaurice, "Fourth Report on the Law of Treaties", *Yearbook*... *1959*, vol. II, pp. 44-47, and for his commentary, ibid., pp. 63-74.
334 Vienna Convention on the Law of Treaties, art. 73.

(7) Circumstances precluding wrongfulness are to be distinguished from other arguments which may have the effect of allowing a State to avoid responsibility. They have nothing to do with questions of the jurisdiction of a court or tribunal over a dispute or the admissibility of a claim. They are to be distinguished from the constituent requirements of the obligation, i.e., those elements which have to exist for the issue of wrongfulness to arise in the first place and which are in principle specified by the obligation itself. In this sense the circumstances precluding wrongfulness operate like defences or excuses in internal legal systems, and the circumstances identified in Chapter V are recognized by many legal systems, often under the same designation.[335] On the other hand, there is no common approach to these circumstances in internal law, and the conditions and limitations in Chapter V have been developed independently.

(8) Just as the articles do not deal with questions of the jurisdiction of courts or tribunals, so they do not deal with issues of evidence or the burden of proof. In a bilateral dispute over State responsibility, the onus of establishing responsibility lies in principle on the claimant State. Where conduct in conflict with an international obligation is attributable to a State and that State seeks to avoid its responsibility by relying on a circumstance under Chapter V, however, the position changes and the onus lies on that State to justify or excuse its conduct. Indeed, it is often the case that only that State is fully aware of the facts which might excuse its non-performance.

(9) Chapter V sets out the circumstances precluding wrongfulness presently recognised under general international law.[336] Certain other candidates have been excluded. For example, the exception of non-performance (*exceptio inadimpleti contractus*) is best seen as a specific feature of certain mutual or synallagmatic obligations and not a circumstance precluding wrongfulness.[337] The principle that a State may not benefit from its own wrongful act is capable of generating consequences in the field of State responsibility but it is rather a general principle than a specific circumstance precluding wrongfulness.[338] The so-called "clean hands" doctrine has been invoked principally in the context of the admissibility of claims before international courts and tribunals, though rarely applied. It also does not need to be included here.[339]

335 See the comparative review by C. von Bar, *The Common European Law of Torts*, vol. 2 (Munich, Beck, 2000), pp. 499-592.

336 For the effect of contribution to the injury by the injured State or other person or entity see article 39 and commentary. This does not preclude wrongfulness but is relevant in determining the extent and form of reparation.

337 Compare *Diversion of Water from the Meuse (Netherlands v. Belgium), 1937, P.C.I.J., Series A/B, No. 70*, p. 4, esp. at pp. 50, 77. See further Fitzmaurice, "Fourth Report on the Law of Treaties", *Yearbook*... 1959, vol. II, pp. 43-47; D.W. Greig, "Reciprocity, Proportionality and the Law of Treaties", *Virginia Journal of International Law*, vol. 34 (1994), p. 295; and for a comparative review, G.H. Treitel, *Remedies for Breach of Contract: A Comparative Account* (Oxford, Clarendon Press, 1987), pp. 245-317. For the relationship between the exception of non-performance and countermeasures see below, commentary to Part Three, Chapter II, para. (5).

338 See e.g. *Factory at Chorzów, Jurisdiction, 1927, P.C.I.J., Series A, No. 9*, p. 31; cf. *Gabčíkovo-Nagymaros Project, I.C.J. Reports 1997*, p. 7, at p. 67, para. 110.

339 See J.J.A. Salmon, "Des 'mains propres' comme condition de recevabilité des réclamations internationales", *A.F.D.I.*, vol. 10 (1964), p. 225; A. Miaja de la Muela, "Le rôle de la condition des mains propres de la personne lésée dans les réclamations devant les tribunaux internationaux", in *Mélanges offerts à Juraj Andrassy* (The Hague, Martinus Nijhoff, 1968), p. 189, and the dissenting

ANNEX 89

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
WASHINGTON, D.C.

In the arbitration proceedings between

NIKO RESOURCES (BANGLADESH) LTD.
(Claimant)

and

PEOPLE'S REPUBLIC OF BANGLADESH
(First Respondent)
BANGLADESH PETROLEUM EXPLORATION & PRODUCTION COMPANY LIMITED ("BAPEX")
(Second Respondent)
BANGLADESH OIL GAS AND MINERAL CORPORATION ("PETROBANGLA")
(Third Respondent)

(jointly referred to as Respondents)

ICSID Case No. ARB/10/11
and
ICSID Case No. ARB/10/18

DECISION ON JURISDICTION

Members of the Tribunal
Mr Michael E. Schneider, President
Professor Campbell McLachlan
Professor Jan Paulsson

Secretary of the Tribunal
Ms Frauke Nitschke

Date of decision: 19 August 2013

TABLE OF CONTENTS

GLOSSARY **5**

1. INTRODUCTION **8**

2. THE PARTIES AND THE ARBITRAL TRIBUNAL **11**

2.1 The Claimant 11

2.2 The Respondents 11

2.3 The Arbitral Tribunal 12

3. SUMMARY OF THE RELEVANT FACTS **14**

3.1 The negotiations leading to the JVA 14

3.2 The JVA and its arbitration clause 20

3.3 The negotiations of the Gas Purchase and Sale Agreement (GPSA) 24

3.4 The arbitration clause in the GPSA 33

3.5 The Payment Claims under the GPSA 36

3.6 The blowouts and the Compensation Claim 36

4. THE PROCEDURAL HISTORY **40**

4.1 From Registration to the Constitution of the two Tribunals 40

4.1.1 ICSID Case No. ARB/10/11 40

4.1.2 ICSID Case No. ARB/10/18 43

4.2 Following the Constitution of the two Tribunals 45

5. THE CLAIMANT – ITS IDENTITY AND ITS NATIONALITY **51**

5.1 The position of the Parties 51

5.2 The Claimant's identity 52

5.3 The Claimant's nationality 55

5.3.1 The link with Cyprus 55

5.3.2 The link with Canada 58

6. THE STATE OF BANGLADESH AS A PARTY TO THE ARBITRATION **61**

6.1 The role of the Government of Bangladesh 62

6.2 Petrobangla and BAPEX as agencies or instrumentalities of the Government of Bangladesh 63

6.3 The separate legal identity of Petrobangla and BAPEX 66

6.4 Petrobangla and BAPEX as agents for Bangladesh 67

6.5 Attribution 68

6.6 Consent 70

7. JURISDICTION WITH RESPECT TO BAPEX AND PETROBANGLA – THE ISSUE OF DESIGNATION 73
7.1 The issue and the Parties' positions 73
7.2 The requirement of designation 75
7.2.1 The term "designation" as distinguished from "notification" 75
7.2.2 The purposes of designation under Article 25(1) 77
7.2.3 Types of designation – General and *ad hoc* designation 80
7.2.4 The form of designation and the question of implicit designation 81
7.2.5 Communicating the State's designation to the Centre 84
7.2.6 Conclusions concerning the requirement of "designation" under Article 25(1) 91
7.3 Designation in the present case 92
8. THE DISPUTE ARISING DIRECTLY OUT OF AN INVESTMENT 97
9. ILLEGAL ACTS, GOOD FAITH AND CLEAN HANDS 104
9.1 The Parties' positions 104
9.2 The Canadian conviction of Niko Canada on account of bribes to the Minister of Energy in 2005 107
9.3 Other indications of possible acts of corruption and the Respondents' disclosure request 110
9.3.1 Investigation by the Bangladesh Anticorruption Commission (ACC) 110
9.3.2 The BELA proceedings 112
9.3.3 The proceedings against Stratum 112
9.3.4 The action of Mr Harb 113
9.3.5 The Respondents' request for document production 114
9.3.6 Conclusion on the Claimant's acts of corruption 116
9.4 Corruption and international public policy 117
9.5 Contracts of corruption 118
9.6 Contracts obtained by corruption 120
9.7 Denial of jurisdiction despite an otherwise binding arbitration agreement 126
9.7.1 Arbitration offer applicable only for good faith investment 126
9.7.2 Protecting the "integrity of the system" 128
9.7.3 The "clean hands" doctrine 128
10. JURISDICTION WITH RESPECT TO CLAIMS UNDER THE JVA (THE COMPENSATION DECLARATION AND THE COOPERATION CLAIM) 133
10.1 The position of the Parties 133
10.2 Jurisdiction *ratione materiae* 135
10.3 Jurisdiction *ratione personae* 138

10.4 Impact on legal interests of third parties 140
10.5 BAPEX cooperation with respect to the GPSA claims (the Cooperation Claim) 142
11. JURISDICTION WITH RESPECT TO CLAIM UNDER THE GPSA (THE PAYMENT CLAIM) 144
11.1 The Position of the Parties 144
11.2 Has Petrobangla agreed to arbitrate with Niko? 145
11.3 Is Niko precluded as a matter of principle to claim for both Joint Venture Partners? 146
11.4 The position under the agreements 148
12. DECISION 155

above, the Government of Kenya had avoided the agreement; the tribunal had accepted jurisdiction; and in the exercise of that mandate denied the claim on the merits.

9.7.2 Protecting the "integrity of the system"

473. In another line of argument, the Respondents submit that it "*would violate the principles of international public policy to afford the Claimant access to ICSID*".[310] In this context the Respondents speak of the Tribunal's power "*to protect the integrity of the ICSID dispute settlement mechanism*".[311]

474. The Tribunal is mindful of the importance of the ICSID dispute settlement mechanism and its integrity. In the Tribunal's view, such integrity is promoted, and not violated, by the adjudication of disputes submitted to the Centre under a valid consent to arbitrate. Faced with a binding arbitration agreement and subject to the specific requirements under the ICSID Convention, considered elsewhere in this decision, the Tribunal must address the substance of the dispute. In so doing, the integrity of the system is protected by the resolution of the contentions made (including allegations of violation of public policy) rather than by avoiding them.

475. In the present case ICSID arbitration is invoked not in pursuit of a claim for corruption nor for claims under an otherwise illegal contract. The Claimant seeks performance of agreements which, despite the Respondents' knowledge about the sanctioned cases of bribery, have not been avoided and from which the Respondents continue to benefit. The Tribunal cannot see why hearing and resolving these claims under the given circumstances would affect the integrity of the ICSID system.

9.7.3 The "clean hands" doctrine

476. Finally, the Respondents state that the Claimant "*does not bring this claim with clean hands*".[312] In a footnote of its First

[310] R-CMJ.2 – Payment Claim, paragraph 54.
[311] R-CMJ.1, paragraph 54; R-CMJ.2 – Payment Claim, paragraph 53.
[312] R-CMJ.2 – Payment Claim, paragraph 53.

Counter-Memorial it had explained that the "*'clean hands' principle is well recognised in common law*" and referred to a decision of the High Court of Australia.[313] The Respondents also quote from the Individual Opinion which Judge Manley Hudson delivered in the case before the Permanent Court of International Justice (PCIJ) and concerning the *Diversion of Water from the Meuse*.[314] That opinion relies on a legal principle described by various expressions including the maxim "*He who seeks equity must do equity*"; it is often referred to as a particularly important manifestation of the "clean hands" principle.[315]

477. The principle of clean hands is known as part of equity in common law countries. The question whether the principle forms part of international law remains controversial and its precise content is ill defined. The situation has been analysed in great detail in a recent award in the case of *Guyana v. Suriname* by an Arbitral Tribunal Constituted Pursuant to Article 287, and in Accordance with Annex VII of the United Nations Convention on the Law of the Sea (UNCLOS). That UNCLOS Tribunal[316] found:

> "*No generally accepted definition of the clean hands doctrine has been elaborated in international law. Indeed, the Commentaries of the ILC Draft Articles on State Responsibility acknowledge that the doctrine has been applied rarely and, when it has been invoked, its expression has come in many forms. The ICJ has on numerous occasions declined to consider the application of the doctrine, and has never relied on it to bar admissibility of a claim or recovery. However, some support for the doctrine can be found in dissenting opinions in certain ICJ cases, as well as in opinions in cases of the Permanent Court of International Justice ('PCIJ'). […] These cases indicate that the use of the clean hands doctrine has been*

[313] R-CMJ.1, fn. 44.
[314] (*Netherlands v. Belgium*) (1937) PCIJ, Series A/B, No. 70, p. 73 *et seq*.
[315] *See e.g.* Moloo, "*A Comment on the Clean Hands Doctrine in International Law*", Transnational Dispute Management, vol. 8. Issue 1 (February 2011), p. 2; Dumberry and Dumas-Aubin, "*The Doctrine of 'Clean Hands' and the Inadmissibility of Claims by Investors Breaching International Human Rights*", Transnational Dispute Management, vol. 10, Issue 1 (January 2013), p. 2.
[316] *Guyana v. Suriname*, PCA, Award of 17 September 2007 (under UNCLOS Ch VII). The Tribunal was composed of Judge Dolliver M. Nelson, Professor Thomas Franck, Dr Kamal Hossain, Professor Ivan Shearer and Professor Hans Smit.

sparse, and its application in the instances in which it has been invoked has been inconsistent."[317]

478. While the ILC Special Rapporteur Crawford concluded (quoting Rousseau[318]) that "it is not possible to consider the 'clean hands' theory as an institution of general customary law",[319] others are of the view that, primarily because of its recognition in the domestic orders of many States, it must be qualified as a general principle of law.[320]

479. Concerning the substantive content of the principle in international law, it has been summarised by Fitzmaurice:

> "'*He who comes to equity for relief must come with 'clean hands'. Thus a State which is guilty of illegal conduct may be deprived of the necessary locus standi in judicio for complaining of corresponding illegalities on the part of other States, especially if these were consequential on or were embarked upon in order to counter its own illegality – in short were provoked by it.*"[321]

480. As shown by this quotation, the application of the principle requires some form of reciprocity, so much so that, in his Individual Opinion in the *Diversion of Water from the Meuse* case, Hudson assimilated it to the Roman law principle of the *exceptio non adimpleti contractus*.[322] In that case, the claimant State sought to prevent the defendant State from making use of waters from the Meuse which it considered contrary to a treaty; but the claimant State itself was making use of the waters in a similar manner. Similarly, the case of unclean hands to which Judge Schwebel referred in his dissenting opinion in the *Military and Paramilitary Activities* case concerned acts of aggression

[317] Ibid., paragraph 418 (references omitted).
[318] Rousseau, Droit international public, tome V: les rapports conflictuels, (1983), p. 170.
[319] Crawford, Second Report on State Responsibility, Yearbook of the International Law Commission, vol II (part 2) (1999), p. 83.
[320] Dumberry and Dumas-Aubin, op. cit., p. 3, referring to Kreindler, "Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine", Essays in honour of Ulf Franke, 2010, p. 317, and to the opinions of Judges Schwebel and Anzilotti in cases of the ICJ and the PCIJ, respectively.
[321] Fitzmaurice, "The General Principles of International Law", 92 Recueil des Cours (1957) 119 (citations omitted).
[322] (*Netherlands v. Belgium*) (1937) PCIJ, Series A/B, No. 70, Individual Opinion by Mr Hudson, p. 77.

which he saw on the side of the claimant State in relation to those of the defendant State.[323]

481. When considering the defendant State's admissibility argument based on clean hands, the UNCLOS Arbitral Tribunal, dealing with this doctrine "*to the extent that such a doctrine may exist in international law*", referred to three criteria which it had extracted from those cases in which reference to the doctrine had been made, in particular the developments in the opinion of Judge Hudson: (i) the breach must concern a continuing violation, (ii) the remedy sought must be "*protection against continuance of that violation in the future*", not damages for past violations and (iii) there must be a relationship of reciprocity between the obligations considered.[324]

482. In a wider sense, it has been argued that the clean hands doctrine, without express mention of the term, has found application in a number of other cases where claims were dismissed for lack of jurisdiction or as inadmissible because they were obtained fraudulently or were not in accordance with the law of the host State.[325]

483. Applying these considerations to the present case and the Respondents' objection based on the clean hands doctrine, it is obvious that this objection does not meet the criteria which Judge Hudson and the UNCLOS Arbitral Tribunal identified for the application of the doctrine in international law. Here the violation on which the Respondents rely is not continuing, but consisted in two acts that have been completed long ago; the remedy which the Claimant seeks does not concern protection against this past violation; and there is no relation of reciprocity between the relief which the Claimant now seeks in this arbitration and the acts in the past which the Respondents characterise as involving unclean hands.

484. More generally, when the events sanctioned by the Canadian judgment occurred, the JVA had already been concluded. The events were widely publicised in Bangladesh and, shortly after

[323] *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v. United States of America*), Judgment of 27 June 1986, Dissenting Opinion of Judge Schwebel, ICJ Reports 1986, p.25.
[324] *Guyana v. Suriname*, Award of 17 September 2007, paragraphs 420-421.
[325] For details see Moloo, op.cit., p. 6 *et seq*. and Dumberry and Dumas-Aubin, op. cit., p. 3 *et seq*.

they had become public the Minister concerned resigned. Petrobangla and BAPEX, with the approval of the Bangladesh Government, nevertheless entered into the GPSA. If and to the extent the Claimant or its parent company had unclean hands, the Respondents disregarded this situation. They may not now rely on these events to deny jurisdiction under an arbitration agreement which they then accepted. The additional details of which the Respondents may have learned subsequently through the account in Canadian judgment do not aggravate the offence in any substantial manner compared to what was publicly known in Bangladesh when the GPSA was concluded.

485. In these circumstances, the Tribunal may not rely on the events subject of the Canadian judgment as grounds for refusing to examine the merits of a dispute which the parties to the agreements have accepted to submit to ICSID arbitration. The Respondents' objection based on acts of corruption must be dismissed.

10. JURISDICTION WITH RESPECT TO CLAIMS UNDER THE JVA (THE COMPENSATION DECLARATION AND THE COOPERATION CLAIM)

10.1 The position of the Parties

486. The claims brought under the JVA concern primarily what the Claimant calls the "*Compensation Claims*" pending in a court of Bangladesh. The Claimant describes these claims as relating to the proceedings commenced in June 2008 in the Court of District Judge, Dhaka, No 224 of 2008 (the Money Suit) in which Petrobangla and Bangladesh claim from Niko and others "*damages alleged to arise from the blowouts of 2 wells in the Chattak field which were being drilled under the JVA*".[326]

487. In the Notices of Arbitration with respect to the Compensation Claims which the Claimant served on the three Respondents on 8 January 2010, the Claimant sought that the following disputes be arbitrated:

> "*(a) All claims held jointly or severally by any of Bapex, Petrobangla and Bangladesh to damages or losses alleged to arise from the blowouts of two wells which were then being drilled under the JVA in the gas fields in Bangladesh known as the Chattak gas field, including those arising from the matters alleged in either the Legal Notice dated May 27, 2008 issued on behalf of Petrobangla to Niko and/or in the pleadings filed on behalf of Petrobangla in the suit filed June, 2008 by Petrobangla and the Government of Bangladesh against Niko and others in the court of District Judge, Dhaka Bangladesh, no. 224 of 2008;*
>
> *(b) Whether Niko is liable for any of the Compensation Claims in whole or in part, and if it is liable, determination of the amount of liability;*"[327]

[326] RfA I, paragraph 6.8.
[327] RfA I, Attachment C I.

ANNEX 90

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
WASHINGTON, D.C.

In the arbitration proceeding between

FRAPORT AG FRANKFURT AIRPORT SERVICES WORLDWIDE

Claimant

and

REPUBLIC OF THE PHILIPPINES

Respondent

ICSID Case No. ARB/11/12

AWARD

Members of the Tribunal
Professor Piero Bernardini, President
Mr. Stanimir A. Alexandrov
Professor Albert Jan van den Berg

Secretary of the Tribunal
Ms. Aurélia Antonietti

Date of dispatch to the Parties: December 10, 2014

Annex 90

REPRESENTATION OF THE PARTIES

Representing Fraport AG Frankfurt Airport Services Worldwide:

Mr. Michael D. Nolan
Ms. Elitza Popova-Talty, and
Mr. Edward Baldwin *(until May 21, 2014)*
Milbank, Tweed, Hadley & McCloy LLP
1850 K Street, NW
Suite 1100
Washington, D.C. 20006
U.S.A.

and *until March 12, 2014*

Dr. Sabine Konrad
McDermott Will & Emery Rechtsanwälte
Steuerberater LLP
Feldbergstraβe 35
60323 Frankfurt am Main
Germany

and

Ms. Lisa M. Richman
McDermott Will & Emery LLP
The McDermott Building
500 North Capitol Street, NW
Washington, D.C. 20001-1531
U.S.A.

Representing the Republic of the Philippines:

Hon. Florin T. Hilbay
Mr. Bernard G. Hernandez
Mr. Eric Remegio O. Panga
Ms. Ellaine Sanchez-Corro
Ms. Myrna S. Agno, and
Ms. Jane E. Yu
Office of the Solicitor General of the Philippines
134 Amorsolo St., Legaspi Village
Makati City, 1229,
Philippines

and

Justice Florentino P. Feliciano
224 University Avenue
Ayala Alabang Village
Muntinlupa City, Metro Manila,
Philippines

and

Ms. Carolyn B. Lamm
Ms. Abby Cohen Smutny
Mr. Francis A. Vasquez Jr.
Mr. Hansel T. Pham
Ms. Anne D. Smith
Mr. Frank Panopoulos, and
Mr. Brody K. Greenwald
White & Case LLP
701 13th Street, N.W.
Washington, D.C. 20005
U.S.A.

TABLE OF CONTENTS

I. INTRODUCTION AND PARTIES 1

II. OVERVIEW OF THE CASE AND PARTIES' REQUESTS FOR RELIEF 1

III. PROCEDURAL HISTORY 5

IV. FACTUAL BACKGROUND 25

A. The NAIA Terminal 3 Project and the Concession Agreements 25

B. Fraport's Investment in the Terminal 3 Project 38

C. Attempts to Renegotiate Terminal 3 Concession Agreement 44

D. Nullification of the Terminal 3 Concession 46

E. Further 2003/2004 Proceedings 52

F. The Government's Taking of NAIA Terminal 3 53

V. SUMMARY OF THE PARTIES' POSITIONS 61

V.I RESPONDENT'S OBJECTIONS TO JURISDICTION AND ADMISSIBILITY 61

A. Respondent's Basis for its Objections to Jurisdiction and Inadmissibility 62

B. Fraport Knowingly Based its Investment on a Concession that had been Illegally Obtained and that was Invalid under Philippine Law 63

C. Fraport Violated the Anti-Dummy Law 64

1. The Philippine Anti-Dummy Law 64

2. Fraport's Alleged ADL Violations 66

D. Fraport's Corruption and Unlawful Conduct Render its Claims Inadmissible 67

1. The Four "Liongson Schemes" to Procure Government Approvals 67

2. The EPC Contract Schedule 7 Kickback Scheme 69

3. Improper Receipt of Funds by Fraport Officials 70

4. Fraport's Responses 70

5. Respondent's Argument Relating to Fraport's Ultimate Use of the Funds Put in the Project 72

V.II SUMMARY OF FRAPORT'S CLAIMS AND RELIEFS 74

A. Fraport's Claims for Expropriation 74

1. The Alleged Acts of Expropriation 74

2. Respondent's Defense of the Invalidation of the Terminal 3 Concession Agreements 75

3. Failure to Pay Compensation 78

4. Public Purpose 80

B. Unfair and Inequitable Treatment 81

1. Legitimate Expectations 82

2. Bad Faith 83

3. Denial of Justice 85

4. Lack of Transparency 86

C. Impairment by Arbitrary and Discriminatory Measures 86
D. Failure to Afford Full Protection and Security 87
E. Breach of Umbrella Clause 88
F. Compensation under Theories of Unjust Enrichment and *Quantum Meruit* 89
V.III THE PHILIPPINES' COUNTERCLAIMS 89
VI. JURISDICTION 91
A. Governing Law and Burden of Proof 91
B. The "Investment" under the BIT 93
1. The Parties' Positions 93
1.1 Respondent's Position 93
1.2 Claimant's Position 95
2. The Tribunal's Analysis 98
C. Respondent's Jurisdictional Objections 103
1. Introduction 103
2. Jurisdictional Objection 1: Fraport Violated the Anti-Dummy Law 105
2.1 Introduction to the Anti-Dummy Law 105
2.2 The Parties' Arguments 106
a) Respondent's Position 106
b) Claimant's Position 115
2.3 The Tribunal's Analysis 120
a) Interpretation of the ADL 122
(i) Whether the ADL Applied Prior to the Operation of Terminal 3 122
(ii) Shareholder Conduct under the ADL 125
(iii) Whether the ADL Prohibits Planning a Prohibited Act without More 128
(iv) Whether a Violation Requires "Knowledge" 131
(v) Whether a Violation Can Be Cured 133
(vi) Good Faith as a Defense 134
b) Assessment of Fraport's Alleged ADL Violation 139
3. Jurisdictional Objection 2: There is no Jurisdiction and all of Fraport's Claims are Inadmissible as a Result of Fraport's Corruption and Fraud 148
4. Jurisdictional Objection 3: Fraport Knew of PIATCO's Misrepresentations to Obtain the Concession Award 153
4.1 Respondent's Position 153
4.2 Claimant's Position 156
4.3 The Tribunal's Analysis 159
VII. COSTS 164
A. The Parties' Positions 164
B. The Tribunal's Analysis 165
VIII. TRIBUNAL'S DECISION 167

considers for its part that this decision does not relate to bribery or corruption but to the execution of the 1997 Concession Agreement which pre-dates Fraport's investment, and that a motion for reconsideration had been filed against it.[186]

204. On March 26, 2014, the Supreme Court issued a Notice where it consolidated the petitions for review of the August 22, 2013 decision of the Court of Appeal in expropriation cases of PIATCO and Takenaka and referred them to the Court en banc.[187]

205. As of November 2014, to the knowledge of the Tribunal, also on the basis of the record, there had been no convictions or indictments of Government officials for having accepted bribes. Nor have there been any firm conviction for ADL violations or corruption in the Philippines, nor convictions in Germany. Except for the pending-suspended ADL charges and the case against Henry Go, all criminal investigations relating to Terminal 3 have been dismissed in the Philippines.

V. SUMMARY OF THE PARTIES' POSITIONS

206. The Tribunal will now provide a summary of the Parties' positions, starting with Respondent's objections to jurisdiction and admissibility, followed by Fraport's claims and Respondent's counterclaims. To the extent relevant or useful, additional arguments will be discussed in the Tribunal's analysis below.

V.I RESPONDENT'S OBJECTIONS TO JURISDICTION AND ADMISSIBILITY

207. Respondent objects to the jurisdiction of the Tribunal and to the admissibility of Fraport's claims because it argues that Fraport is in violation of Philippine law, based on Fraport's alleged ADL violations, Fraport's alleged corruption, and failure to sufficiently substantiate the ultimate use of its claimed investment in the Terminal 3.

[186] Fraport's letter, Apr. 28, 2014; Claimant's reply submission on costs, para. 17.

[187] RE-2147, Supreme Court, Notice, Mar. 26, 2014.

A. Respondent's Basis for its Objections to Jurisdiction and Inadmissibility

208. According to Respondent, the BIT does not apply to investments made in violation of Philippine law. Article 1(1) of the BIT defines "investment" as "any kind of asset accepted in accordance with the respective laws and regulations of either Contracting State […]." Thus, Fraport must demonstrate that it has "an investment" that complied with Philippines law and regulations.[188] This is a legality requirement, which is supported by the remainder of the BIT and its Protocol.[189] Not only Fraport's investment was illegal for the alleged reasons that the Tribunal will examine below, but it was not "accepted" by the Philippines.[190]

209. Even without taking the terms of Article 1(1) of the BIT into account, for Respondent, all BITs contain a tacit jurisdictional requirement of legality[191] and the Tribunal has no jurisdiction over disputes involving investment made in violation of host State law.[192]

210. In addition, Respondent argues that "regardless of whether Fraport's unlawful investment is considered to satisfy the BIT's definition of an investment," [193] its claims are inadmissible on the basis of the doctrine of clean hands and the requirement of good faith, relying mainly on Bin Cheng and *World Duty Free v. Kenya*, because Fraport invested in violation of Philippine law and international public policy, and that its investment was illegal.[194]

[188] C-Mem., para. 776.

[189] CA-1, Protocol to the BIT (follows text of BIT).

[190] R. PHB1, paras. 22-23.

[191] Rej., paras. 579-581 ; R. PHB1, paras. 9-13, relying on *Phoenix Action Ltd. v. Czech Republic* (ICSID Case No. ARB/06/5), Award, Apr. 15, 2009 ("*Phoenix*, Award").

[192] C-Mem., para. 808.

[193] Rej., para. 582.

[194] *Ibid.*, para. 588; R. PHB1, paras. 119-126.

211. Fraport considers that the BIT does not contain a legality requirement, and certainly not a *de facto* continuous one,[195] but rather that Article 1(1) was designed as an admittance clause, as supported by the *travaux préparatoires*.[196]

212. Fraport further argues that the concept of admissibility based on clean hands does not apply here as Respondent has not shown corruption and "should not be able to use its own illegal acts of extortion and corruption in order to take operational Terminal without compensation."[197] It considers that the allegations of corruption have nothing to do with Fraport's investment, or the legality of such investment, either in time or facts, pointing out for instance that the acquisition of shares has never been illegal.[198] Respondent replies that there is no temporal limitation for the doctrine of admissibility.[199]

213. In any event, Fraport also counter-argues that all its discrete and multiple investments are entitled to the protection of the BIT.[200] Respondent dismisses this theory based on the "unity of investment" doctrine and argues that corruption taints the entirety of an investment.[201]

B. Fraport Knowingly Based its Investment on a Concession that had been Illegally Obtained and that was Invalid under Philippine Law

214. According to Respondent, the clean hands doctrine applies to render inadmissible claims relating to an investment that was procured through fraudulent misrepresentations.[202] PIATCO made material misrepresentations regarding its financial capacity and technical qualifications to PBAC. PAIRCARGO misrepresented its proposed annual guaranteed payments. Fraport is said to have joined in with this fraudulent conduct because it knew

[195] Sur-Rej., paras. 244-246.

[196] Rep., para. 596; Sur-Rej., paras. 191-235; RE-21.

[197] Rep., para. 660.

[198] Sur-Rej., paras. 122, 246.

[199] Rej., para. 627.

[200] Rep., paras. 642-657; Sur-Rej., paras. 250-260.

[201] C-Mem., paras. 830-849; Rej., paras. 615-626.

[202] C-Mem., para. 894.

before it made its own investment that PIATCO has secured the Terminal 3 Concession under false pretenses.[203]

215. Fraport also knew that the concessions agreements were in violation of the BOT law, including an unlawful direct Government guarantee in Section 4.04(c)(iv) of the ARCA, the lack of NEDA's approval of the Concession Agreement or the ARCA, and were missing critical approvals of the DOTC and the Minister of Finance that could not be legally obtained.[204]

216. Fraport denies those allegations and claims that it had every reason to believe that PIATCO achieved the award and concession agreements through legitimate means, which in any event turns to be the case.[205]

C. Fraport Violated the Anti-Dummy Law

217. Respondent alleges that Fraport's investment in PIATCO violated the 1936 ADL, as Fraport deliberately assisted, aided and/or abetted in the "*planning*" of an ADL violation, which deprives the Tribunal of jurisdiction over Fraport's claims and renders such claims inadmissible.[206]

1. The Philippine Anti-Dummy Law

218. The Philippine Constitution restricts operation of a public utility (which the Parties agree includes Terminal 3) to Philippine citizens or corporations established under Philippine law at least 60% of whose capital is owned by Philippine citizens. The ADL, designed to prevent circumvention of such nationality requirements, prohibits in Section 2-A "interven[tion] in the management, operation, administration, or control" of, *inter alia*, public utilities by persons who do not meet the nationality requirements.

[203] C-Mem., para. 896 ; R. Skeleton, paras. 13-17.

[204] R. Skeleton, paras. 18-24 ; C-Mem., paras. 814-816.

[205] Sur-Rej., paras. 128-132; Cl. PHB1, para. 201.

[206] C-Mem., Section III.C.1; C-Mem., paras. 866-872; R. PHB1, para. 32; R. PHB2, paras. 30, 33.

B. The "Investment" under the BIT

1. The Parties' Positions

1.1 Respondent's Position

300. The essence of Respondent's jurisdictional objections is that the BIT contains an explicit or implicit requirement that the investor comply with the laws and regulations of the host State with respect to its investment and that Fraport failed to do so. The BIT is limited in its application to investments accepted in accordance with host State law. Since Claimant's investment was made in violation of the Philippine ADL and because its investment was in an enterprise that had been awarded concession agreements in violation of the Philippine BOT law, its investment falls outside of the BIT's protection also as a result of Fraport's corruption and fraud.[348]

301. In essence, Respondent contends that Claimant's investment was not "accepted" in accordance with the laws of the Philippines under Article 1(1) of the BIT. Article 1(1) defines an "investment" as "any kind of asset accepted in accordance with the respective laws and regulations of either Contracting State […]." Therefore, according to Respondent in order to benefit from the BIT's protection Claimant must demonstrate that its investment complied with Philippines law and regulations.[349]

302. According to Respondent, a legality restriction is provided by other provisions of the BIT.[350] Thus, with regard to "Promotion and Acceptance" of investments, Article 2(1) provides that "[e]ach Contracting State shall promote as far as possible investments in its territory […] and admit such investments in accordance with its Constitution, laws and regulations as referred to in Article 1 paragraph 1. […]" Likewise, Article 3(3) provides that each Contracting State shall apply the most favored nation treatment regarding investments "which are made in accordance with the legislation of that Contracting State."

[348] C-Mem., para. 773; R. PHB1, para. 62.

[349] *Ibid*., para. 776.

[350] *Ibid*., para. 780.

303. When parties to the BIT wished to refer to registration requirements they did so specifically, as in Article 5(1) requiring the host State to guarantee free transfer of payment regarding investments "which have been duly registered by its appropriate government agencies if so required." Additional references to legality requirements are contained in the Protocol to the BIT, which "forms an integral part" of the BIT,[351] while other Articles of the Protocol refer to registration requirements, which reference would be redundant if Article 1(1) only referred to a registration regime as suggested by Claimant.[352]

304. According to Respondent, even if the BIT did not expressly require that investments comply with host State law to qualify for treaty protection, the Tribunal should decline jurisdiction on account of illegality of the investment. It refers to the legal opinion of Professor Dolzer, who observes that the fundamental aim of the ICSID Convention "is to promote the rule of law in the area of foreign investment"[353] so that "unlawful investment will not be enforced by an international tribunal even if the relevant BIT contains no clause on domestic conformity."[354] The same view is expressed by Professor Schreuer,[355] another legal expert for Respondent.

305. In Respondent's view, other tribunals have confirmed that claims based on illegal investments cannot be protected even in the absence of a specific clause of the relevant treaty requiring compliance with host State's law. Reference is made by Respondent to *Phoenix Action v. Czech Republic*, holding that "States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments made in violation of their law," and to *Hamester v. Ghana* holding the same with reference to *Phoenix*.[356] Fraport's reference to *EDF International and others v. Argentina* is wrong since this case stands for

[351] C-Mem., para. 782.

[352] *Ibid*., para. 784.

[353] Dolzer II (ICSID 2), para. 97.

[354] *Ibid*., para. 78.

[355] C-Mem., para. 802 and fn. 1747.

[356] *Phoenix*, Award, para. 101; *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana* (ICSID Case. No. ARB/07/24), Award, June 18, 2010 ("*Hamester*, Award"), paras. 123-124; both cited in C-Mem., paras. 803-804 and Rej., para. 579.

the opposite proposition by holding that "the requirement of not having engaged in a serious violation of the legal regime is a tacit condition inherent in every BIT […]"[357]

306. Fraport's argument that Article 1(1) does not create a legality requirement as it contains the word "accepted" rather than "made"[358] is flawed as it assumes that an investment "made" in violation of host State law can nevertheless be "accepted in accordance with the respective laws and regulations" of that State.[359] Contrary to Fraport's view that the object and purpose of the BIT is "enshrined in its preamble," having therefore regard to the promotion of investment with no new barriers to BIT protection,[360] the promotion of investment in such object and purpose must consider the entirety of the BIT provisions.[361]

307. In conclusion, since according to Respondent Article 1(1) requires covered investments to comply with host State law, the Tribunal should decline jurisdiction over Claimant's claims because "Fraport's investment was a violation of the Philippine Anti-Dummy Law and was an investment in an enterprise that obtained its concession in violation of the Philippine law."[362]

1.2 Claimant's Position

308. According to Claimant, contrary to Respondent's afterthought argument contrived to evade its compensation obligations, the investments made by it meet at all times the requirements of the BIT, are legal under Philippine law and were accepted, indeed encouraged, by the Philippine Government.[363]

309. According to Article 31(1) of the Vienna Convention on the Law of Treaties (the "VCLT"), to which both Germany and the Philippines are parties, Article 1(1) of the BIT

[357] C-Mem. paras. 805-806.

[358] Rep., paras. 591-603.

[359] *Ibid.*, para. 536.

[360] *Ibid.*, para. 517.

[361] *Ibid.*, para. 567.

[362] C-Mem., para. 808.

[363] Mem., para. 644.

must be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[364]

310. The ordinary meaning of the term "accepted," when modified by "in accordance with the respective laws and regulations," means permission to the Philippines to put in place laws and regulations to regulate its acceptance of assets as investments.[365] This meaning is consistent with the object and purpose of the BIT, which is the encouragement and protection of investments, as made clear by the Preamble.[366] It is also consistent with the context of the BIT, which provides for specific narrow reservation in the Protocol that did not apply to Claimant's investment.[367]

311. Other articles of the BIT confirm that Ad Article 1(1) is concerned only with the admission of investments, such as Article 2(1) which was included at the instigation of the German Government to reflect that all investments that have been admitted are protected investments.[368] Likewise, Article 5(a) of the Protocol expressly envisages an acceptance and registration regime by providing that "it is understood that duly registered investments are assets of any kind as defined in Article 1, admitted in accordance with Article 2(1) and reported to competent governmental agencies at the time the investment was made."[369]

312. An acceptance regime is provided by other treaties concluded by the Philippines using the same wording of Article 1 of the BIT, such as the Italy-Philippines BIT.[370] By contrast, other treaties concluded by the Philippines expressly provide for the requirement of compliance with Philippine law as a condition to jurisdiction.[371]

[364] Mem., para. 645.

[365] *Ibid*., para. 646; *see also* Rep., paras. 590-596.

[366] Sur-Rej., para. 205.

[367] Mem., para. 647; *see also* Rep., paras. 598-601 and Sur-Rej., paras. 208-212 for reference to the "context" of the BIT.

[368] *Ibid.*, para. 649.

[369] *Ibid*., paras. 653-655.

[370] *Ibid*., para. 651.

[371] Such as the Philippine-Romania BIT, which omits the word "accepted": Mem., paras. 656-657.

313. Also the *travaux préparatoires*, considered by Respondent to be "often unreliable,"[372] confirm that the treaty language of Article 1(1) was meant to be an admittance requirement, not a legality requirement, as shown by the exchange of Notes Verbale (*sic*) between the two Governments in the course of 1995.[373]

314. Respondent's attempt to read into the BIT a legality requirement that is not there has been rejected by other tribunals, for example, in *EDF International and others v. Argentina* where the tribunal agreed with the claimant that where a BIT does not explicitly provide that an investment must be made "in accordance with the laws" of the host State no legality clause may be read into the treaty for purpose of admission of an investment.[374]

315. Neither of the cases referred to by Respondent dealt with provisions similar to or relevant for an interpretation of the meaning of Article 1(1) of the BIT.[375]

316. According to Claimant, the only possible requirement that may be imposed on an investor for purposes of jurisdiction is that its investment "is reported to competent governmental agencies" at the time it is made, as provided by Ad Article 5(a) of the BIT Protocol.[376]

317. Article 3(3) of the BIT imposes on the investors rather than the Contracting State an obligation of conformity with the host State's legislation of investments made by them as a condition for an investor to be eligible for MFN treatment. According to Claimant, this position is instructive for two reasons. First, because it confirms the conscious use of the word "accepted" instead of "made" in Article 1(1), which is instrumental to its interpretation. Second, since the legality of the investment is required for the MFN protection this means that in any other respects protection of the treaty is granted if the

[372] C-Mem., para. 790.

[373] Mem., para. 661; Rep., paras. 619-622; Sur-Rej., paras. 220-221.

[374] Mem., para. 663; *EDF International S.A., SAUR International S.A. and Léon Participaciones S.A. v. Argentine Republic* (ICSID Case No. ARB/03/23), Award, June 11, 2012 (CA-99) ("*EDF and others*, Award"), paras. 304-307.

[375] Rep., paras. 609-611.

[376] *Ibid*., para. 586.

investment is accepted.[377] Article 8 of the BIT provides confirming context when requiring conformity with host State's legislation only for BIT protection of "investments made prior to its entry into force."[378]

318. In conclusion, Claimant contends that an investment will not receive the BIT protection under Article 1(1) either if it was not accepted by the host State or if the State's acceptance was not in accordance with its "respective laws and regulations." This is not the case in the present dispute considering that Claimant's investments "were accepted by the highest levels of the Philippine Government"[379] and that such acceptance was in accordance with all relevant laws and regulations, considering that Respondent does not impose specific admittance or registration requirements on investments in shares or in the form of loans or guarantees."[380]

2. The Tribunal's Analysis

319. The overview of the Parties' position regarding the issue of jurisdiction conducted so far, although not meant to be exhaustive of the respective arguments, is sufficient to evidence their fundamental disagreement on the scope of Article 1(1) of the BIT and the consequence for the Tribunal's jurisdiction.

320. According to Claimant, Article 1(1) was intended by both parties to the Treaty to be an admittance clause, with the consequence that since its investments had complied with any registration or admission requirement under the laws and regulations of the Philippines, the Tribunal has jurisdiction to hear the case.[381] According to Respondent, Article 1(1) is a legality requirement, with the consequence that since Claimant's investment were made in violations of the host State's law the Tribunal lacks jurisdiction *ratione materiae* should such violation be established.

[377] Rep., paras. 603-606.

[378] *Ibid*., para. 608.

[379] *Ibid*., para. 485.

[380] *Ibid*., paras. 623-625; Sur-Rej., para. 197.

[381] This is also because, according to Claimant, "the alleged anti-dummy violations – which even Respondent admitted were cured – are not factually related to Fraport obtaining its shares;" Sur-Rej., para. 248.

321. Turning to Article 1(1) of the BIT, which is at the core of the Parties' disagreement, the Tribunal's analysis must be conducted applying the rules for treaty interpretation under the VCLT. According to Article 31(1) of the VCLT

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

322. Article 1(1) of the BIT provides, in relevant part, that "the term 'investment' shall mean any kind of asset accepted in accordance with the respective laws and regulations of either Contracting State […]"

323. Regarding the "ordinary meaning" of the term "accepted" in Article 1(1), the Tribunal concurs with Respondent's reference to the meaning of the term according to the Oxford Dictionary as "satisfactory," "acceptable" and "generally recognized as correct or valid."[382] However, any forms of acceptance, to be valid, must be "in accordance with the laws and regulations" of the host State and this supports the interpretation of Article 1(1) favoring the requirement that investments, to be accepted, must comply with the host State's law. In other words, the reading of the whole sentence in Article 1(1) legitimates the interpretation that is not the act of acceptance that has to conform to the host State's law but that the investment to be accepted must comply with such law.[383]

324. Regarding the "context," other provisions of the BIT confirm the legality requirement for an investment to be accorded the BIT protection. Thus, Article 2(1) provides that each Contracting State, in addition to promoting investments in its territory, shall admit them "in accordance with its Constitution, laws and regulations, as referred to in Article 1 paragraph 1." Once again, to admit investments in accordance with the Constitution, laws

[382] C-Mem., para. 778.

[383] Particularly in the case, like the present one, where the host State has no specific rules governing the acceptance (in the sense of admission) of foreign investments.

and regulations may only be interpreted to mean that investments, to be admitted to the BIT protection, must conform to the host State's law.[384]

325. Reference to investments "made in accordance with" or "consistent with" the host State's legislation is made by Article 3(3) and Article 8 of the BIT, respectively to grant MFN treatment to investment and to extend the BIT protection also to investments made prior to the BIT entry into force. Requiring compliance with host State's law only limited to these two situations may be hardly reconciled with the repeated references in the BIT to the host State's law, pointing rather to a general requirement of compliance with such law for an investment to be accorded the BIT protection.

326. As mentioned by Respondent, investment registration is expressly required by the BIT in certain cases. This is the case of Article 5(1) for the "guarantee of free transfer of payments in connection with investments." This is also the case of Ad Article 5(a) of the Protocol defining, which are duly registered investments for the Philippines. In the Tribunal's view, nothing would have prevented the Contracting States from using the same language in Article 1(1), had they intended that provision to be an admittance clause.

327. The Tribunal also refers to the Philippines' Instrument of Ratification to the BIT, which the Tribunal considers both States to have accepted "as an instrument related to the treaty" in the Protocol of Exchange of the Instruments of Ratifications of the BIT, and which therefore constitutes part of the "context" under Article 31(2)(b) of the VCLT. With relative clarity, that Instrument of Ratification states that the "Agreement shall be in areas *allowed by and in accordance with the Constitution, laws and regulations of each of the Contracting Parties.*"[385]

328. Investment treaty cases confirm that such treaties do not afford protection to illegal investments either based on clauses of the treaties, as in the present case according to the above analysis, or, absent an express provision in the treaty, based on rules of international

[384] Considering also that a State's Constitution does not normally regulates the process of admission of investments in its territory, as it is the case of the Philippine Constitution (CBII-6).

[385] C-Mem., para. 785 (italics in the quote).

law, such as the "clean hands" doctrine[386] or doctrines to the same effect.[387] One of the first cases having ruled on this issue, *Inceysa v. El Salvador*, has held that "because Inceysa's investment was made in a manner that was clearly illegal, it is not included in the scope of consent expressed by Spain and the Republic of El Salvador in the BIT and, consequently, the disputes arising from it are not subject to the jurisdiction of the Centre."[388]

329. Cognizant that the good faith interpretation of a treaty encompasses the principle of *effet utile*, however, the Tribunal does not regard it as appropriate to treat the term "accepted" as surplusage. Rather, recalling that the ordinary meaning of the term "accepted" includes "received," the Tribunal considers that "accepted" refers to the point in time when the

[386] "A party who asks for redress must present himself with clean hands," American Commissioner Hassaurek, Ecuadorian-United States Claims Commission (1862), cited by Bing Cheng, General Principles of Law as applied by International Courts and Tribunals, 1953, p. 156.

[387] Identified by Latin maxims such as "*ex injuria jus non oritur*," "*nemo auditur propiam turpitudinem allegans*" or "*ex dolo malo non oritur action.*"

[388] *Inceysa Vallisoletana S.L. v. Republic of El Salvador* (ICSID Case No. ARB/03/26), Award, Aug. 2, 2006, para. 257. A series of other cases have consistently applied the requirement of legality of investments and declined accordingly jurisdiction in case of investment made in violation of the host State's law;

Plama Consortium Limited v. Republic of Bulgaria (ICSID Case No. ARB/03/24), Award, Aug. 27, 2008, para. 139: "[...] the ECT should be interpreted in a manner consistent with the aim of encouraging respect of the rule of law. The Arbitral Tribunal concludes that the substantive provisions of the ECT cannot apply to investments that are made contrary to law";

Phoenix, Award, para. 101: "States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments made in violation of their laws. If a State, for example, restricts foreign investment in a sector of its economy and a foreign investor disregards such restriction, the investment concerned cannot be protected under the ICSID/BIT system. These are illegal investments according to the national law of the host Stat and cannot be protected through an ICSID arbitral process. And it is the Tribunal's view that this condition – the conformity of the establishment of the investment with the national laws – is implicit even when not expressly stated in the relevant BIT";

Hamester, Award, paras. 123-124: "An investment will not be protected if it has been created in violation of national or international principles of good faith; by way of corruption, fraud, or deceitful conduct; or if its creation itself constitutes a misuse of the system of international investment protection under the ICSID Convention. It will also not be protected if it is made in violation of the host State's law (as elaborated, *e.g*. by the tribunal in *Phoenix*). These are general principles that exist independently of specific language to this effect in the Treaty"; and

SAUR International v. Argentine Republic (ICSID Case No. ARB/04/4), Decision on Jurisdiction and Liability, June 6, 2012 ("*SAUR*, Decision"), para. 306: "The requirement of not having engaged in a serious violation of the legal regime is a tacit condition, inherent in every BIT, since it cannot be understood under any circumstance that a State is offering the benefit of protection through investment arbitration when the investor, to reach that protection, has committed an unlawful action" [translated from the French original].

investment is received in the host State, or, in other words, at the time the investment is made.

330. This understanding is supported by the use of the term "*zugelassen sind*" in the German text of Article 1(1).[389] As Claimant explained, "zugelassen sind" is the passive participle of the verb "*zulassen*," meaning "to "accept" *or* "to admit."[390] Thus, the German text is, at the very least, consistent with the Tribunal's view that Article 1(1) refers to the admission of the investment, a well-known concept in international investment law. Indeed, the English text of the BIT also does not clearly differentiate between acceptance and admission. While Article 2 of the BIT is entitled "Promotion and Acceptance," the text of Article 2(1) refers instead to the "promot[ion]" and "admi[ssion]" of investments. In the German version of Article 2, the references to both "[a]cceptance" and "admi[ssion]" use forms of the verb "*zulassen*," the same term used for "accepted" in Article 1(1).

331. For these reasons, the Tribunal disagrees with Claimant's contentions that the phrase "accepted in accordance with the [host State's] laws and regulations," as used in Article 1(1), simply contemplates a potential regime for regulation of the admission of foreign investment. Rather, the Tribunal finds that the use of this phrase limits the scope of "investment" in the BIT to investments that were lawful under (*i.e.*, "in accordance with") the host State's laws and regulation *at the time the investments were made*.

332. The Tribunal is also of the view that, even absent the sort of explicit legality requirement that exists here, it would be still be appropriate to consider the legality of the investment. As other tribunals have recognized, there is an increasingly well-established international principle which makes international legal remedies unavailable with respect to illegal investments, at least when such illegality goes to the essence of the investment.[391]

[389] The BIT provides that the German, Filipino, and English texts are all authentic versions of the treaty, although in the case of conflict, the English text prevails.

[390] Rep., para. 591.

[391] *See, e.g.*, *EDF and others*, Award (CA-99), para. 308: "La condition de ne pas commettre de violation grave de l'ordre juridique est une condition tacite, propre à tout APRI, car en tout état de cause, il est incompréhensible qu'un État offre le bénéfice de la protection par un arbitrage d'investissement si l'investisseur, pour obtenir cette

333. In light of the foregoing analysis, the Tribunal concludes that Article 1(1) of the BIT requires that an investment comply with the laws of the host State at the time it is made in order to be accorded protection under the BIT. The Tribunal's assessment of Respondent's jurisdictional objections will therefore focus on the time of entry of Claimant's investment.

C. Respondent's Jurisdictional Objections

1. Introduction

334. Based on the foregoing conclusion regarding the requirement of legality of investments to found the Tribunal's jurisdiction *ratione materiae*, the Tribunal shall now proceed to analyze the Parties' arguments regarding Respondent's jurisdictional objections. Before doing so, the following issues have to be determined, namely

(a) which of Claimant's "investments" are to be considered for jurisdictional purposes;
(b) which are Respondent's jurisdictional objections.

335. Regarding issue (a), according to Claimant's most recent submission on the subject

> Fraport's investments in the NAIA 1PT 3 Project span a period of several years, from 1999 and ending in 2002-2203. A report prepared by PricewaterhouseCoopers ("PWC") and submitted with the Memorial set forth the investment made by Fraport per years. Fraport made several types of investments, as defined under Article 1 of the BIT. The BIT states that investments include "shares of stock and debentures of companies or interest in the property of such companies". Fraport's investments include (1) equity investments in PIATCO and in a "cascade" of Philippine companies that have ownership interests in PIATCO; (2) loans to PIATCO and the cascade companies; (3) payments to Takenaka and the Project lenders specifically for the construction of the Terminal (resulting, *inter alia*, in subrogation rights); and (4) services rendered. Fraport's investments also include Fraport's

protection, a agi à l'encontre du droit" (translated in Schreuer-Kriebaum-Binder I (ICSID 2), fn. 81 as "The condition of not committing a grave violation of the legal order is a tacit condition of any BIT, because in any event it is incomprehensible that a State would offer the benefit of protection through investment arbitration if the investor, in order to obtain such protection, has acted contrary to the law").

ANNEX 91

In the matter of an arbitration pursuant to the Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference, dated June 1981:

BETWEEN

HESHAM TALAAT M. AL-WARRAQ
(Claimant)

Vs.

THE REPUBLIC OF INDONESIA
(Respondent)

Final Award

Members of the Tribunal:

Mr. Bernardo M. Cremades
Mr. Michael Hwang S.C.
Mr. Fali S. Nariman S.C.

Representing the Claimant

Mr. George Burn

Ms. Louise Woods
Mr. Alexander Slade
Vinson & Elkins LLP

Representing the Respondent

Ms. Karen Mills
Mr. Ilman F. Rakhmat
KarimSyah Law Firm

Mr. Yoseph Suardi Sabda
on behalf of the Attorney General
of the Republic of Indonesia

Mr. Arthur Marriott, Q.C.
Ms. Mahnaz Malik

I. Parties.- 4
II. Appointment of the Tribunal.- 5
III. Procedural History.- 6
IV. Facts.- 18
A. Bank Century 18
B. Bank Indonesia 19
C. Bank Century's Bailout 21
D. Mr. Tantular's Connection with Bank Century 28
E. The Investigation and Prosecution of the Claimant 30
F. The Claimant's Trial in Absentia 39
V. The Parties' Position.- 51
1. The Claimant's Status as an Investor 51
A. The Respondent 52
(i) The Claimant did not hold any shares in Bank Century in his own right 52
(ii) The Tribunal has already ruled that the Claimant cannot seek damages for shares owned by FGAH 54
(iii) The OIC Agreement only protects investors that comply with Article 9 of the OIC Agreement 55
(iv) The "clean hands" doctrine renders the Claimant's claims inadmissible 56
B. The Claimant 57
(i) The Claimant clearly has an investment within the meaning of the OIC Agreement 57
(ii) The Claimant Qualifies as an Investor within the Meaning of the OIC Agreement 58
(iii) The Claimant's Investment is not entitled to the protections afforded by the OIC Agreement 60
2. The Claimant's Rights under Article 10 of the OIC Agreement 61
A. The Claimant's contentions 61
(i) The Respondent violated Article 14(2) of the ICCPR when it prejudged the Claimant's guilt 61
(ii) The Claimant's right to a fair trial under Article 14 of the ICCPR is further violated in light of the Respondent's nefarious motive for his prosecution and conviction 66
(iii) The Respondent deprived the Claimant of his basic rights in the manner in which it conducted its criminal investigation of the Claimant 73
(iv) The Respondent deprived the Claimant of his basic rights, when it failed properly to summon him to attend the criminal trial 77
(v) The Respondent's trial in absentia of the Claimant violated its own domestic law, and deprived the Claimant of his basic rights, inter alia, his right "to be tried in his presence and to defend himself in person or his counsel of his

own choosing" and to his "conviction and sentence to be reviewed by a higher tribunal according to law" 82
B. The Respondent 91
(i) The Claimant was properly made a subject of the Interpol Red Notice 91
(ii) The Claimant was properly served with investigation summonses, and was fully aware of the proceedings at all relevant times. 93
(iii) The Claimant was properly served with the court summons 94
(iv) By refusing to comply with the court summons, the Claimant was properly tried *in absentia* 96
3. The Claimants' Expropriation Claim 99
A. The Claimant 99
B. The Respondent 112
4. The Claimant's Fair and Equitable Treatment Claim 122
A. The Claimant 122
B. The Respondent 127
5. The Claimant's Protection and Security Claim Under Article 2 of the OIC 133
A. The Claimant 133
B. The Respondent 135
6. The Respondent's Counterclaim 137
A. The Respondent 137
1. The Tribunal has jurisdiction to decide on the Respondent's Counterclaim 137
(ii) Article 17 of the OIC Agreement likewise contemplates counterclaims .. 137
(iii) The UNCITRAL Rules, *which are* applicable to this arbitration, permit counterclaims 138
(iv) The Claimant's own legal representatives consented to counterclaims in the arbitration agreement 139
(v) Indonesia is not claiming the same damages as in the criminal judgment 140
(vi) The Counterclaim does not violate the rule of ne bis in idem 141
2. Indonesia is entitled to more than US$ 300 million in damages from the Claimant 142
(i) The actions of the Claimant, together with Mr. Rizvi, were the proximate cause of Bank Century's insolvency and the need for the bailout 142
B. The Claimant 146
(i) The OIC Agreement grants no right of recourse to the state; the right only belongs to the investor 146
(ii) The Respondent's counterclaim is outside the scope of the Claimant's consent to arbitration 147
(iii) The Respondent has already raised the complaint before the national courts and is therefore precluded from seeking relief through arbitration 148

(iv) The findings of the Indonesian court have no effect on the findings of the Tribunal 149
(v) No evidence that losses claimed were incurred as a result of the Claimant's actions 150
VI. The Decision.- 151
1. Preliminary Issues 152
2. The Claimant's Status as Investor within the Meaning of Article 1 of the OIC Agreement 153
3. The Meaning of "Basic Rights" under Article 10 of the OIC Agreement / Investment Guarantees 159
4. Claimant's Expropriation Claim 161
5. The Claimant's Fair and Equitable Treatment Claim 167
(i) Article 8 and the Most Favoured Nation Standard 167
(ii) The Fair and Equitable Treatment Standard and the ICCPR 173
6. The Claimant's Protection and Security Claim Under Article 2 of the OIC 196
7. Application of Article 9 of the OIC Agreement 198
8. Claimant's Claim for Damages 202
9. The Respondent's Counterclaim 204
10. Costs 210
11. Award 213

be prejudicial to public interest. Additionally, he should also refrain from even *trying to achieve gains through unlawful means*. It is plain that Article 9 requires the investor to observe an enhanced code of conduct throughout the life of his investment in the host state.

158. Moreover, it is well-established that investments that violate host state law are not afforded treaty protection and the Tribunal is said to lack jurisdiction over the subject matter (*ratione materiae*) of such a claim. If the Claimant does not comply with Article 9, the Tribunal lacks jurisdiction to adjudicate his claims (*ratione personae*).

159. The Respondent submits that the Claimant's breach of Article 9 is indisputable in this case. He perpetrated criminal offences in relation to his role in Bank Century, for which he was duly convicted by a competent court. The final and binding judgment of the Indonesian Court confirms that he acted in violation of Indonesian criminal laws. It goes without saying that this constituted highly immoral, as well as illegal, conduct and that the Claimant achieved gains through unlawful means.

160. The Respondent submits that the Court's finding of illegality, and indeed immorality, is binding on this Tribunal. The position under Indonesian law is a question of fact. The Court interprets and enforces the Indonesian criminal law applicable to the Claimant's conduct. According to the Respondent, in the present case the Tribunal is faced with a *finding* – not merely an allegation – of criminality, by the competent court. It must accept the Court's judgment as dispositive of the Claimant's criminality and immorality in this case.

(iv) The "clean hands" doctrine renders the Claimant's claims inadmissible

161. According to the Respondent, even if the Tribunal should otherwise find it has jurisdiction over the Claimant's claims the fact that he comes to this Tribunal with "unclean hands" renders his claims inadmissible. The Indonesian Court

convicted the Claimant of theft, corruption and money laundering. All these offences were perpetrated in relation to the alleged investment.

162. The Respondent argues that in the context of investment arbitration the doctrine of "clean hands" has also been affirmed as a general principle regarding claims tainted by corruption[43] and operates as a ground of inadmissibility[44].

163. Moreover, investment treaty tribunals, as upholders of public international law, should be viewed as having inherent or incidental jurisdiction to find that claims are inadmissible for abuses of process or other serious forms of misconduct.

164. The Respondent submits that in the present case, the integrity of the Tribunal requires that a convicted criminal and a fugitive from justice cannot be allowed to abuse the OIC Agreement by submitting a claim that is tainted by his own fraud and corruption. The "clean hands" doctrine operates as a procedural bar to his claims. This Tribunal should render them inadmissible.

B. The Claimant

(i) The Claimant clearly has an investment within the meaning of the OIC Agreement

165. The Claimant submits that the OIC Agreement Article[45] 1(4) defines capital as *"[a]ll assets ... owned by a contracting party to this Agreement or by its nationals, whether a natural person or a corporate body and present in the territories of another contracting party whether these were transferred to or earned in it ..."*. In turn, Article 1(5) of the OIC Agreement defines investment as the *"employment of capital in one of the permissible fields in the territories of a contracting party with a view to achieving a profitable return, or the transfer*

[43] RLA 27, Richard Kreindler, *Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine*, page 317.
[44] RLA 28, Yearbook of the International Law Commission, 1999, documents of the fifty-first session, paragraph 333.
[45] CLA01.

630. As a final point, the Tribunal notes that the standard of protection and security required by Article 3 of the UK-Indonesia BIT (applicable by virtue of the MFN clause in Article 8 of the OIC Agreement) is '*full* protection and security'. The Tribunal considers that full protection and security is not a higher standard than adequate protection and security. As the Tribunal has found there has been no violation of the adequate protection and security standard, its follows that nor has there been any violation of the full protection and security standard.

7. APPLICATION OF ARTICLE 9 OF THE OIC AGREEMENT

631. Unlike most BITs, the OIC Agreement contains an explicit provision that binds an investor to observe certain norms of conduct. That restriction is found in Article 9 which reads:

> *"The investor shall be bound by the laws and regulations in force in the host state and shall refrain from all acts that may disturb public order or morals or that may be prejudicial to the public interest. He is also to refrain from exercising restrictive practices and from trying to achieve gains through unlawful means."*

632. Article 9 prevents the investor from taking any actions that would disrupt the public interest. It appears from the evidence provided by the Parties during the present proceedings, that the systematic threat of the Claimant's actions in the Indonesian financial system have been prejudicial to the public interest. Article 9 also prevents the investor from *"trying to achieve gains through unlawful means"*.

633. The Tribunal has heard the testimonies of highly qualified experts and heard them critically analyze the actions of the Claimant and Mr. Rizvi in the investment banking sector.

634. The Tribunal refers to the Brattle Report[208], which identified six types of fraud in which the Claimant was engaged. These are as follows:

[208] R26.

635. Uneconomical *Swap – with his own entity:* According to the Report, in December 2004, Bank Century handed over substantial cash and valuable assets to Chinkara (now FGAH), an investment company owned by the Claimant. In exchange it received securities worth substantially less. The assets obtained by Bank Century were worth roughly US$70 million less than the assets delivered. Bank Indonesia identified these losses during its 2005 audit of Bank Century.

636. Use *of Bank Century Assets to Obtain Private Loan*: During 2004, Bank Century pledged to Chinkara/FGAH existing securities with face value of US$157.48 million. The pledged securities would have commanded a market value of around US$100 million at the time. The understanding was that Chinkara/FGAH would then use the pledged assets as collateral to obtain credit facilities on behalf of Bank Century. Rather than obtaining the full US$100 million facility, however, the Claimant caused Chinkara/FGAH to obtain a loan of only US$35 million. The Claimant and Mr. Rizvi used at least part of the remainder of the securities, as collateral for a loan for themselves.

637. Failure *to Obtain Loans and Return Collateral: Bank* Century pledged further securities with US$65 million face value to FGAH during 2005 and 2006, on the understanding that FGAH would use the assets as collateral to obtain credit facilities on its behalf. FGAH, controlled by the Claimant, never obtained new loan facilities. The Claimant did not return to Bank Century many of the securities pledged to FGAH.

638. Failure *to Honour the AMA*: Following Bank Indonesia's guidance at the end of 2005, Bank Century sought to sell over US $200 million of its "marketable" securities. Bank Century signed the AMA with Telltop, one of their investment vehicles. Under the AMA, Bank Century appointed Telltop to manage and sell various securities and then to deliver back to Bank Century the cash proceeds from any sale. Although FGAH/Telltop held various securities on behalf of Bank Century under the AMA, and although Telltop warranted to Bank Century that it would receive cash of at least face value by 2009 for these securities, it appears that Bank Century received little or none of such proceeds.

639. Replacing *Valuable Assets For Trash*: The Report also states that, the Claimant and Mr. Rizvi replaced on several occasions from 2005 onwards several of Bank Century's securities that would pay out cash in US dollars upon maturity, for others that would pay out in shares of various funds managed by a company called First Capital Management, also controlled by them. The Claimant and Mr. Rizvi made the "Assets for Trash" switches on their own initiative and without Bank Century's approval. Bank Century has derived no value whatsoever from shares in the funds managed by First Capital Management.

640. Failure *to Pay Interest on Securities Held for Bank Century*: Throughout the period 2005 to 2008, and resulting from asset pledges and other transactions, FGAH held various securities on behalf of Bank Century. Many of the securities were interest-bearing. But according to the Report, the Claimant never passed through the associated interest payments to Bank Century.

641. In addition to the above, the Claimant was the Vice President of the Board of Commissioners in Bank Century. As a member of the Board of Commissioners the Claimant had the obligation, among others, to supervise management policies, the running of management in general, with regard to both the company and the company's business, and give advice to the Board of Directors.

642. Article 108(2) of the Indonesian Company Law provides:

> *"Boards of Commissioners shall supervise management policies, the running of management in general, with regard to both the Company and the Company's business, and give advice to the Board of Directors."*

643. The Claimant admitted at the Final Hearing during his cross-examination[209] that he was not aware of his obligations as provided by Indonesian Company Law.

644. The Claimant's admission that he undertook the duties on the Board of Commissioners in a major bank without understanding their significance is clearly prejudicial to the public interest prohibited by Article 9 which refer to

[209]Transcript, 12 March, page 87: line 5 to page 89: line 25.

the investor's being *"bound by the laws and regulations in force in the host state"*.

645. The Tribunal concludes from the above that the Claimant failed to uphold the Indonesian laws and regulations. The Tribunal further considers that the Claimant's action, whether criminal or not, caused a liquidity issue to Bank Century, and his actions have been prejudicial to the public interest, in this case the Indonesian financial sector. The Claimant having breached the local laws and put the public interest at risk, he has deprived himself of the protection afforded by the OIC Agreement.

646. In this regard, the Tribunal is of the view that the doctrine of *"clean hands"* renders the Claimant's claim inadmissible. As Professor James Crawford observes, the "*clean hands*" principle has been invoked in the context of the admissibility of claims before international courts and tribunals. Also the Tribunal refers to the decision of Lord Mansfield in Holman v Johnson (1775) which states:

> *"No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says he has no right to be assisted"*.

647. As mentioned above, it is established the Claimant has breached Article 9 of the OIC Agreement by failing to uphold the Indonesian laws and regulations and in acting in a manner prejudicial to the public interest. The Claimant's actions were also prejudicial to the public interest. The Tribunal finds that the Claimant's conduct falls within the scope of application of the "clean hands" doctrine, and therefore cannot benefit from the protection afforded by the OIC Agreement.

648. The Tribunal concludes that, although it has been established that the Claimant did not receive fair and equitable treatment, as set out in paragraphs 555 to 603 above however, by virtue of Article 9 of the OIC Agreement the Claimant is prevented from pursuing his claim for fair and equitable treatment.

ANNEX 92

PCA CASE NO. 2012-2

IN THE MATTER OF AN ARBITRATION BEFORE A TRIBUNAL CONSTITUTED IN ACCORDANCE WITH THE UNCITRAL ARBITRATION RULES 1976 PURSUANT TO THE AGREEMENT BETWEEN THE GOVERNMENT OF CANADA AND THE GOVERNMENT OF THE REPUBLIC OF ECUADOR FOR THE PROMOTION AND RECIPROCAL PROTECTION OF INVESTMENTS, SIGNED 29 APRIL 1996

BETWEEN:-

COPPER MESA MINING CORPORATION

(Canada)

The Claimant

- and -

THE REPUBLIC OF ECUADOR

The Respondent

AWARD

---

15 March 2016

THE ARBITRATION TRIBUNAL:

Dr. Bernardo Cremades
Judge Bruno Simma
V.V. Veeder QC (President)

Administrative Secretary: Mr. Martin Doe

Annex 92

TABLE OF CONTENTS

TABLE OF ABBREVIATIONS	iii
DRAMATIS PERSONAE	vi
TABLE OF LEGAL MATERIALS	x
PART 1 – THE ARBITRATION	1.01
PART 2 – THE PRINCIPAL ISSUES	2.01
PART 3 – THE PRINCIPAL LEGAL TEXTS	3.01
PART 4 – THE PRINCIPAL FACTS – CHRONOLOGY	4.01
PART 5 – JURISDICTION AND ADMISSIBILITY	5.01
PART 6 – LIABILITY AND CAUSATION	6.01
PART 7 – COMPENSATION	7.01
PART 8 – INTEREST	8.01
PART 9 – LEGAL AND ARBITRATION COSTS	9.01
PART 10 – SUMMARY OF THE TRIBUNAL'S DECISIONS	10.01
PART 11 – THE OPERATIVE PART	11.01

Annex 92

E: Unclean Hands

5.36. According to the Respondent, the Claimant's claims are inadmissible *ratione materiae* as the Claimant approaches the Tribunal with "unclean hands" having failed to comply with applicable Ecuadorian and international laws. [61] This fourth jurisdictional objection relates only to the Junín concessions. In its post-hearing brief, the Respondent re-confirmed that its case on "unclean hands" only applies to the Claimant's claims concerning the Junín concessions and not to the Chaucha and Telimbela concessions.[62]

5.37. In brief, according to the Claimant, the Respondent is estopped from raising any case based on "unclean hands", because it failed at the material time to investigate any "unclean hands" committed by the Claimant. [63] The Claimant submits that no contemporary statement was ever made by the Respondent or its officials regarding any alleged violations of human rights by the Claimant prior to this arbitration.[64]

5.38. Further, the Claimant contends that the "scope of this doctrine is limited to cases where the claimant is seeking a remedy of an equitable nature but is involved in on-going conduct that is precisely similar in fact and law as the conduct it seeks to prevent".[65]

5.39. In brief, the Respondent contends that the Claimant's narrow interpretation of the doctrine of "unclean hands" would limit the doctrine to cases where equitable relief was sought, which, so the Respondent contends, is wrong as a matter of international

---

[61] Respondent's Counter-Memorial paras 361-376.

[62] Claimant's Post-Hearing Brief para 48; Transcript, Day 6, 1241:22-1243:7.

[63] Claimant's Post-Hearing Brief paras 52-53; *Wena Hotels Limited. v. Arab Republic of Egypt,* Award, 8 December 2000 (CLA-32) ["*Wena Hotels v Egypt*"] paras 111-117; *Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited ("Bapex") and Bangladesh Oil Gas and Mineral Corporation ("Petrobangla")*, ICSID Case Nos. ARB/10/11 and ARB/10/18, Decision on Jurisdiction, 19 August 2013 (CLA-88) ["*Niko Resources v Bangladesh*"] para 484.

[64] Claimant's Post-Hearing Brief paras 55-66, 125-126. According to the Claimant, the letter from the Ministry of Mining of June 2006 and the four letters of 2007 cited by the Respondent in its Rejoinder do not contain allegations of violations of human rights; nor do the Suspension, Nullification and Termination Resolutions do not do so either. The Claimant also contends that Ms. Ruiz testified that she did not make any written complaints regarding human rights violations by the Claimant to the relevant Ecuadorian authorities (Transcript, Day 4, 683:13-25), [redacted] The Claimant further contends that it has "met the test that even Professor Murphy argues is applicable for a company to 'respect' human rights. It did not knowingly become complicit in any use of force, [it] investigated the complaints of human rights abuses [and] took remedial actions to avoid any further confrontation by terminating both Falericorp and H&L after the incident became known to it." (Mr. Davis' testimony, Reply paras 93, 96-112; Transcript, Day 2, 530:13).

[65] Claimant's Reply para 307.

law.[66] The Respondent submits that the doctrine also applies in at least two other situations, namely, (i) "where the respondent's allegedly unlawful conduct is a consequence of, or has been prompted by, the claimant's own unlawful conduct"; and (ii) "where the claimant's claim arises out of actions or circumstances that are tainted by the claimant's own international illegality or conduct that is incompatible with international public policy".[67] The Respondent submits that the latter is the present situation; and that, in any case, it is well-established under international law that the scope of application of the relevant legal principle ("unclean hands", *nemo auditur, ex injuria non oritur*, etc.) is not limited to the making of the investment.[68]

5.40. In response, the Claimant contends that none of these doctrines can be used to expand the scope of the relevant inquiry to cover all aspects of the conduct of a claimant or its investment, as a matter of jurisdiction under international law.[69] According to the Claimant, however broad the doctrine, the Respondent is now estopped from denying the validity of the Junín concessions.[70]

5.41. The Claimant contends that not all actions relating to these concessions' acquisition or operation can be relevant. It would require a substantial non-compliance with the host State's laws and regulations, which the Claimant contends is not the present case and

---

[66] Respondent's Rejoinder paras 272-274.
[67] Respondent's Rejoinder paras 275-276.
[68] Respondent's Rejoinder paras 276-291. *Mr X, Buenos Aires v. Company A*, ICC Case No. 1110, Award, 1963; *SAUR International S.A. v. Argentina, ICSID Case No. ARB/04/4,* Decision on Jurisdiction and Liability (RLA-141) ["*SAUR International v Argentina*"]; *World Duty Free Company Limited v. Kenya*, ICSID Case No. ARB/00/7, Award, 25 September 2006 (RLA-37) ["*World Duty Free v Kenya*"]; *Plama Consortium Limited v. Republic of Bulgaria,* ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005 (RLA-82) ["*Plama v. Bulgaria*"]; Mr Cremades' Dissenting Opinion in *Fraport v Philippines I*; *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan,* ICSID Case No. ARB/05/16, Award, 29 July 2008 (CLA-23) ["*Rumeli v Kazakhstan*"]; International Law Commission, "Second Report on State Responsibility by James Crawfor, Special Rapporteur", 3 May-23 July 1999, A/CN.4/498/Add.2 (RLA-73) ["ILC Second Report"] paras 314-334; James Crawford, THE INTERNATIONAL LAW COMMISION'S ARTICLES ON STATE RESPONSIBILITY, INTRODUCTION, TEXT AND COMMENTARIES (Cambridge Univ. Press 2002) (RLA-103, RLA-142) ["Crawford ILC Commentary"] pp 160-162. See also Professor Murphy's Second Report paras 7, 13, 15-18, 20-21, and the cases there cited, including *Rumeli v Kazakhstan* para 340 and *SAUR v. Argentina* para 310.
[69] Claimant's Reply para 300; Claimant's Post-Hearing Brief paras 77-85; *Teinver SA et al. v. Argentine Republic,* ICSID Case No. ARB/09/1, Decision on Jurisdiction, 21 December 2012 (CLA-70) ["*Teinver v Argentina*"] para 330; *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States,* ICSID Case No. ARB (AF)/04/5 (NAFTA), Award (Redacted Version), 21 November 2007 (CLA-43) ["*ADM v. Mexico*"] paras 168-180; *Niko Resources v Bangladesh* para 484.
[70] Claimant's Memorial paras 287-291; *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary, ICSID Case No. ARB/03/16,* Award, 2 October 2006 (CLA-19) ["*ADC v Hungary*"] para 475; *Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007 (CLA-20) ["*Kardassopoulos v Georgia*"] para 194; Claimant's Reply para 329.

which the Respondent has not proven.[71] The Claimant further contends that the alleged tender "rigging" in the Respondent's original grant of the Junín concessions is based purely on speculation by the Respondent; and, furthermore, that the Respondent nonetheless decided at the time to grant the concessions, instead of cancelling the tender.[72]

5.42. The Respondent replies that it does not contend that "any breach" of the law is relevant and that "a trivial violation of the law that is unrelated to the merits would not be relevant". However, the Respondent contends that such is not the case here. The Respondent submits that the Claimant and its subsidiary, Ascendant Ecuador, "have committed flagrant breaches of Ecuadorian and international human rights law and international public policy" in circumstances that are not "unrelated to the merits of the claim", rather "the Claimant's claim arise directly out of the circumstances in which the breaches were committed and thus form the very subject matter of the dispute before this Tribunal".[73] Further, the Respondent contends that it is not estopped from challenging the Claimant's claims on the basis of illegality.[74]

F: The Tribunal's Analyses and Decisions

5.43. The Treaty was signed on 29 April 1996; and it came into force on 6 June 1997. The Claimant was a legal person organised under Canadian law on 5 May 2004. As further explained below, the Claimant owned, indirectly, the three project companies from July 2004 onwards, up to and including the Termination Resolutions (12 November 2008) in regard to the Junín concessions and also the events of June 2009 regarding "a cloud on title" in regard to the Chaucha concession (with the Telimbela concession). Accordingly, the Claimant made its alleged investments in Ecuador in July 2004 onwards, through its intermediary subsidiary (Ascendant Barbados), a legal person formed under Bajun law.

5.44. The Claimant's investments thus took place before the alleged measures taken by the Respondent in 2008 and 2009 allegedly in breach of the Treaty, allegedly causing legal harm to the Claimant. They also took place long before the Claimant's Notice of Dispute of 20 July 2010 and the commencement of this arbitration on 21 January 2011.

---

[71] Claimant's Reply para 333.
[72] Claimant's Memorial paras 293-302.
[73] Respondent's Rejoinder paras 296-297. See also Professor Murphy's Second Report para 44.
[74] Respondent's Rejoinder paras 303-310.

Further, the Tribunal accepts the Claimant's case that, *de jure*, the Claimant's transactions with Biotreat in 2009 did not deprive the Claimant of its investments before this arbitration's commencement. Hence, the Tribunal finds there was continuous legal ownership by the Claimant of its investments from 2004 up to 21 January 2011.

5.45. There remains an issue as to exactly when Ascendant Copper (Barbados) Corporation was formed in Barbados. The Respondent at first submitted that it was formed *after* the date of its "acquisition" by the Claimant in May 2004 and, hence, that such acquisition was a legal impossibility. The Respondent then pointed (in particular) to the Bajun company's certificate of incorporation dated 28 September 2004.[75] That jurisdictional objection was then modified following the Claimant's filing of the legal opinion of Ms Hyde Porchetta on Bajun company law.

5.46. The Tribunal notes first that this issue was first raised by the Respondent in this arbitration. In all its previous dealings with the Claimant, the Respondent had never sought to challenge the Claimant's indirect ownership and control of its Ecuadorian project companies. Moreover, it would be fair to describe the Respondent's modified objection as, at best, purely technical: there can be no suggestion of bad faith or manipulation by the Claimant of the corporate structures by which it held its investments in Ecuador. Yet, even a technical objection as to jurisdiction requires the Tribunal's consideration.

5.47. This issue of the Claimant's direct ownership of Ascendant Barbados, with the Claimant's indirect ownership (through the Bajun company) of the Ecuadorian project companies, is a long and complicated story. The details are not here important. Ultimately, it arrives, subject to the precise date in 2004 of the Claimant's completed acquisition of the Bajun company (itself immaterial to this case), at the same result: the Claimant indirectly owned and controlled the Ecuadorian project companies from at least the end of 2004 up to at least the dates of the measures in 2008 and 2009 impugned by the Claimant and, further, up to the date of this arbitration's commencement in January 2011, as a matter of Canadian, Bajun and Ecuadorian laws, as applicable to the Claimant, Ascendant Barbados and the project companies. The

[75] R-35.

Tribunal concludes such ownership continued, *de jure*, up to the date of this arbitration's commencement.

5.48. Accordingly, subject only to what follows, the Tribunal decides that the Claimant has met the jurisdictional requirements of the Treaty, as regards *ratione temporis*, *ratione personae* and *ratione materiae*. The Tribunal next addresses the distinct jurisdictional objections made the Respondent, under three separate headings: Article XII of the Treaty; Illegalities; and Unclean Hands.

5.49. *Article XIII:* The Tribunal considers that the Claimant has complied with the formal requirements of Article XIII(3) & (4)(c) of the Treaty, with the UNCITRAL Arbitration Rules, for commencing this arbitration against the Respondent. Moreover, the Tribunal does not understand the Respondent to contend otherwise.

5.50. The Tribunal considers that the Claimant is entitled, as a matter of jurisdiction and admissibility, to advance its own claims against the Respondent, in respect of its own investments in Ecuador pursuant to Article XIII(1) and (2) of the Treaty. The Tribunal also considers that is what the Claimant has done in this arbitration for its primary claims: it has not there sought to advance or espouse any claim in the name of any its subsidiaries; and it is only claiming compensation for harm which it has itself suffered and not any harm suffered by its subsidiaries. That was re-confirmed, unambiguously, by the Claimant in its post-hearing brief.[76] Although, in case its primary claim failed, the Claimant also advanced an alternative claim under Article XIII(12) of the Treaty, that alternative subsidiary claim was made only in response to the Respondent's jurisdictional objection to its primary claims. In the circumstances, this alternative claim is otiose and need not here be considered further by the Tribunal.

5.51. It is nonetheless correct that, during these arbitration proceedings, many of those subsidiaries' names have often been used by the Parties interchangeably with the successive names of the Claimant. Yet, that shorthand, made for ease of reference only to avoid unnecessary confusion, cannot change the formal status of the Claimant's pleaded claims against the Respondent under Article XIII(1) and (2) of the Treaty. In the Tribunal's view, these are all claims pleaded against the Respondent by the Claimant alone, in its own right and on its own behalf for its own harm to its own

[76] Claimant's Post-Hearing Brief para 49.

investments. For that purpose, as a matter of jurisdiction, the Claimant does not advance any claim on behalf of any of the project companies; and it does not need to place any reliance upon Article XIII(12) of the Treaty.

5.52. In this regard, the Tribunal notes, with approval, the important distinction drawn by the NAFTA tribunal in *UPS v Canada* between Articles 1116 and 1117 of NAFTA, on wording broadly similar to Article XIII(2) and Article XIII(12) of the Treaty. In that NAFTA award, that tribunal there decided:[77]

> "[34]. UPS argues that Canada's objection is not well taken. UPS asserts that it has properly brought its claims under article 1116, that it is entitled to claim for losses incurred by a wholly owned subsidiary, that this has been recognized by other NAFTA tribunals, and that it should be allowed the election between claims under article 1116 and article 1117. UPS joins issue with Canada respecting the decisions of other NAFTA tribunals, directly contradicting Canada's reading of NAFTA tribunal decisions in the *Mondev* case and in *Pope & Talbot Inc v Canada,* Award in Respect of Damages (31 May 2002). If this Tribunal does not accept its contentions respecting the construction of article 1116, UPS asks that it be permitted to modify its claim as a claim under article 1117.
>
> [35]. We agree with UPS that the claims here are properly brought under article 1116 and agree as well that the distinction between claiming under article 1116 or article 1117, in the context of this dispute at least, is an almost entirely formal one, without any significant implication for the substance of the claims or the rights of the parties. UPS is the sole owner of UPS Canada. As such, it is entitled to file a claim for its losses, including losses incurred by UPS Canada. If there were multiple owners and divided ownership shares for UPS Canada, the question of how much of UPS Canada's losses flow through to UPS – the question posed by Canada here – may have a very different purchase. As it is, there is no reason to ask that question in the instant proceeding. Whether the damage is directly to UPS or directly to UPS Canada and only indirectly to UPS

[77] *UPS v Canada* paras 34-35.

is irrelevant to our jurisdiction over these claims. That is clearly the same position taken by the tribunal in the *Pope & Talbot* proceeding ..."

The Tribunal considers it unnecessary to add a list of further decisions comprising, on this point, an effective *jurisprudence constante* to like effect.

5.53. In these circumstances, no question can arise here as to any requirement imposed by Articles XIII(1) and (2) of the Treaty upon the Claimant to obtain the consents or waivers of its subsidiaries in commencing this arbitration against the Respondent. In the Tribunal's view, the requirements of Article XII(12)(a) of the Treaty are simply not applicable to the Claimant's case under Articles XIII(1) and (2). It is therefore unnecessary to consider further the Respondent's submission that Article XII(12) operates as an improved or exclusive 'fork-in-the-road' provision.

5.54. *Illegalities:* As regards violations of Ecuadorian law, in the Tribunal's view, the wording of the Treaty is confined, at most, to a jurisdictional bar applying to the time when the Claimant first made its investment. That was in 2004. The wording of Article 1(g) of the Treaty is clear: the phrase "in accordance with the latter's laws" qualifies the earlier concept of the investment's ownership and control when made; and it does not extend to the subsequent operation, management or conduct of an investment.

5.55. Not only is any such wording significantly absent from Article 1(g), but it would take clear wording to produce such an important jurisdictional bar. It would effectively deprive an investor from exercising any arbitral remedy under the Treaty if the investor (or its agents or employees) ever committed a breach of the host State's laws during the life of its investment. That would be a stark and potentially harsh result, severely limiting the legal autonomy of the arbitration agreement between an investor and a host State resulting from Article XIII(4) of the Treaty.

5.56. The Respondent, of course, readily accepts that no jurisdictional bar could arise from a minor breach of the local law; and that concession was necessarily made. For example, an employee of the investor cycling to work in the dark without a rear light (in contravention of local traffic laws) should not deprive that investor forever of its arbitral remedy under the Treaty. However, the Respondent's broad interpretation, however tailored, would still leave a significant lack of clarity as to the exact dividing-line between minor and non-minor violations of the local law. It would also produce

much room for debate in activities that are almost inevitably litigious, such as mining. Where illegal conduct remains relevant to the merits of an investor's claim under the Treaty, without clear language, there is here no discernable object or purpose in elevating such a defence into a jurisdictional bar. The Tribunal notes that the same interpretation, on similar wording in the Canada-Venezuela BIT, was reached by the ICSID tribunal in *Vannessa Ventures v Venezuela.* It there decided that the jurisdictional significance of the requirement of legality was exhausted once the investment was made.[78]

5.57. Accordingly, with the Tribunal's interpretation based on the wording used in the Treaty, interpreted with its ordinary meaning under Article 31 of the Vienna Convention on the Law of Treaties, the Respondent's case is limited to the time of the Claimant's original investment in acquiring the Junín concessions. There seems to be, as already noted, no similar case advanced by the Respondent in regard to the Chaucha and Telimbela concessions.

5.58. As recited in Part 4 above, as to the facts, the Tribunal rejects the Respondent's submissions that the Claimant acquired the Junín concessions in violation of Ecuadorian law, assessed at the time when the Claimant made its initial investment in 2004. It also accepts the testimony of the Claimant's expert witness on Ecuadorian law, Dr Zumarraga, to the effect that the Junín concessions were validly granted by the Respondent.[79]

5.59. On all these matters, the Respondent bore the legal burden of proving its positive allegations. At most, it could only allege that something was possibly awry with the original tender and grant of the Junín concessions to Dr Bustamante in 2003. That allegation was not proven on the evidence adduced before this Tribunal. Moreover, there was no cogent evidence linking Dr Bustamante's actions in 2003, even assuming them to be somehow unlawful or collusive, with Ascendex, any other of the project companies or (still less) the Claimant in 2004. The Tribunal does not accept, on the evidence, that the acquisition of the Junín concessions was made otherwise than in

[78] *Vannessa Venures v Venezuela* para 167.
[79] See Dr Zamarraga's First Report of 13 June 2013 paras 54ff.

good faith and at arm's length by Ascendex; and it accepts the testimony of Mr Jurika to such effect.[80]

5.60. *Unclean Hands:* The Tribunal does not consider that the Claimant was guilty of any wrongdoing, whether it amounted to "unclean hands" or any other like impropriety, at the time when it acquired the Junín concessions in 2004. The Tribunal does not understand the Respondent's case on "unclean hands" to extend to the Chaucha and Telimbela concessions. Accordingly, the Respondent's case on unclean hands is limited to the alleged misconduct of the Claimant (by itself, its agents and employees) after its indirect acquisition of the Junín concessions in 2004.

5.61. The Respondent has adduced an impressive amount of expert testimony and materials relating to the legal doctrine of unclean hands under international law, including the obligations of foreign investors on human rights in the broadest sense.[81] The Tribunal has studied this testimony and materials, including (in particular) the expert testimony of Professor Murphy. Nevertheless, this is not the place to address these materials in detail, for two cumulative reasons.

5.62. First, the Tribunal considers that the Respondent's case on unclean hands is not a jurisdictional objection, but rather an objection to the admissibility of the Claimant's claims based upon its alleged post-acquisition misconduct. In regard to the latter, if correct, the Tribunal would have jurisdiction, but it could not exercise that jurisdiction in favour of the Claimant's claim. An objection as to admissibility necessarily assumes that a tribunal has jurisdiction.

5.63. Second, the Respondent's case involves grave allegations against the Claimant of violations of international law, particularly during the post-acquisition period from 2005 to 2007. All, or almost all, of such alleged conduct took place in Ecuador, openly and in view of the Respondent's governmental authorities both in the Junín area and in Quito. Yet, as regards international law, international public policy and human rights, not a single complaint was made by the Respondent against the Claimant at the time. Such a complaint surfaced for the first time after the commencement of this arbitration.

---

[80] Jurika WS 1 paras 31-37.

[81] The Tribunal's reference to "human rights" includes civil and political rights and economic, social and cultural rights.

5.64. In these circumstances, the Tribunal considers that it is far too late for the Respondent to raise such objections to the Tribunal's exercise of jurisdiction in this arbitration. Given the Respondent's obligation of good faith under the Treaty in regard to arbitration, the Tribunal decides that the Respondent is precluded from raising this objection as to admissibility. (This decision does not apply to other wrongdoings under Ecuadorian law by the Claimant and its agents).

5.65. The Tribunal has decided to join what remains of the Respondent's case on admissibility to the merits of the Claimant's claims in regard the Junín concessions. As will appear below, the Tribunal there prefers to take into account the Claimant's case not in the form of the doctrine of unclean hands as such, but rather under analogous doctrines of causation and contributory fault applying to the merits of the Claimant's claims arising from events subsequent to the acquisition of its investment. That result, based on the Respondent's case on the merits, strikes the Tribunal as more legally appropriate to this case than an outright dismissal of the Claimant's claims (in regard to the Junín concessions) on the ground of inadmissibility.

5.66. The Tribunal also notes that this is is not a case where an essential part of the Claimant's claim is necessarily founded upon its own illegal acts or omissions, regardless of any defence by the Respondent. In other words, this case is materially different from cases such as *World Duty Free v Kenya* or (more recently) *Al-Warraq v Indonesia* where the claim, as a cause of action, was directly based from the beginning upon the claimant's own illegal act.[82]

5.67. *Summary:* For these several reasons, the Tribunal dismisses the Respondent's objections to the Tribunal's jurisdiction and (as regards the Junín concessions) the admissibility of the Claimant's claims. Accordingly, the Tribunal has here also decided, in substance, the principal issues listed in Part 2 above, under Paragraphs 2.3 to 2.10.

[82] *World Duty Free v Kenya*; *Hesham Talaat M. Al-Warraq v. Republic of Indonesia*, UNCITRAL, Final Award, 15 December 2014 ["*Al-Warraq v Indonesia*"] (where the tribunal awarded no damages).

ANNEX 93

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

WASHINGTON, D.C.

IN THE MATTER OF AN ARBITRATION UNDER THE ICSID ADDITIONAL FACILITY RULES

between

RUSORO MINING LIMITED

(Claimant)

and

THE BOLIVARIAN REPUBLIC OF VENEZUELA

(Respondent)

ICSID Case No. ARB(AF)/12/5

AWARD

Members of the Tribunal

Prof. Juan Fernández-Armesto, Chairman of the Tribunal

Prof. Francisco Orrego Vicuña, Arbitrator

Judge Bruno Simma, Arbitrator

Secretary of the Tribunal

Ms. Alicia Martín Blanco

Date of dispatch to the Parties: 22 August 2016

Annex 93

REPRESENTATION OF THE PARTIES

Representing Rusoro Mining Ltd.:

Mr. Nigel Blackaby
Mr. Noah Rubins
Mr. Alex Wilbraham
Mr. Jean-Paul Dechamps
Mr. Ben Love
Mr. Robert Kirkness
Mr. Gustavo Topalian
Mr. Ricardo Chirinos
Mr. Juan Pomés
Freshfields Bruckhaus Deringer US LLP
700 13th Street, NW
10th Floor
Washington, DC 20005-3960
United States of America

Ms. Alejandra Figueiras
Mr. Guillermo Iribarren
Figueiras Abogados
Edificio Cavendes
Piso 8, Oficina 806
Los Palos Grandes
Caracas, 1060
Venezuela

Mr. Andrés Mezgravis
Ms. Militza Santana
Mezgravis & Asociados
Avenida Venezuela
Torre Oxal, Piso 5, Oficina 5-A
Urbanización El Rosal
Caracas, 1060
Venezuela

Representing the Bolivarian Republic of Venezuela:

Dr. Reinaldo Enrique Muñoz Pedroza
Procurador General de la República
Dr. Felipe Daruiz
Coordinador de Juicios Internacionales
Procuraduría General de la República
Bolivariana de Venezuela
Av. Los Ilustres, c/c calle Francisco Lazo
Marti, Urb. Santa Mónica
Caracas
Venezuela

Mr. Derek Smith
Mr. Alberto Wray
Mr. Thomas Ayres
Mr. Diego Cadena
Ms. Analía González
Mr. Christopher Hart
Ms. Christina Beharry
Ms. Erin Argueta
Mr. Ofilio Mayorga
Ms. Melinda Kuritzky
Mr. José Rebolledo
Foley Hoag LLP
1717 K Street, NW
Suite 1200
Washington, DC. 20006
United States of America

TABLE OF CONTENTS

I. INTRODUCTION 15

II. THE PARTIES TO THE ARBITRATION 17

1. The Claimant – Rusoro Mining Limited 17

2. The Respondent – The Bolivarian Republic of Venezuela 18

III. PROCEDURAL HISTORY 20

IV. FACTS 33

1. Background: From Grupo Agapov to Rusoro 33

2. Government policy regarding mining 36

3. Rusoro acquires Cradock's assets 37

4. Rusoro acquires Mena's assets 39

5. Rusoro acquires Gold Fields' Venezuelan assets 39

6. Rusoro acquires Hecla's assets 41

7. The Venrus Joint Venture 42

8. The Venezuelan gold and exchange control regulations 43

9. The Nationalization Decree 47

10. The first negotiation period 48

11. The second negotiation period 49

12. The taking of control of Rusoro's assets 50

V. RELIEF SOUGHT BY THE PARTIES 51

1. The Parties' requests in brief 51

2. Claimant's request for relief in full 52

3. The Respondent's Request for Relief 53

VI. JURISDICTIONAL OBJECTIONS 54

VI.1. THE FIRST JURISDICTIONAL OBJECTION: THE DISPUTE IS TIME-BARRED 54

1. Respondent's position 55

2. Claimant's position 56

3. The Tribunal's decision 57

VI.2. THE SECOND JURISDICTIONAL OBJECTION: NO JURISDICTION BEFORE THE ICSID ADDITIONAL FACILITY 64

1. Respondent's position 65

2. Claimant's position 66
3. The Tribunal's decision 66
VI.3. THE THIRD JURISDICTIONAL OBJECTION: ILLEGALITY IN THE OWNERSHIP OF MINING ASSETS 71
1. The Respondent's position 71
2. The Claimant's position 73
3. The Tribunal's decision 74

VII. RUSORO'S CLAIMS 86
VII.1. PRELIMINARY ISSUES 86
1. Legal framework 86
2. Claimant's good faith 86
VII.2. EXPROPRIATION 88
1. Claimant's position 88
2. Respondent's position 89
3. The Tribunal's decision 90
3.1 Direct expropriation 91
3.2 Requirements established in art. VII.1 92
3.3 Creeping expropriation 98
VII.3. ANCILLARY CLAIMS 103
1. Claimant's position 103
2. Respondent's position 106
3. The Tribunal's decision 111
3.1 Proven facts 111
3.2 Preliminary defences 112
3.3 FET 116
3.4 FPS 122
3.5 Discrimination 123
3.6 Free transfer of funds 125
3.7 Conclusion 130
VII.4. VENEZUELA'S COUNTER-CLAIM 130
1. Respondent's counter-claim 131
2. Claimant's position 133
3. The Tribunal's decision 134

VIII. QUANTUM 138

VIII.1. COMPENSATION FOR EXPROPRIATION 140
1. The price of gold and the value of gold mining companies 142
2. Rusoro's investments in Venezuela 144
3. Rusoro's investment adjusted 149
4. The book value of Rusoro's investment 150
5. Rusoro's market capitalization 154
6. The valuation of Rusoro proposed by Claimant's expert..... 156
7. The Tribunal's decision 164
VIII.2. DAMAGES FOR BREACH OF TREATY 174
1. The experts' calculation..... 174
2. The Tribunal's decision 176
VIII.3. INTEREST 179
1. Claimant's position 179
2. Respondent's position 180
3. The Tribunal's decision 180
VIII.4. TAXES 182
1. The Parties' position 182
2. The Tribunal's decision 183

IX. COSTS..... 185
1. Claimant's position 185
2. Respondent's position 186
3. The Tribunal's decision 186

X. SUMMARY 190
1. Jurisdiction 191
2. Liability 193
3. Quantum 195

XI. DECISION..... 197

foreign currency against VEF, at a market exchange rate which was consistently higher than the Official Exchange Rate.

485. This dual system came to a halt on 17 May 2010, when the Ley Cambiaria was amended, making the use of the Swap Market illegal[402].

B. The 2010 Measures

486. In July 2010 the BCV[403] amended the 2009 Measures, liberalized the gold sale regime and reduced the distinction between publicly and privately owned gold producers.

487. The purpose of the July 2010 BCV Resolution[404] was to regulate the sale of gold by public and private producers operating in Venezuela. It created a unified regime for public and private producers:

- 50% of production had to be sold to the BCV, at a price expressed in VEF and converted at the Official Exchange Rate; and

- the remaining 50% could be exported, subject to authorization from the BCV.

488. Simultaneously the Convenio Cambiario No. 12 (originally issued in 2009) was amended, partially liberalizing the exchange control regime of gold producers, and unifying the different regimes applicable to private and to public gold producers (except small scale producers). All gold producers were now required to sell 50% of their foreign currency income from export operations to the BCV at the Official Exchange Rate, and were authorized to keep the other 50% in foreign accounts and to use the funds for payments in foreign currency outside the Bolivarian Republic[405].

3.2 PRELIMINARY DEFENCES

489. Venezuela has filed two preliminary defences: that Rusoro's hands are dirty (**A.**) and that the exception benefitting prudential regulation, provided for in Art. X of the BIT, is to be applied (**B.**).

490. Both defences are without merit.

A. Dirty hands

491. The Republic argues that Rusoro may not seek relief for regulations adopted by Venezuela to prevent Rusoro's illegal sales to domestic buyers, in order to permit buyers to illegally export gold from Venezuela (i), and that the purpose of the 2009 and 2010 Measures was to curb such illicit transactions (ii).

[402] Doc. C-200 – Ley de Reforma Cambiaria.
[403] See para. 157 *supra*.
[404] Doc. C-203 – July 2010 BCV Resolution and Amendment to Convenio Cambiario No.12.
[405] Doc. C-203 – July 2010 BCV Resolution and Amendment to Convenio Cambiario No.12.

492. (i) The problem with Venezuela's first contention is not the principle (it is undisputed that claimants with "dirty hands" have no standing in investment arbitration[406]), but the total lack of evidence.

493. Venezuela submits that Rusoro knowingly furthered the illegal export of gold

- By selling to domestic clients, certified by the Ministry of Mines, but not included in the BCV's list of registered gold exporters[407],

- And by incorrectly making out waybills in favour of a security transport company (and not the final buyer of the gold)[408].

494. In accordance with Art. 88 Mining Law the Ministry of Mines is entrusted with the following duties with regard to mining activities and companies:

> "El Ejecutivo Nacional, por órgano del Ministerio de Energía y Minas, vigilará, fiscalizará y controlará las actividades de toda persona natural o jurídica, pública o privada, en las materias sometidas a las disposiciones de esta Ley […]".

The Ministry is also empowered to impose sanctions on persons who breach the mining regulations[409].

495. Using the powers conferred by law, the Ministry of Mines supervised (or should have supervised) the activities carried out by Rusoro, Venezuela's largest private gold producer. There is no evidence in the file that, as a consequence of such supervisory activities, the Ministry ever challenged the legality of Rusoro's conduct, filed a complaint against Rusoro or imposed any sanction. The Bolivarian Republic is now raising, for the first time and *ex post facto*, previously unidentified violations of its own laws to challenge Rusoro's claim.

496. To prove this allegation, the Republic is not marshalling any direct evidence, but only what Respondent itself defines as "indirect evidence"[410]. The Republic avers that this evidence "demonstrates that Rusoro systematically evaded mining regulations that required it to document with specificity each and every gold transaction"[411].

497. The Tribunal is unconvinced.

498. If Rusoro's conduct had indeed been as egregiously illicit as now claimed, the Ministry of Mines must have been aware of the situation and must have adopted the corresponding measures. However, there is no evidence that this actually took place. In the Tribunal's opinion, the "indirect evidence" marshalled by the

[406] *Flughafen Zürich* at 132; *Phoenix* at 101; *Saur* at 308.
[407] R II at 71.
[408] R II at 77.
[409] See Doc. RLA-49 – Mining Law, Art. 109 *et seq*.
[410] R II at 82.
[411] R II at 81.

Bolivarian Republic is blatantly insufficient to prove Venezuela's allegation, that Rusoro knowingly colluded with domestic purchasers to foster illicit gold exports.

499. (ii) The second leg of Rusoro's contention is that the 2009 and 2010 Measures were adopted to combat illegal exports.

500. Again, the evidentiary underpinning of this allegation is inexistent: the Measures themselves fail to state (in their preambles or otherwise) that their purpose was to combat illegal gold exports; and the Republic has not drawn the Tribunal's attention to any contemporary memorandum, report or public statement confirming the Republic's averment.

501. The very content of the 2009 and 2010 Measures disproves the Republic's contention: If Venezuela's true aim had been to limit illegal exports, the natural course of action would have been to reinforce the supervisory capacity of the Ministry of Mines and of the BCV, to intensify reporting requirements and to increase sanctions for improper behaviour. None of these measures was adopted. The fundamental innovation introduced by the 2009 and 2010 Measures was to put producers under a compulsory obligation to sell a percentage of their production to the BCV, at a price in VEF converted at the Official Exchange Rate – a measure which permitted the BCV to increase its holdings of gold paying a price which was lower than the price which would have accrued if the market exchange rate had been applied.

B. Art. X of the BIT

502. Art. X of the BIT provides as follows:

> "Investment in Financial Services
>
> Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or maintaining reasonable measures for prudential reasons, such as:
>
> (a) The protection of investors, depositors, financial market participants, policy-holders, policy-claimants, or persons to whom a fiduciary duty is owed by a financial institution;
>
> (b) The maintenance of the safety, soundness, integrity or financial responsibility of financial institutions; and
>
> (c) Ensuring the integrity and stability of a Contracting Party's financial system".

503. Art. XII(13) adds the following possibility:

> "Where and investor submits a claim to arbitration and the disputing Contracting Party alleges as a defense that the measure in question is
>
> a reasonable measure for prudential reasons of the kind referred to in Article X, or

ANNEX 94

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

BLUSUN S.A., JEAN-PIERRE LECORCIER AND MICHAEL STEIN
Claimants

v.

ITALIAN REPUBLIC
Respondent

ICSID Case No. ARB/14/3

AWARD

Members of the Tribunal
Judge James Crawford AC, President
Dr. Stanimir Alexandrov, Arbitrator
Professor Pierre-Marie Dupuy, Arbitrator

Secretary of the Tribunal
Mr. Francisco Abriani

Date of dispatch to the Parties: 27 December 2016

Annex 94

REPRESENTATION OF THE PARTIES

Representing Blusun S.A., Jean-Pierre Lecorcier and Michael Stein:

Mr. Barton Legum
Ms. Anne-Sophie Dufêtre
Mr. Niccolò Castagno
Dentons Europe LLP
5, boulevard Malesherbes
75008 Paris
France

Representing the Italian Republic:

Avv. Gabriella Palmieri
Avv. Sergio Fiorentino
Avv. Paolo Grasso
Avv. Giacomo Aiello
Prof. Dr. Maria Chiara Malaguti
Avv. Giuseppe Stuppia
Avvocatura dello Stato
Via dei Portoghesi, 12
00186 Rome
Italy

ABBREVIATIONS

AEEG	Authority for the Electric Energy and Gas
AU	*Autorizzazione Unica* (Single Authorisation)
DIA	*Denuncia di Inizio Attività* (Declaration of Initiation of Activity)
EIA	Environmental Impact Assessment
ECT	Energy Charter Treaty
EPC	Engineering, Procurement and Construction
EU	European Union
FET	Fair and Equitable Treatment
Fifth Energy Account	*Decreto Ministeriale 5 luglio 2012* (Ministerial Decree of 5 July 2012)
First Renewables Directive	European Directive 2001/77/EC
FIT	Feed-in Tariffs
Fourth Energy Account	*Decreto Ministeriale 5 maggio 2011* (Ministerial Decree of 5 May 2011)
GSE	*Gestore dei Servizi Energetici* (Manager of Electricity Services)
ICSID	International Centre for Settlement of Investment Disputes

NAFTA	North American Free Trade Agreement
PV	Photovoltaic
Romani Decree	*Decreto Legislativo 3 marzo 2011, n. 28: Attuazione della direttiva 2009/28/CE sulla promozione dell'uso dell'energia da fonti rinnovabili,recante modifi ca e successiva abrogazione delle direttive 2001/77/CE e 2003/30/CE.* (Legislative Decree of 3 March 2011, No. 28: 'Implementation of Directive 2009/28/EC on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC')
Second Energy Account	*Decreto Ministeriale 19 febbraio 2007* (Ministerial Decree of 19 February 2007)
SIB	Società Interconnessioni Brindisi S.R.L.
SPV	Special Purpose Vehicle
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
Third Energy Account	*Decreto Ministeriale 6 agosto 2010* (Ministerial Decree of 6 August 2010)
VCLT	Vienna Convention on the Law of Treaties
WS1	First Witness Statement
WS2	Second Witness Statement

TABLE OF CONTENTS

I. THE PARTIES 1
II. PROCEDURAL HISTORY 1
III. RELIEF SOUGHT BY THE PARTIES 14
1. The Claimants' request for relief 14
2. The Respondent's request for relief 15
IV. FACTUAL BACKGROUND 16
A. The 120 MW project 16
B. The Claimants' involvement in the Project 17
C. The Italian legislative and regulatory framework for solar projects as of November 2009 19
1. Construction permits 20
2. Permits to connect to the national transmission and local distribution grids 23
3. Tariffs 24
D. The Claimants' investments 26
1. The two substations 26
2. The local companies and the land 27
3. The local grid 28
4. The construction permits 29
E. The Constitutional Court decision of 2010 and the regulations adopted thereafter 29
F. Eskosol's EPC contract with Siemens and contacts with potential investors 31
G. The Romani Decree 32
H. The Fourth Energy Account 34
I. The GSE's lists 35
J. The project to build 27 plants 36
K. The municipal stop-work order 37
L. Law Decree 1 of 24 January 2012 39
M. Abandonment of the Project by the Claimants 41
V. POSITIONS OF THE PARTIES ON JURISDICTION AND ADMISSIBILITY 41
A. The Respondent's position 41
1. The Project was not an investment under the ICSID Convention and the ECT 42
(a) The ICSID Convention 42

Annex 94

(b) The ECT 43
2. The Project is not a protected investment under the ECT 44
3. Admissibility 46
B. The Claimants' position 46
1. The Claimants' investments under the ECT and the ICSID Convention 47
(a) The ECT 47
(b) The ICSID Convention 48
2. Good faith and the Claimants' investments 49
3. The clean hands doctrine 50
VI. POSITIONS OF THE PARTIES ON LIABILITY 51
A. The Claimants' position 51
1. The alleged breach of Article 10(1) of the ECT 51
(a) Italy's alleged failure to encourage and create stable, equitable, favorable and transparent conditions 51
(b) Italy's alleged breach of the fair and equitable treatment standard 53
2. The alleged breach of Article 13 of the ECT 55
B. The Respondent's position 56
1. The alleged breach of Article 10(1) of the ECT 56
(a) Italy's alleged failure to encourage and create stable, equitable, favorable and transparent conditions 56
(b) Italy's alleged breach of the fair and equitable treatment standard 57
2. The alleged breach of Article 13 of the ECT 63
VII. THE POSITIONS OF THE PARTIES ON QUANTUM 63
A. The Claimants' position 63
B. The Respondent's position 66
VIII. THE EC'S AMICUS CURIAE BRIEF AND THE POSITIONS OF THE PARTIES ON *INTER SE* APPLICATION OF THE ECT 69
A. The European Commission's Amicus Brief 69
1. The legal order of the EU and investment protection under EU law 70
2. The lack of *inter se* obligations under the ECT between Member States 73
3. The limited scope of *inter se* obligations between Member States 74
4. Application of Chapter III and Article 26 ECT under VCLT Article 30 75
B. The Respondent's position 76

1. Interpretation of the ECT under International Law 78
2. The evolution of EU treaties and their impact on the ECT 80
C. The Claimants' position 82
1. The ECT creates *inter se* obligations among all Contracting Parties 83
2. Transfer of competence does not protect EU Member States from responsibility under the ECT 84
3. The inapplicability of the *lex posterior* principle 85
IX. ISSUES OF JURISDICTION AND ADMISSIBILITY: THE TRIBUNAL'S CONCLUSIONS 86
A. Issues originally raised by the Respondent 86
1. The Claimants' Investment 86
2. 'Clean hands'/Good faith 92
B. EU Law and the *inter se* issue 94
X. THE MERITS: THE TRIBUNAL'S APPRECIATION 107
A. The Legal Instability Claim: ECT Article 10(1) 107
1. The interpretation of Article 10(1) 108
2. The legal instability claim 113
(a) Decision 119 of 26 March 2010 of the Constitutional Court 114
(b) The Romani Decree and the Fourth Energy Account 117
(c) The publication of the GSE lists of large plants 122
(d) The Brindisi stop-work order 125
B. Breach of the Fair and Equitable Treatment Standard: ECT Article 10(1), second sentence (legitimate expectations) 130
C. The Issue of Causation in relation to ECT Article 10(1) 133
1. The status of the DIAs and the Project as a unified scheme 135
2. The failure to obtain project financing 137
3. The evidence underlying the 'legal stability' claim 138
4. Conclusion on Causation 141
5. Overall Conclusions on ECT Article 10(1) 142
D. The Expropriation Claim: ECT Article 13 142
XI. COSTS 148

one were to apply the *Salini* criteria as interpreted in subsequent decisions,[502] the Claimants clearly had an investment for ICSID purposes.

2. 'Clean hands'/Good faith

272. The Respondent also argues for the inadmissibility of the claim on the ground that the Claimants lacked 'clean hands' or were acting in bad faith in pursuing the Project.

273. This issue has already been substantially treated under the rubric of the legality of the Project. No evidence has been tendered that Eskosol was guilty of 'deceiving the Energy Services Operator on the actual size and nominal power of the photovoltaic plant', a key basis for the Court of Criminal Cassation decision of 5 February 2014;[503] and in the absence of any such evidence, the 'clean hands' doctrine has nothing to operate on. It is therefore unnecessary for the Tribunal to decide whether there exists a generic 'clean hands' defence or ground of inadmissibility in international investment law.[504]

274. Under the 'clean hands' rubric, the Respondent also argues that the Project was not treaty-protected because of the Claimants' failure to conduct an EIA:

> as for the issue of the obligation of the EIA, the abusive conduct by the Claimants appears contrary to the obligation of good faith not only because it is inconsistent with the *rationale* of domestic law, but also because it is in conflict ... with international law, and in particular with [Article 19 of] the ECT...[505]

275. Article 19 of the ECT provides, in so far as relevant:

---

[502] *Salini Costruttori SPA and Italstrade SPA v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, Exhibit CL-38, paras. 50–58. The *Salini* test was applied, e.g., in *LESI-Dipenta v Algeria*, ICSID Case No. ARB/03/08, Award, 10 January 2005, para. II.13(iv); *Bayindir v. Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, Exhibit RL-35, paras. 131–137; *Victor Pey Casado v. Chile*, ICSID Case No. ARB/98/2, Award, 8 May 2008, para. 233; *Electrabel v. Hungary*, Exhibit CL-10, para. 5.43.

[503] *Cassazione penale* 05/02/2014, No. 11981, 5 February 2014, Exhibit RL-36.

[504] See J. Crawford, Second Report on State Responsibility, *ILC Ybk* 1999 vol II(1) paras. 330-4.

[505] Rejoinder, para. 79.

> ... each Contracting Party shall strive to minimize in an economically efficient manner harmful Environmental Impacts occurring either within or outside its Area from all operations within the Energy Cycle in its Area... Contracting Parties shall accordingly:
>
> (i) promote the transparent assessment at an early stage and prior to decision, and subsequent monitoring, of Environmental Impacts of environmentally significant energy investment projects[.]

The Claimants object that claims based on Article 19, contained in Part IV of the ECT ('Miscellaneous Provisions'), are beyond the scope of the Tribunal's jurisdiction, which is confined to Part III ('Investment Promotion and Protection'). But the Respondent does not make any affirmative claim or counterclaim based on Article 19, and it is at least arguable that a tribunal constituted under Part III could take into account conduct clearly in breach of other provisions of the ECT insofar as it is relevant to the admissibility of a claim. The key point, however, is that Article 19 operates not at the level of individual investors but at the interstate level, as is equally the case with the developing general international law of EIAs.[506] In so far as there is any requirement for private parties to carry out an EIA for any proposed project, this can only arise under the relevant national law. This is made clear by an Understanding of the Contracting Parties appended to Article 19(1)(i):

> It is for each Contracting Party to decide the extent to which the assessment and monitoring of Environmental Impacts should be subject to legal requirements, the authorities competent to take decisions in relation to such requirements, and the appropriate procedures to be followed.

In accordance with Article 19(1)(i), it is for the law of the host state to determine the existence and extent of EIA requirements binding on private parties, and it is not enough to appeal to 'the *rationale* of domestic law' in the absence of specific legal requirements.

276. Under Italian law there is no EIA procedure required for small solar power plants. Large solar plants are subject to a screening process as a result of which an EIA may

---

[506] *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, I.C.J. Reports 2010 (I), Exhibit CL-127, pp. 55-56, para. 101. For more recent discussion, see *Construction of a Road in Costa Rica Along the San Juan River (Nicaragua v. Costa Rica)*, Judgment of 16 December 2015, paras. 101, 104.

be imposed. No screening occurred (or seems to have been required) when the project companies obtained approval for the individual plants which would make up the Puglia Project.[507] At most, there may have been some uncertainty as to the applicability of the screening procedure given the 'aggregative' character of the Project. But by the time Eskosol acquired the twelve development companies, the time for an EIA was, by parity of reasoning from the 2012 decision of the Puglia Court, past. At the level of the admissibility of claims, it is too late for Italy now to assert that an EIA was 'really' required.

B. EU Law and the *inter se* issue

(a) Admissibility of the *inter se* argument

277. Claimants continue to protest[508] that the Tribunal should not admit this argument, introduced late by the EC in its request to file a non-disputing party submission, and subsequently adopted by the Respondent (paragraphs 23-31 above). But as the Tribunal has already ruled, it has an obligation to determine its jurisdiction, and the rules of EU law relevant in the matter are part of the applicable law for this Tribunal. The procedural barrier arising from the terms of ICSID Rule 37(2) has been effectively overcome by the Respondent's belated endorsement of the EC's position, and any additional costs imposed on the Claimants by this delay on the part of the Respondent can be compensated for in the Tribunal's final award on costs. Accordingly, the *inter se* argument is admissible.

(b) The applicable law

278. The Parties in effect agree that the applicable law in determining this issue is international law, and specifically the relevant provisions of the VCLT. The Tribunal agrees, but would observe that this does not exclude any relevant rule of EU law, which would fall to be applied either as part of international law or as part of the law of Italy.

---

[507] See the account of Italian law in Claimants' Reply, para. 129, not denied in the Rejoinder.

[508] Claimants' Observations, paras. 7-9.

ANNEX 95

PCA Case No. 2016-39

IN THE MATTER OF AN ARBITRATION UNDER THE AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND THE GOVERNMENT OF THE REPUBLIC OF BOLIVIA FOR THE PROMOTION AND PROTECTION OF INVESTMENTS, SIGNED ON 24 MAY 1988

- and -

THE UNCITRAL ARBITRATION RULES 2010

- between -

GLENCORE FINANCE (BERMUDA) LIMITED

(the "Claimant")

- and -

THE PLURINATIONAL STATE OF BOLIVIA

(the "Respondent", and together with the Claimant, the "Parties")

PROCEDURAL ORDER NO. 2: DECISION ON BIFURCATION

Tribunal

Prof. Ricardo Ramírez Hernández (Presiding Arbitrator)
Prof. John Y. Gotanda
Prof. Philippe Sands

Registry

Permanent Court of Arbitration

31 January 2018

TABLE OF CONTENTS

I. PROCEDURAL BACKGROUND 3
II. RESPONDENT'S OBJECTIONS TO JURISDICTION AND ADMISSIBILITY 4
A. CLAIMANT'S POSITION 4
1. Consent to arbitration 4
2. Jurisdiction *ratione temporis* 5
3. The Claimant's investments and their legality 5
4. Abuse of process 5
5. The Claimant's Swiss ownership 6
B. RESPONDENT'S POSITION 6
1. The Claimant's alleged investments 6
2. The legality of the Claimant's alleged investments 7
3. Abuse of Process 7
4. The Claimant's Swiss ownership 8
5. The conflicting ICC arbitration clauses and waiver of diplomatic claims 9
6. The Tin Stock claims were never notified to Bolivia 9
III. RESPONDENT'S REQUEST FOR BIFURCATION 9
A. CLAIMANT'S POSITION 9
B. RESPONDENT'S POSITION 10
IV. ANALYSIS OF THE TRIBUNAL 11
A. APPLICABLE STANDARD 11
B. QUALIFICATION AS INVESTOR 12
C. ABUSE OF PROCESS 13
D. CLEAN HANDS 13
E. PIERCING THE CORPORATE VEIL AND INDIRECT INVESTMENT 14
F. ICC ARBITRATION 16
G. TIN STOCK 16
H. CONCLUSION 17
V. DECISION 17

I. PROCEDURAL BACKGROUND

1. By **Notice of Arbitration** dated 19 July 2016, the Claimant initiated this arbitration pursuant to the UNCITRAL Arbitration Rules and Article 8 of the Agreement between the Government of the United Kingdom of England and Northern Ireland and the Government of the Republic of Bolivia for the Promotion and Protection of Investments, signed on 24 May 1988 (the "**Treaty**").

2. On 18 August 2016, the Respondent submitted its **Response to the Notice of Arbitration**, which included a request for bifurcation of the proceedings.

3. By letter dated 8 March 2017, the PCA circulated on behalf of the Tribunal Draft Terms of Appointment and Draft Procedural Order No. 1, and invited the Parties to submit their comments thereon.

4. By e-mail of 24 March 2017, the Claimant submitted the Parties' comments on the Draft Terms of Appointment and Draft Procedural Order No. 1, as confirmed by the Respondent's e-mail of the same date. The Respondent included a request for bifurcation of the proceedings in its comments on the procedural calendar.

5. By letter dated 29 March 2017, the Tribunal issued the Terms of Appointment and invited the Parties to set out in more detail their positions regarding, *inter alia*, the question of the bifurcation of the proceedings.

6. On 3 and 14 April 2017, the Parties provided their further comments on the bifurcation of the proceedings. The Respondent argued that the Tribunal should already decide on its request for bifurcation, while the Claimant contended that only after the submissions of the Statement of Claim would the Tribunal be able to properly assess whether to bifurcate the proceedings.

7. On 15 May 2017, a **First Procedural Meeting** was held by conference-call, during which the Parties provided further comments on Draft Procedural Order No. 1.

8. On 31 May 2017, the Tribunal issued **Procedural Order No. 1**, including a timetable for the arbitration. In particular, the Tribunal decided that it would only rule on the Respondent's request for bifurcation after the receipt of the Statements of Claim and Defence and, potentially, a hearing on bifurcation.

9. On 15 August 2017, the Claimant filed its **Statement of Claim** including the **Claimant's Response to the Respondent's Request for Bifurcation**.

10. By letter dated 11 December 2017, the PCA informed the Parties that the Tribunal had decided not to hold a hearing on bifurcation.

11. On 18 December 2017, the Respondent filed its **Statement of Defence** including all objections to the Tribunal's jurisdiction, as well as the **Respondent's Reply on Bifurcation**. In the covering letter to its submission, the Respondent requested that the Tribunal reconsider its decision not to hold a hearing on bifurcation.

12. By letter dated 27 December 2017, the Claimant opposed the Respondent's request to hold a hearing on bifurcation.

II. RESPONDENT'S OBJECTIONS TO JURISDICTION AND ADMISSIBILITY

A. CLAIMANT'S POSITION

1. Consent to arbitration

13. The Claimant asserts that Bolivia has expressly and unequivocally consented to resolve investment disputes with UK investors through international arbitration by way of Article 8 of the Treaty, which provides in relevant part as follows:

> If after a period of six months from written notification of the claim there is no agreement to an alternative procedure, the parties to the dispute shall be bound to submit it to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law as then in force. [1]

14. The Claimant contends that all requirements in terms of jurisdiction and admissibility set out by Article 8 are met: (i) a dispute exists between Glencore Bermuda (a national of one Contracting Party) and Bolivia (the other Contracting Party) concerning the obligations of the latter under the Treaty in relation to investments made by Glencore Bermuda in Bolivia; (ii) in its written notices dated 11 December 2007, 14 May 2010, and 27 June 2012 Glencore Bermuda formally notified Bolivia of the existence of the dispute pursuant to Article 8 of the Treaty; (iii) Glencore Bermuda repeatedly sought to resolve the dispute amicably but no satisfactory response was ever received from the Bolivian Government; and (iv) more than six months have elapsed since Glencore Bermuda notified Bolivia of the existence of the dispute in relation to each of the nationalizations and the dispute remains. [2]

[1] Statement of Claim ¶ 133; **C-1**, Treaty, Article 8.

[2] Statement of Claim ¶¶ 134-137.

2. Jurisdiction *ratione temporis*

15. The Claimant notes that the Treaty was signed on 24 May 1988, entered into force on 16 February 1990, and was extended to the United Kingdom overseas territory of Bermuda on 9 December 1992 pursuant to an exchange of notes. [3] While the Respondent denounced the Treaty with effect from May 2014, the Claimant asserts that all of its investments were made in prior to Bolivia's denunciation and therefore continue to benefit from its protection according to Article 13 of the Treaty. [4]

3. The Claimant's investments and their legality

16. The Claimant argues that its indirect shareholding in Vinto and Colquiri and stake in the Colquiri Lease, the Smelters, and the Tin Stock constitute protected investments under Articles 1(a)(i) and 1(a)(ii) of the Treaty.[5] The Claimant disputes that its investment must meet any additional requirements such as contribution to the host State's development, but argues that it meets such additional requirements in any event.[6]

17. The Claimant further argues that the Respondent's allegations that Glencore Bermuda's investments were "unlawfully" acquired is inconsistent with contemporaneous evidence.[7] The Claimant also notes that there was no further investigation, formal accusation, or judicial proceeding ever brought against Glencore regarding the alleged illegality of the investments.[8]

4. Abuse of process

18. In response to the Respondent's abuse of process objection, the Claimant affirms that the investments were acquired through a competitive international bidding process organized by a reputable firm specializing in the mining sector; the assets were held by Panamanian Companies and CDC (a development finance institution entirely owned by the UK government); and the transaction also involved assets located in Argentina.[9] Furthermore, even if the transaction were

[3] Statement of Claim ¶ 125; Exchange of Notes, December 3, 1992, and December 9, 1992, pursuant to which the Treaty was extended to Bermuda and other territories, **C-2**.

[4] Statement of Claim ¶¶ 125-126.

[5] Statement of Claim ¶¶ 129-132, 311.

[6] Statement of Claim ¶ 311.

[7] Statement of Claim ¶¶ 322-324.

[8] Statement of Claim ¶ 323.

[9] Statement of Claim ¶¶ 316-317.

considered a "restructuring" with the aim of obtaining treaty protection, the Claimant argues that Glencore Bermuda's acquisitions took place in March 2005, before any of the challenged measures had occurred or were even foreseeable.[10]

5. The Claimant's Swiss ownership

19. According to the Claimant, in order to qualify as a protected investor, the Treaty requires only that a company be "incorporated or constituted" in the territory of one of the State parties, and it has shown that Glencore Bermuda is a company incorporated under the laws of Bermuda.[11] The Claimant maintains that arbitral tribunals "have universally rejected similar jurisdictional objections based on allegations that the claimant was a 'shell company' where the applicable BIT merely required the claimant to be 'incorporated' or 'constituted' in a territory to be considered a protected investor."[12]

20. The Claimant further argues that, even if it were relevant, Glencore Bermuda—which "has historically been the holding company for the vast majority of Glencore's international investments, including those in Latin America"—is not a shell company.[13] Furthermore, the Claimant asserts that Glencore International would have enjoyed protection under the Switzerland-Bolivia BIT, such that its restructuring was immaterial.[14]

B. RESPONDENT'S POSITION

1. The Claimant's alleged investments

21. The Respondent argues that an investor is entitled to protection under the Treaty only if it "actively invests" in the territory of a contracting party, and that Glencore Bermuda made no investment in Bolivia, but "merely held legal title to assets for which it made no payment and to which it made no further contribution."[15]

[10] Statement of Claim ¶¶ 318-320.

[11] Statement of Claim ¶¶ 127-128, 310-312.

[12] Statement of Claim ¶ 313.

[13] Statement of Claim ¶ 314.

[14] Statement of Claim ¶ 314.

[15] Bolivia's Preliminary Objections, Statement of Defence and Reply on Bifurcation ¶¶ 258-292.

2. The legality of the Claimant's alleged investments

22. The Respondent argues that it is a generally accepted principle of investment arbitration that a tribunal cannot hear claims regarding an investment tainted by illegality.[16] The Respondent argues that the privatization process was riddled with illegalities as the legal framework for the privatization of the Colquiri Mine Lease and the Antimony Smelter was established by former President Sánchez de Lozada to benefit his own economic interests in breach of the Bolivian constitution.[17] In particular, the Respondent argues that the prices paid for the Smelters and the Colquiri Lease are inexplicably low.[18] According to the Respondent, the Claimant could not have been unaware of these facts when it acquired the Smelters and the Colquiri Lease.

3. Abuse of Process

23. The Respondent claims that "a change of ownership structure when there is a reasonable prospect of a dispute constitutes an abuse of process, requiring that claims be dismissed, whenever the change had a purpose of obtaining investment treaty protection".[19]

24. The Respondent affirms that the disputes were "clearly foreseeable, and in fact foreseen" in 2005 when Glencore International transferred the assets to Glencore Bermuda.[20] The Respondent recalls that Glencore International took out political risk insurance for the Smelters and Colquiri Lease to guard against exactly the sort of expropriation that it now claims to have suffered.[21] Moreover, the Respondent notes that, at the time of the acquisition in 2005, Evo Morales was posed to assume presidency and it was clearly foreseeable that he "would be less indulgent of private mining interests and would ensure complete respect for the law and the diverse social interests affected by the mining industry."[22] The Respondent also submits that the Claimant was aware that various actors had been publicly questioning the legality of the Tin Smelter privatization since 2002, that the failure to put the Antimony Smelter into operation in accordance

[16] Bolivia's Preliminary Objections, Statement of Defence and Reply on Bifurcation ¶¶ 325, 338-345.

[17] See Bolivia's Preliminary Objections, Statement of Defence and Reply on Bifurcation ¶¶ 326-329.

[18] Bolivia's Preliminary Objections, Statement of Defence and Reply on Bifurcation ¶¶ 330-337.

[19] Bolivia's Preliminary Objections, Statement of Defence and Reply on Bifurcation ¶¶ 293-304.

[20] Bolivia's Preliminary Objections, Statement of Defence and Reply on Bifurcation ¶ 306.

[21] Bolivia's Preliminary Objections, Statement of Defence and Reply on Bifurcation ¶ 307.

[22] Bolivia's Preliminary Objections, Statement of Defence and Reply on Bifurcation ¶¶ 308-310.

with the contractual terms would give rise to a dispute, and that the Respondent would likely have to intervene in the growing dispute with *cooperativistas* at the Colquiri mine.[23]

25. The Respondent adds that the Claimant has not provided any other justification for such transfer than to obtain Treaty protection, and that it is not true that Glencore International would benefit from protection under the Switzerland-Bolivia BIT given that treaty's requirement of "a substantial Swiss interest".[24] The Respondent argues that there is no substantial Swiss interest in the Glencore group, which has widely dispersed shareholding by a range of global funds.[25]

4. The Claimant's Swiss ownership

26. The Respondent denies that formal incorporation in Bermuda suffices to establish jurisdiction, given that the investors "are purely Swiss in substantive reality".[26] The Respondent refers to the released "Paradise Papers" which show that "Glencore Bermuda exists only in a nearly empty room that "held a filing cabinet, a computer, a telephone, a fax machine and a checkbook" at the Glencore Group's Bermudan law firm.[27]

27. On the other hand, if the Claimant's corporate veil cannot be pierced, the Respondent then argues that the Claimant should not be allowed to submit claims based on the indirectly held rights of its subsidiaries.[28] The Respondent argues that, in contrast to other contemporaneous investment treaties (such as the Switzerland-Bolivia BIT) which extend jurisdiction to indirect investments, the UK-Bolivia Treaty does not make an exception to the otherwise applicable customary rule pursuant to which a shareholder may not substitute itself for the company in which it holds shares.[29]

---

[23] Bolivia's Preliminary Objections, Statement of Defence and Reply on Bifurcation ¶¶ 312-319.

[24] Bolivia's Preliminary Objections, Statement of Defence and Reply on Bifurcation ¶¶ 320-324; Agreement between the Swiss Confederation and the Republic of Bolivia on the reciprocal promotion and protection of investments, English translation, Article 1(b)(aa), **RLA-19**.

[25] Bolivia's Preliminary Objections, Statement of Defence and Reply on Bifurcation ¶ 323; Morningstar, Glencore PLC Major Shareholders, **R-236**.

[26] Bolivia's Preliminary Objections, Statement of Defence and Reply on Bifurcation ¶¶ 348-359.

[27] Bolivia's Preliminary Objections, Statement of Defence and Reply on Bifurcation ¶¶ 360-369, quoting International Consortium of Investigative Journalists, Room of Secrets Reveals Glencore's Mysteries, press article of 5 November 2017, **R-243**, pp. 1-7.

[28] Bolivia's Preliminary Objections, Statement of Defence and Reply on Bifurcation ¶¶ 351, 370-371.

[29] Bolivia's Preliminary Objections, Statement of Defence and Reply on Bifurcation ¶¶ 372-384.

5. The conflicting ICC arbitration clauses and waiver of diplomatic claims

28. The Respondent argues that Claimant's claims ultimately concern the Tin Smelter, Antinomy Smelter, and Colquiri Lease contracts (the "**Contracts**"), and are therefore subject to the mandatory ICC arbitration clauses and waivers of diplomatic remedies contained in those Contracts.[30] The Respondent points out that the Claimant itself invokes the Contracts in support of its claims.[31]

6. The Tin Stock claims were never notified to Bolivia

29. The Respondent asserts that the Claimant never notified Bolivia about the existence of potential claims concerning the Tin Stock as required under Article 8(1) of the Treaty.[32] The Respondent considers that the claims regarding the Tin Stock are distinct from the Claimant's other claims and that the absence of prior notification deprives the Tribunal of jurisdiction over these claims.[33]

III. RESPONDENT'S REQUEST FOR BIFURCATION

A. CLAIMANT'S POSITION

30. The Claimant contends that, contrary to the Respondent's allegations, bifurcation is not favoured under the UNCITRAL Rules, nor it is the general practice of international tribunals.[34] Rather, according to the Claimant, efficiency is the overarching basis for deciding on bifurcation requests.[35] In particular, the Claimant relies on *Glamis Gold* to argue that the relevant criteria are the likelihood of success of the jurisdictional objections and whether they can be decided without examining the merits of the case.[36]

31. As regards the first criterion, the Claimant argues that the chances of the Respondent's objections prevailing are minimal, such that bifurcation will only lead to unwarranted delay and expense.[37]

---

[30] Bolivia's Preliminary Objections, Statement of Defence and Reply on Bifurcation ¶¶ 385-392.

[31] Bolivia's Preliminary Objections, Statement of Defence and Reply on Bifurcation ¶¶ 393-399.

[32] Bolivia's Preliminary Objections, Statement of Defence and Reply on Bifurcation ¶¶ 400-404.

[33] Bolivia's Preliminary Objections, Statement of Defence and Reply on Bifurcation ¶¶ 405-411.

[34] Statement of Claim ¶¶ 300-305.

[35] Statement of Claim ¶¶ 299, 306.

[36] Statement of Claim ¶¶ 306-307; *Glamis Gold Ltd v United States* (UNCITRAL) Procedural Order No. 2, 31 May 2005, **CLA-58**, para 12(c).

[37] Statement of Claim ¶¶ 309, 325-328.

The Claimant adds that bifurcation may give rise to costly and time-consuming parallel proceedings if either party challenges a decision on jurisdiction before the Paris courts.[38]

32. As for the second criterion, the Claimant asserts that the Respondent's jurisdictional objections are "inherently factual and cannot be divided from the merits of the dispute".[39] According to the Claimant, in order to decide the Respondent's objections, the Tribunal will have to investigate many of the same facts and legal arguments from the same witnesses that the Parties will develop when discussing their substantive claims and defenses.[40] In particular, the Claimant argues that bifurcation of the Respondent's objection will require duplicative testimony from Mr. Eskdale on various issues.[41]

33. Accordingly, the Claimant requests that the Respondent's bifurcation request be dismissed.[42]

B. RESPONDENT'S POSITION

34. The Respondent submits that it is a well-established rule in international arbitration that, when jurisdictional objections are well-founded and may be separated from the merits of the dispute, the Tribunal should proceed to decide such objections as a preliminary matter.[43] The Respondent argues that "it is fundamentally unjust, and even contrary to fundamental legal principles, to demand that a state defend itself against the merits of a claim before a tribunal without jurisdiction or where that jurisdiction is in dispute."[44] According to the Respondent, efficiency is but an additional consideration that militates in favour of bifurcation.[45] The Respondent therefore argues that the Tribunal should apply the three criteria set out in *Philip Morris v. Australia*, namely (i) whether the objections are *prima facie* serious and substantial, (ii) whether the objection can be

[38] Statement of Claim ¶ 327.

[39] Statement of Claim ¶ 325.

[40] Statement of Claim ¶ 325.

[41] Statement of Claim ¶¶ 315, 321, 324.

[42] Statement of Claim ¶ 326.

[43] Response to the Notice of Arbitration ¶ 51.

[44] Bolivia's Preliminary Objections, Statement of Defence and Reply on Bifurcation ¶¶ 416-420.

[45] Bolivia's Preliminary Objections, Statement of Defence and Reply on Bifurcation ¶¶ 421-428.

examined without prejudging or entering the merits, and (iii) whether the objection, if successful, would dispose of all or an essential part of the claims raised.[46]

35. The Respondent argues that its preliminary objections clearly meet the *Philip Morris* criteria since, if any of them were granted (with the exception of the failure to notify the dispute over the Tin Stock), it would bring an immediate end to the entire arbitration proceeding.[47] They are also serious and substantial as they are backed by extensive legal authorities and factual exhibits, and they are entirely separable from the merits of the dispute: "the core facts for the objections extend only through when Glencore Bermuda received the Assets in 2005, while the core merits facts are from events in 2007, 2010, 2012, and beyond".[48]

36. The Respondent further contends that the Claimant does not explain why the Respondent's preliminary objections are said to be interlinked with the merits, and that the fact that Mr. Eskdale would testify both as to facts relevant to jurisdiction and facts relevant to the merits does not create such a linkage.[49]

37. Accordingly, the Respondent requests that its preliminary objections be decided in a bifurcated preliminary phase.[50]

IV. ANALYSIS OF THE TRIBUNAL

A. APPLICABLE STANDARD

38. The Tribunal begins its analysis by setting out the applicable standard in relation to the issue of application as raised in this case. Articles 17.1 and 23.3 of the UNCITRAL Rules give discretion to the Tribunal to decide jurisdictional objections. Neither of those provisions imposes a presumption in favor or against bifurcation. Thus, in accordance with Article 17.1, the overarching principle that shall guide the Tribunal's decision is procedural fairness and efficiency, having regard to the totality of circumstances.

---

[46] Bolivia's Preliminary Objections, Statement of Defence and Reply on Bifurcation ¶ 429 quoting **CLA-121**, *Philip Morris Asia Limited v Commonwealth of Australia* (UNCITRAL) Procedural Order No 8 of 14 April 2014 ¶ 109.

[47] Bolivia's Preliminary Objections, Statement of Defence and Reply on Bifurcation ¶ 431.

[48] Bolivia's Preliminary Objections, Statement of Defence and Reply on Bifurcation ¶¶ 431-436.

[49] Bolivia's Preliminary Objections, Statement of Defence and Reply on Bifurcation ¶ 438.

[50] Bolivia's Preliminary Objections, Statement of Defence and Reply on Bifurcation ¶ 440.

39. With this principle in mind, the Parties appear to agree that the proper factors or criteria to be taken into account are the ones used by the tribunals in *Philip Morris Asia Limited v Commonwealth of Australia*51 *and Glamis Gold Ltd v United States*[52]. Although framed somewhat differently, both Tribunals seemed to consider the same factors or criteria, *i.e.*:

a) *Whether the request is substantial* or *is the objection prima facie serious and substantial*?
b) *Whether the request, if granted, would lead to a material reduction in the proceedings at the next stage* or *could the objection, if successful, dispose of all or an essential part of the claims raised*?;
c) *Whether bifurcation is impractical in the sense that the issues are too intertwined with the merit that it is very unlikely that there will be any savings in time* or *cost or can the objection be examined without prejudging or entering the merits*?

40. With these criteria in mind, the Tribunal will now address each of the objections raised by the Respondent:

B. QUALIFICATION AS INVESTOR

41. The first allegation is that the Claimant made no investment in Bolivia. Bolivia is arguing that the scope of the treaty extends only to companies which "actively" invested in Bolivia. According to Respondent, given that Glencore Bermuda made no investment in Bolivia, the investor does not have a claim under the applicable BIT. On the other hand, Claimant argues that the treaty only "requires a company to be 'incorporated or constituted' in the territory of one of the State parties" and that it does not require any requirement of "seat or material business presence in the State"[53].

42. Before addressing the issue of whether the objection is serious and substantial, the Tribunal confirms that, at this stage of the proceedings, its task is not to decide on the merits. Turning to the objection, however, the Tribunal finds, on the basis of the material before it at this stage, no clear textual support in the applicable BIT for the proposition that this agreement requires material or active presence for a company to qualify as investor. Thus, although the Tribunal recognizes that the objection is not frivolous, and the contextual arguments posed by the Respondent in this regard are capable of being argued and worth exploring in depth, it is not convinced that this

[51] *Philip Morris Asia Limited v Commonwealth of Australia* (UNCITRAL) Procedural Order No 8, 14 April 2014.

[52] *Glamis Gold Ltd v. United States of America,* (UNCITRAL) (Procedural Order No.2 (Revised), May, 31, 2005.

[53] Statement of Claim ¶ 311.

objection is sufficiently serious and substantial as to justify bifurcation. In light of this view, the Tribunal will not address the other two criteria.

C. ABUSE OF PROCESS

43. The second allegation is that the Claimant committed abuse of process in bringing this arbitration. Respondent alleges that the Tribunal lacks jurisdiction because Glencore Bermuda committed an abuse of process by structuring an investment in order to obtain standing. Respondent argues that Glencore International "rerouted" its investment through Bermuda when a dispute with Bolivia was foreseeable. On the other hand, Claimant argues that Glencore Bermuda's "acquisition of its investments in Bolivia was not a 'restructuring' with the purpose of providing treaty protection"[54]. Moreover even if that was the purpose, the Claimant argues that there could only be abuse of process "in very exceptional circumstances", that is when "the purpose of the restructuring was exclusively obtaining treaty protection"[55].

44. The Tribunal notes that it is not disputed that Glencore International was the company that acquired/leased the disputed assets and that Glencore Bermuda acquisition started in March 2005. It is also not disputed that the first alleged breach occurred in February 2007 (Vinto's nationalization). Notwithstanding the time gap between the acquisition of the investment and the first alleged breach, valid questions arise as to the purpose of restructuring the investment as well as whether the investor could foresee that a dispute was going to arise. Based on this, the Tribunal finds that this exception is serious and substantial. As to the second element, it is clear that, if successful, these proceeding would be brought to an end. As to the third element, almost all the facts relevant for this claim predated February 2007, which is the date when the dispute presumably arose. Thus, it seems that the objection can be addressed without prejudging the merits.

D. CLEAN HANDS

45. The third objection deals with the allegation that the privatization of the assets underlying the claim was illegal under Bolivian law. The Respondent alleges that the acquisition of the Colquiri Mine Lease and the Antimony Smelter were contrary to the Bolivian Constitution. Bolivia also argues that the "circumstances surrounding the privatization of the Assets were contrary to basic

[54] Statement of Claim ¶ 317.

[55] Statement of Claim ¶ 318.

requirement of transparency and good faith."[56] Based on this, Bolivia claims that, in accordance with the "clean hands" principle, "Claimant cannot present for adjudication before this Tribunal claims tainted by the illegality which Claimant was aware of when it received the Assets"[57]. Claimant argues that "the assets were lawfully awarded to private investors through public tender processes."[58]

46. Regarding the "clean hands" principle, the Tribunal agrees with the tribunal in *Churchill Mining* who rightly pointed out that:

> The common law doctrine of unclean hands barring claims based on illegal conduct has also found expression at the international level, although its status and exact contours are subject to debate and have been approached differently by international tribunals.[59]

47. In reaching a decision on this objection, the Tribunal will not only have to accept this principle and determine its status, but also lay out its contours. Thus, it is difficult to come to a definitive view without a clear standard against which the substantiality and seriousness of this objection could be assessed. In this regard, the Tribunal has doubts as to whether a mere assertion of unlawful conduct could be enough to raise this objection above the required threshold. However, even accepting that the objection is serious and substantial, *quod non*, it is conceivable that the alleged illegalities would be part of the defense of the Respondent against breaches of the BIT. Thus, it seems that this objection cannot be addressed without touching on the merits of this dispute.

E. PIERCING THE CORPORATE VEIL AND INDIRECT INVESTMENT

48. The fourth jurisdiction objection relates to the claim that, in reality, the Claimant is a Swiss company and, therefore, not subject to the protection of the BIT. Respondent claims that the BIT excludes jurisdiction asserted based on corporate formalities when the real party in interest is not protected. Respondent requests to pierce the corporate veil because Glencore Bermuda is an "empty shell". In the alternative, the Respondent claims that, even if the corporate veil protects Glencore Bermuda, international law does not allow it to bring claims for its indirect investment.

[56] Bolivia's Preliminary Objections, Statement of Defence and Reply on Bifurcation ¶ 337.

[57] Bolivia's Preliminary Objections, Statement of Defence and Reply on Bifurcation ¶ 338.

[58] Statement of Claim ¶ 323.

[59] *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award of 6 December 2016, ¶ 493.

Conversely, the Claimant argues that Bolivia's argument has no foundation in the facts or in the text of the Treaty and that Glencore Bermuda has submitted sufficient evidence that it is a company incorporated under the laws of Bermuda (one of the United Kingdom overseas territories to which the Treaty was expressly extended) with "investments" protected under the Treaty.

49. Turning to the first objection, the Tribunal finds also no clear textual support in the applicable BIT for the proposition that this agreement requires material or active presence for a company to qualify as investor. In addition, the Tribunal is not sure that the case quoted by the Respondent is applicable in this context since that case was dealing with the interpretation of "foreign control" set forth in Article 25(2)(b) of the ICSID Convention.[60] In fact, another of the cases cited by Respondent takes the opposing view:

> *As the matter of nationality is settled unambiguously by the Convention and the BIT, there is no scope for consideration of customary law principles of nationality, as reflected in Barcelona Traction, which in any event are no different. In either case inquiry stops upon establishment of the State of incorporation, and considerations of whence comes the company's capital and whose nationals, if not Cypriot, control it are irrelevant.*[61]

50. Thus, although the Tribunal recognizes that the objection is not frivolous, and the arguments posed by the Respondent in this regard are capable of being argued and worth exploring in depth, it is not convinced that this objection is sufficiently serious and substantial as to justify bifurcation.

51. Turning to the alternative objection, the Respondent argues that the ownership in the relevant assets is "indirect",[62] and therefore, since the BIT does not include indirect investment, Glencore Bermuda is precluded from bringing this case. Although the Respondent makes a valid argument that some investment treaties have traditionally distinguished between direct or indirect investment and in this case the applicable BIT does not include indirect investment, no textual basis or precedent is cited as to an investment tribunal who has made this distinction and dismissed a case on this ground. Thus, the Tribunal is not convinced that these objections are

[60] *TSA Spectrum de Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/05/5, Award of 19 December 2008.

[61] *ADC Affiliate Limited and ADC & ADMC Management Limited v Republic of Hungary* (ICSID Case No ARB/03/16) Award of the Tribunal of 2 October 2006, ¶ 357.

[62] Glencore Bermuda holds shares in Kempsey, Iris, and Shattuck, three Panamanian companies, which in turn own Colquiri through Sinchi Wayra. Colquiri directly owns the Assets (or Vinto, owned by Colquiri, in the case of the Tin Smelter).

sufficiently serious and substantial as to justify bifurcation. Considering this view, the Tribunal does not consider necessary to address the other two factors.

F. ICC ARBITRATION

52. The fifth objection relates to the claim that the Tribunal does not have jurisdiction over the contract claim. The Respondent argues that the Claimant ignored the arbitration clauses in the relevant contracts which required ICC arbitration adjudication. The Claimant responds that this dispute "concerns the propriety of actions taken by the State in its sovereign capacity—it does not, as Bolivia attempts to argue, concern contractual breaches."[63]

53. The Tribunal has difficulty understanding how the alleged breaches by Respondent are entirely contractual in nature. Moreover, even accepting that the objection is serious and substantial, the Tribunal believes that the facts related to this objection are too intertwined with the merits of the case and addressing this claim could touch on and prejudge the merits of the dispute.

G. TIN STOCK

54. Finally, the Respondent argues that the Tribunal lacks jurisdiction over the Tin Stock claims because they were never notified to Bolivia. The Respondent alleges that "Claimant never provided Bolivia with written notification of its Tin Stock claims, depriving Bolivia of the opportunity to reach an amicable resolution of those claims"[64]. The Claimant argues that since 2010 Bolivia took the position that "Tin Stock formed part of the nationalized Antimony Smelter's inventory and its return would be addressed in the context of the negotiations to be held in relation to the nationalization"[65]

55. The Tribunal finds that this is an ancillary claim that cannot, of itself, justify bifurcation. Even Respondent concedes that, if successful, it would not bring the dispute to an end, nor dispose of an essential part of the claims raised, nor even lead to a material reduction in the proceedings at the next stage.[66] Therefore, the Tribunal dismisses this ground for bifurcation.

---

[63] Letter in response to concerns expressed by the Bolivia with respect to the Tribunal's decision to cancel the hearing on bifurcation. December 27, 2017. At page 4.

[64] Bolivia's Preliminary Objections, Statement of Defence and Reply on Bifurcation ¶ 404.

[65] Letter in response to concerns expressed by the Bolivia with respect to the Tribunal's decision to cancel the hearing on bifurcation. December 27, 2017. At page 8.

[66] Bolivia's Preliminary Objections, Statement of Defence and Reply on Bifurcation ¶ 431.

H. CONCLUSION

56. After reviewing each of the preliminary objections, the Tribunal's analysis reveals that the abuse of process objection, but only that objection, could justify the bifurcation of the proceedings. Nevertheless, the Tribunal recalls that the overarching principle is the fairness and efficiency of this process as a whole. With this principle in mind, the Tribunal considers that it would be more efficient to deal with all preliminary objections together with liability in a first phase, and leave issues of damages, if any, for determination in a second phase. This approach seems to the Tribunal more efficient in terms of time and costs than the alternative, which is to bifurcate just one issue but leave all other objections to a merits phase. Finally, the Tribunal wishes to stress that the ultimate outcome of the objections will be a factor that the Tribunal may take into account when awarding costs in this arbitration.

57. The Tribunal has considered the positions and preferences of the Parties with regards to the procedural timetable to follow in these proceedings. After deliberation, the Tribunal has adopted the procedural calendar attached to this order as **Annex 1**.

58. Pursuant to Procedural Order No. 1, document production requests submitted to the Tribunal for decision, together with objections and responses, must be in tabular form pursuant to the model appended to this Procedural Order as **Annex 2** (modified Redfern schedule). The Parties shall use the model format throughout their exchange of requests, objections, and responses.

V. DECISION

59. For these reasons, the Tribunal, decides to hear the Parties' submissions regarding jurisdiction and admissibility together with their submissions on the merits, while bifurcating the proceedings with regards to quantum to a later phase of proceedings, if the need for such a later phase arises.

60. The Tribunal establishes the procedural calendar attached to this order as **Annex 1**.

Prof. Ricardo Ramírez Hernández
(Presiding Arbitrator)

On behalf of the Tribunal

Annex 1: Procedural calendar

Event	Party	Date
Simultaneous Document Production Requests	Both	9 February 2018 (21 days)
Production of undisputed documents and Objections to production	Both	2 March 2018 (21 days from Document Production Requests)
Replies to Objections to production and reasoned applications for an order on Production of Documents in the form of a Redfern Schedule (**Annex 2**)	Both	16 March 2018 (14 days from Objections to Production)
Tribunal's decision on Document Production	Tribunal	26 March 2018 (10 days from submission of Redfern Schedule)
Production of the disputed documents pursuant to the Tribunal's decision	Both	16 April 2018 (21 days from the Tribunal's Decision on Document Production Requests)
Claimant's Reply on the Merits and Counter-Memorial on Jurisdictional Objections (if any)	Claimant	18 June 2018 (150 days from the Tribunal's Decision on Bifurcation and 63 days from the Tribunal's Decision on Document Production)
Respondent's Rejoinder on the Merits and Reply on Jurisdictional Objections (if any)	Respondent	16 October 2018 (120 days from the Claimant's Reply)
Claimant's Rejoinder on Jurisdiction (if any)	Claimant	14 January 2019 (90 days from the Respondent's Rejoinder)
Submissions of the Notifications to the witnesses and experts called to appear at Hearing	Both	28 January 2019 (14 days from the Claimant's Rejoinder)
Pre-Hearing Conference Call	All	Week of 4 February 2019
Hearing	All	One-week period, at some point between 11 March and 6 May 2019

Annex 2: Model Redfern Schedule for Document Requests

No.	Documents or category of documents requested (requesting Party)	Relevance and materiality, incl. references to submission (requesting Party)		Reasoned objections to document production request (objecting Party)	Response to objections to document production request (requesting Party)	Decision (Tribunal)
		References to Submissions, Exhibits, Witness Statements or Expert Reports	Comments			

ANNEX 96

International Centre for Settlement of Investment Disputes
1818 H Street, N.W., Washington, D.C. 20433, U.S.A.
Telephone: (202) 458-1534 Faxes: (202) 522-2615/2027
Website: www.worldbank.org/icsid

CERTIFICATE

Plama Consortium Limited

v.

Republic of Bulgaria

(ICSID Case No. ARB/03/24)

I hereby certify that the attached is a true copy of the Award of the Arbitral Tribunal, dated August 27, 2008.

Nassib G. Ziadé
Acting Secretary-General

Washington, D.C., August 27, 2008

INTERNATIONAL CENTRE FOR SETTLEMENT
OF INVESTMENT DISPUTES
WASHINGTON, D.C.

IN THE PROCEEDINGS BETWEEN

PLAMA CONSORTIUM LIMITED
(CLAIMANT)

and

REPUBLIC of BULGARIA
(RESPONDENT)

(ICSID Case No. ARB/03/24)

AWARD

Members of the Tribunal
Carl F. Salans, President
Professor Albert Jan van den Berg, Arbitrator
V.V. Veeder, Arbitrator

Administrative Assistant to the Tribunal
Ms. Anne Secomb

Representing Claimant
Mr. Frank H. Penski
Ms. Abigail Reardon
Nixon Peabody LLP
Mr. Ciril Pelovski
Denev & Oysolov Law Office

Representing Respondent
Mr. Ivan Kondov
Head of the Judicial Protection of the Ministry of Finance of the Republic of Bulgaria
Mr. Paul D. Friedland
Ms. Carolyn B. Lamm
Ms. Abby Cohen Smutny
Mr. Jonathan C. Hamilton
Mr. Francis A. Vasquez, Jr.
White & Case LLP
Mr. Lazar Tomov
Tomov & Tomov

Date of dispatch to the Parties: [*August 27, 2008*]

Annex 96

TABLE OF CONTENTS

I. INTRODUCTION 4

II. PROCEDURE 5

A. Registration of the Request for Arbitration 5

B. Constitution of the Arbitral Tribunal and Commencement of the Proceedings 6

C. Written and Oral Procedures 7

III. SUMMARY OF THE DISPUTE 16

A. The Refinery's Acquisition 16

B. The Refinery's Operation and the Bankruptcy 19

C. The Dispute 21

IV. PRELIMINARY DISCUSSION: CLAIMANT'S 'OWNERSHIP' AND 'CONTROL' AND THE ALLEGATIONS OF MISREPRESENTATION 21

A. Is Respondent Entitled to Deny the Advantages of Part III of the ECT to Claimant under Article 17(1)? 22

B. Misrepresentation 26

1. Parties' Positions 26

2. The Requirement of Approval by the Privatization Agency 31

3. The Occurrence of Misrepresentation 32

4. The Consequences of the Misrepresentation 36

V. DISCUSSION OF THE ISSUES – CLAIMANT'S CLAIMS ON THE MERITS 43

A. Summary of the Contentions of the Parties and Relief Sought 43

1. Claimant's Position 43

2. Respondent's Position 47

B. The ECT Protections Invoked by Claimant 49

1. Protections provided in Article 10(1) 51

1.1 Stable, Equitable, Favorable and Transparent Conditions 52

1.2 Fair and Equitable Treatment 53

1.3 Constant Protection and Security 55

1.4 Unreasonable and Discriminatory Measures 56

1.5 Obligations Undertaken Towards Investors 57

2. Protections Provided in Article 13 58

C. Analysis of the Alleged Violations 60

1. Environmental Damages 60

1.1 The Parties' Positions 60
1.2 The Tribunal's Analysis 66
2. Actions of the Syndics 71
2.1 Irregularities in the Appointment of the Syndics 71
2.2 Unlawful Increases in the Salaries of Nova Plama's Workers 71
2.3 Overloading of Debt by the Syndics 72
2.4 Misappropriation of Nova Plama's Funds 72
2.5 Worker Riots 73
2.6 Parallel Recovery Plan 73
2.7 The Tribunal's Analysis 75
3. Paper Profits 78
3.1 The Parties' Positions 78
3.2 The Tribunal's Analysis 80
4. Varna Port 83
4.1 The Parties' Positions 83
4.2 The Tribunal's Analysis 84
5. Biochim Bank 87
5.1 The Parties' Positions 87
5.2 The Tribunal's Analysis 90
6. Re-opened Bankruptcy Proceedings 92
D. Concluding Observations 92
E. Damages 92
F. Costs 93
VI. DISPOSITIVE 97

ANNEX

the Memorandum of Understanding (which is not in the record) with the final text "*presented by*" showed clearly that André and NOT were not shareholders cannot be verified (H. Tr., Day 2, 29 January 2008, pp. 295 *et seq.*) and is contested by Respondent (Respondent's Post-Hearing Submission on the Merits, para. 15). What is clear is that Mr. Vautrin was determined not to disclose his true role in the privatization and, by doing so, he deliberately misrepresented to the Bulgarian authorities the true identity of the investors in Nova Plama.

4. The Consequences of the Misrepresentation

130. It is Respondent's contention that Claimant's investment is null and void under Article 5.1 of the Privatization Act (para. 102 *supra*), when examined in light of the terms of this so-called "straw man" provision. Counsel for Respondent explained in the January-February 2008 hearing that the straw man in the present case was Mr. Vautrin, acting *as if* he were the representative of André when in fact he was acting for his own account (H. Tr., Day 2, 29 January 2008, pp. 463-4).[10] In the opinion of Respondent's legal expert, Professor Markov, dated 16 July 2006, an "unidentified proxy" within the meaning of Article 5.1. "*acts in his own name but on the ultimate account of and in the ultimate benefit of somebody else*" (para. 54). This is not what happened here. The party to the Second Privatization Agreement, *i.e.*, the party making the investment, was PCL, not Mr. Vautrin. PCL was not a "straw man" acting for someone else; it was acting for its own account.

131. Professor Markov cites a Bulgarian Supreme Court decision, in paragraph 55 of his 16 July 2006 opinion, as follows:

> *What is an interpositioned person? The concept of interpositioned person, known also in legal theory as "straw man" or "wooden head," requires the existence of an agreement between the real right-holder (real party) under the*

---

[10] In its Post-Hearing Submission on the Merits, Respondent changed its identification of the straw man as being André and NOT whom Mr. Vautrin used as straw men to conclude the transactions (para. 30).

> *contract, i.e. the person economically interested in the transaction who actually enters into it, and the interpositioned person. Under this agreement the interpositioned person gives his consent that his name will appear in the real estate contract as though he is the party to the contract, whereas the contract is actually between the economically interested person and a third person, the other party to the contract.*

132. In paragraph 56 of his 16 July 2006 opinion, Professor Markov cites the treatise, "Civil Law – General Part" by Professor Pavlova:

> *§ 5 of the Additional Provisions of TPSOMEA* (the Privatization Act) *deserves to be noted among the cases of invalidity for prohibition provided for in special legal provisions. Pursuant to this provision the acquisition transactions under this Act shall be invalid where they are executed through an interpositioned person or an undisclosed representative. The law refers to the cases where the transferee under the privatization transaction conceals his name using another person's name (interpositioned person) or where a person in his own name acquires privatized property acting as a mandatary (a party to a mandate contract) on somebody else's account and with an obligation to transfer the property acquired to the principal. The severe sanction, envisaged in the provision in question, is designed by the legislator to provide maximum transparency in the acquisitions through privatization transactions. The requirement to reveal the identity of the transferee under the transaction constitutes a guarantee against abuse of official and social position and allows the public to watch closely whether the law is circumvented through follow up actions.*

Here, again, we are not dealing with a person who used the name of another person while entering into the Privatization Agreement, nor is the contract signatory acting as a *mandatary* for somebody else's account and with an

obligation to transfer the investment to the principal. In the present case, PCL was the contracting party, acting for its own account and in its own name.

133. Rather, what happened here was that Mr. Vautrin and his representatives presented PCL as a consortium of major companies having substantial assets, whereas in truth, Mr. Vautrin, who personally did not have significant financial resources, was acting alone as the sole investor in the guise of that "consortium." The Arbitral Tribunal is persuaded that Bulgaria would not have given its consent to the transfer of Nova Plama's shares to PCL had it known it was simply a corporate cover for a private individual with limited financial resources. Given the strategic importance of the Refinery and the significant number of employees and creditors, the managerial and financial capacities of the acquirer were a natural concern to the Bulgarian authorities. André, as a world-wide trader and financial institution and NOT as an experienced oil company, appeared to have the required capacities. Mr. Vautrin alone did not.

134. Claimant contends that it acted in good faith, that Respondent never asked who the shareholders of PCL were and that Claimant had no obligation to volunteer this information. The Arbitral Tribunal does not consider that, in the circumstances of the present case, this contention can be accepted. Claimant represented to the Bulgarian Government that the investor was a consortium – which was true during the early stages of negotiations. It then failed, deliberately, to inform Respondent of the change in circumstances, which the Tribunal considers would have been material to Respondent's decision to accept the investment. On the basis of the evidence in the record, Bulgaria had no reason to suspect that the original composition of the consortium, consisting of two major experienced companies, had changed to an individual investor acting in the guise of that "consortium", and no duty to ask. It was Claimant, knowing the facts, which had an obligation to inform Respondent.

135. The investment in Nova Plama was, therefore, the result of a deliberate concealment amounting to fraud, calculated to induce the Bulgarian authorities to authorize the transfer of shares to an entity that did not have the financial and managerial capacities required to resume operation of the Refinery. While the Arbitral Tribunal considers that this situation does not involve the "straw-

man" provision set out in the Bulgarian Privatization Law, the Tribunal is of the view that this behavior is contrary to other provisions of Bulgarian law and to international law and that it, therefore, precludes the application of the protections of the ECT.

136. As noted by Professor Markov in his expert report, Articles 27 and 29 of the Obligations and Contracts Acts (OCA) state:[11]

> *Art. 27. Contracts concluded by persons of legal incapacity, or by their agents without observing the requirements established for such agents, as well as contracts concluded under mistake, fraud, duress or extreme necessity shall be subject to invalidation.*
>
> *Art. 29. Fraud shall constitute grounds for invalidating a contract provided that one of the parties has been misled by the other party into concluding the contract through intentional misrepresentation.*

In addition, Article 12 OCA introduces the principle of good faith by stating that "*parties must negotiate and enter contracts in good faith.*" According to Bulgaria's expert, this principle covers various obligations of the parties, including the obligation to inform the other party of all facts relevant to making a decision concerning the conclusion of the contract.[12]

137. The negotiation and conclusion of the Second Privatization Agreement were carried out by PCL and its owner, Mr. Vautrin, in flagrant violation of these provisions of Bulgarian law. The misrepresentation made by Claimant renders the Agreement unlawful.

138. Unlike a number of Bilateral Investment Treaties,[13] the ECT does not contain a provision requiring the conformity of the Investment with a particular law.

---

11 Legal Opinion of Professor Markov, dated 16 July 2006, para. 64.

12 *Ibid*, para 71.

13 For example the Germany-Philippines BIT, Lithuania-Ukraine BIT, and Italy-Morocco BIT.

This does not mean, however, that the protections provided for by the ECT cover all kinds of investments, including those contrary to domestic or international law. As noted by the Chairman's statement at the adoption session of the ECT on 17 December 1994:

> [...] *the Treaty shall be applied and interpreted in accordance with generally recognized rules and principles of observance, application and interpretation of treaties as reflected in Part III of the Vienna Convention on the Law of Treaties of 25 May 1969.* [...] *The Treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of treaty in their context and in the light of its object and purpose.*[14]

139. In accordance with the introductory note to the ECT "[t]*he fundamental aim of the Energy Charter Treaty is to strengthen the rule of law on energy issues* [...]".[15] Consequently, the ECT should be interpreted in a manner consistent with the aim of encouraging respect for the rule of law. The Arbitral Tribunal concludes that the substantive protections of the ECT cannot apply to investments that are made contrary to law.

140. The Tribunal finds that the investment in this case violates not only Bulgarian law, as noted above, but also "*applicable rules and principles of international law*", in conformity with Article 26(6) of the ECT which states that "[a] *tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law*". In order to identify these applicable rules and principles, the Arbitral Tribunal finds helpful guidance in the decisions made in other investment arbitrations cited by Respondent.

---

[14] Energy Charter Secretariat, *The Energy Charter Treaty and Related Documents. A Legal Framework for International Energy Cooperation*, Chairman's Statement at Adoption Session on 17 December 1994, p. 158.

[15] Energy Charter Secretariat, *The Energy Charter Treaty and Related Documents. A Legal Framework for International Energy Cooperation*, An Introduction to the Energy Charter Treaty, p. 14.

141. In *Inceysa v. El Salvador*,[16] a case in which the investor procured a concession contract for vehicle inspection services in El Salvador through fraud in the public bidding process, the tribunal found that the investment violated the following general principles of law: (i) the principle of good faith defined as the "*absence of deceit and artifice during the negotiation and execution of instruments that gave rise to the investment*"[17] and (ii) the principle of *nemo auditur propriam turpitudinem allegans* – that nobody can benefit from his own wrong – understood as the prohibition for an investor to "*benefit from an investment effectuated by means of one or several illegal acts*".[18] In addition, the tribunal found that recognizing the existence of rights arising from illegal acts would violate the "respect for the law" which is a principle of international public policy.[19]

142. The notion of international public policy was also invoked by an award in the case of *World Duty Free v. Kenya*.[20] In this case, the investor had obtained a contract by paying a bribe to the Kenyan President. According to the tribunal, the term "international public policy" was interpreted to signify "*an international consensus as to universal standards and accepted norms of conduct that must be applied in all fora.*"[21] Accordingly, the tribunal found that "*claims based on contracts of corruption or contracts obtained by corruption cannot be upheld by this Arbitral Tribunal.*"[22] The tribunal further concluded that "*as regards public policy both under English and Kenyan law* [...] *the Claimant is not legally entitled to maintain any of its pleaded claims in these proceedings on the ground of* ex turpi causa non oritur actio."[23] As

---

16 *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, Award of 2 August 2006, ICSID Case No. ARB/03/26 ("Inceysa").

17 *Ibid.*, para. 231.

18 *Ibid.*, paras. 240-242.

19 *Ibid.*, para. 249.

20 *World Duty Free Company Limited v. The Republic of Kenya*, Award of 4 October 2006, ICSID Case No. Arb/00/7.

21 *Ibid.*, para. 139.

22 *Ibid.*, para. 157.

23 *Ibid.*, para. 179.

explained in the award, the *ex turpi causa* defence "*rests on a principle of public policy that the courts will not assist a plaintiff who has been guilty of illegal (or immoral) conduct* [...]."[24]

143. Claimant, in the present case, is requesting the Tribunal to grant its investment in Bulgaria the protections provided by the ECT. However, the Tribunal has decided that the investment was obtained by deceitful conduct that is in violation of Bulgarian law. The Tribunal is of the view that granting the ECT's protections to Claimant's investment would be contrary to the principle *nemo auditur propriam turpitudinem allegans* invoked above. It would also be contrary to the basic notion of international public policy – that a contract obtained by wrongful means (fraudulent misrepresentation) should not be enforced by a tribunal.

144. The Tribunal finds that Claimant's conduct is contrary to the principle of good faith which is part not only of Bulgarian law - as indicated above at paragraphs 135-136 - but also of international law - as noted by the tribunal in the *Inceysa* case. The principle of good faith encompasses, *inter alia*, the obligation for the investor to provide the host State with relevant and material information concerning the investor and the investment. This obligation is particularly important when the information is necessary for obtaining the State's approval of the investment.

145. Claimant contended that it had no obligation to disclose to Respondent who its real shareholders were. This may be acceptable in some cases but not under the present circumstances in which the State's approval of the investment was required as a matter of law and dependant on the financial and technical qualifications of the investor. If a material change occurred in the investor's shareholding that could have an effect on the host State's approval, the investor was, by virtue of the principle of good faith, obliged to inform the host State of such change. Intentional withholding of this information is therefore contrary to the principle of good faith.

---

[24] *Ibid.*, para. 161.

146. In consideration of the above and in light of the *ex turpi causa* defence, this Tribunal cannot lend its support to Claimant's request and cannot, therefore, grant the substantive protections of the ECT.

V. DISCUSSION OF THE ISSUES – CLAIMANT'S CLAIMS ON THE MERITS

147. The Parties have extensively documented their allegations; numerous exhibits, witness statements and expert reports have been submitted by both Parties. The factual and legal arguments have been discussed in detail during the Final Hearing, in which a number of witnesses and experts were also examined by the Parties and the arbitrators. The Tribunal has therefore decided that, in acknowledgement of the Parties' efforts, it will consider their further allegations on the merits. This consideration will lead to the conclusion that, even if Claimant would have had the benefit of the substantive protections of the ECT, Claimant's claims on the merits would have failed.

148. In its analysis, the Tribunal will follow Claimant's presentation of the allegedly unlawful acts and omissions by Respondent (Section C). Accordingly, the Tribunal will first address the allegations regarding environmental damages (Section C.1 *infra*), followed by the allegations regarding the action of the syndics (Section C.2 *infra*), the so-called paper profits (Section C.3 *infra*), the privatization of the Varna Port (Section C.4 *infra*) and Biochim Bank's unlawful breaches of its debt settlement agreement with PCL (Section C.5 *infra*). Before addressing these allegations, the Arbitral Tribunal will consider the ECT protections invoked by Claimant (Section B *infra*). It will rely on those considerations in its subsequent analysis. The Tribunal will commence by presenting a summary of the Parties' contentions on the merits and the relief sought (Section A *infra*).

A. Summary of the Contentions of the Parties and Relief Sought

1. Claimant's Position

149. According to Claimant, despite the promises made at the pre-acquisition stage, the Bulgarian Government, its legislative and judicial bodies and other State organs and agencies "*dashed*" Nova Plama's prospects of success. PCL found itself "*a victim of a series of unlawful acts and omissions which individually*

> *framework can be dispensed with altogether when specific commitments to the contrary have been made. The law of foreign investment and its protection has been developed with the specific objective of avoiding such adverse legal effects.*[35]

178. Finally the Tribunal observes that the condition of transparency, stated in the first sentence of Article 10(1) of the ECT, can be related to the standard of fair and equitable treatment. Transparency appears to be a significant element for the protection of both the legitimate expectations of the Investor and the stability of the legal framework.

1.3 Constant Protection and Security

179. Article 10(1) of the ECT also requires the host State to provide to the Investor's Investment "*the most constant protection and security.*" The Parties are in agreement that this standard imposes an obligation of "due diligence" (Claimant's Memorial on the Merits, paras. 277, 286; Respondent's Counter-Memorial on the Merits, para. 466). As noted by the tribunal in *AMT v. Zaire*, later quoted by the tribunals in *Wena v. Egypt* and *Saluka v. Czech Republic:*

> *The obligation incumbent on the [host State] is an obligation of vigilance, in the sense that the [host State] shall take all measures necessary to ensure the full enjoyment of protection and security of its investments an should not be permitted to invoke its own legislation to detract from any such obligation.*[36]

180. The standard includes, in this manner, an obligation actively to create a framework that grants security. Although the standard has been developed in the context of physical security, some tribunals have also included protection

---

[35] *CMS Gas Transmission Company v. The Argentine Republic*, Award of 12 May 2005, ICSID Case No. AR/O1/8, para. 277 ("CMS").

[36] *American Manufacturing & Trading v. Republic of Zaire*, Award of 21 February 1997, ICSID Case No. AR/93/1, para. 28; *Wena Hotel Limited v. Arab Republic of Egypt*, Award on the Merits of 8 December 2000, ICSID Case No. ARB/98/4, para. 84; *Saluka*, para. 484.

concerning legal security. In this last respect, the standard becomes closely connected with the notion of fair and equitable treatment.[37]

181. Finally, this Tribunal observes that the standard is not absolute and does not imply strict liability of the host State. As noted by the tribunal in *Tecmed* and later quoted by the tribunal in *Saluka* "*. . . the guarantee of full protection and security is not absolute and does not impose strict liability upon the State that grants it.*"[38]

1.4 Unreasonable and Discriminatory Measures

182. The host State must also, under Article 10(1) of the ECT, refrain from subjecting the Investor's Investment to "*unreasonable or discriminatory measures.*" In its Memorial on the Merits, Claimant contends that Respondent's conduct was "*unreasonable*" and makes no reference to the existence of discriminatory treatment. However, in its Reply, Claimant introduces the allegation that Respondent has engaged in discriminatory practices in favor of Neftochim, a direct competitor of PCL.

183. The Tribunal observes that, on a number of occasions, tribunals in investment arbitrations have found a strong correlation between this standard and the fair and equitable treatment standard. For instance, the tribunal in Saluka noted that:

> *The standard of "reasonableness" has no different meaning in this context than in the context of the "fair and equitable treatment" standard with which it is associated; and the same is true with regard to the standard of "non-discrimination". The standard of "reasonableness" therefore requires, in this context as well, a showing that the State's conduct bears a reasonable relationship to some rational policy, whereas the*

---

37 Schreuer, *op. cit.*, p. 4.

38 *Tecmed,* para. 177; *Saluka,* para. 484.

standard of "non-discrimination" requires a rational justification of any differential treatment of a foreign investor.[39]

184. However, this Tribunal believes that, while the standards can overlap on certain issues, they can also be defined separately. Unreasonable or arbitrary measures – as they are sometimes referred to in other investment instruments – are those which are not founded in reason or fact but on caprice, prejudice or personal preference.[40] With regard to discrimination, it corresponds to the negative formulation of the principle of equality of treatment. It entails like persons being treated in a different manner in similar circumstances without reasonable or justifiable grounds.[41]

1.5 Obligations Undertaken Towards Investors

185. The last sentence of Article 10(1) mandates the host State to observe any obligations it has entered into with the Investor or an Investment of an Investor and is described by Claimant as an "*umbrella clause*".

186. The Arbitral Tribunal can limit itself to noting that the wording of this clause in Article 10(1) of the ECT is wide in scope since it refers to "*any obligation.*" An analysis of the ordinary meaning of the term suggests that it refers to any obligation regardless of its nature, *i.e.*, whether it be contractual or statutory.[42] However, the *ad hoc* Committee that decided the annulment in the case, *CMS v. Argentina*, commented that the use of the expression "*entered into*" should

---

[39] *Saluka,* para. 460. Other arbitration tribunals have taken a similar position merging this standard and the notion of fair and equitable treatment. As noted by Professor Schreuer, in the context of NAFTA this position could be explained by the fact that there is not a separate provision on the prohibition of arbitrary or discriminatory treatment. Schreuer, *op.cit.*, p. 5. See, *e.g.*, *S.D. Myers* v. *Canada*, Award on Liability of 13 Nov. 2000, 8 ICSID Reports 18, para. 263; *Waste Management, Inc.* v. *United Mexican States*, Award, 30 April 2004, ICSID Case No. ARB(AF)/00/3, para. 98. Tribunals deciding cases under other investment treaties that have taken a similar position include *CMS,* para. 290; *Impregilo* v. *Pakistan*, Decision on Jurisdiction of 22 April 2005, ICSID Case No. ARB /02/2, paras. 264-270; *MTD,* para. 196.

[40] See *Ronald Lauder v. The Czech Republic*, Final Award of 3 September 2001,UNCITRAL, paras. 221, 222, 232; Schreuer, *op.cit.* pp. 8-9.

[41] See A.F.M. Maniruzzaman, *Expropriation of Alien Property and the Principle of Non-Discrimination in International Law of Foreign Investment: An Overview*, 8 J. Transnational Law & Policy, Vol. 8:1 (1998).

[42] *Enron Corporation Ponderosa Assets L.P. v. Argentine Republic*, Award of 22 May 2007, ICSID Case No. ARB/01/3, para. 274.

ANNEX 97

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Gustav F W Hamester GmbH & Co KG
Claimant

v.

Republic of Ghana
Respondent

(ICSID Case No. ARB/07/24)

AWARD

Tribunal

Professor Brigitte Stern, President
Mr. Bernardo Cremades, Arbitrator
Mr. Toby Landau Q.C., Arbitrator

Secretary of the Tribunal
Ms. Martina Polasek

Representing Claimant:
Mr. Akbar Ali
AFA Law
20 Hillside Road
Cheam Surrey SM2 6ET
United Kingdom
and
Mr. Andrew Goddard Q.C. and
Mr. Riaz Hussain
Atkin Chambers
1 Atkin Building
Gray's Inn
London WC1R 5AT
United Kingdom

Representing Respondent:
Hon. Mrs. Betty Mould-Iddrisu
Attorney-General and Minister for Justice
Republic of Ghana
and
Messrs. Arthur Marriott QC,
Thomas Geuther, Paul Cohen and
Ms. Christina Loucas
Dewey & LeBoeuf
No 1 Minister Court
Mincing Lane
London EC3R 7YL
United Kingdom

Date of Dispatch to the Parties: June 18, 2010

TABLE OF CONTENTS

Page No.

I. INTRODUCTION AND PARTIES 1
A. INTRODUCTION 1
B. PARTIES 1

II. PROCEDURAL HISTORY 2

III. FACTS 6
A. THE JOINT-VENTURE AGREEMENT AND THE INCORPORATION OF WAMCO I 6
B. THE INITIAL YEARS OF THE JOINT-VENTURE AND WAMCO II AND III 9
C. THE 2001 PRICE AGREEMENT 11
D. THE SHORTAGE OF SUPPLY IN 2002 13
E. THE END OF THE JOINT-VENTURE 15

IV. SUMMARY OF THE PARTIES' CLAIMS AND THE RELIEF SOUGHT 20
A. THE CLAIMANT'S POSITION 20
B. THE RESPONDENT'S POSITION 23

V. THE LEGAL GROUNDS FOR JURISDICTION 25

VI. THE FIRST JURISDICTIONAL OBJECTION: FRAUD 28
A. THE RESPONDENT'S POSITION ON THE FIRST JURISDICTIONAL OBJECTION: FRAUD 28
B. THE CLAIMANT'S POSITION ON THE FIRST JURISDICTIONAL OBJECTION: FRAUD 33
C. THE TRIBUNAL'S POSITION ON THE FIRST JURISDICTIONAL OBJECTION: FRAUD 36

VII. THE SECOND "JURISDICTIONAL OBJECTION": NON-ATTRIBUTION - A GENERAL APPROACH 42
A. THE CLAIMANT'S POSITION ON THE QUESTION OF ATTRIBUTION 44
B. THE RESPONDENT'S POSITION ON THE QUESTION OF ATTRIBUTION 48
C. THE TRIBUNAL'S GENERAL APPROACH TO THE QUESTION OF ATTRIBUTION 50

VIII. THE TRIBUNAL'S ANALYSIS ON ATTRIBUTION: THE STATUS OF COCOBOD 53
A. IS COCOBOD A STATE ORGAN UNDER ARTICLE 4 OF THE ILC ARTICLES? 53
B. IS COCOBOD A STATE ENTITY UNDER ARTICLE 5 OF THE ILC ARTICLES? 55

IX. THE TRIBUNAL'S ANALYSIS ON ATTRIBUTION: ARE THE ACTS OF COCOBOD ATTRIBUTABLE TO THE STATE UNDER ILC ARTICLES 5 OR 8? .. 59
A. THE 2001 PRICE AGREEMENT CLAIM 60
1. The Claimant's position *60*
2. The Respondent's position *61*
3. The Tribunal's analysis *62*
1. Has the 2001 Price Agreement been imposed on Wamco by Government policy? 64
- The period 1993 – 1995: Memorandum of Understanding dated January 23, 1997 66
- The period January 1, 1996 – June 30, 1998: Agreement dated July 11, 1997 and Agreement dated July 22, 1998 66
- The period July 1, 1998 – June 30, 1999: Agreement dated September 13, 1999 67
- The period July 1 – December 30, 1999: Agreement dated October 27, 2000 67
- The period January 1 – September 30, 2000: Agreement dated October 27, 2000 68
- The period September 30, 2000 – December 14, 2001: The situation deteriorates 69
- The December 14, 2001 Price Agreement 71
2. Was the 2001 Price Agreement signed under Duress? 73
B. THE 2002 NON-DELIVERY OF BEANS CLAIM 75
1. The Claimant's position *75*
2. The Respondent's position *76*
3. The Tribunal's analysis *77*

Annex 97

C. THE 2003 EXPROPRIATION CLAIM 78
1. The Claimant's position *78*
2. The Respondent's position *79*
3. The Tribunal's analysis *80*
1. Acts of Wamco's Chairman 81
2. Acts of Ghanaian authorities 83
- The police investigation 84
- The meeting with the Ministry of Finance of April 14, 2003 84
- The export ban of February 14, 2003 85
X. THE INTERNATIONAL LEGALITY OF THE ACTS ATTRIBUTED TO THE STATE 85
A. THE POLICE INVESTIGATION AND THE ALLEGED HARASSMENT OF MR. HOLZÄPFEL 85
B. THE MEETING WITH THE MINISTRY OF FINANCE OF APRIL 14, 2003 86
E. THE EXPORT BAN OF FEBRUARY 14, 2003 87
XI. FURTHER ANALYSIS: THE INTERNATIONAL LEGALITY OF THE ACTS NON-ATTRIBUTABLE TO THE STATE 89
A. THE TRIBUNAL'S APPROACH 89
B. CONTRACT CLAIMS AND TREATY CLAIMS 92
1. As a general rule, a violation of a contract is not a violation of international law *93*
2. The existence of a contract does not per se create legitimate expectations protected by the BIT *95*
3. Is there an exception to the general rule for all contractual claims when there is a so-called "umbrella clause"? *96*
1. The Claimant's position 96
2. The Respondent's position 96
3. The Tribunal's analysis 97
XII. THE RESPONDENT'S COUNTERCLAIM 100
XIII. COSTS 101
XIV. AWARD 101

> "The Parties have extensively documented their allegations; numerous exhibits, witness statements and expert reports have been submitted by both Parties. The factual and legal arguments have been discussed in detail during the Final Hearing, in which a number of witnesses and experts were also examined by the Parties and the arbitrators. The Tribunal has therefore decided that, in acknowledgement of the Parties efforts, it will consider their further allegations on the merits. This consideration will lead to the conclusion that, even if the Claimant would have had the benefit of the substantive protection of the ECT, Claimant's claims on the merits would have failed."[237]

315. As set out below, the Tribunal concludes that even if the acts which were not found attributable to the Respondent could somehow be considered so attributable – for example if they are assumed to have been effected under an instruction or under the control of the State – no international responsibility of the ROG could have arisen in any event from these acts, because of *their very nature.*

316. In continuing its analysis in this way, however, the Tribunal has not followed Ghana's suggestion in its Post-Hearing Brief that it deal with every aspect of the Claimant's conduct in this case:

> "The Government feels strongly that the clearest possible message must be sent to Mr Opferkuch and Hamester that their conduct cannot be tolerated and will not be endorsed by the international investment community. That is why the Government was willing to pay Hamester's share of the advance on costs for this arbitration when ICSID invited it to do so.
>
> The Government thus contends that, even though Hamester's claims fail at every jurisdictional and substantive hurdle, this Tribunal should undertake a full accounting of Mr Opferkuch's misdeeds."[238]

317. Rather, the Tribunal will examine whether, on the facts of the case, there could have been international responsibility on the part of the ROG towards Hamester for the different claims raised as to the JVA's performance. It is only if any of the acts complained of raises or could have raised an international responsibility of the ROG, that it then becomes relevant to analyse in detail the investor's behaviour and the accusations of fraud, in order to determine whether the investor has claimed with clean hands, and whether this could have consequences on any relief.

318. The Tribunal recalls that the Claimant asserts three main claims (as set out earlier):

- the 2001 Price Agreement claim;

- the 2002 Shortage in delivery of beans claim;

---

[237] *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24 (ECT), Award, August 27, 2008, para. 147. The issue of jurisdiction was dealt with from page 21 to 43, the discussion of the merits from page 43 to page 92.

[238] Respondent's Post-Hearing Brief, paras. 5-6.

ANNEX 98

REPORTS OF INTERNATIONAL ARBITRAL AWARDS

RECUEIL DES SENTENCES ARBITRALES

Commission established under the Convention concluded between the United States of America and Ecuador on 25 January 1862

Cases of the *Good Return* and the *Medea*, opinion of the Commissioner, Mr. Hassaurek, of 8 August 1865

Commission établie par la Convention conclue entre les États-Unis d'Amérique et l'Equateur le 25 janvier 1862

Les affaires *Good Return* et *Medea*, opinion du Commissaire, M. Hassaurek, du 8 août 1865

8 August 1865

VOLUME XXIX, pp.99-108

Commission established under the Convention concluded between the United States of America and Ecuador on 25 January 1862

Commission établie par la Convention conclue entre les États-Unis d'Amérique et l'Equateur le 25 janvier 1862

Cases of the *Good Return* and the *Medea,* opinion of the Commissioner, Mr. Hassaurek, of 8 August 1865[1]

Les affaires *Good Return* et *Medea*, opinion du Commissaire, M. Hassaurek, du 8 août 1865[2]

Non-recognition of the obligation of a commission to follow a decision of another commission in an identical case.

Obligations of the commissioners—they should be bound by their own conscience and the oath they have taken—they should not consider themselves as the attorneys for either country, but the judges appointed for the purpose of deciding the questions submitted to them, impartially, according to law and justice—they should not be bound by the actions their Governments may have taken on former occasions in each individual case.

Obligation of the party who asks for redress to present itself with clean hands—its cause of action must not be based on an offence against the Government to whom it appeals for redress—contrary to public morality and legislative policy for a State to uphold or endeavour to enforce a claim founded on a violation of its own laws and treaties.

Recognition of neutrality laws as reiterations of a principle of natural law.

Consequences of the neutrality of a nation for its citizens—limits of national protection and rejection of claims for lack of jurisdiction by an international commission if citizens of neutral nations violated the observance of neutrality.

Recognition of a citizen of a neutral State, acting as a privateer for the belligerent nation conducting a war against the State with whom the neutral State is at peace, as a pirate liable to be prosecuted and punished.

---

[1] Reprinted from John Bassett Moore (ed.), *History and Digest of the International Arbitrations to Which the United States has been a Party,* vol. III, Washington, 1898, Government Printing Office, p. 2731.

[2] Reproduit de John Bassett Moore (éd.), *History and Digest of the International Arbitrations to Which the United States has been a Party,* vol. III, Washington, 1898, Government Printing Office, p. 2731.

Determination of the captain's nationality, as far as the captain's claim regarding the captures as a privateer is concerned, by the captain's commission and by the flag of the belligerent under which the captain fought.

Recognition of a rule stipulating that the title to a prize originally vests in the Government represented by the captor during war, whose rights are subsequently ascertained by judicial decisions

Non-reconnaissance d'une obligation pour la commission de se conformer à la décision d'une autre commission dans une affaire identique.

Obligations des commissaires—ils doivent être liés par leur propre conscience et le serment qu'ils ont prêté—ils ne doivent pas se considérer comme les avocats d'un quelconque pays, mais comme des juges nommés afin de décider des questions qui leur ont été soumises, de façon impartiale, en application du droit et de la justice—pour chaque cas particulier, ils ne doivent pas être liés par les actions entreprises par leurs gouvernements à d'autres occasions.

Obligation de la partie qui demande réparation de se présenter avec les mains propres—la cause de sa demande ne doit pas être fondée sur une offense à l'encontre du gouvernement auquel elle fait appel pour obtenir réparation, le soutien ou la tentative de réalisation par un État d'un droit à réparation fondé sur une violation de ses propres lois et traités est contraire à la moralité publique et à la politique législative.

Reconnaissance du droit de la neutralité comme réitération d'un principe de droit naturel.

Conséquences de la neutralité d'une nation pour ses citoyens—limites de la protection nationale et rejet de réclamations pour défaut de compétence par une commission internationale lorsque les citoyens de nations neutres n'ont pas respecté la neutralité.

Citoyen d'un État neutre, agissant en tant que corsaire pour une nation belligérante en guerre contre un État avec lequel l'État neutre est en paix, considéré comme pirate passible d'être poursuivi et puni.

Détermination de la nationalité du capitaine par sa commission ainsi que le pavillon du belligérant sous lequel le capitaine combattait, dans la mesure où il s'agit de la réclamation du capitaine concernant sa capture en tant que corsaire.

Reconnaissance d'une règle prévoyant que le droit de prise revient initialement au gouvernement représenté par le ravisseur en temps de guerre, dont les droits sont établis par des décisions judiciaires ultérieures.

*****

On the 17th of November 1817, John Clark, a native citizen of the United States of America, entered into the service of the Banda Oriental Republic, now Uruguay, which was then engaged in her war of independence against Spain and Portugal, to each of which two powers a portion of her territory belonged.

John Clark obtained a commission as captain in the Banda Oriental Navy, and a patent authorizing him, as the commander of a private armed vessel, *La Fortuna,* to cruise against the vessels and property of the subjects of Spain and Portugal. These letters of marque were issued by General José Artigas, who was then the chief executive of that country, and they were to continue in force for and during the term of eighteen months from the departure of *La Fortuna* from Buenos Ayres.

The United States, it is hardly necessary for me to add here, was neutral in the war between Spain and Portugal and their colonies in America.

Clark left Buenos Ayres with his vessel on the 5th of March 1818, and after cruising for several months, proceeded to Baltimore "for the purpose", as it appears from the statement of one of the claimants, and the testimony in the case, "of procuring provisions and men". Having succeeded in this he left Baltimore on the l5th of September 1818, and in November of the same year captured the Spanish brig *Medea,* with a valuable Spanish cargo, and placed a prize master and crew on board of her, with instructions to take her to the neutral port of St. Bartholomew, to be held there subject to his orders. On the l9th of November the *Medea,* while on her way to St. Bartholomew, was seized by the Venezuelan man-of-war *Espartana,* under the orders of Commodore Joly of the Venezuelan navy, who sent her to the Island of Marguerita, where she was condemned on the 26th of November 1818 as a prize of the *Espartana,* on the ground that her capture by Clark was illegal.

Subsequently (on the 15th November I8I8) *La Fortuna,* captured the Portuguese ship *La Reina de los Mares,* bound from Bahia, Brazil, to Lisbon, with a valuable cargo on board, which, for greater safety, as it is alleged, was transferred by Clark to the *Good Return,* said to be an American ship chartered expressly for the occasion. Whether the latter vessel had accompanied Clark on his cruise, or how it was that she suddenly made her appearance, where she came from, whither she was bound, and who her owners were, does not appear from the papers presented to this commission. The *Good Return* was also taken possession of by Commodore Joly, of the Venezuelan navy, who demanded the value of one-third of the goods on board as ransom, and compelled the captain of the *Good Return* to place her cargo in the hands of the Venezuelan agent at St. Bartholomew, to be sold at auction there, under the most unfavorable circumstances. A cargo of $80,000, it is alleged, was thus sacrificed to make up the sum of $26,000 demanded by Joly, and the proceeds of the sale, being about $24,000, were retained and distributed by the commodore.

The grounds on which these acts of lawlessness were justified by the Venezuelan authorities were: 1st, that General Artigas had no right to grant letters of marque, being a usurper and a rebel against the legitimate authorities of Buenos Ayres; and 2d, that the privateer *La Fortuna* left Buenos Ayres in March 1818, after having arrived at that port in January of the same year as a Buenos Ayres vessel, under the name of *Patriota,* commanded by Captain Taylor, whereas the patent to Captain Clark had been issued on the 15th of

November 1817; that consequently she was navigated under another name and another flag, and commanded by another captain, two months after the issuing of the patent to Captain Clark.

In December 1819 the Republic of Venezuela was united to the former colony of New Granada under the name of the Republic of Colombia. Captain Clark presented his claim to the Colombian Government, and asked for indemnification, but in vain. In 1830 the Republic of Colombia ceased to exist by being constituted into three independent governments—New Granada, Venezuela, and Ecuador—and it is said that payment to the heirs of Clark has been made, through the agency of the United States, by Venezuela, of her proportion of the claim.

By a convention entered into by the three republics on the 23d of December 1834, it was agreed that the debts which they had acknowledged or contracted, while they were united and constituted into one, should be paid by them in the following proportion: 50 per centum by New Granada, 28 1/2 by Venezuela, and 21 1/2 by Ecuador.

Clark died several years ago, and the interest in his claims passed by will to his heirs and devisees, who, with a certain assignee, all of whom are residents and citizens of the United States of America, are the present claimants.

The claim was presented by them to the United States and New Granada mixed commission for the adjustment of claims established by the convention of 1857, and, the commissioners having been unable to agree, an award was made by the umpire, Judge N. G. Upham, of Connecticut (*sic),* in favor of the claimants, for New Granada's proportion of the claim. The case is now presented to this commission in order to fix the responsibility of Ecuador for her share of the original amount and interest thereon up to date.

The decision of a mixed commission like our own, in an identical case, is certainly entitled to great respect, but it can not be considered as an authority which we are necessarily bound to follow; and if, upon a careful examination of the law and the facts, it should appear to us that the decision was erroneous, we are bound by our own conscience and the oath we have taken as members of this commission, to follow our own convictions of right and justice, however sorry we may be to dissent from the opinion of gentlemen for whose ability, conscientiousness, and integrity we entertain the highest regard. The establishment of mixed commissions for the settlement of international claims is evidently an important step, suggested by the humane spirit of the age, in the direction of universal peace and civilization. But to realize the true benefits which the high contracting parties are entitled to expect from such commissions, the commissioners should consider themselves not the attorneys for either the one or the other country, but the judges appointed for the purpose of deciding the questions submitted to them, impartially, according to law and justice, and without reference to which side their decision will affect favorably or unfavorably.

Considering myself bound, in the present case, to dissent from the opinion of the umpire and the American member of the United States and New Granada mixed commission on claims, justice to the claimants and to my own country requires that I should state my reasons in full, so as to leave them open to the scrutiny of those to whom I am responsible for my official conduct.

Before entering upon a discussion of the merits of the case, a preliminary but highly important question presents itself. It is whether this is a claim which can properly be preferred and enforced against Ecuador by the Government of the United States.

I grant that the conduct of the Venezuelan squadron and the decisions of the Venezuelan prize court were unjustifiable upon any principle of international law, and that a great outrage was committed on the sovereign rights and interest of Uruguay; but what is that to the United States? Whatever losses and damages Captain Clark sustained in the premises he sustained not in his character as a citizen of the United States, but as an officer in the service of the Banda Oriental Republic, cruising under her flag, for her benefit, and against her enemies. If, therefore, the spoliations committed by the Venezuelan navy, and sanctioned by the Venezuelan courts, entitle him to indemnification, this indemnification must be claimed by the Banda Oriental Republic, now the Republic of Uruguay, and not by the United States. In the war with Uruguay, and Spain and Portugal the United States were neutral; not so Captain Clark. Although a native citizen of the United States, he had identified himself with one of the belligerents, in violation, as I shall presently show, of the laws and treaties of his own native country. He was cruising under the Uruguay flag, against the commerce of two nations with which the country of his birth was at peace. He must therefore abide by the consequences. If, in the course of his career as an Uruguay privateer, any wrong was done to or any outrage committed upon him, it is to Uruguay he must look for protection and not to the United States.

It is not my intention to enter into an examination of the questions discussed by counsel, whether, by his entering into the service of one of the belligerents, while our country was at peace with both of them, he forfeited his national character as an American citizen; and whether, upon his final return to the United States, his native character reverted, and by thus reverting entitled him to have his claim enforced by his native government. I believe that these questions are immaterial to the decision of this case. Whether Captain Clark was by birth an American, Englishman, Frenchman, or Spaniard, as long as he commanded an Uruguay cruiser, under the Uruguay flag in the service of the Republic of Uruguay, and in the exercise of active hostilities against the enemies of Uruguay and the friends of the United States, he was to all practical intents and purposes an Uruguayan; but especially as to all questions of prize law and maritime warfare. If the Uruguayan Government was either unable or unwilling to protect him in the realization of his prizes, it was his misfortune, with which the United States have no concern. Captain Clark had not yet acquired an individual title to the vessels and cargoes captured by him. The title to a prize origi-

nally vests in the government represented by the captor. The rights of the captor are subsequently ascertained and fixed by judicial decisions. It is true, as alleged by claimant's counsel, that at the time his prizes were taken away from him he had at least a right of possession to them; but, again, I must say that that right he had, not in his character as an American citizen, but by virtue of his commission from one of the belligerents. The captain of an Uruguay cruiser represents Uruguay, wherever he may have been born. To Uruguay he is responsible, and Uruguay is responsible for him. If his prizes are taken away from him by third parties, he must complain to those from whom he derived his authority, and not to neutrals, who have nothing to do with the business one way or the other. Had he been in command of an American vessel and had that vessel been taken away from him by the Colombian navy, and justice been denied to him by the Colombian authorities, it would have been the right and duty of our government to protect him, and to see that he was fully indemnified. But why should the United States, while at peace with all the world, interfere in a controversy between Uruguay and Venezuela, with reference to certain Spanish and Portuguese vessels captured by privateers of the former, when neither the vessels nor the cargoes, nor any part thereof, were American? The United States will protect American interests; but why should they protect Uruguay interests, and take up a quarrel which Uruguay herself seems to have ignored, merely because one of the parties concerned in it, the commander of a foreign privateer, happened to be born in the United States? Captain Clark's nationality, *as far as his claim is concerned,* is determined by his commission and by the flag under which he fought. Any departure from this rule would soon involve us in troublesome questions with the whole world, if, in time of war, the Government of the United States should undertake to insure the captures of every American citizen, who, in violation of our neutrality laws and treaties, may see fit to enter the naval service of a foreign power, or to assume the command of a foreign privateer under a foreign flag.

The conclusion therefore seems to me irresistible, that, although Captain Clark individually may have been an American citizen, his captures, while in command of an Uruguay privateer, were Uruguay captures; and that any claim to be preferred against Colombia, on account of the spoliations committed by the Venezuelan navy, must be preferred by Uruguay and can not possibly be made or enforced by the United States. That Clark's family resided in the United States, that he returned to the country of his birth and died there, does not change the aspect of the case, which is not determined by the nativity of the individual, but by the flag of the belligerent.

But I am referred to a document executed by the Uruguay Government, relinquishing all its rights in the premises and authorizing the individual parties interested in the question to proceed "as they may find convenient." The original of this document is not before us. I must therefore rely on a translation given in the opinion of the umpire of the United States and New Granada mixed commission on claims. Said translation reads as follows:

Department of Foreign Relations,

Montevideo, 10th December 1846.

The undersigned, Minister of Foreign Relations, has received the communication dated November 25 last, which Mr. Hamilton, consul of the United States of America, thought fit to address him; asking in the name of his Government that this Republic should declare that it will make no claim in future against the Governments of Venezuela, New Granada, and Ecuador, for the recapture of the vessels which had been taken by the cruisers *Irresistible, La Fortuna,* and *Constancia*.

The undersigned is directed to say in reply that, to satisfy the wishes of the United States, the Republic has no difficulty in declaring that the Oriental Republic of Uruguay has no claim to make on the part of her treasury, in her character as a nation, on account of the aforesaid vessels; but with respect to the rights of individuals, she leaves them to such action as they can sustain at the time of the declaration solicited, and consequently those interested may exercise those rights as they find convenient.

Francisco Magarinos

To Mr. Hamilton
Consul of the United States of North America

The authority of the consul of the United States to negotiate for such a declaration does not appear. There is nothing before us to show that he was ever instructed by the State Department to request the Uruguayan Government for such a disclaimer. From the mere fact of his having been a consul, no diplomatic authority can be inferred in his favor. To clothe him with the character of a negotiator special authority would be required, which, if ever conferred, it would be an easy task to prove by transcripts from the records and correspondence of the State Department. But there is no such evidence before us. We are left in darkness as to what authority, if any, had been conferred on the consul, and to what communication the above declaration is an answer.

Why should the United States have requested Uruguay to cede her legal rights in the premises, and why should Uruguay have complied with this request, without having received the slightest consideration for such a compliance?

Umpire Upham states in his decision that the above declaration was made by Uruguay "*at the request of the representatives of the claimant,* they prosecuting the claim as citizens of the United States." In the absence of all other evidence I am inclined to believe that this is a correct supposition, and that the above declaration was the result of a private arrangement effected between the claimant and the government of Uruguay, through the good offices of the United States consul at Montevideo, an arrangement with which the United States Government had nothing to do.

It is equally clear that such a document does not better the case of the claimants. It casts away the only legal remedy they had without giving them another. It is not a cession of Uruguay's rights to the United States, nor

does it confer any authority on the United States to prosecute the claim for the benefit of Uruguay or for the benefit of the individual claimants. And, even if it were a cession or an assignment, it is very questionable whether such a cession or assignment would or could have been accepted by the Government of the United States.

And this leads us to the consideration of the question whether it would be right and proper on the part of the United States to father such foreign claims. Article 14 of the treaty of 1795 between the United States and Spain (confirmed with the exception of a few articles by the treaty of 1819) provides as follows:

> Art. 14. No subject of His Catholic Majesty shall apply for or take any commission or letters of marque, for arming any ship or ships to act as privateers against the said United States, or against the citizens, people, or inhabitants of said United States, or against the property of any of the inhabitants of any of them, from any Prince or State with which the said United States shall be at war.
>
> Nor shall any citizen, subject, or inhabitant of the said United States apply for or take any commission or letters of marque for arming any ship or ships to act as privateers against the subjects of His Catholic Majesty or the property of any of them, from any Prince or State with which the said King shall be at war. And if any person of either nation shall take such commissions or letters of marque, he shall be punished as a pirate.

But not only in what he did, but also in the manner of doing it, John Clark violated the laws of his country whose interference and assistance he now invokes to realize the profits of his piracy. By augmenting the force of his armed vessels at the port of Baltimore he plainly and directly offended against the act of Congress passed in 1794, and revised and reenacted in 1819, by which it is declared to be a misdemeanor for any person within the jurisdiction of the United States *to augment the force of any armed vessel* belonging to one foreign power at war with another power, with whom the United States are at peace; or to prepare any military expedition against the territory of any foreign nations with whom they are at peace; or to hire or enlist troops or seaman for foreign military or naval service; or to be concerned in fitting out any vessel to cruise or commit hostilities in foreign service against a nation at peace with them, &c, &c.

The principle which underlies such enactments and treaty stipulations was forcibly stated by Mr. Thomas Jefferson, in his letter of 17 June 1793 to Mr. Genet: "By our treaties," he says, "with several of the belligerent powers, which are a part of the laws of our land, we [the United States] have established a state of peace with them. But without appealing to treaties, we are at peace with them all by the law of nature; for, by nature's law, man is at peace with man, till some aggression is committed, which, by the same law, authorizes one to destroy another, as his enemy. For our citizens, then, to commit murders and depredations on the members of nations at peace with us, or to combine to do it, appeared to the

Executive . . . as much against the laws of the land as to murder or rob, or combine to murder or rob, its own citizens." (See Lawrence's Wheaton, p. 728.)

What right, under these circumstances, has Captain Clark, or his representatives, to call upon the United States to enforce his claim on the Colombian republics? Can he be allowed, as far as the United States are concerned, to profit by his own wrong? *Nemo ex suo delicto meliorem suam conditionem facit.* He has violated the laws of our land. He has disregarded solemn treaty stipulations. He has compromised our neutrality. He has committed depredations against two nations with which we were at peace. He has made himself liable to be prosecuted and punished as a pirate; and now he presents himself before our government with the request to collect for him the proceeds of his misdemeanors. Will our government, by doing so, offer a reward to evil doers for the violation of its own laws and treaties? What would be the object of enacting penal laws, if their transgression were to entitle the offender to a premium instead of a punishment? I agree with the attorneys for the claimants that it would perhaps not become Colombia to make this defense, after having committed an outrage against the rights of Captain Clark. But I do not look upon Colombia as interposing these objections. I hold it to be the duty of the American Government and my own duty as commissioner to state that in this case Mr. Clark has no standing as an American citizen. A party who asks for redress must present himself with clean hands. His cause of action must not be based on an offense against the very authority to whom he appeals for redress. It would be against all public morality, and against the policy of all legislation, if the United States should uphold or endeavor to enforce a claim founded on a violation of their own laws and treaties, and on the perpetration of outrages committed by an American citizen against the subjects and commerce of friendly nations. As an Uruguayan claim, this case would be entitled to the most favorable consideration of the then Colombian republics. But it is not and can not be an American claim. As the American commissioner, I could not sanction, uphold, and reward indirectly what the law of my country directly prohibits. *Quod directo fieri prohibetur etiam dicitur prohibitum per indirectum.* He who engages in an expedition prohibited by the laws of his country must take the consequences. He may win or he may lose. But that is his own risk; he can not, in case of loss, seek indemnity through the instrumentality of the government against which he has offended. For this reason it is the customary practice of nations nowadays, upon the breaking out of a war between two foreign countries, to warn their subjects not to take part in it, on either side, as by doing so they would forfeit their right to the protection of their home government. Such neutrality laws and proclamations are but reiterations of a plain principle of natural law.

It is alleged, however, that the Government of the United States has made this claim its own by presenting it on former occasions to the three Colombian republics and urging its recognition. Granting this to be so, I do

not believe that the members of this commission are bound by what action their governments may have taken on former occasions in each individual case. If it were so, there would have been no need of establishing a mixed commission, instead of which the two governments should have referred these claims at once to the arbitration of a third party. Governments, like individuals, are not infallible, and if the Government of the United States ever encouraged or adopted this claim, I have no doubt it would reconsider the view it then took of the question, if the case should again be submitted to its examination. The present policy of the United States toward their Spanish-American neighbors is one of the most scrupulous good faith and justice. While ever ready and vigilant to protect the rights and interests of American citizens wheresoever or against whomsoever it may be, the United States will not oppress their sister republics with extravagant demands or unjust exactions. The spirit which, in times now passed, occasionally led to misunderstandings between the republic of the North and those of the Latin race has since died away and its revival has been rendered impossible by the removal of its cause through the great events of the last four years.

These observations I have deemed it necessary to add, as great stress has been laid by the attorneys for the claimants on the action of former administrations with reference to this and similar cases. With this, I believe, I have sufficiently explained the reasons why in my opinion, our decision should be against the claimants.

Case of the Atlantic and Hope Insurance Companies *v.* Ecuador (case of the schooner *Mechanic*), opinion of the Commissioner, Mr. Hassaurek[1]

Affaire concernant Atlantic and Hope Insurance Companies c. Ecuador (affaire de la goélette *Mechanic*), opinion du Commissaire, M. Hassaurek[2]

Denial of justice regarding the seizure of goods during war—obligation to respect the principle of "free ships, free goods" established by a treaty—obligation to respect enemy's property covered by the flag of the party to the treaty as neutral property, excepting contraband of war.

---

[1] Reprinted from John Bassett Moore (ed.), *History and Digest of the International Arbitrations to Which the United States has been a Party,* vol. III, Washington, 1898, Government Printing Office, p. 3221.

[2] Reproduit de John Bassett Moore (éd.), *History and Digest of the International Arbitrations to Which the United States has been a Party,* vol. III, Washington, 1898, Government Printing Office, p. 3221.

ANNEX 99

REPORTS OF INTERNATIONAL ARBITRAL AWARDS

RECUEIL DES SENTENCES ARBITRALES

Frierdich and Co. Case

31 July 1905

VOLUME X pp. 45-55

FRIERDICH AND COMPANY CASE [1]

The burden is upon the company to establish clearly and definitely that the respondent Government proceeded in an unlawful manner concerning the boat of said company after it arrived in the port of Güiria.

The initial wrong was all with the claimant company (a) in the engagement of an incompetent captain, with knowledge of his incompetency, (b) in the taking away of the ship's papers by a partner of the company, (c) in permitting the ship thus stripped of its papers to go out on the open sea, (d) in entering the harbor of Güiria under these circumstances.

The arrival of this ship in port under the circumstances attending it justified suspicion and examination of the real status of the schooner by the revenue officers of the port.

The schooner was not in the port of Güiria through any imperious neccessity, but voluntarily. Such compulsion as existed was through the act or neglect of a member of the company; and its unjustifiable departure from the Port of Spain, its journey across the sea, and its entrance to the harbor of Güiria were wholly attributable to the company and its agents.

In order that there may be intervention on the part of France, there must be a legal wrong on the part of Venezuelca.

If Venezuela conforms with its own laws in its own ports, and if these laws are such as are the product of civilization, then there is no error, hence no responsibility on the part of Venezuela and no right of intervention on the part of the claimant Government.

It appears that Venezuela acted in this respect through its regular officers and, until the contrary is clearly shown, the acts of these officers must be assumed to be regular and proper.

Such a presumption of regularity and propriety is a proper protection of the public and its interests.

Venezuela is also entitled to that presumption of good faith in favor of its public officers which ordinarily attends the acts of public officials.

So far as appears, the court in proceeding to condemn the schooner to pay a fine was acting within its jurisdiction and within its right, and until the contrary appears its acts will be presumed to be regular and its judgment righteous.

The laws of Venezuela in regard to such matters as are before the umpire in this case appear to be in harmony with the laws of other civilized countries.

That the Government at Caracas permitted the boat to be returned to its owners without exacting payment of the fine is not an admission on its part that its acts in reference to the schooner had been irregular and unlawful.

The question presented here is one of detention olny, and the detention involves only the question of its reasonableness in point of time. Sufficient time to know all the facts, to assemble them before the court, and for the court to act upon them was a necessary adjunct of the situation.

---

[1] EXTRACT FROM THE MINUTES OF THE SITTING OF MAY 12, 1903.

An examination of the claim of the Orinoco Asphalt Company, amounting to 176,080.10 bolivars, was next taken up. Doctor Paúl rejected it absolutely as without foundation. M. de Peretti, considering the schooner belonging to the company had been illegally detained at Guiria for thirty-four days, asks therefor an indemnity of 5,000 bolivars.

Doctor Paúl does not recognize the illegality of the measure in question. The arbitrators not having been able to come to an agreement, this claim will be likewise submitted to the umpire.

OPINION OF THE VENEZUELAN COMMISSIONER

This claim, presented to the minister of foreign affairs of France by Mr. A. Sanary, who styles himself liquidator of the " Sociedad Betunes del Orinoco," is destitute of all documents proving the juridic personality of such company or the capacity of him who calls himself its liquidator as its trustee. What has been produced is a contract entered into in Paris, on the 2d of December, 1898, by which Messrs. Ernesto Nicolás Frierdich and Tácito Delort, on the one part, and Messrs. Courtant Bergerault and A. Cremer, on the other, agree upon constituting a commercial partnership on the part of Frierdich and Delort, and a silent partnership on the part of Bergerault and Cremer, the firm-name of which was to be " E. Frierdich & Co." Messrs. Frierdich and Delort only were authorized to manage and sign for the company. Besides, the fact on which the claim is based is only the detention sustained by the schooner *Love and Lulu* in the harbor of Güiria during thirty-seven days on account of a confiscation suit entered against her before the finance court for having arrived at that port without a matricula or register and other papers concerning her correct clearing, and in which suit she was condemned to pay a fine, she being released afterwards at the instance of the consul of Holland in Port of Spain, who claimed the preferential payment of debts contracted in said island, for which she was sold to the highest bidder there.

As is seen from the simple statement of these events, there exists no ground to demand an indemnity for the consequences of a suit brought in conformity with the laws on the matter, it being observed that it was Delort himself who denounced to the authorities at Güiria the want of papers of the schooner, alleging that they had been violently taken from the captain by his (Delort's) associate, Frierdich, when the vessel was leaving the island of Trinidad.

For the reasons expressed the arbitrator disallows the claim presented.

CARACAS, *May 12, 1903.*

OPINION OF THE FRENCH COMMISSIONER

The liquidator of the French Society Frierdich & Co., known also by the name of the Orinoco Asphalt Society, claims of the Venezuelan Government an indemnity of 176,030.10 bolivars, because the latter having retained illegally in the port of Guiria the schooner of this society for thirty-nine days should be responsible for the complete ruin of the concern. The information which I have gathered at Trinidad and in Venezuela about this company has convinced me that the condition in which it operated did not bring about such a serious result. At the moment when the accident happened which incited the claim it was already in insolvency. We can not argue, then, that the intervention of the Venezuelan administration, stopping the affairs of the company, obliged it to abandon its operation. If the *Love and Lulu* had not been detained at Güiria and could have been able freely to pursue her voyage, the fate of the enterprise would not have been changed. However, it seems to me that the administration of the custom-house of Guiria committed an abuse of power in retaining for more than a month, without reason, the schooner *Love and Lulu*, and I consider that the damage caused the owners of a boat of its towage by its lying idle for more than a month should be compensated by the granting of an indemnity of 5,000 bolivars. In fact, the nominal owner of the schooner, Mr. Tacite Delort, silent partner of the firm Frierdich & Co., was on board at the arrival of the boat at Güiria, and he himself implored the aid of the authorities of the port against the insubordinate crew. The absence of navigation papers was due to a case of *force majeure* (superior force) analogous to those

which the Venezuelan law anticipated; the papers in question were besides delivered as soon as possible; and finally, the rigorous measure, the forfeiture and sale of the boat, ordered by the tribunal of Güiria, were carried out upon the order coming from Caracas. I have not taken into account a letter which Mr. Frierdich addressed to me the 28th of April, 1903, to request me to withdraw the claim presented under the firm-name of Frierdich & Co., because it was not Mr. Frierdich who presented this claim, but the liquidator of the company. Mr. Frierdich, resident in Venezuela, an insolvent, it appears, was on bad terms with his former partner, to whom he was indebted for quite a large sum. This situation and also, without doubt, the fear of displeasing the authorities of a country where he has definitely established his residence, and where he has married, explains sufficiently the proceeding of Mr. Frierdich. In these conditions, this proceeding (the sending of the letter) could not be taken into consideration. The indemnity of 5,000 bolivars, which I believe equitable, would be, it is necessary to note, diminished by more than half by the fact of payments in bonds of the diplomatic debt, accepted by the French Government, to the end of permitting the Venezuelan Government to pay its debts more easily.

PARIS, *August 26, 1904.*

ADDITIONAL OPINION OF THE VENEZUELAN COMMISSIONER

As stated in my opinion preceding this additional opinion the detention of the schooner *Love and Lulu* by the authorities of the port of Güiria and the subsequent legal action thereon was due, as shown by the documents submitted, to the fact that said schooner arrived in the above-mentioned port without her register and other papers which the laws of Venezuela require from vessels coming into a Venezuelan port from foreign ports. Only in case of showing proof that the arrival of said schooner at the port under said conditions was due to any of the unforseen circumstances specified by law, could the schooner *Love and Lulu* be exempted from the penalty imposed by article 48 of the " Código de Hacienda " (Code of Fiscal Laws) of Venezuela then in force. The detention of the schooner lasted the time necessary for the investigation of the facts and the hearing of the testimony of her owner, whose defense was the allegation that the papers had been violently snatched from him in Trinidad by his partner, Mr. E. Frierdich, and that the schooner had sailed by order of the master and crew who did not obey his (the owner's) determination to discontinue the trip.

It is moreover shown by the same documents (see note of the consul for the Netherlands in Port of Spain dated March 1, 1901, to the minister of the Netherlands in London) that the schooner *Love and Lulu* returned sometime afterwards to Port of Spain, where she was embargoed and sold under the hammer by the courts of the island, for the payment of the workingmen and other creditors. It is also shown by another communication bearing the signature of the consular agent for the Netherlands, under date of May 29, 1899, to F. A. Thompson, register, that on that date, a few days later than the 17th of May of the same year, when the schooner was released by the courts of Güiria, she had been already condemned by the courts of Port of Spain, and that it was on May 29, 1899, that the public sale was to take place.

The register was not the only document lacking the schooner when she came into the port of Güiria. As shown by the note of the consul for the Netherlands, under date March 1, 1901, already quoted, Frierdich, Delort's partner, also took in Trinidad from the master of the *Love and Lulu* the permit or clearance issued by the Venezuelan consul enabling the schooner to go into Venezuelan

ports, the certificate issued by the same official showing that the ship had complied with all the requirements, and other papers.

Article 48 of the Fiscal Code (Código de Hacienda) then in force in Venezuela provides that should only the register be missing, then such measures as are provided by law shall be taken on board of the vessel, * * * and the fine of 5,000 bolivars shall not be levied and collected, nor shall the bond be demanded *when the master can prove* that the lack of the register is due to an accident which he could neither prevent nor foresee, such as *shipwreck, fire, or violence from an enemy or pirates.*[1]

In the case of the schooner *Love and Lulu*, which came under the authorities of Güiria, upon whom devolved the duty of strictly complying with the law, the master did not suffer violence from enemies or pirates, but it was Mr. Frierdich himself, the partner of the plaintiff, Tácito Delort, who took the schooner's papers, and it was the master, Luis Rodriguez, who of his own accord resolved to sail without the indispensable documents which he left behind at the port whence he sailed.

Article 194 of the same code provides that the ship's master is guilty of an offense and is liable to a fine of 10,000 bolivars and other stated penalties whenever he does not produce the other documents, if during the trial, as provided, he fails to show that the absence of such documents is due to any of the unforeseen circumstances set forth in section 2 of article 48.[2] It was not shown, nor was any endeavor whatever made to show at the trial of the schooner *Love and Lulu* that the absence of the other papers was due to unforeseen circumstances of shipwreck, fire, or under duress from enemies or pirates. On the contrary, the proofs then adduced show the party responsible for the absence of the ship's papers to be a partner of Mr. Delort.

The Venezuelan courts by virtue of their rightful and well-established jurisdiction and in conformity with the laws under which they are established were authorized and under obligation to bring an action against the schooner *Love and Lulu* to hold her and to compel the settlement of the liability incurred by her master for gross offenses (*faltas graves*) expressly defined and punished by the Venezuelan laws.

From the above statement of the facts it appears that it was through the fault of the claimant, Mr. Delort, and through the fault of the master in com-

---

[1] ART. 48. Cuando el buque traiga el sobordo y sus demás papeles despachados en forma por el Cónsul de la procedencia, y sólo le falte la patente de navegación, se tomarán a su bordo las precauciones prevenidas en el artículo anterior, y además de imponerse al Capitán la multa del artículo 194, número 1°, se le exigirá una fianza de cinco mil bolívares, si el buque fuere de vela, o de diez mil si fuere de vapor, otorgada por él y por dos comerciantes abonados, a satisfacción del Administrador, la cual se hará efectiva en el caso de que el buque salga del puerto sin permiso de la Aduana, y de la autoridad política respectiva, sin perjuicio de las demás penas a que haya lugar.

No se impondrá la multa ni se exijirá la fianza cuando compruebe el Capitán que la falta de la patente provino de un accidente que no pudo prever ni evitar, como naufragio, incendio o violencia perpetrada por enemigos o piratas. En este caso se dará cuenta al Ministerio de Hacienda con todos los pormenores.

[2] ART. 194. El Capitán de un buque incurre en falta y paga multa en los casos siguientes:

1°. Cuando no presente la patente de navegación, pagará de cuatro mil a cinco mil bolívares en el caso del artículo 48; doblándose esta multa y haciéndose efectivas las demás penas a que haya lugar por la no presentación de los otros documentos, en el caso del artículo 47, si en el juicio respectivo no comprueba el Capitán que la falta proviene de alguno de los accidentes fortuitos previstos en el inciso 2° del artículo 48.

mand of the schooner *Love and Lulu*, and the fault of Mr. Delort's partner, Mr. E. Frierdich, that the schooner in question was subjected to legal proceedings before the fiscal court (tribunal de hacienda) of the port of Güiria, and to be held and condemned in conformity with the laws in the premises. It is to his own acts or negligence, to say the least, that the claimant owes, either directly or indirectly, the grievances or injury he complains of, if he ever did suffer any grievance or injury.

I beg to submit, together with this opinion, a letter duly authenticated, which was sent to Caracas to me in my capacity of commissioner, by Mr. E. Frierdich, a partner of the plaintiff, of the firm of Frierdich & Co., in liquidation, which letter shows, as does also the letter which the same Mr. Frierdich sent my learned colleague, that he has authorized no one to enter a claim against the Venezuelan Government by reason of the seizure of the schooner *Love and Lulu*, and that he does not consider that the authorities of the port of Güiria have given any cause in the present case to enter any claim whatever.

I beg to differ completely from the learned commissioner of France's opinion, that the letter in question must not be taken into consideration by reason of certain personal facts connected with the writer thereof, such as his being insolvent with his partners, and a resident of Venezuela married in the same country, and to be acting under fear of offending the authorities of the country where he resides. The contention that he is insolvent with his partners and the facts of his having his residence in Venezuela and having married a Venezuelan are not, in my opinion, of sufficient weight to destroy the testimony of a person bound no less than by the ties of business association to the claimant, who makes use of the name of the firm to enter the claim in question. As regards the charge of fear, so far no proofs have been offered to show the fact that Mr. Frierdich is susceptible to such fear nor that he is actually laboring under it.

In view of the foregoing, I come to a close supporting my opinion that the claim of the partnership Frierdich & Co., in liquidation, named " Société des Bitumes de l'Orénoque ", has no grounds whatever and that under the circumstances it should be disallowed. And I beg the honorable umpire to grant my request.

NORTHFIELD, VT., *February 1, 1905.*

ADDITIONAL OPINION OF THE FRENCH COMMISSIONER

The reading of the additional memoir of my honorable colleague has not changed my opinion on the two single points which I have thought I ought to mention in the above memoir and upon which I am not in agreement with Doctor Paúl. In the first place, it seems to me evident that the society of Frierdich & Co. being in insolvency it pertains to the liquidator, Mr. Sanary, whose powers to represent the aforesaid society are contained in the dossier.

Mr. Frierdich, insolvent debtor of his associates, proves by his proceedings that, not content with not paying his debts, he still tries to injure his creditors by preventing them from getting the benefit of an eventual indemnity. I am not called upon to consider this manner of action. I am content to refuse to Mr. Frierdich the right which he arrogates to himself of speaking in the name of a company at present in insolvency of which he is only the debtor. Consequently I think the arbitrators have to take no account of his letters.

In the second place, I consider that the custom-house of Güiria has caused, by retaining for thirty-nine days without reason the schooner *Love and Lulu*, an injury to her owners, whatever might have been the condition of the latter at that moment, a situation as to which I share, besides the opinion of my col-

league. In fact, either the custom-house of Guiria proceeded according to the Venezuelan law in retaining this vessel and then should have inflicted the penalty provided by law, and in case of nonpayment should have proceeded to sell according to law, or indeed the law did not authorize the retention of this vessel after the delivery of the papers on board, and then it ought to have delivered her immediately to Mr. Delort. But it stopped the procedure entered upon, which seems to indicate that it had no longer a legal right to prosecute, but it continued to retain the boat, which it did not sufficiently protect against depredations and which it only surrendered thirty-nine days after the seizure.

I maintain, then, that the custom-house of Güiria committed an error; that this error entailed an injury upon the partnership of Frierdich & Co. in depriving it for more than a month of the use of this schooner, and that this injury would be equitably compensated by an indemnity of 5,000 bolivars.

NORTHFIELD, *February 3, 1905.*

OPINION OF THE UMPIRE

The claimant company was organized in France and has unquestioned French nationality.

Tacite Delort and Ernesto Nicolás Frierdich are the active partners and managers of the company, and two other French gentlemen are silent partners.

The business of the company consisted of mining, refining, exporting, and marketing the products of a certain asphalt mine situated at Pedernales in Venezuela, about 70 miles from Port of Spain, Trinidad.

The company entered upon this business in 1898, and to aid in the importation of materials and men for the works and in the exportation of the asphalt to Port of Spain the company bought a schooner, *Love and Lulu*, which at the time of its purchase and thereafterwards was of Dutch nationality. It was registered in the name of Tacite Delort.

Owing to the character of the channel through which Pedernales was approached, it was necessary that the boat be of a peculiar build, which necessity was fully met by the *Love and Lulu*. Its purchase price was $2,100.

From the commencement of work at the mines to April 8, 1899, the company had exported and sold about 800 tons of asphalt.

On the date last named the *Love and Lulu* was in the harbor of Port of Spain and Mr. Delort and Mr. Frierdich were in the city of Port of Spain.

One Luis Rodriguez had been engaged as captain of the boat. This man could neither read nor write, had been previously a river pilot, did not understand the laws attending navigation, and objected to the service at the time of the engagement, because of his ignorance and of his fear that he would commit some blunder in the office. Notwithstanding the knowledge of the company of this ignorance he was made captain.

On said 8th of June, 1899, Mr. Delort learned that the schooner had received its clearance papers and was about to sail for Güiria. He desired to go with the boat when it sailed, but did not desire to go then. He undertook to detain the boat and obtained an order from the Dutch consul to the captain, directing him not to go. He was taken to the schooner and gave the captain the order of the Dutch consul; but the captain refused to recognize the authority of the consul and upon being ordered by Mr. Delort not to sail, the captain refused to recognize Mr. Delort's authority and proceeded to prepare to sail. It was about this time that Mr. Frierdich, the other manager, came to the schooner in a small boat and demanded of the captain, and received from him, all of the ship's papers. Mr. Delort attempted to prevent their delivery to Mr. Frierdich by personal intervention and the use of some violence, but the captain over-

came Mr. Delort's resistance and delivered the ship's papers to Mr. Frierdich, as above stated. Notwithstanding that he had no papers permitting him to sail and against the continuing and earnest protest of Mr. Delort, and with him on board, the captain set sail for Güiria, which port he reached some time that day.

Immediately upon the arrival of the schooner at Guiria Mr. Delort informed the harbor master of that port of the condition of affairs, and on the next morning he made protest before the vice-consul of Spain at Güiria, and at the request of Mr. Delort the testimony of the captain and of the steward was taken.

Some time after April 11 Mr. Frierdich surrendered the ship's papers to the Dutch consul at Port of Spain and they were forwarded by special messenger to Güiria, reaching there about the 14th day of April, on which day they were brought to the attention of the customs officers of that port, and there being no Dutch consul at Güiria the vice-consul of Spain, as the officer of a friendly nation, on the same day at the request of Mr. Delort visited the customs officials at Güiria and solicited of them and also of the captain of the port that the *Love and Lulu* be turned over to Mr. Delort. A formal refusal was made by these officers.

On April 17 the papers had been sent back to the Dutch consul at Port of Spain and he presented them to the Venezuelan consul of that port and formally asked the release of the *Love and Lulu* at Guiria.

Proceedings were instituted against the *Love and Lulu* before the proper tribunal at Güiria under articles 48 and 144 of the Maritime Code of Venezuela. A fine of 5,000 bolivars was duly imposed by the court and due notice was given of the sale of the schooner for the recovery of the fine.

Frierdich & Co. had no other boat than the *Love and Lulu* and not being able to obtain one at Port of Spain suited to the channel of Pedernales they could not transport supplies to the works or bring out the products of the mines, and, as a result, the asphalt works were abandoned and the workmen taken back to Port of Spain. The company had no means to pay the workmen for their labor or to answer the demands of their other creditors, and possession was taken by these creditors of such property of the company as they could find in order to secure their pay.

Pending the sale of the schooner at Güiria, the Dutch consul at Port of Spain asserted to the customs authorities at Güiria a prior and superior lien upon the schooner and demanded its return to Port of Spain to answer to this lien. It resulted that the Government of Venezuela, recognizing the validity of this claim, directed the return of the *Love and Lulu* to Port of Spain, and the schooner arrived there May 17. The fine has been in no part paid. No appeal was taken from the action of the tribunal imposing this fine, and it remains a final and unsatisfied judgment.

On the arrival of the *Love and Lulu* at Port of Spain it was seized under process issuing from the court of Port of Spain and was sold at public auction under such process. Before the sale, however, due notice was given by the Dutch consul to the proper parties in charge of the sale of the superior lien of his consulate, and he demanded payment of this amount before the purchaser could take possession of the schooner.

Later, proceedings in liquidation were instituted at Havre, France, and Mr. A. Sanary was constituted liquidator, and it is on his behalf, at his initiative, and for the benefit of the insolvent company and its creditors as such liquidator, that this claim is here presented.

Mr. Frierdich has filed with both of the honorable commissioners a protest against this claim, denying that there was any fault on the part of the authorities at Güiria at the time in question, or that any responsibility attaches to Venezuela on account of what happened in connection with this schooner.

Quite a large sum of money is claimed by the company of Venezuela on account of its alleged fault, but in the opinion of the honorable commissioner for France there is a just claim for 5,000 bolivars only. He does not ascribe the insolvency of the company to the detention of the schooner at Güiria, and he limits his award to a sum which he regards as not excessive for the abuse of power which he holds was committed by the administrators of the custom-house at Güiria and through the action of the court in detaining the schooner for the time stated, which detention he considers unreasonable.

The honorable commissioner for Venezuela sees no error in the action of the Venezuelan authorities and refuses any compensation.

The honorable commissioners having failed to agree, they join in sending the claim to the umpire for his decision. They have rendered the umpire very efficient aid in their opinions, original and supplementary, and by their courteous answers to his interrogatories.

If the company has a right to claim anything of Venezuela, it is the loss of use of the schooner by its detention a certain length of time in the port of Güiria. This right of use or the rental value of the schooner can not be very large, since the value of the schooner as determined by its selling price was only $2,100. In order that the company should have a claim upon Venezuela, the burden is upon it to establish clearly and definitely that the respondent Government has proceeded in an unlawful manner concerning said boat since it arrived in that port on the 8th of April, 1899. A detention without reason is suggested, but certainly some detention was not only reasonable but necessary. It was at least six days before its papers arrived from Port of Spain which would permit the company to justify in any way the right of the schooner to be upon the seas or in this port of Venezuela. The spirit with which this claim is pressed by the company is manifest from the fact that the claim for detention covers the entire thirty-nine days which elapsed from the time the schooner sailed from Port of Spain and the day of its return to that port. This is so manifestly wrong that it raises a suggestion of insincerity on the part of the claimant which must necessarily affect the value of the company's assertions in other particulars.

The initial wrong was all with the claimant company. It began in the reckless and ill-advised engagement of a captain entirely unfitted for his place, of which unfitness they were advised by the captain himself. It continued in the serious quarrel which had some time developed between the two managers of the company and, so far at this case is concerned, first manifested itself in the open rupture at the schooner's side at Port of Spain on April 6, when the captain, apparently through the advice and approval of one of the managers, openly defied the other, and where one of its managers was willing to see the schooner leave the port stripped of every essential paper to protect itself upon the seas, to become a floating derelict without right, opposed to the laws of all civilized nations and open to capture and condemnation without recourse or remedy. It was concluded when this same captain, ignorantly riding over the laws of every sea and the laws of every civilized port, sailed into the harbor of Güiria. The statements of Mr. Delort, made to the harbor master of the port and to the customs officials and before the consul of Spain, supported as they were in great part by the captain and whilom steward, were so improbable as to stagger belief and might well awaken just suspicions in the breast of the revenue officers of that port concerning the real status of the schooner.

Article 48 of the Fiscal Code then in force in Venezuela was:

> Should only the register be missing, then such measures as are provided in law shall be taken on board the vessel, * * * and the fine of 5,000 bolivars shall not be levied and collected, nor shall the bond be demanded when the master

can prove that the lack of the register is due to an accident which he could neither prevent nor foresee, such as shipwreck, fire, or violence from an enemy or pirates.[1]

But more than the register was lacking. The clearance issued by the consul of Venezuela at Port of Spain was lacking. There were lacking, also, the certificate by the same consul of compliance on the part of the schooner with all the requirements of the law and all other papers ordinarily belonging to a ship that is about to sail or that is sailing on the seas. The master could not prove in excuse that he was in this plight through any lack of foresight or through any accident. By the statement of both Mr. Delort and the master it was essentially true that there had been no accident of any kind, and they were not in the port of Güiria through any imperious necessity which they could not meet and overcome. They were there voluntarily so far as the master was concerned, and such necessity as attended their situation and their presence was the act of one of the managers of equal power with the other; no stranger had intervened, no trespasser had done them any evil; their unjustifiable departure upon and across the seas and their entrance into the harbor of Güiria were wholly attributable and only attributable to the company, its managers and agents. Thus far Venezuela is not involved. Does it act without law afterwards or without legal right? If it does not, then, even if it may be considered as acting harshly, which the umpire does not assert, the Republic of France has no right of intervention; for before there is right of intervention there must be a legal wrong on the part of Venezuela. If it conforms with its own laws in its own ports, and if those laws are such as are the product of civilization, then there is no error, hence no responsibility upon the state and no right of intervention on the part of the claimant Government. It appears that Venezuela acted in this respect through its regular officers and, until the contrary is clearly shown, the acts of those officers must be assumed to be regular and proper. There is a very proper presumption to this effect; and it is proper public policy and a proper protection of the public and its interests that such a presumption should attend the execution of official duties. (120 U. S. Sup. Ct., 605; 14 Johnson (N. Y.), 182; 19 Johnson (N. Y.), 345.)

The general presumption is that public officers perform their official duties, and that their official acts are regular. (American and Eng. Enc. of Law, 2d edition, Vol. 22, page 1267, citing in note 24, a long line of cases in England and the United States.)

Where some preceding act or preexisting fact is necessary to the validity of an official act, the presumption in favor of the validity of the official act is presumptive proof of such preceding act or preexisting fact. (Ib. 1269 and note 1 on same page, citing long line of supporting cases in the U.S. Sup. Ct. and in State courts.)

Similarly there is a presumption of good faith in favor of public officers. This presumption is applied to sustain the regularity of official acts in favor of individuals who rely thereon. (*Supra* and note 3, citing a line of decisions made by the United States Sup. Ct.)

A natural presumption attends them to that extent.

So far as appears, the court which proceeded to condemn the schooner to pay a fine was acting within its jurisdiction and within its right, and, until the contrary appears, its act will be presumed to be regular and its judgment righteous.

This presumption, supported by authorities above cited, applies equally to the actions and decisions of courts. It is only necessary to show that jurisdiction is clearly vested, and then the maxims or rules " Omnia præsumuntur rite esse

[1] See footnote, p. 34.

acta " and " Omnia præsumuntur legitime facta, donec probetur in contrarium " apply. (See Am. and Eng. Enc. of Law, 2d edition, Vol. 22, pages 1270-71 and the cases cited under note 4 of page 1271, both from the United States Sup. Ct. and from many of the State courts.)

The acts of the court must, in the first instance, be presumed to be regular and in conformity with settled usage, and are conclusive until reversed by a competent authority. Williams *v.* U.S., 1 Howard (U.S. Sup. Ct.) 290.

Best, " Principles of the Law of Evidence," first American from the sixth London edition, Subsection IV, under head of " Presumptions in favor of validity of acts," the entire subsection and notes.

So far as has appeared before the umpire, the laws of Venezuela in regard to these matters are in harmony with the laws of other civilized countries, and it does not yet appear before the umpire wherein the fiscal court at the port of Guiria committed error in subjecting this schooner to the fine which had been voluntarily invited by its appearance in the condition which is proven and admitted.

That the Government at Caracas yielded later to the strenuous demand of the consul of Holland at Port of Spain rather than to withstand the demand is not to the umpire an admission on the part of the respondent Government that its acts in reference to the *Love and Lulu* had been irregular and unlawful.

From the facts appearing in this case the umpire is fully satisfied that Frierdich & Co. was practically defunct on the 8th of April, 1899, and that, regardless of the incident of the *Love and Lulu*, it would have met substantially the same subsequent conditions and would have ended in as complete and hopeless failure as in fact followed. This failure was in no especial sense hastened by the incident at Güiria, and the only burden which the detention of the *Love and Lulu* at Güiria placed upon the company was the sum which it had to pay for the use of the boat that took the workmen from its asphalt mines back to Trinidad; and this is, of course, a sum of no great significance.

Whether or not the action of the customs officers at Güiria and of the fiscal court were in fact regular and necessary is a matter of but slight pecuniary importance to the claimant company, and since it was the primary and potent cause of its own misfortunes in connection with this incident and by its own voluntary misconduct brought these inquiries, vexations, and expenses upon the customs officers and the court at Guiria, it is not in position to scrutinize very closely what the officers or court of Venezuela did or did not do.

Here may be applied with a certain degree of propriety one of the most important maxims of equity, viz, " He who comes into equity must come with clean hands."

It certainly has brought pecuniary indebtedness to Venezuela in virtue of what occurred at Güiria through its own fault, which it has not yet asked the privilege to discharge.

And in this connection the claimant company may properly consider the value of another of the maxims of equity, viz, " He who seeks equity must do equity."

As the question is presented here, it does not involve the final judgment of the court condemning the ship to a payment of the fine; nor any matter of restitution of the ship, for that occurred. It involves only the question of detention, and detention involves only the question of its reasonableness in point of time consumed, for a sufficient time to know all the facts and to assemble them before the court, and for the court to act thereon was a necessary adjunct to the situation. If the conditions on both sides are regarded as producing an equilibrium, justice is done, in the opinion of the umpire; and he so holds.

This claim is dismissed for want of equity in the claimant company, and the award will be drawn accordingly.

NORTHFIELD, *July 31, 1905.*

CASE HEIRS OF JEAN MANINAT [1]

The respondent Government is held liable for injuries suffered by a Frenchman in the presence of the general in command of a division of the Venezuelan army, it appearing that the party injured was in the presence of the commanding general by his personal order and that the injury was caused by a subordinate officer without justifying reasons.

The injury being found to be reprehensible in character and the respondent Government for reasons of state declining or neglecting to punish the guilty persons, it is chargeable with the actual damages suffered by the injured person and such further sum as is held to be sufficient to make proper amends to the claimant Government for this affront to it through one of its nationals.

It being found by the umpire that the person came to his death through the injuries thus suffered, but before February 19, 1902, it is held that such only of his brothers and sisters as are of French nationality can present a claim before this commission to recover for his death.

This tribunal does not exist because of damages suffered in Venezuela, except these be damages of Frenchmen, limited in this case to the next of kin of the deceased, who are themselves Frenchmen. If none be French, then the claim falls. It is not possible to hold other than that the national quality of the claimant in fact determines the jurisdiction of the commission.

It is elementary that the burden of establishing nationality is with the claimant. It cannot be assumed or conjectured, but must be clearly proven.

Record proof is not essential if there be other that is convincing.

The marriage of a sister of the deceased to a Frenchman established her French nationality during marriage, which under French law remains after the death of her husband. There is some proof that she was born in France, none that she was born in Venezuela. Her French nationality being clearly established in her marriage, the burden shifts and rests upon Venezuela to show Venezuelan

---

[1] EXTRACT FROM THE MINUTES OF THE SITTING OF MAY 19, 1905.

We then took up the examination of the claim of the heirs of Mr. Jean Maninat.

The French arbitrator, considering on one hand that Mr. Jean Maninat has died as a result of a wound which the Venezuelan officer gave him, but, on the other hand, that Mr. Pierre Maninat does not prove sufficiently his grievance against the Venezuelan authorities in the course of his legal proceedings with his creditors, accords to the heirs of Mr. Jean Maninat a sum of 500,000 bolivars for the *ensemble* of damages which they have suffered for the reparations which were due them.

The Venezuelan arbitrator is of the opinion that Mr. Jean Maninat was cured of his wound when he was attacked by tetanus, from which he died; that none of the grievances formulated by him or his heirs is established by sufficient proofs; that besides Pierre Maninat, born in Venezuela, is a Venezuelan according to Venezuelan law, and that all his four sisters, were born without doubt also in Venezuela. Two are married to foreigners, and have consequently lost their French nationality. Wherefore he rejects absolutely the claim in question.

M. de Peretti replies that according to the French law M. Pierre Maninat and his sisters, save those two who have married foreigners, have conserved their French nationality, besides the fact that Mr. Jean Maninat, born in France, enjoyed incontestably French nationality justifies in his eyes the competency of the commission.

As he maintained his opinion previously expressed, it is agreed that the claim be submitted to the Hon. Frank Plumley, Northfield, Vt.

ANNEX 100

888 F.3d 1231
United States Court of Appeals, Federal Circuit.

GILEAD SCIENCES, INC., Plaintiff-Cross-Appellant
v.
MERCK & CO., INC., Merck Sharp & Dohme Corp., Ionis Pharmaceuticals, Inc., Defendants-Appellants

2016-2302
|
2016-2615
|
Decided: April 25, 2018

Synopsis

Background: Biopharmaceutical company brought action seeking declaratory judgment that patents relating to treatments for Hepatitis C were invalid and that it was not infringing by its activities involving its sofosbuvir products. Patentees counterclaimed for infringement. After jury entered judgment in patentees' favor, the United States District Court for the Northern District of California, No. 5:13-cv-04057-BLF, Beth Labson Freeman, J., 2016 WL 3143943, ruled that patents were unenforceable because of patentees unclean hands and awarded attorney fees. Patentees appealed.

The Court of Appeals, Taranto, Circuit Judge, held that district court did not abuse its discretion in determining that patentees' unclean hands precluded enforcement of their patents.

Affirmed.

***1232** Appeals from the United States District Court for the Northern District of California in No. 5:13-cv-04057-BLF, Judge Beth Labson Freeman.

Attorneys and Law Firms

Juanita Rose Brooks, Fish & Richardson, PC, San Diego, CA, argued for plaintiff-cross-appellant. Also represented by Craig E. Countryman, Jonathan Elliot Singer; Elizabeth M. Flanagan, Deanna Jean Reichel, Minneapolis, MN; Robert M. Oakes, Wilmington, DE; Edmund Hirschfeld, E. Joshua Rosenkranz, Orrick, Herrington & Sutcliffe LLP, New York, NY.

Jeffrey A. Lamken, MoloLamken LLP, Washington, DC, argued for defendants-appellants. Also represented by James A. Barta, Sarah Justine Newman, Michael Gregory Pattillo, Jr.; Sara Margolis, New York, NY; Jessamyn Sheli Berniker, Stanley E. Fisher, Bruce Genderson, Jessica Palmer Ryen, Williams & Connolly LLP, Washington, DC; Mitchell Epner, Stephen S. Rabinowitz, Hughes Hubbard & Reed LLP, New York, NY.

Before Taranto, Clevenger, and Chen, Circuit Judges.

Opinion

Taranto, Circuit Judge.

***1233** This case involves two patents relating to treatments for Hepatitis C. Merck & Co., Inc. and Ionis Pharmaceuticals, Inc. (formerly Isis Pharmaceuticals, Inc.) collaborated on research in the area and eventually obtained U.S. Patent Nos. 7,105,499 and 8,481,712. The patents, whose specifications are materially the same for present purposes, describe and claim classes of compounds, identified by structural formulas, and the administration of therapeutically effective amounts of such compounds. Gilead Sciences, Inc., developed its own Hepatitis C treatments—marketed now as Sovaldi® and Harvoni®, both based on the compound sofosbuvir.

Gilead filed this action against Merck & Co., its subsidiary Merck Sharp & Dohme Corp., and Ionis (collectively, "Merck" unless the context indicates reference just to Merck & Co. and/or Merck Sharp). Gilead sought a declaratory judgment that Merck's '499 and '712 patents are invalid and that Gilead is not infringing by its activities involving its sofosbuvir products. Merck counter-claimed for infringement.

Gilead eventually stipulated to infringement based on the district court's claim construction, which is not challenged on appeal. A jury trial was held on Gilead's challenges to the patents as invalid for lack of both an adequate written description and enablement of the asserted claims (claims 1–2 of the '499 patent and claims 1–3, 5, 7, and 9-11 of the '712 patent) as well as Gilead's closely related defense that Merck did not actually invent the subject matter but derived it from another inventor, employed by Gilead's predecessor. The jury ruled for Merck and awarded damages.

The district court then held a bench trial on Gilead's equitable defenses, including unenforceability against Gilead based on the allegation that Merck had unclean hands regarding the

patents. The district court ruled for Gilead, finding both pre-litigation business misconduct and litigation misconduct attributable to Merck, and it barred Merck from asserting the patents against Gilead. *Gilead Scis., Inc. v. Merck & Co.*, No. 13-cv-04057-BLF, 2016 WL 3143943, at *39 (N.D. Cal. June 6, 2016). Having so concluded, the district court subsequently deemed moot Gilead's motion for judgment as a matter of law of invalidity for lack of adequate written description and enablement. The court also awarded ***1234** attorney's fees, relying on the finding of unclean hands.

Merck appeals the unenforceability judgment based on unclean hands. Gilead cross-appeals the denial of judgment as a matter of law of invalidity, but it asks us to reach that issue only if we set aside the unenforceability judgment. We have jurisdiction under 28 U.S.C. § 1295(a)(1). We affirm the judgment based on unclean hands, concluding that it is sufficiently supported by findings that withstand review for clear error. We therefore do not reach the issues raised by Gilead's conditional cross-appeal.

I

A

In 1998, Merck and Isis began collaborating on finding a way to block propagation of the Hepatitis C virus (HCV) by impeding the synthesis of its RNA. J.A. 20291. The collaborators sought a molecule that would have two properties. First, an enzyme involved in RNA assembly (NS5B polymerase) would recognize the molecule as a building block and add it to the growing RNA chain during replication of the virus's RNA. Second, the addition of this molecule would effectively stop further RNA assembly before completion and, hence, end RNA replication and prevent viral propagation.

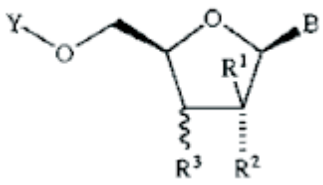
Starting in 2001, the two collaborators filed a series of patent applications related to antiviral agents for Hepatitis C. Dr. Phillipe Durette, a Merck chemist who had become a patent attorney, was central to their initial patenting efforts. J.A. 20301. A provisional patent application dated January 22, 2001, summarizes the invention as "a method for inhibiting hepatitis C virus (HCV) NS5B polymerase, a method for inhibiting HCV replication, and/or a method for treating HIV infection" by administering a "therapeutically effective amount of a compound of structural formula I." J.A. 25808. It sets forth and claims large families of possible structures in Markush format: it displays a number of configurations of nucleic acid derivatives and shows variables at a number of locations in the structures (*e.g.*, different bases, different molecules attached to the sugar ring), the variables each stated to represent any of a substantial number of possible constituents. J.A. 25803–980.

The same is true of Merck's two January 2002 applications under the Patent Cooperation Treaty (PCT applications). J.A. 24832, 26913. One of those became Merck's July 2003 U.S. application 10/250,873, which issued as the '499 patent. J.A. 150, 27227. A non-provisional U.S. application filed in January 2002 led to the 2007 application that issued as the '712 patent. J.A. 223. The number of possible combinations within the Markush groups is very large.

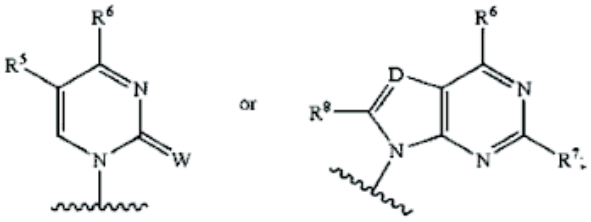
One instance of the formulas in the written description, from the 2003 application that issued as the '499 patent, is:

structural formula III which is of the stereochemical configuration:

(III)



***1235** wherein B is



D is N, CH, C—CN, C—NO2, C—C_{1-3} alkyl, C—$NHCONH_2$, C—$CONR^{11}R^{11}$, C—$CSNR_{11}R_{11}$, C—$COOR_{11}$, C-hydroxy, C—C_{1-3} alkoxy, C-amino, C—C_{1-4} alkylamino, C-di(C_{1-4} alkyl)amino, C-halogen, C-(1,3-6*o*xazol-2-yl), C-(1,3-thiazol-2-yl), or C-(imidazol-2-yl); wherein alkyl is unsubstituted or substituted with one to three groups independently selected from halogen, amino, hydroxy, carboxy, and

C_{1-3} alkoxy;

W is O or S;

Y is H, C_{1-10} alkylcarbonyl, $P_3O_9H_4$, $P_2O_6H_3$, or $P(O)R^9R^{10}$;

R^1 is hydrogen, CF_3, or ***C_{1-4} alkyl*** and one of R^2 and R^3 is OH or C_{1-4} alkoxy and the other of R^2 and R^3 is selected from the group consisting of

hydrogen,

hydroxy,

fluoro,

C_{1-3} alkyl,

trifluoromethyl,

C_{1-8} alkylcarbonyloxy,

C_{1-3} alkoxy, and

amino; or

R^2 is hydrogen, CF_3, or C_{1-4} alkyl and one of R^1 and R^3 is OH or C_{1-4} alkoxy and the other of R^1 and R^3 is selected from the group consisting of

hydrogen,

hydroxy,

fluoro,

C_{1-3} alkyl,

trifluoromethyl,

C_{1-8} alkylcarbonyloxy,

C_{1-3} alkoxy, and

amino; or

R^1 and R^2 together with the carbon atom to which they are attached form a 3- to 6-membered saturated monocyclic ring system optionally containing a heteroatom selected from O, S, and NC_{0-4} alkyl;

R^6 is H, OH, SH, NH_2, C_{1-4} alkylamino, di(C_{1-4} alkyl)amino, C_{3-6} cycloalkylamino, halogen, C_{1-4} alkyl, C_{1-4} alkoxy, or CF_3;

R^5 is H, C_{1-6} alkyl, C_{2-6} alkenyl, C_{2-6} alkynyl, C_{1-4} alkylamino, CF_3, or halogen;

R^7 is hydrogen, amino, C_{1-4} alkylamino, C_{3-6} cycloalkylamino, or di(C_{1-4} alkyl)amino;

each R^{11} is independently H or C_{1-6} alkyl;

R^8 is H, halogen, CN, carboxy, C_{1-4} alkyloxycarbonyl, N_3, amino, C_{1-4} alkylamino, di(C_{1-4} alkyl)amino, hydroxy, C_{1-6} alkoxy, C_{1-6} alkylthio, C_{1-6} alkylsulfonyl, or (C_{1-4} alkyl)$_{0-2}$ aminomethyl; and

R^9 and R^{10} are each independently hydroxy, $OCH_2CH_2SC(=O)$t-butyl, or $OCH_2O(C=O)$iPr;

with the provisos that (a) when R^1 is hydrogen and R^2 is fluoro, then R^3 is not hydrogen, trifluoromethyl, fluoro, ***1236** C_{1-3} alkyl, amino, or C_{1-3} alkoxy; (b) when R^1 is hydrogen and R^2 is fluoro, hydroxy, or C_{1-3} alkoxy, then R^3 is not hydrogen or fluoro; and (c) when R^1 is hydrogen and R^2 is hydroxy, then R^3 is not β-hydroxy.

'499 Patent, col. 13, line 5 through col. 14, line 17 (emphases added to highlight terms of particular interest for this case); J.A. 27245–47. [1]

Various claims appeared in Merck's patent applications based on that structural formula or related ones, including claims 6 and 8 of the January 2001 provisional, J.A. 25954–56, claims 6 and 8 of the PCT application that issued as the '499 patent, J.A. 25036–38, and claim 44 of that same application, which was added, substituting for earlier claims, immediately upon filing the U.S. version in July 2003, J.A. 27482–83. The 2003-added claim 44 of the 2003 application, for example, recites the above structural formula but is limited to the single-ring bases shown above (pyrimidine bases, such as cytosine and uracil). It therefore omits the above-quoted language concerning D, R^7, and R^8, which appear only on the double-ring bases shown above (purine bases, such as adenine and guanine). *Id.*

Annex 100

Claim 44 of the 2003 application and its PCT counter-part, like the structural formula III, encompasses, among the large number of possible combinations of values of the variables, structures having (i) a single-ring base, (ii) a methyl (C1 alkyl) in the R^1 position, and (iii) a fluoro in the R^2 or R^3 position. J.A. 25036–38, 27482–83. A subgenus with those characteristics—which embraces both a metabolite of Gilead's sofosbuvir and an earlier identified compound that was modified to arrive at sofosbuvir, and which Merck eventually focused on in new claims in 2005—is central in this case.

B

In 2002, a pharmaceutical company called Pharmasset, which was later acquired by Gilead, was researching Hepatitis C treatments. When one of Merck's early applications was published that year, Pharmasset reviewed the application, looking for "loopholes." J.A. 20048 (533). After reviewing Merck's application, Jeremy Clark, a chemist at Pharmasset, proposed the compound PSI-6130 (the compound that led to sofosbuvir). *Id.* (533–534). PSI-6130 had a single-ring base (cytosine), a methyl in the 2′ up position, and a fluoro in the 2′ down position. J.A. 24619, 24826. Pharmasset synthesized and tested PSI-6130 by May 2003. J.A. 20040 (504). It was the first compound made by Pharmasset that was active against Hepatitis C. J.A. 20050–51 (544–45). PSI-6130 led to sofosbuvir, which has the same methyl and fluoro substituents as PSI-6130 but contains uracil, rather than cytosine, as its base. J.A. 19913–17, 19951 (401).

Pharmasset filed a patent application for Mr. Clark's invention in May 2003. J.A. 20042 (511–12). The application was published in January 2005. The published application, the "Clark Application," described and claimed (in 129 claims) a range of structures, including both single-ring (pyrimidine) and double-ring (purine) bases, and methods of using them for treatment of various conditions, including Hepatitis C. J.A. 23709–86. Among the many specifically described and claimed structures was PSI-6130. J.A. 23727 (application ***1237** ¶ 168), 23756 (claim 26). The application issued in September 2008 as U.S. Patent No. 7,429,572, with only 19 claims, which cover PSI-6130. J.A. 29947–87.

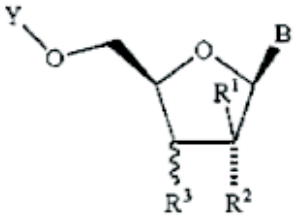
C

In February 2005, the month after the January 2005 publication of the Clark Application, Merck, through Dr. Durette, filed a narrowing amendment in the 2003 application that eventually issued as the '499 patent. J.A. 28318–21. Merck canceled all pending claims and substituted two narrower claims (claims 53 and 54). The claims issued as claims 1 and 2 of the '499 patent on September 12, 2006.

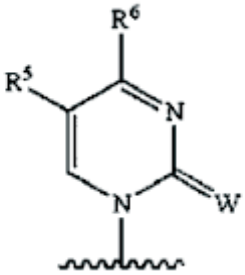
Claim 1 of the '499 patent is representative. It states:

> 1. A method of treating hepatitis C virus (HCV) infection comprising administering to a mammal in need of such treatment a therapeutically effective amount of a compound of structural formula III, or a pharmaceutically acceptable salt or acyl derivatives thereof,

(III)



wherein B is



W is O or S;

Y is H, $C_{1\text{-}10}$ alkylcarbonyl, $P_3O_9H_4$, $P_2O_6H_3$, or $P(O)R^9R^{10}$;

R^1 is CF_3, or $C_{1\text{-}4}$ alkyl and one of R^2 and R^3 is OH or $C_{1\text{-}4}$ alkoxy and the other of R^2 and R^3 is fluoro;

Annex 100

R^6 is H, OH, SH, NH_2, C_{1-4} alkylamino, di(C_{1-4} alkyl)amino, C_{3-6} cycloalkylamino, halogen, C_{1-4} alkyl, C_{1-4} alkoxy, or CF_3;

R^5 is H, C_{1-6} alkyl, C_{2-6} alkenyl, C_{2-6} alkynyl, C_{1-4} alkylamino, CF_3, or halogen; and

R^9 and R^{10} are each independently hydroxy, $OCH_2CH_2SC(=O)$t-butyl, or $OCH_2O(C=O)$iPr.

'499 Patent, col. 137, line 2 through col. 138, line 16. Merck seems to accept that the '499 patent claims include PSI-6130. Merck Br. 18. Gilead characterizes the claim as "target[ing]" PSI-6130. Gilead Br. 16, 18.

We will elaborate below on the connection of Pharmasset's work on PSI-6130 with Dr. Durette, Merck, and Merck's 2005 claim amendments for what became the '499 patent. Those connections, together ***1238** with Dr. Durette's eventual testimony about those connections, came to be the basis of the district court's ultimate determination that Merck had unclean hands, precluding patent enforcement against Gilead.

D

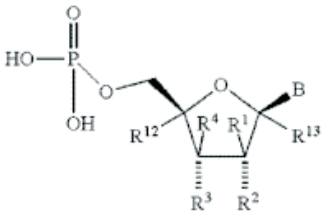
In February 2007, a few months after the '499 patent issued, Merck's Dr. Durette filed the application that ultimately issued as the '712 patent. J.A. 24147. The original claims of that application were quite different from PSI-6130, J.A. 24336–41, and Dr. Durette immediately substituted two claims that were closer, but that the parties here do not contend covered PSI-6130, J.A. 24150–53. It appears undisputed that after April 2007 Dr. Durette did not participate in prosecuting the '712 application. Merck Br. 18; *see e.g.*, J.A. 24369–70 (April 2007 filing by the attorney who took over responsibility for prosecuting the application from Dr. Durette).

In 2010, Pharmasset published an article in the Journal of Medicinal Chemistry describing "sofosbuvir" (PSI-7977) to treat HCV. J.A. 31990–2007. In 2011, attorney Jeffrey Bergman took over prosecuting the '712 application for Merck. J.A. 32383. Merck amended the '712 application to include new claims. J.A. 24394–410. The '712 patent issued on July 9, 2013.

Claim 1 of the '712 patent is representative. It states:

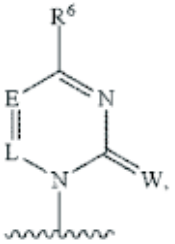
1. A compound having the formula:

(VIII)



or a pharmaceutically acceptable salt thereof, wherein:

B is:



L is CH or N;

E is N or CR_5;

W is O or S;

R^1 is C_{2-4} alkenyl, C_{2-4} alkynyl, or C_{1-4} alkyl optionally substituted with amino, hydroxy, or 1 to 3 fluorine atoms; R^3 is hydroxy or C_{1-4} alkoxy; and R^2 is selected from the group consisting of

halogen,

C_{1-4} alkyl, optionally substituted with 1 to 3 fluorine atoms,

***1239** C_{1-10} alkoxy, optionally substituted with C_{1-3} alkoxy or 1 to 3 fluorine atoms,

C_{2-6} alkenyloxy,

C_{1-4} alkylthio,

C_{1-8} alkylcarbonyloxy,

aryloxycarbonyl,

azido,

amino,

C_{1-4} alkylamino, and

di(C_{1-4} alkyl)amino;

R^4 and R^6 are each independently H, OH, SH, NH_2, C_{1-4} alkylamino, di(C_{1-4} alkyl)amino, C_{3-6} cycloalkylamino, halogen, C_{1-4} alkyl, C_{1-4} alkoxy, or CF_3;

R^5 is H, C_{1-6} alkyl, C_{2-6} alkenyl, C_{2-6} alkynyl, C_{1-4} alkylamino, CF_3, or halogen;

R^{12} and R^{13} are each independently hydrogen or methyl.

'712 Patent, col. 143, lines 2–54. The parties characterize these claims, which embrace a single-ring base with methyl up and fluoro down at the 2′ position in the sugar, as covering metabolites of sofosbuvir, produced in the body after administration of sofosbuvir. Merck Br. 18; Gilead Br. 19. As noted above, in this case Gilead ultimately stipulated to infringement of the asserted claims of the '712 and '499 patents based on the district court's claim construction.

II

After a bench trial on Gilead's equitable defenses, the district court held that Merck could not enforce the two patents at issue here against Gilead because its conduct gave it unclean hands. *Gilead*, 2016 WL 3143943, at *39. The court rested that determination on its findings of both pre-litigation business misconduct and litigation misconduct attributable to Merck. *Id.* at *27. The court balanced the equities and applied its determination to both patents. *Id.* at *37–39.

The Supreme Court has articulated the governing legal standard. In *Keystone Driller Co. v. General Excavator Co.*, the Court explained that a determination of unclean hands may be reached when "misconduct" of a party seeking relief "has immediate and necessary relation to the equity that he seeks in respect of the matter in litigation," *i.e.*, "for such violations of conscience as in some measure affect the equitable relations between the parties in respect of something brought before the court." 290 U.S. 240, 245, 54 S.Ct. 146, 78 L.Ed. 293 (1933). In *Precision Instrument Manufacturing Co. v. Automotive Maintenance Machinery Co.*, the Court stated that the doctrine "closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant," and requires that claimants "have acted fairly and without fraud or deceit as to the controversy in issue." 324 U.S. 806, 814–15, 65 S.Ct. 993, 89 L.Ed. 1381 (1945). The Court added that the doctrine "necessarily gives wide range to the equity court's use of discretion in refusing to aid the unclean litigant." *Id.* at 815, 65 S.Ct. 993; *see also Northbay Wellness Grp., Inc. v. Beyries*, 789 F.3d 956, 960 (9th Cir. 2015) (explaining need for equitable balancing). [2]

***1240** Merck invokes the term "material" to describe the kind of connection between misconduct and the litigation that the Supreme Court's formulations require. But Merck has not identified how that term helpfully refines the Supreme Court's standard in a way that is relevant to this case. *See* Merck Br. 39–43. For purposes of this case, which involves clear misconduct in breaching commitments to a third party and clear misconduct in litigation, the "immediate and necessary relation" standard, in its natural meaning, generally must be met if the conduct normally would enhance the claimant's position regarding legal rights that are important to the litigation if the impropriety is not discovered and corrected. Merck cites no authority holding such misconduct to be outside *Keystone*'s scope. Nor does Merck deny that the standard can cover at least some misconduct that ultimately fails to affect the litigation, as when it is discovered before it bears fruit, as long as its objective potential to have done so is sufficient.

Significantly, this is not a case in which it is clear that the identified misconduct could not reasonably have enhanced the claimant's legal position as to either the creation or the enforcement of the legal rights at issue. Nor is this a case involving alleged deficiencies in communications with the PTO during patent prosecution, for which this court's inequitable-conduct decisions, *e.g.*, *Therasense, Inc. v. Becton, Dickinson & Co.*, 649 F.3d 1276 (Fed. Cir. 2011) (en banc), set important limits on conclusions of unenforceability through that doctrine. [3] In the circumstances present in this case, we see no genuine issue about the governing legal standard, but only its application.

We conclude that the district court made findings that have adequate support in the evidence and that, taken together, justify the equitable determination of unclean hands as a defense to enforcement in this case. In so concluding, we apply deferential standards of review, as Merck itself urges.

We review the district court's ruling for abuse of discretion, which means that we review factual findings only for clear error. *See* Merck Br. 37 (citing *Northbay*, 789 F.3d at 959).

Our decision rests only on the totality of the evidence-supported misconduct we summarize, not individual elements alone and not every finding of the district court. We are conscious, as any court presented with a defense of unclean hands must be, both of the judicial system's vital commitment to the standards of probity protected by the doctrine and, also, of the potential for misuse of this necessarily flexible doctrine by parties who would prefer to divert attention away from dry, technical, and complex merits issues toward allegations of misconduct based on relatively commonplace disputes over credibility. Having those considerations in mind, we do not find a sufficient basis to set aside the district court's determination of unclean hands under the applicable deferential standard of review.

A

The district court found, with adequate evidentiary support, two related forms of pre-litigation business misconduct attributable to Merck. First, Dr. Durette learned of Pharmasset's PSI-6130 structure by participating, at Merck's behest, in a conference call with Pharmasset representatives, violating a clear "firewall" understanding ***1241** between Pharmasset and Merck that call participants not be involved in related Merck patent prosecutions. Second, Merck continued to use Dr. Durette in the related patent prosecutions even after the call. The district court also found, with adequate evidentiary support, a direct connection to the ultimate patent litigation involving sofosbuvir. Thus, Dr. Durette's knowledge of PSI-6130, acquired improperly, influenced Merck's filing of narrowed claims, a filing that held the potential for expediting patent issuance and for lowering certain invalidity risks. Those findings establish serious misconduct, violating clear standards of probity in the circumstances, that led to the acquisition of the less risky '499 patent and, thus, was immediately and necessarily related to the equity of giving Merck the relief of patent enforcement it seeks in this litigation.

1

The business misconduct found in this case grows out of Merck's dealings with Pharmasset. In the early 2000s, the two companies discussed possible business arrangements that would include work on "discovery and development of antiviral agents against ... hepatitis C virus." *Gilead*, 2016 WL 3143943, at * 6. They entered into a non-disclosure agreement in January 2001. *Id.*

In September 2003, Pharmasset gave Merck certain information about Pharmasset's NS5B Nucleoside Inhibitor, *i.e.*, PSI-6130. *Id.*; J.A. 32161–81. In October 2003, the companies signed a Material Transfer Agreement under which Pharmasset would give Merck the "Pharmasset HCV NS5B Nucleoside Inhibitor" for Merck to evaluate. *Gilead*, 2016 WL 3143943, at *7; J.A. 30077–83. The Agreement allowed Merck to test PSI-6130 as long as it did not try to discern the compound's chemical structure. *Gilead*, 2016 WL 3143943, at *7; J.A. 30078 ¶ 3.1.

In January 2004, Merck asked Pharmasset to furnish more information to a "firewalled" Merck medicinal chemist—meaning that the chemist was "firewalled" from Merck's own Hepatitis C program. *Gilead*, 2016 WL 3143943, at *7–8; J.A. 32183–86. Pharmasset agreed to provide information to Merck's chemist, Dr. Ashton, on the conditions that the information was subject to the 2001 non-disclosure agreement and, what is critical here, that it was to be shared only on a " 'fire walled' basis." J.A. 22921–22; *Gilead*, 2016 WL 3143943, at *7–8. In February 2004, Merck's "firewalled" chemist determined that "PSI6130 and its relatives represent a potentially good fit with Merck's existing anti-HCV portfolio arising from the Isis collaboration." J.A. 22918–19.

Merck and Pharmasset then scheduled, for March 17, 2004, a conference call during which Pharmasset would disclose the structure of PSI-6130. J.A. 23706–07; *see Gilead*, 2016 WL 3143943, at *8. Merck planned to have Dr. Durette, Merck's patent prosecutor for what became the '499 patent, "view the structure" during the call. J.A. 23706–07; *Gilead*, 2016 WL 3143943, at *8; *see also* J.A. 19945 (375) (Dr. Durette's supervisor asked him to participate in the call). The district court found that Dr. Durette knew before the call "that any information he learned about Pharmasset's PSI-6130 nucleoside analog compound would overlap with the subject matter of his patent prosecution docket for Merck, thereby creating a conflict." *Gilead*, 2016 WL 3143943, at *9.

On the March 17, 2004 call, before disclosing the compound's structure, Pharmasset confirmed the importance of the firewall to it by asking whether the two participating Merck

employees (Dr. Durette and Dr. Pon) were within the firewall ***1242** separating Merck call participants from related Merck HCV patenting efforts. *Id.*; J.A. 31544–45; J.A. 19947 (382). At some point in the call, the Merck participants said that they were within the firewall. *Gilead*, 2016 WL 3143943, at *9–10; J.A. 31544–45; J.A. 19960 (435). Pharmasset's notes from the call, however, also indicate some disclosure by Dr. Durette of a conflict issue for him: "It's a problem for Phil Durette; he needs to have a conversation with his supervisor; 'seems quite related to things that I'm involved with.' ... [H]e is personally conflicted; not the company." J.A. 31545; *see Gilead*, 2016 WL 3143943, at *9–10. The PSI-6130 structure was disclosed during the call. *Id.* at *9.

After the March 17, 2004 call, Dr. Durette stopped participating in the work of the Merck team dealing with Pharmasset. J.A. 19944 (373). But Merck kept him working as the prosecuting attorney for its patent applications related to nucleosides that inhibit Hepatitis C virus replication. *Gilead*, 2016 WL 3143943, at *10 ("Instead of withdrawing from prosecution, Dr. Durette continued to prosecute Merck's HCV patent applications and write new claims that targeted Pharmasset's work."). The court found that neither Merck nor Dr. Durette provided any explanation as to why he was not removed from further prosecution of the Merck patent applications. *Id.*

Those facts support the district court's findings of serious business misconduct. Merck sent Dr. Durette to participate in the March 2004 call despite the clear firewall and the fact that "Merck ... knew that Pharmasset's compound was an NS5B polymerase inhibitor just like its own compounds from the Merck-Isis collaboration." *Id.* at *28. "Dr. Durette's involvement with Merck's HCV patents violated the understanding the parties had about their firewall obligations, which excluded anyone involved with Merck's internal HCV program." *Id.* And after the call, it was "wrong for Merck to allow Dr. Durette to continue to prosecute" the Merck applications: he continued prosecution of the application that became the '499 patent, and in 2007 he filed (and immediately amended) the application that became the '712 patent. *Id.* [4]

2

The district court found, with sufficient basis, that the wrongful business conduct had the required connection to this patent litigation. *Id.* at *29. As laid out above, in February 2005, a month after the publication of Pharmasset's Clark Application, Dr. Durette amended the Merck application that ultimately issued as the '499 patent by canceling the broad genus claims and substituting claims that narrowed the scope to a subgenus focused on the key features of PSI-6130. *Id.* at *11. The district court ***1243** found that "Dr. Durette would not have written new claims to cover PSI-6130 in February 2005 but for his improper participation on the March 17, 2004 patent due diligence call and learning the structure of PSI-6130 ahead of the structure being published." *Id.*

Given that Dr. Durette learned of the PSI-6130 structure in March 2004 (as is now conceded), the district court could readily find that his knowledge from the call played a significant role in his actual process of decision-making that led him to file claims focusing on that and similar structures. Dr. Durette admitted during his deposition that participation in the March 2004 call, which he at the time denied, "would have tainted [his] judgment as to what claims to pursue in the Merck/Isis collaboration." J.A. 22341 (38). The timing of Merck's February 2005 amendment, which occurred just one month after the structure of PSI-6130 was published in January 2005, supports the inference, as the district court put it, that Merck was deliberately "wait[ing]." *Gilead*, 2016 WL 3143943, at *11 ("Dr. Durette waited to amend the claims ... until Clark application was published"). Dr. Durette provided support for the inference of a taint when he stated in his deposition that failing to keep participants in the March 2004 call separate from the patent prosecutors "could raise issues down the road on the patent that would issue based on the attorneys prosecuting of those patents." J.A. 22374 (171). [5]

The additional finding that Dr. Durette would not otherwise have made the February 2005 amendment is not clearly erroneous. Dr. Durette's testimony at his deposition greatly downplayed the role of the sole prominent candidate for an independent cause of the February 2005 amendment, namely, the January 2005 Clark Application. In doing so, Dr. Durette gave testimony that is capable of being read as suggesting that the Clark Application alone would not have led him to amend the claims. J.A. 22344–46. Significantly, Merck did not present evidence that would compel a finding, or even meaningfully argue for a finding, that even if Dr. Durette personally had not made the February 2005 amendment, others at Merck lacking the earlier knowledge of PSI-6130 would have done something equivalent so as to break any causal connection between the business misconduct and the patent-rights benefits associated with the amendment. *See* Defs.' [Proposed] Findings of Fact and Conclusions of Law

Regarding Gilead's Equitable Defenses, *Gilead Scis., Inc. v. Merck & Co., Inc., et al.*, Case No. 5:13-cv-04057-BLF, D.I. 407 at 27–28 (¶¶ 113–15) (N.D. Cal. Apr. 22, 2016) (brackets in document name in original).

Although Merck stresses that even the pre-February 2005 claims *included* PSI-6130 and similar structures, Dr. Durette explained the benefits to a patentee's legal position from a narrowing amendment of this sort. "It would expedite prosecution." J.A. 22347 (62); *see* J.A. 19945 (376) ("the Examiner would have less subject matter to ... search"). Relatedly, "limiting the scope" of the claims would mean "fewer opportunities for prior art to ... present an issue of patentability" under ***1244** 35 U.S.C. §§ 102 and 103. J.A. 22347 (62). That would be so during prosecution and also in a litigation challenge. And a narrowing amendment can reduce a patentee's risk on other invalidity issues, such as the risk that breadth can create under the requirement that the "full scope" of a claim be enabled. *See*, *e.g.*, *Amgen Inc. v. Sanofi*, 872 F.3d 1367, 1375 (Fed. Cir. 2017). Such risks can be reduced even if, as here, the resulting claim still covers a large, though less large, number of compounds.

In these circumstances, we see no error in the district court's determination that the pre-litigation business misconduct we have summarized was immediately and necessarily related to the equity of Merck's obtaining enforcement of its patent in this litigation.

B

The district court also found, with adequate evidentiary support, essentially two forms of litigation misconduct involving Dr. Durette as a witness and attributable to Merck. First, in his deposition, where he appeared partly as Merck's corporate witness on issues to which the March 2004 call was relevant, Dr. Durette gave testimony that he did not participate in the March 2004 call—testimony that was later conceded to be false and that the court found to be intentionally so. Second, both in the deposition and then at trial, Dr. Durette, in support of Merck's validity positions, gave testimony about the role the January 2005 Clark Application played in Dr. Durette's filing of the February 2005 amendment that the court found so incredible as to be intentionally false. The intentional testimonial falsehoods qualify as the kind of misconduct that can, in these circumstances, support a determination of unclean hands. The court also found, with adequate evidentiary support, that the false testimony, in both respects, bore on the origin story of the February 2005 amendment, which was relevant to the invalidity issues in the litigation and hence immediately and necessarily related to the equity of the patent-enforcement relief Merck seeks in this case.

1

In 2015, during the discovery phase of this case, Merck designated Dr. Durette as its corporate witness under Fed. R. Civ. P. 30(b)(6) on certain issues, even though he had retired from Merck in 2010. *Gilead*, 2016 WL 3143943, at *12; J.A. 22335 (15–16), 22377 (181–84); J.A. 22214. In particular, Merck designated him to represent the corporation regarding the prosecution of the application that issued as the '499 patent. *Gilead*, 2016 WL 3143943, at *12; J.A. 22214–16 (¶¶ 15–21). Dr. Durette was not Merck's representative regarding the 2007 application that issued as the '712 patent, *id.* (¶¶ 20–21), though he filed that application.

On May 8, 2015, Gilead deposed Dr. Durette in both his personal and his representative capacities. J.A. 22331–83. Near the end of the deposition, Dr. Durette stated that his answers regarding the '499 patent would not differ according to the capacity in which he was testifying. J.A. 22377 (183–84). Merck's counsel represented both Merck and Dr. Durette at the deposition. *Gilead*, 2016 WL 3143943, at *12; J.A. 22333 (7). Dr. Durette testified that, in preparation for his deposition, he met with Merck's outside counsel for six to seven hours on each of two days and spent eight to ten additional hours on his own. *Gilead*, 2016 WL 3143943, at *12; J.A. 22334 (10–11).

Dr. Durette gave two different answers about whether he participated in the March 17, 2004 call with Pharmasset. Near the start of the deposition, J.A. 22336 (19), and toward the end of the deposition, J.A. ***1245** 22374–75 (172–73), he repeatedly said that he did not recall participating. But during a portion of the deposition not long after it started (corresponding to about nine pages of the transcript), Dr. Durette repeatedly stated, definitively, that he did not participate. J.A. 22339–41 (30–38); *see*, *e.g.*, J.A. 22339 (31) ("sure" that he was not involved in any discussion with Pharmasset in March 2004 where he was told of PSI-6130's structure); J.A. 22341 (37) ("I never participated in a due diligence meeting on March 17 .... I did not participate in any meeting of due diligence on March 17"). One reason that he was so sure, he said, was that it would have violated

Merck policy to allow his participation and to keep him on the related patent prosecutions. J.A. 22341 (38–39), 22373–74 (168–72); 22382 (202). On the basis of those definitive denials, the district court found that "[w]hen asked about the March 17, 2004, call at the deposition, Dr. Durette denied ever having been on such a call. When asked whether he was sure that he was not on the March 17, 2004, call, Dr. Durette unequivocally answered yes." *Gilead*, 2016 WL 3143943, at *12.

That denial of participation was false, as came to be undisputed by Merck, and acknowledged by Dr. Durette, at trial. *See id.* at *14; J.A. 19937–38 (344–47). The district court found the falsity of the deposition denial of participation to be intentional. *Gilead*, 2016 WL 3143943, at *29–31. We cannot deem that state-of-mind finding to be clearly erroneous, given the district court's direct observation of Dr. Durette at the trial; the documentary evidence of his participation, including pre-participation emails (some that he reviewed during his deposition); and the sufficiently supported findings that aspects of his testimony were "inconsistent, contradictory, and untruthful." *Id.* at *29; *see id.* at *12–16.

Regarding the role of the January 2005 Clark Application in Dr. Durette's decision to file new claims in February 2005, Dr. Durette downplayed that role in ways that the district court reasonably found incredible. Most starkly, at his deposition, he stated that he simply did not recall whether he saw the Clark Application before filing the February 2005 amendment and hence could not state that it played a role in the amendment. *See id.* at *16; J.A. 22343–44 (48–52), 22348–49 (66–69).

Before trial, the court denied Merck's motion to exclude all evidence post-dating 2002 from the jury trial regarding invalidity—a denial not separately challenged as incorrect here. J.A. 19220–22 (denying exclusion because the information was relevant to invalidity issues). Once that motion was denied, Merck itself indicated that it would call Dr. Durette as a witness. J.A. 19404 (42) (Merck explaining that Dr. Durette is "planning to come and testify in our case"). Gilead then took the opportunity to call Dr. Durette first, cross-examining him before Merck conducted its direct examination regarding validity issues, including the origin of the February 2005 amendment.

In his trial testimony, Dr. Durette continued to downplay the role of the Clark Application, though to a lesser extent than during the deposition. *See Gilead*, 2016 WL 3143943, at *16. Explaining his decision to file the amendment, he stressed that he narrowed the claims to "expedite" examination, *id.* at *17; J.A. 19944–45 (371–75), and said that "he amended the '499 claims to focus on 'get[ting] allowance on the subject matter that was most important to the [Merck-Isis] collaboration,' " *Gilead*, 2016 WL 3143943, at *17; J.A. 19952 (404). He also testified, however, that he had "bec[o]me convinced that it was the publication of the [Clark] [A]pplication that led [him] to reexamine" the ***1246** prosecution of the application that became the '499 patent and file the February 2005 amendment. J.A. 19949 (390–91); *Gilead*, 2016 WL 3143943, at *16. The district court could reasonably find that, by stating that it was surrounding circumstances that so convinced him, not his own recollection, Dr. Durette was continuing to minimize the actual role of the Clark Application and what he learned in the March 2004 call, *i.e.*, the role of Pharmasset's work, in his amendment decision for Merck. As already noted above, the court reasonably found that he had in mind the information he learned in the March 2004 call, that he was waiting for publication of PSI-6130's structure to avoid violating the non-disclosure agreement, and that he filed the February 2005 amendment once publication of the Clark Application occurred. In light of those findings, it was also reasonable for the district court to find Dr. Durette's trial testimony a misleading effort to downplay the role of Pharmasset's work in the February 2005 amendment.

The district court found that "Dr. Durette's changing and evasive explanations for why he narrowed the claims undermine his testimony" and that "his testimony [was] not credible." *Id.* at *17. It found that Dr. Durette's testimony that "he amended the '499 claims to focus on 'get[ting] allowance on the subject matter that was most important to the [Merck-Isis] collaboration' is contrary to the evidence and is not credible because Merck never tested any of the claimed compounds" until after the Clark Application was published. *Id.* The testimony downplaying the role of Pharmasset's work —published in the Clark Application, first disclosed to Dr. Durette in March 2004—the court found "not credible" and "false." *Id.*

2

The district court properly charged Merck with the consequences of the testimony, at the deposition and at the trial, that the court found to be intentionally false. *Id.* at *29 ("[T]he record shows that ... [Dr. Durette's] testimony

was sponsored by Merck."). As already noted, not only did Merck's counsel appear as counsel for Dr. Durette at his deposition, and prepare him for it, but Dr. Durette was Merck's official corporate representative on matters (the origin of the '499 patent) to which the testimony at issue was relevant. As also already noted, Dr. Durette appeared at trial after Merck indicated that it was going to call him to testify about invalidity matters, to which the testimony at issue here had been held relevant.

The testimony, relevant to issues in the case and reasonably found to be intentionally false, had an immediate and necessary relation to the equity of the patent-enforcement relief Merck seeks in this litigation. The district court held that the origin of the February 2005 amendment, and hence Dr. Durette's testimony about that, was relevant to the invalidity issues to be tried. *Id.* at *14 ("At trial, Dr. Durette provided key testimony for Merck on validity issues, including written description of the '499 Patent."); *id.* at *32 (determining that the testimony was "directed at and supported Merck's validity arguments, and went to the heart of significant issues in this case"). The verdict form made explicit that lack of written description and lack of enablement were tied to the defense of "derivation from Jeremy Clark" (the Pharmasset inventor of PSI-6130)—the latter to be addressed only if the jury found either lack of an adequate written description or lack of enablement. J.A. 21066–75. Merck's own policy of separating patent prosecutors from discussions like the ones held with Pharmasset is confirmation that Merck recognized, as Dr. Durette testified, that the origin of patent claims ***1247** could matter in eventual litigation over those claims. *See* J.A. 22341 (39–40). In this case, downplaying the role of the Clark Application (and the March 2004 call) naturally served to aid Merck's case that it did not derive the claimed inventions from Pharmasset's Jeremy Clark. In these circumstances, the district court could reasonably determine that the testimony at issue here held a significant potential to give Merck an advantage in the litigation, satisfying the *Keystone* standard.

C

We see no reversible error in the district court's balancing of the equities. *Gilead*, 2016 WL 3143943, at *37–39. As to the '499 patent, the equity balance follows directly from the determinations already described: the misconduct leading to the February 2005 amendment and the misconduct involved in the litigation defense of the resulting patent claims. On appeal, we have relied on a more limited set of wrongful conduct than recited in the district court's opinion, *see supra* nn.4–5, but we do not think that the equitable balance is altered by that narrowing. The conduct we have affirmed as wrongful is so clearly the core of the district court's analysis that we have no doubt that the equitable balancing by the district court would have been the same if it had limited its wrongful-conduct findings to those we have recited. On these facts, there is no abuse of discretion.

As the district court recognized, the question for the '712 patent is closer, but we also see no abuse of discretion in the district court's ultimate conclusion that the unclean hands defense extends to that patent as well. The district court connected the '712 patent to one portion of Merck's improper conduct: once Dr. Durette improperly learned PSI-6130's structure through participating in the March 2004 call at Merck's behest, Merck kept him in his patent-prosecution role—which, as noted, included filing the 2007 application that issued as the '712 patent, as well as the initial substitute claims, after the (tainted) '499 patent had already issued. *Id.* at *10–11. While the district court said that its "finding of improper business conduct related to the March 2004 call was not considered by the Court in determining whether unclean hands prevented enforcement of the '712 Patent," *id.* at *36 n.5, that statement does not refer to the retention of Dr. Durette as the lead prosecutor of HCV applications, including the one that eventually issued as the '712 patent, and the court relied on that improper retention. *E.g.*, *id.* at *10–11. The district court relied on the connection between the two patents: "Dr. Durette played a key role in the prosecution of both the '499 and '712 Patents. He was responsible for filing the application that eventually matured as the '712 Patent and this application shares the same specification as the '499 Patent." *Id.* at *36.

More importantly, the district court, turning from the business misconduct to the litigation misconduct, reasonably concluded that "Merck's litigation misconduct infects the entire lawsuit, including the enforceability of the '712 Patent." *Id.* at *32. "[T]he untruthful testimony offered by Dr. Durette in his deposition and at trial was not incidental, but rather was directed at and supported Merck's validity arguments, and went to the heart of significant issues in this case." *Id.* The validity issues were largely the same for the two patents, focused on the common specification of the two patents and how that specification bore on written-description support for and enablement of claims in the two patents that have closely related scope. As indicated above, the jury verdict form tied both of those issues, for both ***1248** patents, to the question of "derivation from Jeremy Clark" (the Pharmasset

inventor of PSI-6130, disclosed in March 2004 and published in the Clark Application). J.A. 21066–75. Thus, the litigation misconduct "infected this entire case, covering both patents-in-suit." *Gilead*, 2016 WL 3143943, at *36. We conclude that, contrary to Merck's suggestion, the district court set forth a sufficient explanation of the '712 patent's connection to Merck's misconduct.

Merck argues that even where there is misconduct related to one patent, "that does not defeat claims under another patent simply because they were 'brought ... in the same lawsuit.' " Merck Br. 69. We agree; but the assertion does not undermine the district court's ruling here. The Supreme Court's decisions in *Keystone* and *Precision Instruments*, dealing with findings of unclean hands when multiple patents were at issue in the litigation and the alleged misconduct related to a subset of the patents, are instructive. In both cases, the Supreme Court applied the finding of unclean hands to all of the patents. *Keystone*, 290 U.S. at 246–47, 54 S.Ct. 146; *Precision Instrument*, 324 U.S. at 819, 65 S.Ct. 993. The district court in the present case had sufficient reason to find that both patents were tainted by the patentee's misconduct, especially the litigation misconduct. Thus, we see no abuse of discretion with respect to either the '499 patent or the '712 patent.

III

Because the district court did not abuse its discretion in applying the doctrine of unclean hands, we affirm.

Costs awarded to Gilead.

AFFIRMED

All Citations

888 F.3d 1231, 126 U.S.P.Q.2d 1481

Footnotes

1 The top figure shows the key elements of the nucleoside. B is the base, shown in the next two figures in single-ring (pyrimidine) and double-ring (purine) versions. R^1 and R^2 are located at the 2# (carbon) position on the ring, with R^1 at the 2# "up" location and R^2 at the 2# "down" location. R^3 is at the 3# position.

2 The doctrine of unclean hands is not patent-specific, but its application to patents has some distinctive features affecting the patent system. We need not choose between Ninth Circuit and Federal Circuit law on the subject here. The parties have identified no differences pertinent to this case, and they have not identified what law they contend controls in this appeal.

3 We therefore have no occasion in this case to consider issues that may arise in seeking to ensure that the unclean-hands doctrine operates in harmony with, and does not override, this court's inequitable-conduct standards governing unenforceability challenges based on prosecution communications with the PTO.

4 The court added that Merck's own "corporate policy forb[ade] Merck's patent prosecutors from participating in licensing discussions in an area related to their prosecution work." *Id.* at *9 (citing J.A. 22341 (38–39)); *see id.* at *28; J.A. 22374 (170–71). That policy, as we note below, confirms the connection between (a) Merck's patent prosecutor learning the structure of PSI-6130 during the March 2004 call and (b) Merck's patenting and the resulting litigation. To the extent that the district court suggested that the violation of Merck's internal policy was an independent basis for finding wrongful conduct, even apart from the violation of the firewall understanding, we see no basis for such a suggestion. A patent-obtaining firm may legitimately have such a policy simply to avoid having its later litigation position weakened by exposure to information gained from licensing discussions. Violation of such a policy would be a wrong to the firm but not to the potential licensee, or the judicial system, in the absence of other understandings, such as the firewall understanding here.

5 The timing of the amendment undermines a different, but ultimately immaterial, finding of the district court—that Merck violated the non-disclosure agreement with Pharmasset. *E.g.*, *Gilead*, 2016 WL 3143943, at *10, *27, *29. The only identified forbidden use of information covered by the agreement—Dr. Durette's February 2005 claim amendment focusing on PSI-6130—did not occur until the information was publicly disclosed in the Clark Application. The disclosure ended the information's protection by the agreement. J.A. 32152 ¶ 3(ii).

ANNEX 101

Neutral Citation Number: [2013] EWCA Civ 328

Case No: A3/2012/1463 & A3/2012/1474

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEENS BENCH DIVISION
COMMERCIAL COURT
MR JUSTICE BURTON
[2012] EWHC 1278 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/04/2013

Before :

LORD JUSTICE MAURICE KAY
LORD JUSTICE TOULSON
and
LORD JUSTICE AIKENS

- -

Between :

The Royal Bank of Scotland Plc	**Appellant**
- and -	
(1) Highland Financial Partners LP	**Respondents**
(2) HFP CDO Construction Corp.	
(3) Highland CDO Opportunity Master Fund LP	
(4) Highland Capital Management Europe, Limited	
(5) Scott Law Group LLC	

- -

(Transcript of the Handed Down Judgment of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

- -

Mr John Nicholls QC & Ms. Louise Hutton (instructed by **Linklaters LLP**) for the **Appellant**
Mr Stephen Auld QC, Mr Benjamin Strong & Mr Laurence Emmett (instructed by **Cooke, Young & Keidan LLP**) for the **Respondents (1) to (3)**
Mr Graham Dunning QC and Mr Jeremy Brier (instructed by **DaySparkes)** for the **Respondent (5)**

Hearing dates : 27th-29th of November 2012

- -

Judgment
As Approved by the Court

Annex 101

156. In my judgment that analysis is applicable to the facts of this case. So the question is: what was SG's status in the 2012 trial? RBS had no option but to call SG as a witness to deal with the allegation of "unclean hands" and the allegation that the Liability judgment had been obtained by fraud. He was RBS' key witness on both those issues. Also, by the time of the 2012 trial, SG was a Managing Director of RBS working in the European Credit Special Situations Group. He was authorised to make his seventh witness statement, his chief witness statement in the 2012 trial, on behalf of RBS in support of the anti-suit injunction claims.[141] Although the judge did not make an express finding to this effect, I would expect that, as in the earlier litigation, SG was part of the RBS litigation team for the purposes of the 2012 trial. There was no evidence from RBS that SG's situation had changed from that at the time of the Liability hearing.[142]

157. There can be no doubt, in my view, that when SG gave his evidence in the 2012 trial, he had the status necessary to make his evidence that of RBS for the purposes of the "unclean hands" issue as well as the issue of whether the Liability judgment had been obtained by fraud – as to which Mr Nicholls did not raise the "attribution" argument. So I must reject the first of Mr Nicholls' two main submissions.

158. **Did the judge err in concluding that there was a sufficient "immediate and necessary" relation between the misconduct of SG and the claim by RBS for equitable relief in the form of an anti-suit injunction such that RBS was to be denied it under the "unclean hands" doctrine?**

There is no dispute that there exists in English law a defence to a claim for equitable relief, such as an injunction, which is based on the concept encapsulated in the equitable maxim "he who comes into equity must come with clean hands".[143] Mr Nicholls accepted that the doctrine applies to a claim for an anti-suit injunction where the claim is based on an allegation that the defendant has started proceedings in a foreign jurisdiction in breach of contract because the claimant and defendant had agreed to an exclusive jurisdiction clause in favour of the English courts. It is clear from the speech of Lord Bingham in ***Donohue v Armco Inc***[144] that this defence is distinct from that of there being "strong reason" not to grant an anti-suit injunction.

159. It was common ground that the scope of the application of the "unclean hands" doctrine is limited. To paraphrase the words of Lord Chief Baron Eyre in ***Dering v Earl of Winchelsea***[145] the misconduct or impropriety of the claimant must have "an immediate and necessary relation to the equity sued for". That limitation has been expressed in different ways over the years in cases and textbooks. Recently in ***Fiona Trust & Holding Corporation and others v Yuri Privalov and others***[146] Andrew Smith J noted that there are some authorities[147] in which the court regarded attempts to mislead it as presenting good grounds for refusing equitable relief, not only where the purpose is to create a false case but also where it is to bolster the truth with

---

[141] Seventh witness statement para 2.
[142] See the finding of Burton J on that point in the May 2012 judgment at [104]
[143] ***Snell's Equity (32nd Ed 2010) at 15-15 (page 98-9).***
[144] ***[2002] 1 Lloyd's Rep 425 at [24]***
[145] ***(1787) 1 Cos 318 at 319.***
[146] ***[2008] EWHC 1748 (Comm)***
[147] ***Armstrong v Sheppard & Short Ltd [1959] 2 QB 384; J Willis Son v Willis [1986] EGLR 62; Gonthier v Orange Contract Scaffolding Ltd [2003] EWCA Civ 873***

fabricated evidence. But the cases noted by him were ones where the misconduct was by way of deception in the course of the very litigation directed to securing the equitable relief.[148] ***Spry: Principles of Equitable Remedies,***[149] suggests that it must be shown that the claimant is seeking "to derive advantage from his dishonest conduct in so direct a manner that it is considered to be unjust to grant him relief". Ultimately in each case it is a matter of assessment by the judge, who has to examine all the relevant factors in the case before him to see if the misconduct of the claimant is sufficient to warrant a refusal of the relief sought.

160. Mr Nicholls relied strongly on the House of Lords' decision in ***Grobbelaar v News Group Newspapers.***[150] The House of Lords permitted the claimant footballer to bring an action to obtain an injunction to restrain *The Sun* newspaper from printing false allegations about him *actually* throwing matches, when a jury had convicted him of *conspiring* to throw matches in return for bribes but not of actually having done so. In contrast, Mr Dunning relied on ***Armstrong v Sheppard & Short Ltd***[151] in which the Court of Appeal held that the claimant's attempt to mislead the court about whether a conversation had taken place between him and a representative of the defendant, which was fundamental to the claimant's claim for an injunction, was sufficiently closely connected. In my view these cases are simply illustrations of the application of the principle and they do not assist further in defining its ambit.

161. Ultimately Mr Nicholls did not quarrel with the legal test that the judge adopted in this case, as discussed at [175] – [180] of the May 2012 judgment. Mr Nicholl's argument is that the judge misapplied the legal principles to the facts of this case. Mr Nicholls noted that the judge had accepted[152] that SG's misconduct did not relate to the existence of the relevant jurisdiction clause ie. clause 13 of the FLD, nor its construction, nor its "enforceability", by which I think the judge must have meant "validity", because "enforceability" was the very matter in issue, as the judge makes clear later in the same paragraph.

162. However, Mr Nicholls submitted that the judge erred fundamentally in finding that the misconduct of SG in relation to the 2012 trial itself was relevant at all. Mr Nicholls argued that the judge should not have taken SG's misconduct in that trial into account and, if he had left it out, then the judge would have concluded that there was no misconduct that was sufficiently closely connected to the equitable relief claimed to warrant a refusal to grant the anti-suit injunctions sought.

163. In my view it is vital to identify carefully the two elements with which we are concerned; that is "the equity sued for" and "the misconduct" said to make RBS' hands unclean. The "equity sued for" is an injunction to restrain Highland and Scott Law from continuing to be in breach of (or in Scott Law's case refusing to be bound by) the jurisdiction clause in the FLD by bringing proceedings in which it is alleged that RBS had "knowingly misrepresented material facts and withheld critical information from [Highland] as part of [RBS'] scheme to acquire the 36 Loans at

---

[148] Andrew Smith J at [20]. He said that in those cases the connection between the misconduct and the claim to equitable relief was far more immediate than in the case before him.
[149] ***8th Ed 2010***
[150] ***[2002] 1 WLR 3024.***
[151] ***[1959] 2 QB 384***
[152] [189] May

severely understated values".[153] The misconduct alleged against RBS, through SG, falls into two Stages. First, there is the fact that RBS did not accept without challenge the judge's findings made in the Quantum judgment about the matters surrounding the transfer of the 36 Loans, the BWIC and the subsequent suppression of facts until the Quantum trial itself. Secondly, the fact of the lies of SG in the 2012 trial in trying to challenge the findings that the judge had made in his Quantum judgment.

164. As I read [185] – [192] of the 2012 judgment, Burton J accepted that if the misconduct of RBS (through SG) had ended with an acceptance of the conclusions made in the Quantum trial, then he would not have regarded the misconduct of RBS as being sufficiently immediate and having the necessary relation to the equity sued for to fall foul of the "unclean hands" doctrine. Thus, at the start of the 2012 trial, even though RBS might have pleaded a challenge to the various findings Burton J had made in the Quantum trial, if RBS had then accepted them, the judge would have held that RBS had not come to court with "unclean hands" because, to continue the metaphor, RBS would have "washed them". Therefore, it seems, the judge would have rejected Highland/Scott Law's "unclean hands" defence to RBS' claim for an anti-suit injunction.

165. But what tipped the balance the other way was the action of RBS in continuing to challenge four principal findings of fact made by Burton J in the Quantum trial, which I have summarised at [58] above, particularly through the evidence of SG in the 2012 trial, Burton J's reaffirmation of his Quantum judgment findings (save for the more nuanced finding in relation to motivation for termination) and his conclusion that SG had lied again. Does the fact that RBS persisted in challenging the judge's findings of fact in his Quantum judgment and its insistence that there had been no concealment of "The Suppressed Fact" constitute misconduct and, if so, does it have the necessary immediate and close relationship to the particular anti-suit injunction claimed? In my view the answer to both questions is "yes" and I shall briefly explain why.

166. First, it was RBS' decision to continue to challenge the findings of the judge in the Quantum judgment. It did so in particular through the key evidence of SG, who was put forward as a "witness of truth" as to the events that occurred in 2008-9, not as a witness who was going to explain and apologise for previous lies. Whilst I entirely accept that counsel and solicitors acting for RBS during the 2012 trial and subsequently have done so in complete good faith, the same cannot be said for SG. As the judge found, he always knew the true position and he had never forgotten it. SG's lies and his unsuccessful attempt to explain away his conduct in November 2008 at the 2012 trial were themselves grave misconduct. Bluntly, SG perjured himself again. His misconduct must be attributed to RBS for the reasons that I have already given above.

167. Secondly, that misconduct is immediately or closely related to the equity sued for because it relates, at least in part, to the very allegations being made against RBS and SG in the Texas proceedings under Count 2 of the Petition. The aim of the anti-suit injunction is to prevent Highland and Scott Law pursuing those allegations in the Texas proceedings because (it is said) they agreed that all such matters would be dealt

[153] See para 73 of the Texas Petition, which is part of Count 2 against RBS and Messrs Griffiths and Hall.

with exclusively by the English courts or (in Scott Law's case) were bound by that agreement. The judge has found that RBS, through SG, has lied about central facts on which Highland and Scott Law found the allegations that are made against RBS in the Texas proceedings. RBS, through SG, has relied on this false evidence in the course of the English proceedings whose very object is to stop the Texas action. To my mind the misconduct could not be more immediately related to the equity that is sued for.

168. Thirdly, I have not lost sight of the fact that the judge analysed the nature of the allegations being made by Highland and Scott Law in the Texas proceedings at [162] – [169] of the May 2012 judgment. He concluded that the allegations made and the measure of damages claimed in the Texas action were inconsistent with his conclusions in his Quantum judgment. He also found that, insofar as Counts 2 and 3 in the Texas Petition are based on the fraud of RBS, Highland knew all the relevant facts by the outset of the Quantum trial and so could have been pursued the allegations then.[154] The judge held that RBS had a "strong case" that, based on the English law doctrines of res judicata, issue estoppel and the principle in ***Henderson v Henderson,***[155] Highland and Scott Law should be precluded from bringing the Texas proceedings in relation to all three Counts. But he held that those "strong arguments" were not sufficient to lead to the grant of an injunction on the ground that the Texas action was vexatious or oppressive.[156] RBS has not appealed that conclusion.

169. Fourthly, the judge also took this conclusion about the nature of the claims in the Texas proceedings into account when considering the extent to which RBS would suffer hardship if he were to refuse to grant it an anti-suit injunction based on breach/ non-compliance of the FLD exclusive jurisdiction clause. As I read his judgment, he held that the "strong argument" on res judicata and so forth was insufficiently powerful to neutralise the "unclean hands" defence. The judge held that RBS could argue that case in the Texas proceedings. [157] It may be that Highland and Scott Law's position on this issue is stronger as a result of my conclusion on the Liability judgment. However, the knock-on effect on the "unclean hands" issue of a finding that the Liability judgment should be set aside was not elaborated in argument before us and I do not need to explore it here, given the conclusions I have reached.

170. Fifthly, the judge also noted that Highland and Scott Law were prepared to give undertakings not to seek multiple or punitive damages against the defendants in the Texas proceedings "if such would be the deciding factor in my declining the grant of an anti-suit injunction".[158] He did not say whether a refusal to give such undertakings would have altered his overall conclusion, but that seems likely as the judge states that the undertaking is to be recorded in the court order. In Highland's Respondent's Notice it submits that the judge was wrong to require Highland and Scott Law to give the undertaking they did and they ought to be released from their undertaking. That point was not argued orally before us.

---

[154] [168] and [169] May
[155] ***(1843) 3 Hare 100;*** confirmed by the House of Lords in ***Johnson v Gore Wood & Co [2002] 2 AC 1.***
[156] [172] and [194(ii)] May.
[157] [194(ii)] May.
[158] [194(i)]

171. However, I would not release Highland and Scott Law from those undertakings. Both Mr Auld and Mr Dunning accepted that if clause 13 of the FLD applies then Highland is in breach of contract and Scott Law is bound by it. I do not have to decide that issue finally, given my conclusion on "unclean hands". But it seems to me correct that we should proceed on the basis that there is, at least, a very good argument that Highland and Scott Law are in breach of/bound by an exclusive jurisdiction clause in favour of the English courts where the remedy of multiple and punitive damages would not be available. Therefore, at least until that issue is finally decided (and it is agreed that all issues of damages have to be adjourned),[159] Highland and Scott Law should be kept to their undertakings.

172. **Conclusion on the "unclean hands" defence.** Given all these factors, I conclude that the judge was correct to hold that the anti-suit injunction should be refused because Highland and Scott Law could successfully rely on the defence of "unclean hands".

173. **Other arguments advanced by Highland and Scott Law on the anti-suit injunction.** I do not need to decide these points and I am not going to go into them in any detail. I will just outline my views very briefly.

174. **The ambit of clause 13.1 of the FLD: does it extend to the claims made in the Texas proceedings concerning the extension of the Mandate and the ISD?** The argument is that the claims comprised in the three counts in the Texas proceedings are not disputes which "arise out of" or "in connection with" the FLD of 31 October 2007, but relate to the Mandate Letter (and its extension) and the ISD of 7 April 2007. The judge was correct in holding that the contractual documents have to be read and construed together. He was also correct in holding that the phrase "in connection with" has been widely construed by English courts in the context of jurisdiction and arbitration clauses. So my view is that Burton J was correct to hold that the ambit of clause 13.1 of the FLD is wide enough to embrace the three counts in the Texas proceedings.

175. **Is clause 13.1 of the FLD an exclusive jurisdiction clause?** Mr Dunning is obviously right to argue that it would have been much clearer if the first three lines of clause 13.1 had read "…the Parties irrevocably agree that the courts of England shall have ***exclusive*** jurisdiction to hear and determine any suit action or proceedings….". However, taking the wording of clause 13.1 as a whole and bearing in mind the contrasting phraseology of clause 13.2, I think that clause 13.1 must be construed as an exclusive jurisdiction clause. The use of the words "*shall have* jurisdiction" and the requirement that the parties "*irrevocably* submit" to the jurisdiction of the English courts (my emphasis) are powerful pointers. So also is the wording of clause 13.2 which, in my view, gives RBS an option to bring proceedings in other jurisdictions, in contrast to the inability of other "Parties" to do so. I agree with the judge's conclusion on this point.

---

[159] As Scott Law is only an assignee, it cannot, strictly speaking, be "in breach" of the jurisdiction clause, although Mr Dunning accepted it would be bound by it if it is otherwise effective. Accordingly, although RBS can claim damages for breach of contract against Highland, it cannot do so against Scott Law. By a proposed amendment, RBS claimed equitable compensation/damages against Scott Law. Whether RBS should have leave to amend was one of the matters that Burton J ordered be left over to a further hearing: see para 8(ii) of the Order of 25 May 2012.

ANNEX 102

OFFICIAL TRUSTEE IN BANKRUPTCY v TOOHEYS LTD BC9303945

Unreported Judgments NSW · 24 Pages

SUPREME COURT OF NEW SOUTH WALES COURT OF APPEAL EQUITY DIVISION

GLEESON CJ, MEAGHER AND SHELLER JJA

CA 40417/91

9 and 10 February 1993, 18 March 1993

Headnotes

EQUITY — Estoppel by Conduct — expectations created by lessor's conduct towards lessee — fraudulent misstatement by party relying on expectation — not unconscionable for lessor to fail to make good representations — no estoppel arose — unjust enrichment — lessors consequent enrichment not unjust.

EQUITY — Constructive Trust — constructive trust did not arise — Equitable Maxim "He who comes to equity must have clean hands" — fraudulent misstatement by lessees was disentitling conduct — sufficient connection between fraud and equity sue for to bar relief.

EQUITY — ESTOPPEL BY CONDUCT — CONSTRUCTIVE TRUSTS — hoteliers acquired a brewery lease of a hotel at a time when industry practices, to which the brewery was a party, involved representations that brewery tenants would have security of tenure notwithstanding the terms of their leases — these practices and representations created a goodwill for which incoming tenants were prepared to pay ~ however, the hoteliers in question made certain false and material misrepresentations to the brewery — the trial judge declined to find an estoppel or a constructive trust as claimed because of the false representations — HELD — the false representations by the hoteliers meant that the brewery's representations did not give rise to an estoppel; alternatively, the doctrine of unclean hands meant that the hoteliers, claim to a constructive trust must fail.

George Whitechurch v Cavanagh [1902] AC 117

Hewson v Sydney Stock Exchange (1967) 87 WN (NSW) 422 applied

Gleeson CJ

The issue in this appeal concerns the circumstances in which a court will decline to find and enforce an estoppel by representation on the ground that the person in whose favour such an estoppel would otherwise have arisen was himself guilty of misrepresentation.

The appellant commenced proceedings in the Equity Division in his capacity as trustee of the bankrupt estates of Mr and Mrs B L Williams. The respondent, a brewery owner, had sold a certain hotel, and the appellant claims that

part of the proceeds of sale should be regarded as being subject to a constructive trust in favour of Mr and Mrs Williams. Bryson J concluded that the appellant would otherwise have succeeded in making out all the elements necessary to substantiate such a claim, but that the claim should be dismissed on the ground that Mr and Mrs Williams had induced the

---------- ***BC9303945 at 2***

respondent to participate in the original dealings upon which the appellant's claim was based by fraud.

The appellant does not challenge the findings of fact made by Bryson J as to the fraudulent misrepresentations, and the respondent does not call into question Bryson J's conclusion that, but for the misrepresentations, the claim as to a constructive trust would have been made out. The sole issue in the appeal concerns, the legal effect of the misrepresentations that were made to Tooheys Ltd by or on behalf of Mr and Mrs Williams.

In order to explain how the problem arose it is necessary to refer to some features of the industry background against which the dealings in question took place.

The goodwill attaching to a brewery lease:

For many years the two major breweries in New South Wales were Tooheys Ltd and Tooths & Co Ltd. In 1979 those two companies were parties to proceedings in the Trade Practices Tribunal seeking authorisation of their tied house system. The report of the Trade Practices Tribunal, which appears at (1979) ATPR 40-113, is a useful source of information as to then current industry practice. It contains (at 18,205) the information that both breweries had a strong preference for operating their hotels under lease. There were a few hotels that were operated by managers employed by the breweries, but almost all brewery hotels were operated

---------- ***BC9303945 at 3***

under lease. A senior officer of Tooheys explained that the company considered that lessees were better able to maximise the potential of a hotel. There was a strong demand for tenancies, and the breweries, in their own interest, engaged in practices which stimulated and maintained that market. They permitted renewal and assignment of leases to suitable persons. The breweries dealt with their tenants in a variety of ways that were more favourable than would have been the case had they enforced their rights under the leases. In particular, they fostered a system under which an incoming tenant would pay an outgoing tenant a substantial sum for the goodwill of a hotel business.

Brewery leases were typically of a relatively short term, such as one year, and, when their leases expired, tenants would commonly hold over from month to month or week to week. In those circumstances one might wonder how it was that, when the lessee of a hotel decided to sell out, the incoming tenant, who was only going to get the unexpired portion of a short term lease, or a new lease for a short term, would have been prepared to pay a substantial sum for the goodwill of the hotel business. Leaving to one side questions of possible default by the lessee, on the face of the relevant contractual documents the brewery would have been entitled to resume possession of the hotel after a short time. That, however, was not the way things worked in practice.

For reasons that will appear below, between 1987 and 1989, following a takeover of Tooheys by another company

---------- ***BC9303945 at 4***

and a change in Tooheys commercial practices, there was a deal of litigation between Tooheys and its tenants. In

the course of that litigation the nature of the commercial practice that had been engaged in by Tooheys became well established, and in these proceedings it was agreed that Bryson J should draw upon earlier decisions for information in that respect. The following is a summary of that information. Because of the limited issue in the appeal it is adequate for present purposes, although it may require elaboration or qualification in other contexts.

In brief, Tooheys adopted a policy that, at least so long as a tenant was satisfactory, the tenant was treated as having security of tenure, notwithstanding the legalities of the leasing arrangements in force. The corollary was that the goodwill of the hotel business in question was treated as being marketable by tenants, and an outgoing tenant could expect to be paid by an incoming tenant a substantial sum, based upon the turnover of the business. Thus, for example, leaving to one side the possibility of serious default by the lessee, Tooheys would never resume possession of a tenanted hotel, at least without paying an amount of compensation to the tenant calculated on the basis that the goodwill of the business belonged to the tenant. Similarly, Tooheys facilitated the transfer of tenancies to approved transferees, and in doing so obtained information as to the financial arrangements concerning such transfers. Tooheys knew that those arrangements normally included a

---------- ***BC9303945 at 5***

payment by the transferee to the transferor of a sum for goodwill.

It is unnecessary for present purposes to examine the precise nature of the concept of goodwill in this context (cf Carlton & United Breweries Ltd v Tooth & Co Pty Ltd(1985-1987) 7 IPR 581 at 595-599). In commercial terms, there was an established market in brewery leases, and a brewery lessee who sold a hotel business could expect to receive, in addition to the value of any tangible assets transferred, a consideration related to the size of the business, notwithstanding that, in legal terms, all that the lessee had to assign was the balance of a short term lease. This market was sustained by a well understood practice according to which Tooheys refrained from exercising their strict legal rights as landlords. The practice was to the commercial advantage of Tooheys because it supported the system of hotel leases, which they saw as being to their benefit, and it enabled them to obtain higher rents from tenants.

The relevant transaction:

That was the industry background against which Mr and Mrs Williams, in 1983, became the lessees of the Speers Point Hotel. The previous lessee was Doiko Pty Ltd, and Mr and Mrs Williams agreed to purchase the hotel business from that company. The price they agreed to pay was $400,000 apportioned as to $56,000 to furniture, plant and effects and as to $344,000 to

---------- ***BC9303945 at 6***

goodwill. The manner in which the purchasers were arranging finance, and the representations they made to Tooheys as to the amount of finance they intended to obtain, are matters of central importance to the issue in the appeal. For present purposes, however, what is to be noted is that, as Tooheys were made aware, the purchasers paid to Doiko Pty Ltd a substantial sum for goodwill. Mr and Mrs Williams were subsequently granted a lease of the hotel for a term of one year. When that period expired they held over as tenants from month to month. They remained in occupation until April 1987.

Mr & Mrs Williams did not make a financial success of the hotel. They encountered difficulties for three main reasons. First, the weekly takings of the business were lower than had been expected. Secondly, they borrowed heavily to buy the business (far more heavily than they had led Tooheys to believe) and they were not able to sell other assets in order to relieve their burden of debt. Thirdly, at a time when, in the ordinary course, they would have expected to have been able to sell out of the hotel, their expectations were defeated by the change in Tooheys

policy which gave rise to this litigation, and to the other court cases earlier mentioned.

The change in Tooheys policy:

Tooheys Ltd was taken over by the Bond group in 1985. At some time thereafter, for reasons that are not presently material, an announcement was made that Tooheys

---------- ***BC9303945 at 7***

no longer recognised goodwill attaching to hotel leases and, at least by implication, that henceforth hotel lessees could expect Tooheys to deal with them on the basis of the legal rights and obligations as set out in their leases. This had a damaging effect upon the market for hotel leases and produced the result, amongst other things, that Mr and Mrs Williams found it impossible to sell out of the Speers Point Hotel, at least on terms that would enable them to recoup the money they had paid for goodwill.

A number of tenants of Tooheys hotels banded together to resist the change in policy, and they were relatively successful. In various actions commenced by Tooheys against tenants, following the expiry of leases, to recover possession of hotels, the tenants pleaded successfully that Tooheys was by its contract estopped from exercising its rights under its leases without paying compensation in an amount that reflected the value of the goodwill for which the tenants had paid and which had, in substance, been expropriated by Tooheys. An example of such a case was Bond Brewing (NSW) Pty Ltd v Reffell Party Ice Supplies Pty Ltd which was decided by Waddell CJ in Eq in August and September 1987. The relevant lease had expired and the brewery brought proceedings in ejectment against the tenant. The trial judge held that the defendant had made out a case of estoppel, in the nature of promissory estoppel, and that, in consequence, although the plaintiff was entitled to judgment for possession of the hotel premises, the

---------- ***BC9303945 at 8***

defendant was entitled to an order that execution on the judgment should be stayed until the plaintiff had compensated the defendant by paying a reasonable sum to reflect the value of the goodwill which the business would have retained if the plaintiff had adhered to the representations inherent in the practices earlier described.

Unlike some of the other tenants, Mr and Mrs Williams lacked the financial strength to maintain the fight. They left the Speers Point Hotel without any ejectment proceedings having been taken against them. However, in a finding that was not challenged on this appeal, Bryson J held that, although they were not directly compelled by Tooheys to leave, they were as effectively forced out by Tooheys as if Tooheys had sent in bailiffs and changed the locks. In this respect his Honour was referring to the conduct of Tooheys involved in its change of policy, which made it impossible for tenants in financial difficulties to sell out. His Honour said:

"As the Williams' financial affairs failed they made endeavours to seek some way out of their difficulties in dealings with (their financiers) and with Tooheys Ltd, but these endeavours came to nothing as they were bound to do in the presence of the dominating reality that the only thing that the Williams owned and had paper to show for was a holding-over on an expired lease; they had no opportunity to sell the business and transfer anything of value without the cooperation of the defendant, and it was notorious in the industry that the defendant had had a radical change of policy and would not participate in or facilitate transfers."

---------- ***BC9303945 at 9***

Following the departure from the hotel of Mr and Mrs Williams, Tooheys sold the freehold of the hotel. Included in

the consideration received from the purchaser was a substantial sum referable to the goodwill of the hotel business.

The relief claimed:

Following the success achieved in litigation by those tenants who had remained in possession and fought Tooheys, and following the bankruptcy of Mr and Mrs Williams, the present appellant commenced these proceedings. The precise nature of the relief sought appears from the orders which this Court was asked to make in the event that the appeal succeeded:

"DECLARATIONS

1 That during the subsistence of the lease of the Speers Point Hotel at Speers Point dated 10 August 1983 from the Respondent ('Tooheys') to Brian Leslie Williams and Rita Anne Williams ('Mr and Mrs Williams') and the period of holding over until the departure of Brian Leslie Williams and Rita Leslie Williams on 12 April 1987, (alternatively 'during the period of subsistence of the Lease of the Speers Point Hotel dated 10 August 1983 from the Respondent ('Tooheys') to Brian Leslie Williams and Rita Anne Williams ('Mr and Mrs Williams') from and after January 1986') the Respondent was estopped from denying to Mr and Mrs Williams:

(a) That the leasehold interest in the said Hotel premises for the time being in existence and the goodwill of the business for the time being conducted thereon were together freely saleable and transferable at any future time during which the same were held by Mr and Mrs Williams and by any transferee thereof including any transferee from Mr and Mrs Williams of whom Tooheys approved in pursuance of an obligation on its part to give bona fide consideration to any such approval;

---------- ***BC9303945 at 10***

(b) That the leasehold interest in the said Hotel premises for the time being in existence would not be terminated or otherwise brought to an end by Tooheys and the goodwill of the business for the time being conducted thereon would not be acquired by Tooheys, whether the same be in the possession of Mr and Mrs Williams or any such successors in title, and irrespective of any then existing default in relation to such leasehold interest at least on the part of Mr and Mrs Williams, without Tooheys compensating Mr and Mrs Williams or any such successors in title for the value of such leasehold interest and goodwill at the time of termination and acquisition calculated upon the basis of the security of tenure referred to in para(a) above.

2 That In the events which happened as found by Bryson J in the proceedings in his Judgment delivered 24 June 1991, Tooheys became obliged from and after 13 April 1987 to pay or account to Mr and Mrs Williams for an amount equal to the value as at that date of the tenure and goodwill relating to the Hotel calculated upon the basis of their rights declared in para(a) and para(b) of Declaration 1

3 Alternatively to 2, in the events which happened as found by Bryson J in the proceedings in his Judgment delivered 24 June 1991, Tooheys became obliged from and after 27 June 1988 to pay or account to the Official Trustee In Bankruptcy for an amount equal to the value as at that date of the tenure and goodwill as a component of the sale price relating to the Hotel calculated upon the basis of the rights Mr and Mrs Williams declared in para(a) and para(b) of Declaration 1.

ORDERS THAT

4 There be referred to his Honour the Trial Judge the determination of the values referred to in Declarations 2 and 3.

5 That Tooheys pay to the Official Trustee in Bankruptcy the valuation sums referred to in Declarations 2 or 3, as determined pusuant to O4."

Had it not been for the defence to be considered below, Bryson J would have granted the relief sought. Following the earlier decisions of the Chief Judge in

---------- ***BC9303945 at 11***

Equity and other judges, his Honour would have held that Tooheys was, by its conduct in 1983, estopped from denying what might be described in summary form as the security of tenure necessary to enable Mr and Mrs Williams to sell the goodwill of the business of the Speers Point Hotel on the same basis as they had originally acquired it. By turning the tenants out of the hotel and otherwise acting in a manner inconsistent with the representations giving rise to that estoppel Tooheys produced the result that the goodwill of the business was no longer something of value to the tenants. It was, however, something for which a purchaser of the freehold of the hotel was prepared to pay; but the recipient of such payment was Tooheys. A court would intervene by imposing a constructive trust upon the monies received by Tooheys when it sold the hotel so as to give Mr and Mrs Williams, in effect, an amount equivalent to the amount of compensation which Tooheys had been ordered to pay the other tenants who resisted claims for possession. Bryson J described the process of reasoning that he would have followed in these words:

"The defendant would be treated as becoming a constructive trustee of the Williams' interest in the goodwill at the point on 13 April 1987 where the defendant took control of it; the defendant would not be admitted to say but would be estopped from saying that it took control of it in its own interest, or that when it sold the hotel it had disposed of the goodwill element for its own benefit, and would be accountable for the part of the proceeds of sale which is attributable to the goodwill. The quantification of the amount for which the defendant is accountable would require some careful further consideration, but it is a valuing question and it is not in principle

---------- ***BC9303945 at 12***

difficult to recognise the appropriate form of relief, which would be granted on much the same basis as if the trust has been an express trust."

Neither party to the appeal was concerned to challenge this process of reasoning, and it is therefore unnecessary to analyse it further. What is significant for the purpose of the appeal is that the appellant's claim for relief, which had its foundation in representations made by Tooheys as to the way in which it would deal with Mr and Mrs Williams, was based, not on contract, but on principles of estoppel by conduct of the kind considered by the High Court in Legione v Hateley (1983) 152 CLR 406; Waltons Stores (Interstate Ltd) v Maher (1988) 164 CLR 387 and The Commonwealth of Australia v Verwayen (1990) 170 CLR 394. The ultimate relief sought, the imposition of a constructive trust, was equitable relief (cf Kettles and Gas Applicances Ltd v Anthony Horden & Sons Ltd (1934) 35 SR (NSW) 108 at 129).

The successful defence:

The appellant failed at first instance for the following reason.

When, in 1983, Mr and Mrs Williams took over the lease of the Speers Point Hotel from Doiko Pty Ltd, and bought the goodwill of the business, the transaction required the approval of Tooheys. The evidence showed that, whilst Tooheys engaged in the practices described above, and dealt with brewery tenants more favourably than the

tenants were entitled to under their leases, at

---------- ***BC9303945 at 13***

the same time Tooheys closely monitored the financial arrangements between outgoing and incoming tenants, and the ability of tenants to make those arrangements depended in practice upon the approval of Tooheys. One matter that was of particular interest to Tooheys was the extent to which an incoming tenant needed to borrow the funds to be used for the purchase.

After the present proceedings had been commenced, Tooheys discovered that Mr and Mrs Williams, and the brokers in the transaction, had misrepresented to Tooheys some of the financial arrangements including, in particular, the extent of the finance which the purchasers needed. It was represented to Tooheys that the total purchase price was $350,000 whereas in truth it was $400,000. More important, Tooheys were told that the purchasers were borrowing $130,000 whereas in truth they were borrowing more than three times that amount. Tooheys had a policy that they would not approve a transferee who was borrowing more than fifty percent of the purchase price. Bryson J accepted that, had Tooheys been aware of the true nature of the financing arrangements entered into by Mr and Mrs Williams, Tooheys would not have approved the transfer of the hotel business to them. His Honour found that Mr and Mrs Williams had fraudulently misrepresented to Tooheys the nature of the financial arrangements into which they were entering for the purpose of the transaction and that Tooheys were thereby induced to approve the transfer of the hotel business to them and to accept them as tenants.

---------- ***BC9303945 at 14***

There is no challenge to these findings. Bryson J went on to hold that, as a consequence, the appellant was not entitled to the relief claimed in the proceedings. It is that conclusion which forms the subject matter of the appeal.

Bryson J rested his decision upon two grounds. First, he held that the misrepresentations made by Mr and Mrs Williams to Tooheys produced the consequence that it was not unconscionable for Tooheys to fail to fulfil the expectations which Tooheys had, by its conduct, created. Those expectations, his Honour said, were based on fraud and deceit and had no equitable claim to fulfilment. Secondly, his Honour said that the same result would flow from the application of the maxim that he who comes to equity must come with clean hands.

Conclusion:

In Spencer Bower and Turner, Estoppel by Representation, 3rd ed, p137 the following statement of principle applies:

"If the representation is proved by the representor to have been the result of fraudulent representation, whether in language or by conduct, on the part of the representee, a good answer is established to an estoppel which might otherwise have arisen."

There is ample authority to support this proposition (eg George Whitechurch Ltd v Cavanagh [1902] AC 117 at 145, Porter v Moore [1904] 2 Ch 367). Expressed in terms of what Deane J said in The Commonwealth v Verwayen (170 CLR at 444) described as the central principle of the

---------- ***BC9303945 at 15***

doctrine of estoppel by conduct, the reason is that it is not unconscientious of a party to depart from an assumption

that has been adopted by the other party as the basis of some conduct, even though such departure would operate to that other party's detriment, if the other party procured the assumption by fraud.

It was argued on behalf of the appellant that the proposition is too broad. Two reasons were advanced in support of that argument.

It was contended that the analogy of contract law exposes the injustice of an inflexible application of such a rule. Suppose, it was said, that the representations relied upon by the appellant had taken the form of contractually binding stipulations. It would be inaccurate, and an over simplification, to say that the stipulations could not be enforced because the contract was entered into as a result of fraud. Questions of restitution would arise, and here Tooheys is not offering to put Mr and Mrs Williams back into the position they were in before the relevant transaction. A related submission was that the case is one of unjust enrichment of Tooheys, and equity would not permit such an outcome.

It is true that a contract induced by fraud is voidable, not void, and that a party to a contract who is a victim of fraud may find that the relief available depends upon the circumstances, which might include the possibility of restitution. It is also true that a party who has induced another to enter into a contract by fraud

---------- ***BC9303945 at 16***

is not thereby necessarily, and absolutely, barred from relief in the event of breach. That is simply the corollary of the proposition that the contract is voidable, not void. However, the analogy with the law of contract is apt to be misleading. The law of contract is governed by a variety of rules, some having their origin in common law and some in statute, which have no bearing upon a claim such as that made by the appellant. Furthermore, if Mr and Mrs Williams had contracted with Tooheys about the matters in issue there is no way of knowing what conditions or qualifications Tooheys might have attached to the obligations they undertook, or how those obligations might have been related to the representations made as to the Williams' financial position and arrangements. The contract might have expressly provided that the obligation of Tooheys to honour its undertaking as to security of tenure was conditional upon the truth of the representations made as to the Williams' financial position. The parties would have been free to contract as they chose, and there is no justification for assuming one particular form of contract and comparing the outcome decided upon by Bryson J with the outcome under such a contract.

The assertion that the result contrived for by the respondent is unjust enrichment begs the question. If it is not unconscionable for Tooheys to treat itself as no longer bound to honour its representations as to security of tenure, for the reason that Tooheys itself had been tricked into accepting Mr and Mrs Williams as tenants in

---------- ***BC9303945 at 17***

the first place, then any consequent enrichment is not unjust. The cards are simply left to lie where they have fallen. That is frequently an outcome which the law regards as just.

There is a deal of force in the appellant's submission, as a matter of theory, that the statement of principle referred to above may be too inflexible. The rule was originally propounded at a time when the role of estoppel was somewhat more limited than is now the case. Recent cases have emphasised the flexibility of equitable estoppel as an instrument of justice (Amalgamated Property Co v Texas Bank [1982] 1 QB 84 at 103 per Robert Goff J, The Commonwealth v Verwayen (1990) 170 CLR 394 at 412 per Mason CJ and at 442 per Deane J). The concept of unjust enrichment is becoming more influential in legal theory. In that connection it is of interest to note that, speaking in relation to the law of contract, Lord Wright gave unjust enrichment as the reason why a buyer of goods who has been defrauded cannot recover the purchase price without returning the goods. (Spence v Crawford [1939] 3 All ER 271 at 288-9).

The central question is whether, in all the circumstances, it would be unconscionable for Tooheys to fail to make good the representations as to security of tenure on the basis of which Mr and Mrs Williams bought the goodwill of the hotel business from Doiko Pty Ltd. In order to answer that question in the negative it is not necessary to hold that any false representation would justify Tooheys in failing to honour

---------- ***BC9303945 at 18***

its own representations. The fraudulent representations in the present case went to the essence of Tooheys' interest in the contract between outgoing and incoming tenants; they went to the financial capacity of the incoming tenants to make a success of the business.

The alternative way of looking at the matter is by reference to the principle that he who comes to equity must come with clean hands. The application of that principle as a bar to discretionary equitable relief has been considered in such cases as Myers v Casey (1913) 17 CLR 90, Hewson v Sydney Stock Exchange (1967) 87 WN (NSW) 422 and FAI Insurances Ltd v Pioneer Concrete Services Ltd (1987) 15 NSWLR 552. The unmeritorious conduct which debars relief is not "general depravity"; it must be conduct which has "an immediate and necessary relation to the equity suited for" (Derring v Earl of Winchelsea (1787) 1 Cox 318 at 319; See also Keystone Co v Excavator Co (1933) 290 US 240). On that test, the present case is one in which the relationship between the false representations and the equity sued upon is sufficiently close to establish the defence. There is a clear and close connection between the misrepresentations made to Tooheys and Tooheys' willingness to participate in the transaction out of which the alleged estoppel arose.

In the circumstances of this case I see no significant difference between the two alternative approaches to the defence on which the respondent relies. Bryson J was correct to conclude, as he did, that the

---------- ***BC9303945 at 19***

appellant must fail by reason of the fraud that had been practised upon Tooheys.

There was a complaint about his Honour's order that the appellant pay the costs of the action, bearing in mind his success on most of the issues that were litigated. However, I see no error in his Honour's discretionary judgment on this matter. Failure on the ground of fraud is not an auspicious launching pad for such an argument.

The appeal should be dismissed with costs.

---------- ***BC9303945 at 1***

Meagher JA

I agree with the Chief Justice.

Sheller JA

---------- ***BC9303945 at 1***

I have had the benefit of reading the judgment prepared by the Chief Justice. I agree that the appeal should be dismissed with costs. The facts of the case and the practice of dealing in what over many years has been treated in the market for brewery leases as goodwill are set out in his Honour's judgment and I need not repeat them in detail.

On 29 June 1983 the appellants, Mr and Mrs Williams, agreed to purchase the business at the Speers Point Hotel from Doiko Pty Ltd, then the lessee from Tooheys. The purchase price of $400,000 was apportioned as to $344,000 for goodwill. On 18 August 1983 Tooheys entered into a written agreement to grant the appellants a lease for twelve months. The appellants agreed to pay such an amount for goodwill and to accept a lease of so short a term in the expectation that they would have from Tooheys security of tenure at least to the extent necessary to enable them to sell the goodwill of the business on the

---

BC9303945 at 2

same basis as they had acquired it. This expectation was encouraged by Tooheys and derived from assumptions adopted, by the convention of the parties, as the basis of their relationship; see Spencer Bower and Turner, Estoppel by Representation, 3rd ed 1977, at 157 quoted by Brandon LJ, as he then was, in Amalgamated Investment and Property Co Ltd v Texas Commerce International Bank Ltd [1982] 1 QB 84 at 130-1. The appellants left the premises on 13 April 1987 and Tooheys resumed possession. Their claim is not that they were wrongly evicted but that they were denied by Tooheys the opportunity to fulfil their expectation that they would be compensated for their outlay by being able to sell the goodwill of the business. However Tooheys' encouragement of the appellants and adoption of the assumptions upon which the relationship of the parties was based was induced by the fraudulent and deceitful misrepresentations of the appellants. Lord Brampton in George Whitechurch Ltd v Cavanagh [1902] AC 117 at 145 said: " ... no representations can be relied on as estoppel if they have been induced by the concealment of any material fact on the part of those who seek to use them as such; and if the person to whom they are made knows something which, if revealed, would have been calculated to influence the other to hesitate or seek for further information before speaking positively, and that something has been withheld, the representation ought not to be treated as an estoppel.' So Tooheys argued that even if its conduct in going back, to the detriment of the appellants, on the conventional basis of the relationship adopted by the parties would otherwise call for a remedy, as Bryson J thought, it did not do so once it was demonstrated that the convention was induced by the fraud of the appellants.

I do not think inducement by a claimant's fraud or deceit inevitably defeats a claim based upon what would otherwise be the

---

BC9303945 at 3

unjust or unconscionable conduct of a party who departs or withdraws from a convention adopted by the parties as the basis of their relationship. The resolution of whether it does calls for an examination of all the circumstances of the case. Had Tooheys relied on fraud to rescind the agreement for lease equity may have exacted a price for reasons inherent in the equitable nature of the relief sought; Mayfair Trading Co Pty Ltd v Dreyer (1958) 101 CLR 428 at 452. But Tooheys made no such claim. Had the payment for goodwill been made to Tooheys, it may have been obliged, on a claim by the appellants for restitution, to pay compensation for the benefit it derived. But the payment was made to a third party, the outgoing tenant. The claim made by the appellants is that they be compensated for the loss of their expected recoupment, by resale of the business, of moneys outlaid. The relief chosen is the imposition of a constructive trust upon the proceeds of sale of the hotel and the business conducted there. The success of such a claim depends at least upon its being unjust or unconscionable in all the circumstances of the case for Tooheys to retain the whole of these proceeds of sale. One circumstance to be considered is the convention adopted as the basis of the relationship of the parties and giving rise to the expectation of recoupment. Another circumstance is that this convention was induced by the fraud of the appellants.

The last is, in this case, a decisive consideration. Tooheys received from the appellants in return for its being party to the convention not a payment of money which it then sought to retain in addition to the proceeds of sale, but the appellants' assurance as to the financial arrangements they had made. This assurance satisfied Tooheys and led to its approving the transaction and granting the lease. The appellants in fact deceived Tooheys about their financial arrangements. As the Chief Justice has pointed out Bryson J accepted that, had Tooheys been

aware of the true nature of the financing arrangements entered into by the appellants, it would not have approved the transfer of the hotel business to them. In the circumstances the relief sought was rightly refused. Accordingly, I agree that the appeal should be dismissed with costs.

Order

The appeal is dismissed with costs.

Counsel for the appellant: R A Conti QC, H A Coonan, R Sofroniou

Solicitors for the appellant: Slater & Elias

Counsel for the respondent: P M Jacobson QC, D R Pritchard

Solicitors for the respondent: Freehill, Hollingdale & Page

End of Document

ANNEX 103

Federal Court of Appeal  Cour d'appel fédérale

Date: 20010321

Docket: A-403-99

Citation number: 2001 FCA 79

CORAM: **ROTHSTEIN J.A.**
SHARLOW J.A.
MALONE J.A.

BETWEEN:

ACCESS INTERNATIONAL AUTOMOTIVE LTD.

Appellant

- and -

VOLKSWAGEN CANADA INC.

Respondent

- and -

VOLKSWAGEN AG, VOLKSWAGEN MEXICO SA and AUDI AG

Third Parties

REASONS FOR JUDGMENT

SHARLOW J.A.

[1] This is an appeal by Access International Automotive Ltd. ("Access International") from the order of a Motions Judge (reported at (1999), 174 F.T.R. 161, [1999] F.C.J. No. 1016) dismissing an appeal from an order of a Prothonotary (reported at (1999), 171 F.T.R. [illegible], [1999] F.C.J. No. 529). The Prothonotary had allowed a motion

made by Volkswagen Canada Inc. ("Volkswagen Canada") to strike out certain paragraphs of the Statement of Defence and Counterclaim filed by Access International.

[2] This case began with the filing of a statement of claim by Volkswagen Canada on February 25, 1998. I summarize as follows the facts alleged in the statement of claim.

[3] Volkswagen and Audi automobiles, parts and accessories are manufactured by two German corporations, Volkswagen AG and Audi AG, and a Mexican corporation, Volkswagen Mexico SA. Volkswagen Canada is a wholly owned subsidiary of Volkswagen AG. Since its incorporation in 1952, Volkswagen Canada has been responsible for the sale and service of Volkswagen and Audi automobiles in Canada. Volkswagen Canada has spent decades selling and advertising Volkswagen and Audi automobiles in Canada and has created a market for such vehicles in Canada by ensuring that the automobiles, parts and accessories that it sells in Canada are of a uniform quality. Volkswagen Canada is the only entity in Canada authorized by Volkswagen AG, Audi AG and Volkswagen Mexico SA. to import Volkswagen and Audi automobiles, parts and accessories.

[4] Access International imports into Canada for sale parts and accessories that bear, or are packaged in material that bears, the Volkswagen logo (VW) or the Audi logo (four rings). These parts and accessories originate from a source other than Volkswagen Canada and therefore outside the authorized distribution channels in Canada for such products. Access International sells the Volkswagen and Audi parts and accessories, or

by way of trade exposes or offers them for sale, and distributes them for the purposes of trade. All of these activities have been carried on without the consent or authority of Volkswagen Canada.

[5] In June of 1996 Volkswagen AG, the first owner of the copyright in the Volkswagen logo, assigned the Canadian copyright to Volkswagen Canada. In July of 1996 Audi AG, the first owner of the copyright in the Audi logo, assigned the Canadian copyright to Volkswagen Canada. Volkswagen Canada registered both copyrights as the owner.

[6] On or about August 1, 1996, Volkswagen Canada put Access International on notice of its ownership of the Canadian copyright in the Volkswagen logo and the Audi logo, and requested that Access International cease dealing in parts and accessories bearing either logo, except parts and accessories that were purchased from Volkswagen Canada or from a party that obtained them from Volkswagen Canada.

[7] Volkswagen Canada pleads that the importation and sale of Volkswagen and Audi parts and accessories by Access International since August 1, 1996 is an infringement of its copyright. Volkswagen Canada seeks a number of remedies, including a permanent injunction, delivery up of all infringing materials, damages and an accounting.

[8] I summarize as follows the facts alleged by Access International in its statement of defence and counterclaim. Access International is an Alberta corporation that, for the

past 20 years, has been in the business of importing automobile parts and accessories for sale in Canada. As part of its business, it imports products that bear, or are packaged in materials that bear, the Volkswagen logo or the Audi logo. Access International acquires the Volkswagen and Audi parts and accessories from manufacturers who are authorized by Volkswagen AG to produce and sell them on the open market. They are acquired by Access International already bearing the logos on the product itself or the packaging. Access International claims that such importation is lawful.

[9] Access International further says that Volkswagen Canada has had actual knowledge of these activities of Access International since at least 1986. In 1991, Volkswagen Canada demanded that Access International cease its business activities with respect to the importation and distribution of Volkswagen and Audi parts and accessories, but then did nothing until it issued a further such demand in 1996 after acquiring the copyright.

[10] Access International denies that it has infringed any copyright of Volkswagen Canada. Access International argues that Volkswagen Canada, in acquiring the copyright for the logos and then attempting to use its copyright to prevent Access International from importing genuine Volkswagen and Audi parts and accessories, is abusing the copyright.

[11] The pleadings of Access International that are the subject of Volkswagen Canada's motion to strike read as follows:

Statement of Defence

2. [...] In addition, the Plaintiff's actions and, by implication, those of Volkswagen AG seek to unduly limit, restrain, prevent or lessen the trade in genuine Volkswagen and Audi parts and accessories, which actions breach the provisions of the *Competition Act*.

15. Access reiterates that the Plaintiff is solely owned by its German parent corporation, Volkswagen AG, and that its purported copyright in the VW logo and FOUR RINGS LOGO was derived directly or indirectly from Volkswagen AG.

16. The Plaintiff and, by implication, Volkswagen AG, seeks to make use of its copyright and alleged exclusive distribution right, the existence of which is specifically denied by Access, in order to:

a. limit unduly the facilities for transporting, supplying, storing or dealing with genuine Volkswagen and Audi parts and accessories;

b. restrain or injure unduly trade and commerce in relation to genuine Volkswagen and Audi parts and accessories; or

c. prevent or lessen, unduly, competition in the purchase, sale, transportation or supply of genuine Volkswagen and Audi parts and accessories.

17. Access pleads and relies upon section 32 of the *Competition Act* and states that the actions of the Plaintiff constitute unlawful acts designed solely to interfere with and cause damage to the business of Access.

Counterclaim

1. [...] Volkswagen Canada Inc., in bringing the within action against Access, attempts to use its newly acquired copyright in order to unduly limit, restrain, prevent or lessen the trade in genuine Volkswagen and Audi parts and accessories. These actions on the part of Volkswagen Canada Inc. contravene the provisions of the *Competition Act*. [...]

7 In attempting to use its copyright in the VW logo and FOUR RINGS LOGO to prevent Access from carrying on its legitimate business, the Plaintiff seeks to use its copyright in a manner not contemplated under the *Copyright Act* breaches the Act [sic]

WHEREFORE THE PLAINTIFF BY COUNTERCLAIM CLAIMS:

a. for a permanent injunction pursuant to section 32(2)(b) of the *Competition Act* enjoining Volkswagen Canada Inc. from carrying out or exercising any or all of the terms or provisions of any agreement, arrangement or licence which would interfere with or obstruct the lawful business activities of Access [...].

[12] These statements can be struck only if it is plain and obvious or beyond doubt that they do not disclose a basis for a defence or counterclaim: *Hunt* v. *Carey Canada Inc.*, [1990] 2 S.C.R. 959. In determining this question, the facts alleged in the statement of defence and counterclaim must be presumed to be true.

[13] All of the paragraphs that Volkswagen Canada seeks to strike relate to section 32 of the *Competition Act*, the relevant parts of which read as follows:

32(1) In any case where use has been made of the exclusive rights and privileges conferred by one or more patents for invention, by one or more trade-marks, by a copyright or by a registered integrated circuit topography, so as to	32(1) Chaque fois qu'il a été fait usage des droits et privilèges exclusifs conférés par un ou plusieurs brevets d'invention, par une ou plusieurs marques de commerce, par un droit d'auteur ou par une topographie de circuit intégré enregistrée pour:
...	...
(*d*) prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, transportation or supply of any such article or commodity,	*d*) soit empêcher ou réduire indûment la concurrence dans la production, la fabrication, l'achat, l'échange, la vente, le transport ou la fourniture d'un tel article ou d'une telle denrée,
the Federal Court may make one or more of the orders referred to in subsection (2) in the circumstances described in that subsection.	la Cour fédérale peut rendre une ou plusieurs des ordonnances visées au paragraphe (2) dans les circonstances qui y sont décrites.

(2) The Federal Court, on an information exhibited by the Attorney General of Canada, may, for the purpose of preventing any use in the manner defined in subsection (1) of the exclusive rights and privileges conferred by any patents for invention, trade-marks, copyrights or registered integrated circuit topographies relating to or affecting the manufacture, use or sale of any article or commodity that may be a subject of trade or commerce, make one or more of the following orders:	(2) La Cour fédérale, sur une plainte exhibée par le procureur général du Canada, peut, en vue d'empêcher tout usage, de la manière définie au paragraphe (1), des droits et privilèges exclusifs conférés par des brevets d'invention, des marques de commerce, des droits d'auteur ou des topographies de circuits intégrés enregistrées touchant ou visant la fabrication, l'emploi ou la vente de tout article ou denrée pouvant faire l'objet d'un échange ou d'un commerce, rendre une ou plusieurs des ordonnances suivantes:
...	...
(*b*) restraining any person from carrying out or exercising any or all of the terms or provisions of the agreement, arrangement or licence;...	*b*) empêcher toute personne d'exécuter ou d'exercer l'ensemble ou l'une des conditions ou stipulations de l'accord, de l'arrangement ou du permis en question;...

[14] The Prothonotary allowed the motion to strike the pleadings and did not grant leave to amend. He noted that section 32 of the *Competition Act* permits the Federal Court to grant a remedy for certain uses of a copyright, but only if the result of the use is to unduly lessen or prevent competition. He concluded that, without a finding by the Federal Court of undue consequences of the stipulated kind and following the stipulated procedure, starting with an information exhibited by the Attorney General, section 32 cannot be used as the basis of a defence or counterclaim in a copyright infringement action.

[15] Access International appealed the decision of the Prothonotary. That appeal was dismissed by the Motions Judge. Access International now appeals the decision of the Motions Judge.

[16] Volkswagen Canada relies on the decision of Addy J. in *Eli Lilly and Co. v. Marzone Chemicals Ltd.* (1976), 29 C.P.R. (2d) 253 (F.C.T.D.), affirmed [1977] 2 F.C. 104, 14 N.R. 311, 29 C.P.R. (2d) 255 (F.C.A.). This was a patent infringement action. The defendant alleged in its statement of defence that the patent owner should not be entitled to the relief claimed because it had participated in a conspiracy, contrary to paragraphs 31(1)(a), (b) and (c) of the *Combines Investigation Act*, R.S.C. 1970, c. C-23 as then in force, to unduly limit competition in the patented product. The defendant also counterclaimed for damages. At that time, section 31.1 of the *Combines Investigation Act* permitted a claim for compensation to be made by any person who suffered loss or damage as a result of conduct contrary to section 32.

[17] The patent holder sought to strike the parts of the statement of defence and counterclaim that were based on section 32 of the *Combines Investigation Act*. The motion was dismissed. With respect to the counterclaim for damages, Addy J. said that section 31.1 of the *Combines Investigation Act* permitted a claim for damages for a breach of section 32 whether or not proceedings had been taken or a conviction entered under that provision.

[18] This case is distinguishable from *Eli Lilly* because here there are statutory preconditions that would preclude Access International from claiming a remedy for a breach of section 32 of the *Competition Act*. The remedy sought by Access International in the counterclaim is substantially the remedy in paragraph 32(2)(b). Therefore, to

permit the counterclaim to stand would be to permit Access International to benefit from a statutory remedy without adhering to the statutory preconditions. On that basis, I agree with the Prothonotary and the Motions Judge that paragraphs 3, 4, 5 and 7(a) of the counterclaim should be struck without leave to amend. In that regard, I note that the proposed amendment merely removes the reference to section 32 of the *Competition Act* and is not a substantive change.

[19] Different considerations apply, however, to Access International's defence. In *Eli Lilly*, Addy J. indicated that the section 32 allegations in the statement of defence should not be struck because it was arguable that section 31.1 afforded a defence to the infringement claim. He went on to say this:

> A more cogent reason, however, is that the plaintiffs are seeking equitable relief and must come into the Court with their hands clean. Should they in fact be in breach of the *Combines Investigation Act*, as alleged in para. 9 of the statement of defence, this would constitute a most valid reason for refusing injunctive relief although the allegations might well not constitute a defence to a claim at law.

[20] It seems to me that Addy J. was leaving open the possibility that, even if a remedy would be barred by a failure to meet statutory preconditions, that same failure would not necessarily bar an equitable defence. This leaves open the question as to whether conduct by a copyright owner that is described in subsection 32(1) can form the basis of a defence to a claim for equitable relief for infringement of the copyright.

[21] I take it to be undisputed that the remedies sought by Volkswagen Canada in this case include equitable relief, and that it is open to Access International to allege that Volkswagen Canada should be denied such relief because it does not come to the Court with "clean hands". An unclean hands defence can be made out if, but only if, there is a sufficient connection between the subject matter of the claim and the equitable relief sought. This was explained as follows by Schroeder J.A. in *City of Toronto v. Polai*, [1970] 1 O.R. 483 (C.A.) (affirmed without discussion of this point, [1973] S.C.R. 38):

> The maxim "he who comes into equity must come with clean hands" which has been invoked mostly in cases between private litigants, requires a plaintiff seeking equitable relief to show that his past record in the transaction is clean: *Overton v. Banister*, (1844), 3 Hare 503, 67 E.R. 479; *Nail v. Punter* (1832), 5 Sim. 555, 58 E.R. 447; *Re Lush's Trust* (1869), L.R. 4 Ch. App. 591. These cases present instances of the Court's refusal to grant relief to the plaintiff because of his wrongful conduct in the very matter which was the subject of the suit in equity. The maxim must not be interpreted and applied too broadly as, e.g., against a plaintiff who had not led a blameless life. In *Dering v. Earl of Winchelsea* (1787), 1 Cox 318, 29 E.R. 1184, Lord Chief Baron Eyre stated at pp. 319-20:
>
> > It is argued that the author of the loss shall not have the benefit of a contribution; but no cases have been cited to this point, nor any principle which applies to this case. It is not laying down any principle to say that his ill conduct disables him from having any relief in this Court. If this can be founded on any principle, it must be, that a man must come into a Court of Equity with clean hands; but when this is said, it does not mean a general depravity; it must have an immediate and necessary relation to the equity sued for; it must be a depravity in a legal as well as in a moral sense. In a moral sense, the companion, and perhaps the conductor, of Mr. Dering, may be said to be the author of the loss, but to legal purposes, Mr. Dering himself is the author of it; and if the evil example of Sir Edward led him on, this is not what the Court can take cognizance of.
>
> The misconduct charged against the plaintiff as a ground for invoking the maxim against him must relate directly to the very transaction concerning which the complaint is made, and not merely to the general morals or conduct of the person seeking relief; or as is indicated by the reporter's note in the old case of *Jones v.*

> *Lenthal* (1669) 1 Chan. Cas. 154, 22 E.R. 739: "... that the iniquity [sic] must be done to the defendant himself."

[22] This Court has recently considered two cases involving the propriety of pleadings alleging some interplay between anti-competitive conduct and a claim for relief for infringement of a statutory monopoly. The first is *Procter & Gamble Co. v. Kimberley-Clark of Canada Ltd.* (1990), 29 C.P.R. (3d) 545 (F.C.A.), a patent infringement case. The defendant sought to include in its statement of defence a paragraph alleging that the patent holder had disentitled itself from equitable relief because it had sold its patented products at unreasonably low prices or below cost for the purpose of substantially lessening competition and eliminating the defendant as a competitor, contrary to the *Competition Act*, S.C. 1986, c. 26. The Motions Judge allowed the amendment, but this Court reversed his decision on the basis that these allegations could have no bearing on the defence or on the patent holder's claim for equitable relief. Hugessen J.A., speaking for the Court, said:

> For past conduct to be relevant to a refusal of equitable relief under the "clean hands" doctrine, relief to which the party would otherwise be entitled, such conduct must relate directly to the subject matter of the plaintiff's claim, in this case their patent: see *City of Toronto v. Polai* (1969), 8 D.L.R. (3d) 689, [1970] 1 O.R. 483 (C.A.). Here not only must the alleged predatory pricing be unrelated to the patent (what wrong is done if the holder of a legal monopoly prices his products below their cost and who suffers thereby?), but the plaintiff's recovery of the defendant's profits would actually be reduced by the alleged practice.

[23] On these facts, the plaintiff's ownership of the patent, which was the basis of the patent infringement claim, was independent of any predatory pricing practices it might

have adopted. Therefore, there was no relationship between the alleged wrongful conduct and the patent rights that formed the basis of the plaintiff's claim for an equitable remedy.

[24] The second case is *Visx Inc. v. Nidek Co.* (1995), 68 C.P.R. (3d) 272 (F.C.T.D.), affirmed (1996), 209 N.R. 342, 72 C.P.R. (3d) 19 (F.C.A.). This also was a patent infringement action. The patents related to excimer lasers used for eye surgery. The defendant pleaded in its statement of defence that the patents were unenforceable or void because the patent holder had used its patent rights to attempt to extract fees and royalties for surgical procedures, and to impose oppressive licence conditions, which was alleged to be an undue restraint of trade contrary to section 32 of the *Competition Act*. The plaintiff sought to strike out the pleadings relating to the *Competition Act*. The defendant argued that the pleadings should not be struck because they formed the basis of an argument that the plaintiff's behaviour disentitled it to equitable relief for patent infringement. The Prothonotary ordered the pleadings struck, and the Motions Judge agreed, substantially adopting the same reasons in the *Procter & Gamble* case (*supra*).

[25] *Visx* and *Procter & Gamble* are two examples in which the alleged breaches of the *Competition Act* by a patent holder did not cast any shadow on the patent rights themselves. Therefore, there was no relationship between the alleged unlawful behaviour and the equitable remedy sought by the patent holder that could support an unclean hands defence.

[26] The Motions Judge concluded that the same could be said of this case, with the result that there was no hope of a successful unclean hands defence. I must respectfully disagree. In this case, Access International wishes to argue that the assignment of copyright in the VW and Audi logos to Volkswagen Canada is conduct described in subsection 32(1) of the *Competition Act*, because the result of Volkswagen Canada's obtaining the copyright was to unduly limit or prevent competition in authentic Volkswagen and Audi parts and accessories. This allegation is quite different from the allegations considered in *Visx* and *Procter & Gamble*. In my view, it is at least arguable that in this case there is a sufficient relationship between the copyright and the unclean hands defence that the equitable remedy might not be granted.

[27] I see nothing in any of the cases to which we were referred, or in section 32 itself, that suggests that such an argument is bereft of all hope of success.

[28] For these reasons, I would allow the appeal except as it relates to the counterclaim, so that the second sentence of paragraph 2 and paragraphs 15, 16 and 17 of the statement of defence will remain in the pleadings. As success is divided, each party will bear its own costs.

Karen R. Sharlow

J.A.

"I agree
Marshall Rothstein J.A."

"I agree
Brian Malone J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-403-99
STYLE OF CAUSE:	Access International Automotive Ltd. v. Volkswagen Canada Inc. and Volkswagen AG, Volkswagen Mexico SA and Audi AG
PLACE OF HEARING:	Calgary, Alberta
DATE OF HEARING:	February 13, 2001
REASONS FOR JUDGMENT BY:	**Sharlow J.A.**
CONCURRED IN BY:	**Rothstein J.A.** **Malone J.A.**
DATED:	March 21, 2001

APPEARANCES:

David R. Haigh, Q.C.	FOR THE APPELLANT
L.E. Trent Horne	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Burnet, Duckworth & Palmer Calgary, Alberta	FOR THE APPELLANT
Sim, Hughes, Ashton & McKay Toronto, Ontario	FOR THE RESPONDENT

ANNEX 104

OXFORD PUBLIC INTERNATIONAL LAW

Oxford Reports on International Law

Societe Generale de Surveillance SA v Pakistan, through Secretary, Minister of Finance, Revenue Division and Islamabad, Appeal to Supreme Court, Civil Appeal No 459/2002, Civil Appeal No 460/2002, 2002 SCMR 1694, ILDC 82 (PK 2002), 3rd July 2002, Pakistan; Supreme Court

Date: 03 July 2002
Citation(s): Civil Appeal No 459/2002 (Official Case No)
Civil Appeal No 460/2002 (Official Case No)
2002 SCMR 1694 (Other Reference)
ILDC 82 (PK 2002) (OUP reference)
Content type: Domestic court decisions
Product: Oxford Reports on International Law [ORIL]
Module: International Law in Domestic Courts [ILDC]
Jurisdiction: Pakistan [pk]; Supreme Court

Parties: Societe Generale de Surveillance SA
Pakistan, through Secretary, Minister of Finance, Revenue Division (Pakistan [pk]), Islamabad (Pakistan [pk])

Judges/Arbitrators: Munir A Shiekh; Qazi Muhammad Farooq; Abdul Hameed Dogar

Procedural Stage: Appeal to Supreme Court

Previous Procedural Stage(s):
Judgment of Lahore High Court, Rawalpindi Bench, First Appeal, Order; *Societe Generale de Surveillance SA v Pakistan,* No 9, 2002; 2002 CLD 790, 14 February 2002
Order; *Societe Generale de Surveillance SA v Pakistan,* 7 January 2002

Subject(s):

International procedure — International investment law — Estoppel — Treaties, application — Treaties, interpretation — Conflicts between — Arbitral agreements

Core Issue(s):

Whether international treaty and conventional law prevailed over municipal Pakistani law.

Whether an arbitration agreement between the parties was binding in view of a Bilateral Investment Treaty.

Whether the right to seek remedy before the International Centre for the Settlement of Investment Disputes ('ICSID') has been waived.

Oxford Reports on International Law in Domestic Courts is edited by:

Professor André Nollkaemper, University of Amsterdam and August Reinisch, University of Vienna.

Facts

F1 Societe Generale de Surveillance SA ('SGS') entered into an agreement with the government of Pakistan for services of pre-shipment inspection of all consignments to Pakistan.

F2 The agreement was terminated by Pakistan on 12 December 1996.

F3 Although the agreement contained an arbitration clause, SGS filed a civil suit against Pakistan in the court of first instance in Geneva for the recovery of US$368,430.49.

F4 The civil suit was rejected by the Swiss court. On 7 September 2000, Pakistan filed an application under Section 20 of the Arbitration Act, 1940, before the civil judge at Rawalpindi, to file the arbitration agreement in Court and to appoint an arbitrator in order to commence the contractual arbitration as agreed between the parties. Meanwhile, SGS filed an appeal before the Swiss Supreme Court, but that appeal was also rejected. SGS filed its reply to the Section 20 application on 10 October 2001, contesting the application filed by Pakistan.

F5 SGS, on 12 October 2001, sought to institute an ICSID arbitration on the ground that that, by virtue of the Bilateral Investment Treaty, 11 July 1995 ('BIT') between the Swiss Confederation and Pakistan, Pakistan was bound to submit to arbitration. This request was registered on 12 November 2001. SGS on 4 January 2002 made an application before the civil judge at Rawalpindi to stay the proceedings under Section 20 on the grounds that the ICSID arbitration had commenced. The civil judge dismissed the application of SGS on 7 January 2002 and ordered SGS to nominate arbitrators.

F6 SGS filed an appeal before the Lahore High Court at Rawalpindi. The High Court held that a process which had already commenced could not be reversed even under the BIT or the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (18 March 1965) 575 UNTS 159, entered into force 14 October 1966 ('ICSID Convention'), as the contractual arbitration was initiated earlier in time and would prevent the parties from going to the ICSID. The High Court held that choice of forum would prevail where parties had not initiated judicial proceedings for arbitration. It also held that because SGS first went to the Swiss court, and then filed an objection and raised a counterclaim to Pakistan's application under Section 20, SGS had waived its right to institute ICSID proceedings.

F7 The appeal filed by the SGS before the Lahore High Court was dismissed by an order dated 14 February 2002. The Judge of the High Court came to the conclusion that no domestic law had been enacted to give effect to the ICSID Convention or the BIT, and that therefore their legal efficacy was but that of an instrument of administrative nature which, as such, could not be enforced as law.

F8 SGS then filed the present Leave to Appeal before the Supreme Court of Pakistan against the order of 14 February 2002. Leave was granted to consider whether the arbitration agreement between the parties was binding upon the parties notwithstanding the BIT, and further to consider whether the trial court had been right in holding that SGS was not an 'investor' within the meaning of that word under the BIT. The third and final issue was whether the SGS had waived its right to go to the ICSID.

F9 The Attorney-General of Pakistan argued on behalf of Pakistan that Pakistani courts could not take note of the violation of any provision of international agreement or law in the absence of any relevant provision of domestic law. Courts in Pakistan were bound to give effect to municipal law. He argued that international agreements could only be enforced where there was legislation in the country. In support of his contention he relied upon *Maclaine Watson and Co v Department of Trade and Industry,* and the related appeal in *Maclaine Watson v International Tin Council,* (1989) 3 All ER 523. He further relied upon numerous examples of intervening legislation to incorporate the provisions of conventions and treaties in Pakistan. It may be noted that when the Attorney-General argued this case before the High Court, he had also referred to Article 69 of the BIT, which provides that each contracting State will take legislative measures to give effect to the provisions of the BIT.

F10 Counsel for SGS argued that Pakistan had entered into the BIT with the Swiss Confederation on 11 July 1995, which provides that all disputes related to investment may be resolved through ICSID arbitration. He argued that by reason of its own omission, Pakistan could not avoid the enforcement of the provisions of a treaty. He further argued that ratification of a treaty amounted to giving that treaty status of law. Counsel for SGS sought to persuade the Court that, by virtue of a unilateral act of Pakistan, Pakistan, having failed to incorporate the treaty into domestic law, should not be allowed to take advantage of such omission. Having once ratified a treaty, that amounted to giving that treaty the status of law. For this, counsel for SGS relied upon Article 97 of the Constitution, Pakistan, which provided that the Executive Authority of the Federation should extend only to those matters with respect to which Parliament can make laws. The Fourth Schedule of the Constitution embodied the list of such matters with respect to which Parliament can make laws, and it included the implementing of treaties and agreements.

Held

H1 The provisions of the BIT could not have the effect of altering the existing law and the rights arising therefrom as there was no intervening legislation incorporating the treaty into the laws of the country by way of statute. Therefore, the BIT could not be enforced through the courts, as the courts did not have the power to do so. (paragraph 23)

H2 Intervening legislation was necessary in order to enforce the terms and conditions of an international agreement. The rights arising under a treaty could not be enforced through a court of law unless the provisions of the treaty had been incorporated through legislation into the laws of the country. The rights and obligations under the treaty must become a part of the municipal law of the country through legislation in order for a court to enforce it. (paragraph 28)

H3 Article 175(2) of the Constitution of Pakistan provides that no court shall have jurisdiction unless conferred upon it by or under any law or the Constitution. Therefore, unless the treaty was incorporated into the law to become part of the municipal law, no court shall have jurisdiction to enforce rights arising thereunder. (paragraph 23)

H4 SGS had waived its rights to seize the ICSID court by filing the recovery suit before the Swiss courts, and by filing the reply and counterclaim to Pakistan's application under Section 20 of the Arbitration Act. (paragraphs 57, 59, 60)

Date of Report: 31 August 2006

Reporter(s): Ayesha Malik

Analysis

A1 This case was one of the leading cases in Pakistan on international commercial arbitration and on the treatment of international agreements by domestic courts.

A2 The preliminary issue in the case was the treatment of international agreements by domestic courts. Currently, the settled position under Pakistan law is that Pakistani courts cannot take note of the violation of any provision of an international agreement or international law in the absence of any relevant provision of domestic law. (This would include customary international law, although the judgment did not expressly refer to customary law.) Therefore, courts in Pakistan were bound to give effect to municipal law.

A3 According to the Court, international agreements could only be enforced where there was implementing legislation in the country. Without framing legislation in terms of the agreement, the covenants of the agreement were neither binding nor were they the law. At best, they have a 'persuasive value'.

A4 However, the reasoning of the Supreme Court was that, if municipal law provides adequate remedies or solutions, international law may be disregarded. At the same time, the importance of international law and the acknowledgement of the binding nature of international agreements has been considered by the Superior Courts of Pakistan. The Supreme Court held in *Hitachi Ltd v Rupali Polyester,* 1998 SCMR 1618 that, in the 'modern civilized world', nations have found that they cannot shelter behind the principle of territorial sovereignty to disregard foreign rules of law merely because they happen to be at variance with their own internal or territorial system. Superior Courts have held that a government which was party to an international agreement or convention cannot enforce it like municipal law unless it has been enacted or codified by the legislature. However, in line with the Court's 'persuasive value' argument, it observed that if Pakistan was party to a convention, it had a 'moral obligation' to observe the provisions of that convention. Where there was a conflict between the domestic law and a convention, the domestic law will prevail. Finally, where Pakistani law and/or policy were clear, foreign law would be excluded to the extent that it was repugnant to municipal law.

A5 Another interesting aspect of this case was the argument raised by SGS before the High Court that, even though it was not a signatory to the BIT, in view of the definition given to the word 'investment' under the BIT, SGS could invoke the provisions of the BIT regarding arbitration and choice of forum. However, the High Court gave SGS the benefit of this argument by providing that even though SGS was not a party to the BIT, applying general principles of interpretation, a person for whose benefit a contract was made may sue to enforce any obligation. The High Court, interpreting the various articles of the BIT, had held that the general rules of statutory interpretation would apply to interpretation of treaties unless stated otherwise. Rules commonly applied by the courts for the interpretation and construction of municipal law are applicable to the interpretation of treaties and in particular law making treaties in so far as they constitute general rules of jurisprudence. The Supreme Court disagreed with the High Court, holding that the dispute between the parties was not covered under Article 1(1) and (2) of the BIT, nor under the ICSID Convention. There was an agreement between the parties and therefore the arbitration clause contained in that agreement should prevail. The Supreme Court further found SGS's conduct of first approaching the Swiss courts as amounting to waiver by implication of the right to seek arbitration, and as estoppel from seeking arbitration under ICSID. No reference was made by the Supreme Court to the Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 331; 8 ILM 679 (1969); 63 AJIL 875 (1969), entered into force 27 January 1980 ('VCLT'). (Pakistan signed the VCLT on 27 April 1970, but had not ratified it, as at March 2006.) The High Court, while dealing with the issue of whether the parties should settle their dispute in terms of ICSID or under the contract, found that

unless domestic law was legislated, the treaty or convention in question remains as 'Executive Act' and no more. The High Court had found, in the instant case, that Pakistan had no legislation to give effect to the terms and conditions of the ICSID Convention, and it discussed several other conventions such as the Vienna Convention on Consular Relations (24 April 1963), 596 UNTS 261; 21 UST 77; TIAS No 6820, entered into force 19 March 1967 and the Vienna Convention on Diplomatic Relations (18 April 1961) 500 UNTS 95, entered into force 24 April 1964. However, the High Court also made no reference to the VCLT. The law as it stands today is that, even if Pakistan is a signatory to a treaty or convention, the terms and conditions of such treaty or convention can only be enforced if there is domestic legislation. At best, such documents have a persuasive value and the courts may press into service the contents of the treaty or convention if it is not in conflict with the law of the land.

Date of Analysis: 31 August 2006
Analysis by: Ayesha Malik

Instruments cited in the full text of this decision:

Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (18 March 1965) 575 UNTS 159, entered into force 14 October 1966

Bilateral Investment Treaty, 11 July 1995, Articles 1, 2

Cases cited in the full text of this decision:

Hub Power Co Ltd (HUBCO) v Pakistan Wapda, All Pakistan Legal Decisions 2000 SC 841

To access full citation information for this document, see the Oxford Law Citator record

Decision - full text

Munir A. Sheikh, J.

Munir A. Sheikh, J.

1 By this consolidated judgment, we propose to decide Civil Appeals Nos.459 and 460 of 2002, involving identical questions of law and facts.

2 These two appeals by leave of the Court are directed against the judgment dated 14-2-2002 of the Lahore High Court, Rawalpindi Bench, Rawalpindi whereby appeal filed by the appellant (Civil Appeal No.459 of 2002) against the order, dated 7-2-2002 of the trial Court has been dismissed and the request of the appellant Pakistan through Secretary, Ministry of Finance, Islamabad in the connected Appeal No.460 of 2002 to restrain the SGS to pursue the remedy through arbitration of International Centre for Settlement of Investment Disputes (ICSID) has been dismissed.

3 The facts of the case are that SGS, hereinafter called the "appellant" entered into an agreement on 29-9-1994 with the Federation of Pakistan, hereinafter called the "respondent", by which the services of the appellant were huried for pre-shipment inspection of all consignments to be imported into Pakistan on the basis of which the custom duty, etc., and other Government dues as prescribed under the relevant Statutes were to be charged and recovered from the importers. This contract was terminated by the respondent on 12-12-1996 which was accepted by the appellant on 23-12-1997 with the reservation of its legal right. This agreement contained an arbitration clause which is Clause 11.1. It reads as under:—

> "**11.1** Arbitration.—Any dispute, controversy or claim arising out of, or relating to this Agreement, or breach, termination of invalidity thereof, shall as far as it is possible, be settled amicably. Failing such amicable settlement, any such dispute shall be settled by arbitration in accordance with the Arbitration Act of the Territory as presently in force. The place of arbitration shall be Islamabad, Pakistan and the language to be used in the arbitration proceedings shall be the English language."

4 The appellant, however, filed a case against the respondent in the Court of first instance in Geneva for the recovery of an amount of U.S.$ 8,368,430.49 with interest thereon and the balance due on SGS invoices. In the petition filed before the said Court, it was alleged that the appellant did not except fair trial from the Courts in Pakistan to justify its act of not invoking the arbitration clause, for settlement of dispute by Courts in Pakistan. The said Court decided the case against the appellant on the ground that arbitration clause was reasonable, fair trial was possible in Pakistan. The claim of sovereign immunity of Pakistan was also upheld. The appeal filed by the appellant before the Swiss Court of Justice against the said judgment was dismissed through judgment dated 23-6-2000.

5 The respondent on 7-9-2000 filed an application under section 20 of the Arbitration Act, 1940 for filing of the agreement in the Court and appointment of an arbitrator as per Arbitration Clause No.11.1 of the said Agreement. The appellant filed an appeal before the Swiss Supreme Court which too was dismissed on 23-11-2000.

6 The appellant contested the said application by filing detailed reply on 7-4-2001. After filing this reply, on 10-10-2001, the appellant filed consent to ICSID Arbitration which was followed by a formal request for arbitration dated 12-10-2001 which was registered on 12-11-2001. Apart from preliminary and other legal objections, the appellant also raised counter-claim of more or less the amounts which were claimed in the case filed before the Swiss Court of first instance. No plea was raised that the dispute between the parties by force of Bilateral Investment Treaty dated 11-7-1995 or the Convention of Washington dated 18-3-1965 could exclusively or at the option of the appellant be resolved through arbitration of ICSID. It was long after the dismissal of the appeal of the appellant by the Swiss Supreme Court on 23-11-2000 that the appellant made an application under section 41 of the Arbitration Act before the trial Court on 4-1-2002 seeking stay of proceedings under section 20 of the Arbitration Act, 1940 contending that ICSID arbitration proceedings had been instituted, therefore, these proceedings should be stayed. The trial Court through order dated 7-1-2002 dismissed this application and on the same date, by a separate order, it directed the parties to file panel of proposed Arbitrators. The appellant filed Appeal (F.A.O. No.9 of 2002) before the Lahore High Court, Rawalpindi Bench through which it assailed both the orders i.e., the order by which its application for stay.of proceedings was dismissed and the order of acceptance of application under section 20 of the Arbitration Act made by the respondent.

7 In the said appeal, the respondent moved C.M. No.339-C of 2002 praying that the appellant be restrained from taking any step, action or measure to pursue or participate or to continue to pursue or participate in the ICSID Arbitration. The appeal filed by the appellant and the said civil miscellaneous application made by the respondent have been dismissed through the impugned judgment dated 14-2-2002 by the High Court against which these two appeals by leave are directed.

8 The learned Judge in Chamber of the High Court after surveying the facts and relevant laws on the subject came to the conclusion that no domestic law was enacted to give effect to the Washington Convention of 1965 or bilateral treaty for which reasons the legal efficacy of both of them was nothing but an instrument of administrative nature as such could not be enforced as law.

9 As to the effect of Bilateral Investment Treaty dated 11-7-1995 in which a provision was made for ICSID arbitration of the disputes between investor of one contracting State and the other relating to or arising from investment made after 1-9-1954, it was held that though the appellant was not party to the said treaty but it could invoke the same on the basis of generally accepted principles that a contract can be enforced also by a person who is beneficiary thereunder but this principle was not attracted in this case for no law had been enacted to give provisions of the treaty the status of Municipal Law which could be enforced as such. It was also held that the same did not have the effect of taking away the rights accrued to the parties under a particular agreement entered into by them of their free volition. It was also declared that since the respondent had earlier approached the trial Court under section 20 of the Arbitration Act and the appellant had also raised counterclaims and was contesting the said application on merits of the claims, therefore, the said process which had already commenced could not be reversed even under the Bilateral Investment Treaty, the same having been initiated earlier in time would exclude any of the parties to seek ICSID arbitration which according to learned Judge of the High Court was applicable to those cases which had not yet been commenced before a judicial forum. It was held that there was no conflict between the treaty and the agreement in question between the parties, therefore, the jurisdiction of the trial Court to entertain the said application was held to have not been adversely affected by the treaty. The learned Judge in Chamber further held that under Article 26 of the ICSID Convention, the assertion of supremacy of ICSID Convention and the Bilateral Investment Treaty as major piece of

primary law over the agreement as subordinate instrument was not tenable. According to him, the non-ICSID forum already seized of the same matter could not be asked to take its hands off the dispute.

10 As to the arbitration proceedings initiated by the appellant before the ICSID, it was held that the same were not maintainable on account of lack of consent by one of the parties i.e. the Federation of Pakistan under the relevant Convention, BIT, etc. On the question whether the agreement between the parties related to investment as contemplated by Article 1(2) of the Bilateral Treaty dated 11-7-1995, it has been held that the disputed claim of either of the parties did not fall within the ambit of the meanings assigned to the expression "investment" in this Article. It has also been held that the act of the appellant of approaching the Swiss Courts of general jurisdiction for the recovery of specific amounts under the agreement and of its prosecution up to the Swiss Supreme Court, coupled with the act of filing reply to application under section 20 of Arbitration Act made by the respondent and raising counterclaim without indicating expressly or impliedly that the dispute was referable to ICSID arbitration amounted to waiver by it of the right, if any, under bilateral treaty or otherwise to approach ICSID in the matter. In support of the propositions of law, the learned Judge of the High Court made reliance on the statement of law made in the American Jurisprudence, para.51 at page 260 which need not be reproduced here.

11 The learned Judge in Chamber went on to hold that the arbitration clause in the agreement had a separate entity meaning thereby that the same was severable, as such, survived the termination of the contract of which it was a part. According to his findings, the arbitration clause embodied in the agreement subject-matter of this litigation clearly spelt out the intention of the parties that they had decided to have recourse through arbitration thereunder in order to settle their contractual disputes at Islamabad, Pakistan. It was held that this clause could not be deemed to be either varied or superseded by the Bilateral Investment Treaty, therefore, the parties were bound to abide by it. Keeping in view the fact that the agreement in dispute was executed in Islamabad, the part performance of which was also to be made at Islamabad coupled with the fact that seat of arbitration as argued was Islamabad, as such, it has been held that the parties shall be deemed to have agreed that governing law shall be the law of Pakistan.

12 The learned Judge of the High Court, however, dismissed C.M. No.339-C of 2002 made by the respondent to restrain the appellant from taking any step, action or measure to pursue or participate or to continue to pursue or participate in the ICSID Arbitration on the assumption as if an order of injunction of the nature could only be made in a regular civil suit and not in the present proceedings.

13 These two appeals by leave of the Court are directed against the judgment dated 14-2-2002 of the High Court. Leave was granted, inter alia, to consider the following points:

(a) Whether the arbitration agreement between the parties was binding upon them notwithstanding the coming into force of the Bilateral Investment Treaty?

(b) Whether the trial Court was right in holding that the petitioner was not an investor within the meaning of the said word as defined in Bilateral Investment Treaty?

(c) Whether it has been rightly held keeping in view the circumstances of the case that the petitioner had waived its right to seek remedy before ICSID?"

14 Mr. K.M.A. Samdani, learned counsel for the appellant before making submissions on these points raised an argument that the application of the respondent made under section 20 of the Act for making a reference of the dispute between the parties to arbitrator was not maintainable, for in the application itself, allegations had been made that the same was obtained by payment of bribe, kick-backs and commission as such void in view of law laid down by this Court in HUBCO case reported as The Hub Power Company Limited (HUBCO) through Chief Executive and another v. Pakistan WAPDA through Chairman and others (PLD 2000 SC 841) in which this Court held that the points were not arbitrable.

15 In order to determine whether principles of law laid down in HUBCO case (supra) are attracted to the facts of this case, it would be advantageous to reproduce in extenso the relevant paragraph of the said application:—

> "(3) Investigations have revealed that out of the fee that was being received by the respondent-company from the applicant (being 78% of the dutiable value of the goods inspected by the respondent) an amount equivalent to 6% of the fee was paid to Bomer Finance Inc., an offshore company operated by Jens Schlegelmilch, beneficial owner of which is Asif Ali Zardari, husband of Ms. Benazir Bhutto. This amount was paid as kickback and commission for procuring the contract. Similarly, 3% was paid to another off-shore company Nassam Associates which is also operated by Jens Schlegelmilch, beneficial owner of which was Nasir Hussain, then husband of Sanam Bhutto, while another amount of 1% was paid to Jens Schlegelmilch for the same contract. The bank accounts of these companies were also being handled by Jens Schlegelmilch.
>
> (4) The above facts show that the respondent paid bribes and commissions to the beneficiaries out of the fee being recovered from the Government of Pakistan. This amount of bribes and commission, during the course of operation of the contract, came to USD 4.3 Million. Furthermore the respondent also charged the applicant as its agreed fee a total sum of USD 65.7 Million (out of which the above amounts was paid)."

16 The law declared in HUBCO case (supra) is as under:—

> "S. 23—Illegal objects and considerations of an agreement—Agreement was alleged to have been obtained through fraud or bribe—Allegations of corruption were supported by circumstances which provided basis for further probe into the matter judicially, and, if proved would render the agreement as void—Dispute between the parties was not commercial dispute arising from an undisputed legally valid contract, or relatable to such a contract, for, on account of such criminal acts disputed documents did not bring into existence any legally binding contract between the parties, therefore, dispute primarily related to the very existence of valid contract and not a dispute under such a contract-Such matter, according to the public policy, held, required finding about alleged criminality and was not referable to arbitration".

From a bare reading of this part of the application, it is manifest that though allegation of receipt of kickbacks and bribe have been made to explain the factual background as to how allegedly the contract was obtained but there is nothing in the application that the respondent claimed arbitration on these points also, therefore, HUBCO case is not applicable to the facts of the case in hand. It has further been clarified by the learned Attorney-General that the respondent would neither file any claim based on these

allegations in arbitration proceedings nor ask for arbitration qua them or produce any evidence in respect thereof in these proceedings and would follow the law strictly as laid down in HUBCO case (supra). The claims of the respondent would be based on the terms and conditions embodied in the agreement itself.

17 Before, however, proceeding further, it is necessary to examine the facts of HUBCO case to understand correctly the above principles of law laid down in that case. In HUBCO case, there was no dispute about any claim determinable under the terms and conditions of either the original agreement or about the rates of tariff etc., embodied in subsequent disputed amendments made in the original agreement but it was a case of dispute regarding commission of criminal act, therefore, it was held that the same was not arbitrable.

18 Mr. K.M.A. Samdani, learned counsel for the appellant in relation to point-A of the leave granting order submitted that prior to the ratification of Bilateral Investment Treaty by the Federation of Pakistan on 4-4-1996 and the Swiss Confederation on 6-5-1996, the agreement in dispute between the parties had already been executed on 29-9-1994 but the same was not saved from the mischief of the provisions of the said Treaty and the Convention as they were made applicable to all investments made after 1-9-1954, therefore, the said agreement became subservient to the Convention and the Bilateral Investment Treaty inclusive of the Arbitration Clause 11.1 embodied therein as such arbitration through ICSID could only be adhered to for settlement of disputes.

19 This argument has been raised on the erroneous assumption as if the Washington Convention, 1965 and the Bilateral Investment Treaty has attained legal status of Municipal Law which could be pressed into service and enforced as such.

20 On the other hand, learned Attorney-General maintained that it has consistently been held by the Courts that a Treaty unless was incorporated into the laws of the Country by a Statute, the Courts would have no power to enforce treaty rights and obligations arising therefrom at the behest of an individual or State. To support this contention, he has made reference to the rule laid down in the cases of Maclaine Watson & Co Let V. Department of Trade and Industry and related appeals Maclanine Watson & Co. Ltd. v. International Tin Council (The All England Law Reports 1989 Volume 3 page 523) in which the question which came up for consideration was as to what was the legal status of a Treaty between the two States. It was held as under:—

> “A treaty is a contract between the governments of two or more sovereign States. International law regulates the relations between sovereign States and determines the validity, the interpretation and the enforcement of treaties. A treaty to which Her Majesty's government is a party does not alter the laws of the United Kingdom. A treaty may be incorporated into and alter the laws of the United Kingdom by means of legislation. Except to the extent that a treaty becomes incorporated into the laws of the United Kingdom by statute, the Courts of the United Kingdom have no power to enforce treaty rights and obligations at the behest of a sovereign government or at the behest of a private individual.”

21 In amplification of the above principles, it was also held as under:—

> “The second is that, as a matter of the Constitutional law of the United Kingdom, the royal prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights on individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament. Treaties, as it is sometimes expressed, are not self-executing. Quite simply, a treaty is not

part of English law unless and until it has been incorporated into the law by legislation. So far as individuals are concerned, it is res inter alios acta from which they cannot derive rights and by which they cannot be deprived of rights or subjected to obligations; and it is outside the purview of the Court not only because it is made in the conduct of foreign relations, which are a prerogative of the Crown, but also because, as a source of rights and obligations, it is irrelevant."

22 Learned Attorney-General has also referred to Article VI of the United States Constitution to demonstrate that wherever it was intended to give effect to a Treaty by a State as Municipal law of the Country for enforcement of rights thereunder as such through Courts, law was made through Statutes to incorporate the provisions of the Treaty in the Municipal Law of the Country. Sub-Article (2) of Article VI of the said Constitution reads as under:—

"**(2)** This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the contrary notwithstanding."

23 The argument raised by the learned Attorney-General has considerable force.

Admittedly, in Pakistan, the provisions of the Treaty were not incorporated through legislation into the laws of the Country, therefore, the same did not have the effect of altering the existing laws, as such, rights arising therefrom called treaty rights cannot be enforced through Court as in such a situation, the Court is not vested with the power to do so.

It may be significantly mentioned here that according to Article 175 (2) of the Constitution of Islamic Republic of Pakistan, no Court has any jurisdiction unless conferred by or under any law or the Constitution, therefore, treaty unless was incorporated into the law so that it become part of Municipal Laws of the Country, no Court shall have jurisdiction to enforce any right arising therefrom.

25 Faced with this difficulty, Mr. K.M.A. Samdani, learned counsel for the appellant attempted to overcome it by arguing that by reason of unilateral act of the Federation of Pakistan itself of omission or inaction to incorporate into the laws of the country the provisions of the treaty by legislation it should not be allowed to raise such a plea to avoid the enforcement of the provisions of the treaty. He further argued that according to Article 97 of the Constitution of Islamic Republic of Pakistan, 1973, the executive authority of the Federation extends to the matters enumerated in Part I of Fourth Schedule regarding which the Parliament could legislate therefore, its act of ratification of bilateral Investment Treaty amounted to give it status of law.

26 Article 97 of the Constitution only provides that subject to the Constitution, the executive authority of the Federation shall extend only to those matters with respect to which Majlis-e-Shoora (Parliament) has the power to make laws, including exercise of rights, authority and jurisdiction in and in relation to areas outside Pakistan. Fourth Schedule embodies the list of those matters with respect to which Majlis-e-Shoora has the power to make the laws, Item 3 of which is very relevant which reads as under:—

"**3** External affairs; the implementing of treaties and agreements including educational and cultural pacts and agreements, with other countries; extradition, including the surrender of criminals and accused persons to Governments outside Pakistan."

Since Majlis-e-Shoora has the power to make laws in respect of these matters, therefore, by virtue of Article 97 of the Constitution, the Federal Government of Pakistan has the power to exercise executive authority in respect thereof which was exercised to ratify the treaty, but it has not conferred power on the executive authority to legislate a Statute.

27 Learned Attorney-General has brought to our notice that legislations were made by a number of countries to incorporate the provisions of the Convention and the Treaties to enforce the same through Courts of law as Municipal Law. Following laws listed below were made by the Countries shown against them:—

"Contracting State Title of Legislation (Citation)

Australia ICSID Implementation Act, 1990. (Act No.107 of 1990)

Austria Ratifikationsurkunde fur das Ubereinkommen zur Beilegung von Investitionsstreitigkeiten zwischen Staaten und Angehorigen anderer Staaten.

(Off.Gaz.357, Vol.99, Sept. 10, 1971, p.1853)

Belgium Loi du 17 juillet 1970 portant approbation de la Convention pour le reglement des differends relatifs aux investissements entre Etats et ressortissants d'autres Etats, faite a Washington ele 18 mars 1965.

(Off. Gaz. 185, Sept.24, 1970, p.9548)

Benin Ordonnance No.36/PR/MFAE du 26 aout 1966 portant ratification de la Convention pour le reglement des differends relatifs aux investissements entre Etats et ressortissants d'authres Etats.

(Off. Gaz.17, Sept. 1, 1966, p.773)

Decret No.445/PR/MFAEP du 28 decembre 1967 portant nomination de concilliateurs et d'arbitres au Centre International pour le Reglement des Differends relatifs aux Investissements.

(Off. Gaz.4, February 14, 1968,p.161)

Botswana The Settlement of Investment Disputes (Convention) Act, 1970.

(Act No.65 of 1970)

Burkina Faso Ordonnance No.17/PRES/DEV.T/AET du 31 mars 1966 portant ratification de la Convention pour le reglement des differends relatifs aux investissements enter Etates et ressortissants d'autres Etats conclue sous les ausnices de la Bannque Internationale pour la Reconstruction et le Developpment.

Cameroon Loi No.66/LF/13 du 30 aout 1966 autorisant le President de la Republiqaue Federale a ratifier la Convention pour le reglement des differends relatifs aux investissements entre Etats et ressortissants d'autres Etats.

(Off. Gaz. Sept.1, 1966,p.93)

Decret No.66/DF/454 du 30 aout 1966 portant ratification de la Convention pour le reglement des differends relatifs aux investissements entre Etats et ressortissants d'autres Etats.

(Off. Gaz.December 1, 1966,p.1250)

Loi 75-18 du 8 decembre 1975 relative a la reconnaissance de sentences arbitrales.

(Off. Gaz.6, Suppl., December 15, 1975, p.234)

Chad Loi No.6 du 8 janvier 1966 portant approbation de la Convention.

Decret No.15/PR du 21 janvier 1966 portant ratification de la Convention pour le reglement des differends relatifs aux investissements entre Etats et ressortissants d'autres Etats.

Comoro Decret NO.78/0073/PR portant ratification de l'adhesion de la R.R.I.des Comores a la Convention pour le reglement des difference relatifs aux investissements entre Etas a ressortissants d'autres Etats (CIRDI)

Cango, People's Republic of the Loi No.69/65 autorisant la ratification de la Convention pour le reglement des difference relatifs aux investissements entre Etats a ressortissants d'autres Etats.

Cote d'Ivoire Loi No.65-237 du 26 juin 1965 autorisant le President de la Republique a ratifier la Convention passee avec la Banque Internationale pour la Reconstruction et le Developpement entre Etats et ressortissants d'autres Etats.

(Off. Gaz. 35, July 15, 1965, p.770)

Decret No.65-238 du 28 juin 1965 portant ratification de la Convention passee avec la Banque Internationale pour la Reconstruction et le Developpment pour le reglement des differends relatifs aux investissements entre Etats. et ressortissants d'autres Etats.

Cyprus Council of Ministers Decision No.5331 of January 20, 1966.

(Off. Gaz. 532, October 27, 1966)

Law No.64 of 1966 on approval of Convention by the House of Representatives.

(Off. Gaz.532, October 27, 1966)

Denmark Act No.466 of December 15, 1967, on Recognition and execution of Orders Concerning Certain International Investment Disputes.

Egypt, Arab Republic of Decree-Law No.90 of November 7, 1971, approving the accession of the Arab Republic of Egypt to the International Convention.

(Off. Gaz. November 11, 1971)

El Salvador Acuerdo No.349 de 19 julio 1982.

Decreto No.111 de 7 diciembre 1982.

(Off. Gaz 230, Vol.277, December 14, 1982)

Finland Law No.74/69 of December 27, 1968 containing the approval of the Convention.

(Off. Gaz.No.1–8, 1969, p.7)

Decree No.75/69 of January 24, 1969, containing regulations for the implementation of the Convention.

France Loi No.67-551 du 8 juillet 1967 autorisant la ratification de la Convention pour le reglement des differends relatifs aux investissements entre Etats et ressortissants d'autres Etats, du 18 mars 1965.

(Off. Gaz, July 11, 1967, p.6931)

Gabon Loi No. 19/65 du 20 decembre 1965 portant ratification de la Convention pour le reglement des differends relatifs aux investissements entre Etats.

Germany Gesetz zu dem Ubereinkommen vom 18 Marz 1965 zur Beilegung von Investitionsstretigkeiten zwischen Staaten und Angehorigen anderer Saaten vom 25 Februar 1969.

(Off. Gaz. 12, Part II, March 4, 1969, p.369)

Greece Neccessity Law No.608, November 11, 1968.

Guinea Loi No.12/An-68, portant ratification de la Convention pour le reglement des differends relatifs aux investissements entre Etats et ressortissants d'autres etats.

Decret No.409/PRG du 28 Sept. 1968 promulgant une loi de l'Assemblee Nationale portant ratification par la Republique de Guinee de la Convention pour le reglement des differends relatifs aux investissements entre Etats et ressortissants d'autres Etats.

Honduras Decreto No.41-88

(Off. Gaz. August 4, 1988)

Iceland Law authorizing the Government to become a party to an International Convention on the Settlement of other States.

(Off. Gaz.A, 74, 1966).

Indonesia Law No.5 of June 29, 1968.

(Off. Gaz.32, 1968)

Ireland Arbitration Act, 1980 (covering, inter alia, the ICSID Convention). (Act No.7 of 1980)

Arbitration Act, 1980 (Part IV) (Commencement) Order, 1980.

(S.I. No.356 of 1980)

International Centre for Settlement of Investment Disputes (Designation and Immunities) Order, 1980.

(S.I. No.339 of 1980)

Italy Legge 10 maggio 1970, n. 1093 Ratifica ed execuzione della Convenzione per il regolamento delle Controversie relative agli investimenti tra Stati e cittadini di altri Stati, adottata a Washington il 18, January 12, 1971, p.155)

Jamaica Investment Disputes Awards (Enforcement) Act, 1966 (Act 28 of August 29, 1966) (Off. Gaz. XC, 18 February 16, 1967, p.60)

Buxite (Production levy) Act, 1974.

(Act 19 of 1974)

Jordan Royal Decree granted to Decision No. 1196 of Council of Ministers of May 17, 1972, ratifying the Convention on the Settlement of Investment Disputes Between States and Nationals of other States.

Kenya The Investment Disputes Convention Act of 1966.

(Act 31 of November 22, 1966)

Korea Promulgation of the Convention (as Treaty No.234).

Republic of Kuwait Lesotho (Off. Gaz. Extr. No.4580, February 21, 1967, p.361)

Law Decree No.1 of January 14, 1979.

Arbitration International Investment (Disputes Act (Act 23 of 1974).

(Off. Gaz.10, Suppl. 2, March 14, 1975)

Luxembourg Loi du 8 avril 1970 portant approbation de la Convention pour le reglement des differends relatifs aux investissements entre Etats et ressortissants d'autres Etats, en date a Washington, du 18 mars 1965.

(Off. Gaz. A, No.25, May 9, 1970, p.536)

Malawi Investment Disputes (Enforcement of Awards) Act, 1966 (Act 46 of December 29, 1966)

(Off. Gaz.Suppl, January 10, 1967)

Malaysia Convention on the Settlement of Investment Disputes Act, 1966.

(Act of Parliament 14 of 1966)

Notification on entry into force of the Convention on the Settlement of Investment Disputes Act, 1966.

(Notification No.96 of March 10, 1966)

Arbitration (Amendment) Act, 1980.

(Act A 478 of 1980.

Mali Decret No.09/P-CMLN portant promulgation de I'Ordonnance No.77-63/CMLN du 11 novembre 1977.

(Off. Gaz. 536, January 6, 1978)

Ordonnance No.77-63/CMLN portant approbation de la Convention pour ie reglement des differends relatifs aux investissements entre Etats et ressortissants d'autres Etats.

(Off. Gaz. 536, January 6, 1978)

Mauritania Loi No.65.135 du 20 juillet 1965 autorisant le President de la Republique a ratifier la Convention pour le reglement des differends ralatifs aux investissements entre Etats resortissants d'autres Etats.

(Off. Gaz. 166/167, Setp.15, 1965,p.301)

Marritius Investment Disputes (Enforcement of Awards Act, 1969.

(Act No.12 of April 24, 1969)

Morocco Decret royal No.564-65 du 31 octobre 1966 portant ratification de la Convention pour le reglement des differends relatifs aux investissements entre Etats et ressortissants d'autres Etats.

(Off. Gaz.2820 No.16, 1966, pp.1288, 1332)

Metheriands Law of July 21, 1966, containing the approval of the Convention on the Settlement of Invesment Disputes between States and Nationals of other States.

(Off. Gaz. 339, 1966,p.802)

New Zealand Arbitration (International Investment Disputes) Act, 1979 (Act No. 39 of 1979).

Niger Loi No 68-06 du 12 fevrier 1968 autorisant le President de la reglement des differends relatifs aux investissements entre Etats et ressortissants d'autress Etats, signee par le plenipotentiaire du Niger a Washington le 23 aout 1965.

(Off. Gaz. 4, February 15, 1968, p.119)

Nigeria Decree No.49 of 1967, International Centre for Settlement of Investment Disputes (Enforcement of Awards).

(Off. Gaz. Extr. 105, Vol.54,No.30, 1967, p.A255)

Norway Act of June 8, 1967, relating to the implementation of the Convention of March 18, 1965 on the Settlement of Investment Disputes Between States and Nationals of other States.

(Off. Gaz. 1 (1967), p.23, reprinted Off.Gaz.II(1967),p.415

Papua New Guinea Investment Disputes Convention Act, 1978.

(Act No.48 of 1978)

Portugal Decree-Law No.15/84

(Off. Gaz. No.79, April 3, 1984)

Somania Decret al Consillului de Stat Provind ratificarea Converntici pentru reglementar differend relative la investitii intre State si persoane ale allor State, incheiata la Washington la 18 martie 1965.

(Off. Gaz. 56 june 7, 1975, p.3)

Rawanda Decret No.20/79 du 16 juillet 1979.

Saudi Arabia Council of Ministers Resolution No.372, 15/3/1394 A.H.Royal Decree No.M/8, 22/3/1394 A.H.

Senegal Loi No.67-14 du 28 fevrier 1967 autorisant le President de la Republique a ratifier la Convention pour le reglement des differends relatifs aux investissements entre etats et ressortissants d'autres Etats.

(Off. Gaz. 3888, April 17, 1967)

Decret No.67-517 du 19 mai 1967 ordonnant la publication au J.O. de la Convention poru le reglement der differends relatifs aux investissements entre Etats et ressortissants d'authres Etats.

(Off. Gaz. 3897, June 10, 1967)

Singapore Arbitration (International Investment Disputes) Act (Singapore Statutes, 1970 Rev. Ed., Act No. 18, Ch. 17, Sept.10, 1968, p.257)

Somalia Law No.11 of February 8, 1967 enforcing the Convention.

Sri Lanka Greater Colombo Economic Commission Law, No.4 of 1978.

Sudan Republican Decree No. 121 of 1972, ratifying the Convention.

Sweden Act on Recognition and Execution of Awards Concerning Certain International Investment Disputes.

(Act No.735 of December 16, 1966)

Switzerland Arrete federal approuvant la Convention portant reglement des differends relatifs aux investissements entre Etats et ressortissants d'autres Etats.

(Recueil des lois fed., 32, August 9, 1967 p.1021)

Togo Ordonnance No.32 du 25 juillet 1967 portant ratification par la Republique togolaise de la Convention pour le reglementdes difference relatifs aux investissements entre Etats a ressortissants d'autres Etats.

Trinidad and Tobago Investment Disputes Awards (Enforcement) Aux 1968. (Act No. 23 of August 18 1968)

Tunisia Loi No.66-23 du 3 mai 1966 portant ratification de la Convention pour le reglement de differends relatifs aux investissements entre Etats et ressortissants d'autres Etats.

(Off. Gaz. May 3–6, 1966, p.723)

United Kingdom Arbitration (International Investment Disputes) Act, 1966 (1966 c. 41).

The Arbitration (International Investment Disputes) Act, 1966 (Commencement) Order 1966.

(Statutory Instruments, 1966, No.1597 December 21, 1966).

The Arbitration (International Investment Disputes) Act 1966 (Application to Colonies etc.) Order, 1967.

The Arbitration (International Investment Disputes) (Guernsey) Order, 1968.

(Statutory Instruments, 1968, No. 1199, July 26, 1968).

The Arbitration (International Investment Disputes) Jersey) Order, 1979.

(Statutory Instruments, 1979, No.572, May 23, 1979).

The Arbitration (International Investment Disputes) Act, 1983 (an Act of Tynwald).

United States Convention on the Settlement of Investment Disputes Act of 1966. (Pub.L.89-532; 80 Stat. 344; 22 U.S.C. sec. 1650–1650a, August 11, 1966).

Executive Order designating certain Public International Organizations entitled to enjoy certain privileges, exemptions and immunities.

(Exec. Order 11966; 42 Fed.Reg.4331 (1977).

Zambia Investment Disputes Convention Act, 1970 (Act No.18 of 1970). (Off. Gaz. Suppl.April 17, 1970, p.99).

28 As regards resolution of dispute arising from investment as per terms of Bilateral Investment Treaty in this case, no law has been made in Pakistan of the nature as was done by Zambia Government or other States, therefore, the same could not be enforced as law in order to claim that the alleged choice given to the appellant under the said treaty to approach ICSID for arbitration had preference over the existing lawful contract between the parties inclusive of arbitration clause which is binding on the parties.

29 It is demonstrably clear to which no exception can be taken that the act of the appellant to approach the Court of general jurisdiction in Switzerland seeking recovery of specific amounts under the agreement alleging that the Arbitration Clause No.11.1 embodied therein could not be invoked for the reason of termination of contract and that fait trial in the Courts of Pakistan was not possible and not on account of ICSID arbitration under treaty amounted to admission that otherwise the said clause was valid, legal and operative and binding on the parties.

30 The next question which falls for consideration is whether the agreement between the parties is relatable to any investment to attract the provisions of the Bilateral Investment Treaty became the said Treaty govern the dispute about investment of a party of the Country signatory to the said treaty as is the case here so as to raise a plea that the arbitration clause of the agreement in dispute no longer remained binding between the parties and the choice of the appellant had to be preferred as to the forum of ICSID arbitration. Answer to this question revolves around the answer as to what meant by the

word or expression “investment”. The word “investment” he been defined in Article 1(2) of the Bilateral Investment Treaty as under:—

“**(2)** The term “investments” shall include every kind of assets and particularly—

(a) movable and immovable property as well as any other rights in rem, such as servitudes, mortgages, liens, pledges;

(b) shares, parts or any other kinds of participation in companies;

(c) claims to money or to any performance having an economic value;

(d) copyrights, industrial property rights (such as patents, utility models, industrial designs or models, trade or service marks, trade names, indications of origin,) knowhow and goodwill;

(e) concessions under public law, including concessions to search for, extract or exploit natural resources as well as all other rights given by law, by contract or by decision of the authority in accordance with the law.

31 The term “investor” has been defined in Article 1(1) of the Bilateral Investment Treaty which reads as under:—

“**(1)** The term “investor” refers with regard to either Contracting Party to—

(a) natural persons who, according to the law of that Contracting Party, are considered to he its nationals;

(b) legal entities, including companies, corporations, business associations and other organizations, which are constituted or otherwise duly organized under the law of that Contracting Party and have their seat, together with real economic activities, in the territory of the same Contracting Party;

(c) legal entities established under the law of any country which are, directly or indirectly, controlled by nationals of that Contracting Party or by legal entities having their seat, together with real economic activities in the territory of that Contracting Party.”

32 The agreement between the parties the subject-matter of these appeals is to be tested on the touchstone of true meaning of the word “investment”. In order to decide this question, it could be necessary to examine the agreement itself to arrive at a decision as to its scope and nature. It has to be construed strictly, carefully keeping in view the purpose for which the same was executed.

33 Articles, 1.1, 1.2, 1.4, 1.5, 2.1, 2.2, 2.6 and 2.7 of the Agreement dated 29-9-1994 entered into between Government of Pakistan versus Societe Generale De Suirvellance S.A. are as follows:—

“1.1 Appointment.

The Government hereby appoints SGS to carry out, either by itself, or through its affiliated companies and authorized agents, the services described in Articles

II to IV (hereinafter referred to as the “Services”). This appointment is hereby accepted by SGS.

1.2 Scope of services.

SGS shall performs the service as are expressly set forth in this Agreement as amended from time to time and the following Schedules hereto which form an integral part hereof:

Schedule Title Reference

I Definition of Goods Section 3.1

II Implementation Section 5.1

III Liaison Office Facilities Section 5.8

IV Fees Section 6.1

V Terms of Letter of Credit Section 7.1

VI List of Countries Section 3.1

VII Definition of Benefits Section 4.7

VIII Geographical Area Section 3.1

XI List of affiliates and agents Section 1.1

1.4

Strict adherence in carrying out the Services, SGS shall adhere to the provisions of the Rules referred to in Article V as amended from time to time.

1.5 WTO Agreement.

SGS shall ensure that, in performing the Services, it doss not do or cause to be done, any act that is contrary to the provisions of the agreement on pre-shipment in section of the World Trade Organization: provided that the methods used by SGS to determine the value of duty purposes be strictly in accordance with the laws of the Territory.

Article II Services

Physical identification of goods.—Subject to this Agreement SGS shall carry out the physical identification of all consignments to be imported into the Territory prior to shipment in all countries of supply to determine that the goods presented satisfactorily correspond to the descriptions communicated to SGS by the importer. It shall be in the discretion of SGS to determine the extent of each intervention. In those exceptional cases when goods are permitted to enter the Territory without pre-shipment inspection including where it is so permitted under the Rules specified in Article V and the SGS is the selected inspection company, then the inspection shall be undertaken jointly by Customs and SGS at the port of entry.

2.2 Price verification.

Simultaneously with the physical identifications of imports, SGS shall undertake a price verification of the goods in order to determine on the basis of documentary evidence or other information whether the amount specified in the invoice by a seller in respect of such goods corresponds within reasonable limits, with the export price levels generally prevailing in the country of supply, or where applicable, the world market price verification shall not be limited to the purchase price of the goods, but shall cover the total contracted value including all related services (hereinafter refened to as the "total value").

2.6 Re-inspection in warehouses.

Where re-inspection of goods in bonded warehouses is required, and SGS is the nominated inspection company, SGS sill inspect jointly with Customs and the cost of the inspection shall be paid to SGS by the Government.

2.7 Cost of re-inspection.

Where re-inspection is required under Article 2.6, SGS shall sub-contract this responsibility to SGS Pakistan which will invoice in Pakistan currency at the current commercial inspection rates in Pakistan. SGS shall advise the Government of the current commercial rates and keep the Government informed of any changes thereto. These specific fees shall be subject to all local applicable taxes."

34 From a bare reading of these clauses of the agreement in particular and the agreement as a whole, it is manifest that it was an agreement through which the services of the appellant were hired for carrying out pre-shipment inspection of the goods to determine their value for the purposes of charging custom duty on their import in Pakistan according to the rates prescribed under the relevant laws of Pakistan and the major portion of the exercise was to be undertaken out of Pakistan at the stage of shipment of the goods from the foreign countries from where they were to be imported and in case, reinspection in Warehouse in Pakistan was necessary, the appellant was given authority to carry out the same through SGS Pakistan and nothing else.

35 Considering the nature of these functions for which the services of the appellant were hired in juxtaposition of the meaning of the word "investment", it can safely be held for reasons to follow that it is not an agreement of the kind and nature relating to any investment, as such, as is not covered by the said Bilateral Investment Treaty or the Washington Convention. It was an agreement between the two parties of hiring services simpliciter involving no investment, therefore, the arbitration clause 11.1 embodied therein would not in any manner be adversely affected as to its enforcement through Court of law by any of the Clauses of Bilateral Investment Treaty inclusive of ICSID arbitration being not a dispute related to investment.

36 As is evident from the definition of "investment" given in the Bilateral Investment Treaty that it is not exhaustive for it is controlled by the expression "includes", learned counsel for the appellant when questioned as to how it could claim in view of terms of agreement in question being an agreement of hiring services simpliciter that the same involves any investment referred to clause-C in the Treaty to argue that according to it, any claim to money simpliciter or any performance having an economic value is also investment, therefore, the claim of the appellant for the recovery of the amounts in question for the services rendered by it would be covered by this clause. We are afraid, the argument in our view is not only devoid of any force but also plainly unsound. By raising this argument,

learned counsel for the appellant has overlooked that all claims to money or any performance having an economic value must relate to investment. Clause-C on which reliance has been placed by the learned counsel for the appellant as a matter of fact is of the species of assets earnable by an investor from his investment and not the investment itself. The expression “investment” has a legal connotation and meaning has to be assigned to determine whether the dispute between the parties relate to or has any nexus with investment.

37 Learned Attorney-General in this connection has called our attention to the case of Inland Revenue Comrs. v. Rolls-Royce Ltd. (All England Law Reports Annotated (Vol.2) in which the word “investment” has been interpreted as under:—

> “The word “investment”, though it primarily means the act of investing, is in common use as meaning that which is thereby acquired; and the primary meaning of the transitive verb ‘to invest’ is to lay out money in the acquisition of some species of property; consequently, letters patent, which are undoubtedly a species of property, may properly be described as an investment.”

38 It is sufficiently clear from this that laying out of money in the acquisition of some species of the property was necessary ingredient to determine whether an entry or transaction was relatable to investment or not. Keeping in view this meaning and interpretation of the expression “investment” and examining the terms of the agreement in question in the light thereof, it can safely be concluded that the same does not fall within the scope and ambit of investment, for as observed above, it is simpliciter an agreement through which mere services had been acquired for evaluation the goods mostly in the foreign countries and there is no element of laying money by the appellant for acquisition of any species of property, as such is not a case of investment which is covered by the treaty, as such, no right in the appellant has been created to invoke its provisions for ICSID arbitration.

39 It was also brought to our notice by the learned Attorney-General that in Pakistan, the Foreign Private Investment (Promotion and Protection, Act, 1976 (Act XLII of 1976) has been promulgated which governs the foreign investments and the matters relating thereto. In the said Act, foreign capital has been defined as investment made by foreigner in an industrial undertaking in the form of foreign exchange, imported machinery an equipment or in any other form which the Federal Government may approve for the purpose. This definition is in consonance with the meaning of the word “investment” as discussed above, therefore, this Act can be construed to be the law made by Pakistan relating to foreign investments and in case the meaning to the expression “investment” given in the Bilateral Investment Treaty was to be extended to mere claim of money without laying out money in the acquisition of some species of property as argued, the said Act was required to be amended to incorporate the same in it to enforce it as law which having not been done, as such, the word “investment” as given in the treaty cannot legally he assigned the meaning as argued by the learned counsel for the appellant against the provisions of the said Act. It also does not involve any performance having an economic value for the reasons that the custom duty and other Government dues, were liable to be charged according to the rates specified in the relevant laws. It may also be observed here that evaluation of the goods and the recovery of the import duty were held to be the sovereign acts which were to be performed by the State or its functionaries and by no other person or authority, therefore, it was held in the case of Collector of Customs and others v. Sheikh Spinning Mills (1999

SCMR 1402) by this Court that abdication of sovereign power or delegation thereof in favour of the appellant was not permissible under the law.

40 For what has been discussed above, we are of the view that the arbitration agreement between the parties dated 29-9-1994 was binding and continued to be binding upon them notwithstanding the ratification of the Bilateral Investment Treaty which provided another parallel forum for arbitration before ICSID in that the appellant was not an investor within the meaning of the said word used in the said Treaty and for the reasons discussed above, the findings of the High Court do not suffer from any legal infirmity.

41 This brings us to the most crucial question as to whether in the circumstances of the case, the appellant shall be deemed to have waived its right to seek remedy before ICSID even if it is held that choice was available to the appellant to seek arbitration through ICSID as against arbitration under the arbitration clauses of the agreement.

42 Learned counsel for the appellant submitted that though the appellant is not the signatory of the Bilateral Investment Treaty but in view of the definition of "investor" given in the Treaty to include in its provisions not only the Contracting States but also natural person, legal entities of the Contracting State, therefore, the appellant being a legal entity established in Switzerland could invoke the provisions of the treaty, as such, it had a right to make a choice to invoke the clause of the treaty regarding arbitration of ICSID to resolve the dispute about investment which if made according to the provisions of the treaty are to be given preference over the arbitration clause in the agreement in dispute and the appellant having opted to approach ICSID arbitration, the present proceedings commenced through applications under section 20 of the Arbitration Act by the respondent are liable to be stayed.

43 Learned Attorney-General on the other hand without prejudice to his other submissions and in particular submission that no provision of the treaty could be invoked or pressed into service unless incorporated by the contracting States or any one of them into the laws, maintained that in the circumstances of this case, the appellant had three choices:—

(a) To file a regular suit before the Court of general jurisdiction;

(b) to invoke arbitration clause 11.1 of the Agreement and seek arbitration accordingly; and

(c) as urged by its learned counsel to have recourse to arbitration before ICSID in exercise of its alleged right to make choice.

44 He submitted that after the acceptance of the termination of the contract in December, 1997, it instead of making choice about any of the two arbitration forums as mentioned above for resolution of the dispute filed a suit before the Court of general jurisdiction in Geneva. Specific amounts were claimed under the agreement which were allegedly due to the appellant but it failed and the Courts in Switzerland upheld the plea of sovereign immunity of the Federation of Pakistan and rejected the plea of the appellant that under Arbitration Clause 11.1 of the Agreement, the appellant would not get fair trial in the Court in Pakistan. The judgments of all the three Swiss Courts i.e. Court of first instance, the Appellate Court and the Supreme Court held that fair trial under the said clause was possible.

45 In view of there admitted facts, learned Attorney-General made Submissions that foundation has been laid to raise a plea that firstly by filing the said suit, the appellant shall be deemed to have waived its right to get the resolution of the dispute through arbitration, secondly, the delay after acceptance of termination of the contract in 1997 in approaching the Court in Switzerland not only constituted waiver by implication of the right to seek arbitration but the same also constituted estoppel by conduct for which reason it is estopped from seeking arbitration through ICSID and thirdly the judgments passed by the Courts in Switzerland in the said suit of the appellant also attract the principle of issue estoppel. He argued that the principle is applicable with equal force vis-a-vis the foreign judgments and the conditions to be fulfilled for the applicability of this principle are:—

(a) That the foreign Courts which decided the matter was a Court of competent jurisdiction;

(b) the decision or judgment was final and conclusive; and

(d) on merits.

46 He also argued that additionally by the raising counterclaim in the present proceedings before the trial Court under the agreement, the appellant shall also be deemed to have waived its right to make a choice to take the matter before ICSID for arbitration.

47 In support of his argument that delay or failure to commence arbitration by a party would itself constitute waiver on its part to seek arbitration, he has referred to para. 19.01 of Domke on Commercial Arbitration (The Law of Practice of Commercial Arbitration), Revised Edition by Gabriel M. Wilner, Professor of Law, The University of Georgia School of Law, 1998 Cumulative Supplement (Published August, 1998). If has elaborately dealt with the principle of waiver of arbitration by laches or delay which is not only enlightening but also instructive. The opinion of the author based on case law is as follows:—

> “A party's right to specific enforcement of the arbitration agreement is expressly provided for in modern arbitration statutes, which allow a Court order to compel arbitration, including ex parte proceedings. However, this right may be lost by waiver. It has been suggested that “[t]here is.. nothing irrevocable about an agreement to arbitrate. Both of the parties may abandon, this method of settling their differences, and under a variety of circumstances one party may waive or destroy by his conduct his right to insist upon arbitration.
>
> A party may waive its right to arbitration by failing to initiate arbitration within the time limits dictated in the agreement, or by failing to initiate arbitration within a reasonable period, giving rise to laches. Often, a party will waive the right to arbitration not because of no compliance with time limits or laches, but because that party took no affirmative action to commence arbitration. This is especially true where the party also participated in litigation over otherwise arbitrable issues.
>
> Waiver of arbitration occurs most often when a party institutes a Court action in violation of the arbitration agreement. This appears clearly as a manifestation of an intention not to arbitrate.”

48 It may be mentioned here that this commentary not only covers the principles of waiver not only to a case of failure to initiate arbitration proceedings within a reasonable period but also a case where a party instituted a Court action in violation of the arbitration agreement which would constitute manifestation of an intention not to arbitrate. At another place, it was reiterated in para. 19.06 that a party not demanding arbitration within a

reasonable time may be deemed to have waived the right to arbitrate. It goes on saying that if a party engages in deliberate delay or inaction or other efforts to frustrate the other party's attempts to arbitrate, the first party may be found to have acted in bad faith and to have impliedly waived its entitlement to arbitration. In the opinion of the author, waiver of arbitration occurs in most cases when a party initiates litigation or participates in a law suit in violation of the arbitration agreement. The Seventh Circuit has held that a patty's election to proceed before a non-arbitral tribunal constitutes a presumptive waiver of the right to arbitrate. The author was of the opinion that as a practical matter, the more involved in litigation a party gets, the greater the appearance that the party has chosen an alternative to arbitration. Also, the more involved a party becomes in litigation, the greater chance that prejudice to the other party will be found. It has also been maintained that advancing a counterclaim in a Court action may be considered a waiver of arbitration. The author also observed that the Courts held that an insurer's motion to dismiss the complaint of a claimant for uninsured motorist coverage waived the insurer's party to resort to Court action until an unfavourable result is reached and then switch to arbitration.

49 Cases and Materials on the Law and Practice of Arbitration, Second Edition by Thomas E. Carbonneau C.J. Morrow, Professor of Law, Tulane University; Editor-in-Chief, World Arbitration and Mediation Report, referred to by learned Attorney-General is also of immense help and provide useful guidance to determine this aspect of the case. In the opinion of the author, the question whether a contracting party waives its right to demand the arbitration of contract disputes by participating in judicial proceedings regarding those disputes is an issue that has surfaced with greater frequency in the decisional law on arbitration. On the strength of the case-law, according to the author, the following principles are deducible:—

> “The Court indicated that a waiver may be found when a party seeking arbitration has (1) previously taken steps inconsistent with an intent to invoke arbitration, (2) unreasonably delayed in seeking arbitration, or (3) acted in bad faith or with without misconduct.”
>
> He also goes on saying:—
>
> “The Court-room may not be used as a convenient vestibule to the arbitration hall so as to allow a party to create his own unique structure combining litigation and arbitration.
>
> At another place, it has been reiterated as under:—
>
> “By not bringing the dispute to arbitration, for nearly three years the plaintiff in effect waived its rights to arbitrate. Once arbitration is ordered, the Court held, the party who seeks to have the dispute arbitrated carries the burden of undertaking arbitration in a timely manner.”

He also goes on saying:

> “A Taxas Court of Appeals held in Viree v. Cates, 953 S.W. 2d 489 (Tex. Ct.App. 1997), that the trial Court did not abuse its discretion by holding that the plaintiffs waived their rights to compel arbitration. The Court ruled that a ‘plaintiff who sues on an arbitrable claim unconditionally, without having initiated arbitration of the claim for demanding specific performance of the arbitration agreement, creates in the defendant a right of election, the defendant may insist or not upon arbitration, as he chooses’. The Court further stated that, if the defendant does not insist upon

arbitration, the contracting parties have mutually repudiated the arbitration covenant as a matter of law and waived any right thereunder."

50 American Jurisprudence, Second Edition which is a modern comprehensive text statement of American Law, Volume 5 was also referred to by the learned Attorney-General in which it has also been held on the strength of principles laid down in the cases decided by the Court as under:—

> "51 Generally. The right to arbitrate given by a contract may be waived, even in those jurisdictions where a contract for arbitration is irrevocable. Such a waiver of arbitration may come before as well as after the commencement of litigation. The waiver may be either by express words or by necessary implication. Thus where one party brings suit, he waives his right to arbitration; his conduct is clearly inconsistent with a claim that the parties were obligated to settle their differences by arbitration."

It further goes on observing:

> "Any conduct of the parties inconsistent with the notion that they treated the arbitration provision as in effect, or any conduct that might be reasonably construed as showing that they did not intend to avail themselves of such provisions, may amount to a waiver. A right to arbitration may be waived by denying that there is anything to arbitrate, by failing to perform the preliminary steps leading to arbitration, or by being unjustifiably slow in seeking arbitration."

He also says:—

> "and a party who is guilty of dilatory tactics or of delay may waive his right to arbitrate and to a stay of an action at law pending arbitration."

51 Corpus Juris Secundum, a complete re-statement of the Entire American Law, Volume 6 has also been pressed into service by the learned Attorney-General which on this point is as under:—

> "The parties to an arbitration may by agreement or action expressly or implicitly waive, or abandon the arbitration agreement, and come into Court if they mutually choose to do so. Also, the parties may, by their voluntary act, abandon one arbitration proceeding and proceed with a new proceeding covering the subject-matter embraced in the abandoned proceeding.
>
> Abandonment may result from a lapse of time without any activity therein by the parties, or otherwise by actions and conduct or omissions, clearly indicating on intention to forego the prosecution."

It also opines:—

> "Generally the institution of a suit covering the same subject-matter as that submitted to arbiration revokes the submission.

While there is authority to the contrary, it is generally held that the institution of a suit, before award, by one of the parties, the cause of action being the same subject-matter as that submitted to arbitration, revokes, by implication of law, the agreement to arbitrate. However, the institution of suit has no such effect, unless the action covers the subject-matter submitted; and, until a complaint has been filed by a party to the submission, an adverse party has no legal notice of the cause of action, and the abitrators may proceed with the arbitration and render their award, although a summons has been issued."

52 The judgment in the case of Malarky Enterprises (US) (plaintiff) v. Healthcare Technology Ltd. (UK) (defendant) (United States District Court District of Kansas, 25 April, 1997 Civ.No.96-2254-GTV) has also been brought to our notice which laid down the following principles for determining whether a party shall be deemed to have waived its right to arbitration:—

(1) Whether the party's actions arc inconsistent with the right to arbitrate?

(2) Whether the litigation machinery has been substantially invoked and the parties were well into preparation of a lawsuit before the party notified the opposing party of an intent to arbitrate?

(3) Whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay?

(4) Whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings?

(5) Whether important intervening steps (e.g. taking advantage of judicial discovery procedure not available in arbitration) had taken place? and

(6) Whether the delay affected, misled or prejudiced the opposing party?"

53 The said well established principles of law are fully attracted to the facts and circumstances of this case. The termination of the contract was accepted by the appellant on 27-12-1997. It kept quiet up to 24-6-1999 when, instead of opting for the alleged choice of seeking arbitration through ICSID, of the dispute commenced proceedings in a Court of general jurisdiction for the recovery of the amount allegedly due to it. The appeal filed by it before the Swiss Court of Justice was dismissed on 23-6-2000. Application under section 20 of the Arbitration Act by the respondent was filed on 7-9-2000. The appeal filed by the appellant before the Swiss Supreme Court on 24-7-2000 was dismissed by the said Court on 23-1-2000. Reply to the said application under section 20 was filed by the appellant on 7-4-2001 whereas consent to ICSID arbitration was filed by it on 10-4-2001 whereas formal request for ICSID was made by the appellant on 12-10-2001 which was listed on 21-11-2001.

54 These details of the events also established that consent to ICSID arbitration was made after filing reply to the application under section 20 of the Arbitration Act before the trial Court in which counterclaim under the agreement was also made seeking recovery of the same amounts which were claimed before the Swiss Court. On the basis of these established facts, it can safely be held that the appellant had not only waived the right to opt if any for ICSID arbitration but even principle of estoppel by conduct would also be attracted for institution of the proceedings before the Swiss Court and filing of reply to the

application under section 20 was sufficient to constitute estoppel of conduct of waiver of its right to seek arbitration.

55 The principles of issue estoppel and cause of action are also fully attracted in the present case. Learned counsel for the appellant when questioned as to how in the light of the above noted well-settled principles of law of international recognition after obtaining decision of the Swiss Court, it could maintain before the trial Court by making application under section 41 that these proceedings should be stayed in view of the ICSID arbitration initiated by it, submitted that decisions of the Swiss Courts are not on merits of the claim of the appellant, therefore, those decisions would not operate as res judicata to debar the appellant from raising the plea that the arbitration clause in the agreement was subservient to the option of choice given to the appellant under the Bilateral Investment Treaty of ICSID arbitration and that the said clauses could not be pressed into service by the respondent.

56 We are afraid, the submission is wholly devoid of any force. In order to attract the principles of issue estoppel and cause of action, it is not necessary that the judgment which had previously dealt with the case should be on merits of the claim itself arising from a contract but the merits of the case would be the questions of law raised in those proceedings and decisions rendered by the Courts on them. The merits of the case brought before the Swiss Court by the appellant were whether:—

(a) Arbitration clause 11.1 in the agreement between the parties was severable.

(b) Possibility of fair trial in Pakistan.

(c) Sovereign immunity of Pakistan.

57 The judgments of the Swiss Courts on the merits of these points are that arbitration clause 11(1) of the agreement was severable, for it survived the termination of the agreement. The plea of sovereign immunity of Federation of Pakistan was accepted. It has also been held that fair trial in the Courts of Pakistan was possible. These judgments were passed by the Courts of competent jurisdiction and are of declaratory nature about the merits of the legal points decided therein, therefore, they could be looked into and pressed into service by the Courts in Pakistan as foreign judgments as they satisfy the criteria laid down in section 13, C.P.C. The argument of learned counsel for the appellant that these judgments had to be tested on the touchstone of provisions of section 44-A, C.P.C. has no force, for the said provisions govern the matters relating to execution of such judgments and decrees and not the judgments and decrees of declaratory in nature. As has already been noticed the appellant by the act of the institution of the said proceeding shall be deemed to have expressly waived its right if any making option of arbitration of ICSID and is bound by the said findings to merits of the case on those points which had the effect of operating as to judicata as regards validity and binding nature of arbitration clause 11.1 of the agreement, as such it could not claim stay of proceedings commence under section 20 of the Arbitration Act on the ground that it had approached the ICSID for arbitration which right it had already waived and was no longer available to it. Besides the claim of the appellant on the date when it filed request for arbitration before ICSID had already become barred by time, for the period of limitation started running from 23-12-1997.

58 Mr. K.M.A. Samdani, learned counsel for the appellant submitted that application under section 20 of the Arbitration Act was filed on 7-9-2000 whereas contract was terminated on 12-12-1996, therefore, the principle of delay if any, is also applicable to these proceedings.

59 This plea if considered in isolation appeared to have some substance but keeping in view the established facts and circumstance of this case, the same is found to be not available to the appellant. The appellant on 12-1-1998 commenced proceedings in the matter before the Court of first instance at Geneva and raised a plea that Arbitration Clause 11.1 of the Agreement did not survive or that fair trial was not possible thereunder which was finally decided by the Swiss Supreme Court on 23-1-2000, as such, the respondent cannot be held guilty of laches and as such, cannot be non-suited on the ground of delay.

60 Before parting with this part of the judgment, we may observe here that the conduct of the appellant-SGS is not above board, for it did not disclose before ICSID while filing consent and request for arbitration that it previously had approached the Court in Geneva and failed up to the Supreme Court and the decision on the issues regarding applicability of Arbitration Clause 11.1 and fair trial in Pakistan in pursuance thereof had been decided against it.

61 We are of the firm opinion that in case, those decisions had been brought to the notice of the ICSID Tribunal it would not have entertained the request for arbitration. The appellant did not approach ICSID with clean hands and is guilty of deliberate concealment and suppression of material facts relevant for taking a decision by the said Tribunal whether the request should be entertained and notice issued.

62 The next question which falls for decision is as to what will be the governing law of the arbitration proceedings under arbitration clause 11.1 of the agreement between the parties, the said clause reads as under:—

> "**11.1** Arbitration.—Any dispute, controversy or claim arising out of, or relating to this Agreement, or breach, termination of invalidity thereof, shall as for as it is possible, be settle amicably. Failing such amicable settlement, any such dispute shall be settled by arbitration in accordance with the Arbitration Act of the Territory as presently in force. The place of arbitration shall be Islamabad, Pakistan and the language to be used in the arbitration proceedings shall be the English language."

63 It is clear that the parties had agreed that the seat of arbitration shall Islamabad Pakistan. It also provides that the arbitration shall be in accordance with the Arbitration Act of the Territory as presently in force.

64 Learned Attorney-General in view of these terms of the arbitration clause argued that choice of seat was capable of being determinative of the choice of the governing law of the performance obligations, therefore, the Arbitration Act, 1940 will be the governing law. He referred to Commentary by Russell on Arbitration, Twenty-First Edition by David St. John Sutton. The relevant portion of the commentary reads as under:—

> "Before the Contracts (Applicable Law) Act, 1990 if there was no express choice of a proper law of the performance obligations, an agreement to arbitrate in a particular venue, such as London, was highly relevant to the investigation;. The venue and jurisdiction is often referred to as the 'seat' of an arbitration. If the parties expressly choose a seat, but make no express choice of the law which is to govern the performance obligations under the contract, that choice of the seat was capable of being determinative of the choice of the governing law of the performance obligations. An agreement to refer disputes to arbitration in a particular country may carry with it, and is capable of carrying with it, an implication or inference that the parties have further agreed that the law governing the contract (as well as the law governing the arbitration procedure) is to be the

law of that country. But I cannot agree that this is a necessary or irresistible inference or implication."

65 Mr.K.M.A. Samdani, learned counsel for the appellant did not seriously dispute the correctness of the contention raised by learned Attorney-General that seat of the arbitration being Islamabad and part performance of the obligations of the agreement was also to be made in the territory of Pakistan and the agreement having been executed in Pakistan, therefore, these factors were sufficient to hold that the parties intended that the governing law of the arbitration would be law of Pakistan.

66 Reverting to the merits of Civil Appeal No.460 of 2002 filed by the respondent directed against the order of the learned Judge in Chamber of the Lahore High Court dismissing its application praying that SGS may be restrained from pursuing the remedy through arbitration of International Centre for Settlement of Investment Disputes (ICSID), it may be observed that the relief claimed has been declined on a ground not tenable in law. In the opinion of the learned Judge in Chamber, such a relief could only be claimed and granted in a regular civil suit and not in the present proceedings. It may be mentioned here that according to section 20 of the Arbitration Act the application has the legal status of a suit. Apart from that, under section 41 of the Arbitration Act, the Court in which proceedings are pending is competent and vested with the jurisdiction to pass interim orders as could be passed in a regular civil suit in the form of temporary injunction or otherwise. The view taken by the learned Judge in Chamber has not only resulted in miscarriage of justice but also failure to exercise jurisdiction vested in the Court to pass interim orders of the nature prayed for. Even otherwise it has also been overlooked that after having held that the arbitration proceedings initiated by the respondent before the trial Court were competent and maintainable for the reasons that arbitration clause 11.1 of the agreement was holding the field and was binding on the parties and its legal efficacy and enforceability had not been in any manner adversely affected by Bilateral Investment Treaty and ICSID Arbitration Clause, the legal consequences to follow were that ICSID Arbitration was not maintainable and should not have been allowed to be prosecuted any further.

67 Mr. K.M.A. Samdani, learned counsel for the appellant submitted that the trial Court before deciding the application by passing formal express order as envisaged under section 20 of the Arbitration Act of filing the agreement in the Court, after disposal of the application of the appellant for stay of proceedings directly, proceeded to pass order mechanically calling upon the parties to propose a panel of arbitrators for appointment to proceed with arbitration. This contention has been raised on the assumption that it was mandatory to pass express order of filing of arbitration agreement whereas according to settled law, it was not necessary to do so for execution of agreement in question had not been disputed, therefore, the order calling upon the parties to propose panel of arbitrators can safely be construed to be an order of acceptance of the said application of the respondent. Reference may be made to the case of Messrs Ama Corporation, Madras v. Food Corporation of India (AIR 1981 Madras 121) in support of this view. It has been held in this case that if the Court passes an order for reference of the matter to arbitrators, it would amount to acceptance of the application and no formal order of filing of arbitration agreement is necessary, for the Court while passing such an order would be deemed to have taken the agreement on the file. A perusal of memo, of appeal filed by the appellant before the High Court also reveals that the appellant was itself not in doubt about this legal position as the appeal was directed against the order dated 7-1-2002 of the trial Court

treating it as an order of acceptance of application made under section 20 of the Arbitration Act.

68 Faced with this situation, Mr.K.M.A. Samdani learned counsel for the appellant submitted that the High Court did not advert to this aspect of the case, though ground had been raised that formal order of acceptance of the said application was to precede the direction of calling upon the parties to propose panel of arbitrators or making order for reference to the arbitrators. Nothing turns on it, for such an argument did not deserve any serious consideration or attention as it has been held that no such formal order was necessary and the order passed by the Court on 7-1-2002 did constitute acceptance of the application of the Federation of Pakistan because as observed above, there was no dispute about execution of the agreement and other objections raised in the application made under section 41 had already been rejected.

70 For what has gone before the appellant is debarred from raising objection against arbitration Clause 11.1 of the agreement and maintaining and continuing with the ICSID Arbitration which has been commenced and being pursued as counterblast to the present arbitration proceedings and as such lacked bona fides.

71 Mr.K.M.A. Samdani, learned counsel for the appellant submitted that by subsequent order, dated 4-3-2000, the trial Court appointed the arbitrator after having received no response from the appellant, therefore, the said order would be deemed to be an order of disposal of application filed by the respondent under section 20 of the Arbitration Act against which appeal could still be filed as period of limitation prescribed under the law had no run out.

72 The argument has no substance. The said order is a subsequent order of appointment of arbitrator and not an order of disposal of the application which shall be deemed to have been accepted by the order dated 7-1-2002 when the objection against these proceedings raised by the appellant were rejected and the parties called upon to propose panel of arbitrators:

73 Mr.K.M.A. Samdani, learned counsel for the appellant submitted that the arbitrator appointed by the trial Court issued notices to the parties on 6-3-2002, therefore, legally the arbitration proceedings shall be deemed to have commenced from the said date which being later in point of time than the date when the appellant filed consent to ICSID Arbitration on 10-10-2001 therefore, these proceedings were liable to be stayed instead of proceedings of ICSID Arbitration.

74 The arguments in our considered view is devoid of any force apart from being plainly unsound. It is also on the erroneous assumption as if mere act of consenting to ICSID Arbitration of the appellant had the effect of commencement of ICSID Arbitration which is not the legal position. Application under section 20 of the Arbitration Act from which these appeals have arisen was filed by the respondent on 7-9-2000 to which reply was filed by the appellant on 7-4-2001. If the filing of the said application on 7-9-2000 by the respondent is treated at par with the filing of consent to ICSID Arbitration on 10-10-2001 by the appellant and formal request for ICSID Arbitration by it on 12-10-2001 as the dates of institution of both the proceedings, the proceedings commenced by the respondent before the trial Court are earlier in time. If according to the criteria on the basis of which these arguments have been advanced i.e. notice issued by the arbitrator on 6-3-2002 in these proceedings is to be taken as the date of commencement of arbitration proceedings, in the same manner, formal notice issued by the ICSID to the respondent on 17-4-2002 is to be treated as the date of commencement of those proceedings, even then the date of commencement of arbitration proceedings initiated by the respondent is earlier, as such, seen from whatever angle, the

proceedings initiated by the respondent are earlier in time, therefore, the argument is hereby repelled.

75 Mr.K.M.A. Samdani, learned counsel for the appellant before the conclusion of the arguments feebly argued that the respondent was simultaneously pursuing the remedy in Switzerland for the recovery of specified amounts evidenced by copy of an order dated 26-1-2001 placed on the record of the trial Court issued in this behalf by Swiss Authorities directing the appellant to pay the said amounts for which reason the respondent was legally debarred from maintaining the present proceedings.

76 We summoned the record of the trial Court which is available and find that order of payment issued by the Swiss Authorities relates to recovery of amounts in connection with judgment passed by the Swiss Supreme Court in the appeal filed by the appellant and has no nexus with the amount which according to the respondent-Federation is due to it under the agreement in question.

77 Before parting with this judgment, we would like to dispose of another contention raised by Mr.K.M.A. Samdani, learned counsel for the appellant which was to the effect that in these proceedings, the Court should have refrained from expressing any opinion on the questions relating to the merits of ICSID Arbitration, its maintainability and the right of the appellant to invoke ICSID Arbitration which may be left to be decided by the ICSID if any objection raised in those proceedings by the respondent. The contention in the facts and circumstances of this case is not tenable. It was the appellant who approached the trial Court through application under section 41 of the Arbitration Act objecting to the maintainability of the proceedings under section 20 of the Arbitration Act mainly on the grounds that ICSID Arbitration had supremacy over the arbitration clause in the agreement which had become subservient to the Bilateral Investment Treaty, therefore, all these questions inclusive of the legal effect of the judgments of the Swiss Courts, were directly and substantially in issue as such, it was necessary to decide the same for the disposal of the said objections raised by the appellant who had submitted to the jurisdiction of the Court.

78 The appellant did not file the names of the proposed arbitrators in response to the direction given by the trial Court whereas the respondent proposed the names of Mr. Justice Retd. Nasir Aslam Zahid and Mr. Justice Retd. Shafi-ur-Rehman of this Court. There is nothing on the record that any of the parties raised any objection to the appointment of any of the two learned retired Judges proposed by the respondent as sole arbitrator but the trial Court proceeded to appoint Mr. Justice Retd. Khalil-ur-Rehman Khan of this Court as arbitrator by observing that in its view, he was impartial person. We would not countenance this act of the trial Court which should be very careful while expressing any opinion about impartiality or otherwise of any of the learned retired Judges of this Court. The order of appointment of Mr. Justice Retd. Khalil-ur-Rehman Khan as sole arbitrator is set aside and we hereby direct the trial Court to nominate anyone of the two learned retired Judges proposed by the respondent as sole arbitrator.

79 We may also before closing the judgment express our appreciation to the valuable assistance rendered by the learned Attorney-General and Mr. K.M.A. Samdani and their Associates who assisted them due to which we were able to decide intricate questions of law involving in this case.

80 For the foregoing reasons, Civil Appeal No.459 of 2002 filed by SGS is hereby dismissed with the direction that the respondent-Federation shall neither be allowed to file any claim based on the allegations as contained in paragraphs 3 of the application made under section 20 reproduced in the earlier part of the judgment as regards bribes, commission and kickbacks allegedly received in connection with the agreement nor raise any pica which has been held to be not arbitrable in HUBCO case (supra) and allow it to lead any evidence in relation thereto meaning thereby that arbitration proceedings shall be confined to the claims based on the terms and conditions of the agreement in question. However, the respondent-Federation may seek independent remedy if available to it under the law qua those allegations.

82 Civil Appeal No.460 of 2002 filed by the Federation of Pakistan is accepted and the SGS (appellant in C.A. No.459 of 2002) is hereby restrained from taking any step, action or measure to pursue or participate or to continue to pursue or participate in the ICSID Arbitration.

83 The parties are, however, left to bear their costs.

M.B.A./S-210/S

Order accordingly.

ANNEX 105

OXFORD PUBLIC INTERNATIONAL LAW
Oxford Reports on International Law

South Africa v Mahala and Mahala, Determination of jurisdiction, ILDC 1357 (ZA 1992), 1992 (2) SACR 305 (E), 21st May 1992, South Africa; Eastern Cape

Date: 21 May 1992
Citation(s): ILDC 1357 (ZA 1992) (OUP reference)
1992 (2) SACR 305 (E) (Other Reference)
Content type: Domestic court decisions
Product: Oxford Reports on International Law [ORIL]
Module: International Law in Domestic Courts [ILDC]
Jurisdiction: South Africa [za]; Eastern Cape

Parties: South Africa
Herbert Sipho Mahala, Xolani Maxwell Mahala

Judges/Arbitrators: NW Zietsman

Procedural Stage: Determination of jurisdiction

Related Development(s):
Appeal against determination of jurisdiction and sentence; *S v Mahala*, [1994] 4 All SA 198 (A) 29 March 1994
Appeal against determination of jurisdiction and sentence; *S v Mahala*, 1994 (1) SACR 510 (A) 29 March 1994

Subject(s):

Sovereignty — Responsibility of states — Relationship between international and domestic law — Jurisdiction of states, domestic

Core Issue(s):

Whether a court had to refuse to exercise jurisdiction over a person who had been unlawfully seized and abducted within the territory of another state.

Oxford Reports on International Law in Domestic Courts is edited by:

Professor André Nollkaemper, University of Amsterdam and August Reinisch, University of Vienna.

Facts

F1 Under South Africa's policy of apartheid and its homeland system, Ciskei was considered an independent state by South Africa, having been bestowed independence by the South African Parliament. South Africa was the only state to recognize Ciskei as an independent state. The United Nations had called upon its members not to recognize Ciskei.

F2 The two accused were wanted for crimes committed in January 1991 in Stutterheim, South Africa. The first accused was arrested by Ciskei police upon the request of the South African police at his home in Ciskei. The South African police went to the Zwelitsha police station in Ciskei, where he was questioned and informed of the allegations against him. The first accused agreed to accompany the South African police to South Africa, where he was arrested, and signed a document to that effect.

F3 The second accused was stopped by South African police in Ciskei. He was searched, agreed to enter a police van, and was taken to Stutterheim, where he was arrested.

F4 Both accused objected to the court's jurisdiction, alleging their arrests to be unlawful and in breach of international law. They claimed that their removal from Ciskei was an act of 'international delinquency', as South Africa had performed an act of sovereignty in another state by removing them from Ciskei to South Africa.

F5 South Africa argued that neither of the arrests occurred in Ciskei and since the express consent of both accused was obtained for their removal to South Africa, and the assistance of the Ciskei police was received, the sovereignty of Ciskei was not impinged.

Held

H1 In order for the act of sovereignty in another state to constitute an international delinquency, the act must have been committed by a person acting in his or her official capacity. (paragraph 30)

H2 Performing or purporting to perform an act of sovereignty in another state constituted an international delinquency and was a violation of international law. If a state unlawfully seized and abducted a person within the territory of another state, the court would refuse to exercise jurisdiction over that person, even if he or she was subsequently arrested within the jurisdiction of the court. This was because in criminal proceedings, the state was the litigant and had to approach the court with 'clean hands'. (paragraph 32)

H3 Both accused had given their consent to accompany the South African police back to South Africa, and the assistance of the Ciskei police was sought in the arrest of the first accused. Therefore South Africa had not impinged upon the sovereignty of Ciskei and the court had jurisdiction to try both of the accused. (paragraph 34)

Date of Report: 18 December 2012

Reporter(s): Jan Norval

Analysis

A1 The capture of suspects by authorities of a state acting in another territory is not a bar to jurisdiction. The capture would be a breach of international law, however: distinction

must be drawn between jurisdiction to prosecute and jurisdiction to capture: M Shaw, *International Law* (6th edn Cambridge University Press, Cambridge 2008) 680.

A2 Two differing rules are applied in national courts regarding abduction to another territory for prosecution. Under the principle *mala captus bene detentus*, regardless of how a person is brought before court, the person may be tried. The opposite is *non faciat malum, ut inde veniat bonum*, that no positive result can excuse an illegal action. Under the latter principle, the abduction would prevent the court from having jurisdiction.

A3 Prior to the 1970s, both Israeli and French courts used the *mala captus bene dentus* rule. See *Attorney General of Israel v Eichman*, District Court judgment (1961) 36 ILR 18 and *In re Argoud*, Court of Cassation Judgment (1964) 45 ILR 90.

A4 However, after 1970, courts in New Zealand, England, and South Africa have applied the *non faciat malum* rule. See *Regina v Hartley*, New Zealand Court of Appeal judgment, (1978) 2 NZLR 299; *Bennet v Horseferry Road Magistrate's Court*, House of Lords judgment, (1993) 3 All ER 138; *S v Ebrahim*, South African Supreme Court of Appeal judgment, (1991) 2 SA 553.

A5 The court here embraced the rule of *non faciat malum*. However, since the policemen were not acting in their official capacity, the sovereignty of Ciskei was not breached and so no bar to the jurisdiction of the court could be upheld. Thus the court made a differentiation between formal arrest and apprehension or collection. This approach was followed in a subsequent South African case, *S v December*, South African Supreme Court of Appeal judgment, (1995) 1 SACR 438.

A6 These decisions relate only to states that were recognized by South Africa at the time. Commentators have argued that the court's decision would have been different if the case had dealt with states that had been recognized by the rest of the world and if the courts did not truly believe the states to be independent: J Dugard, *International Law: A South African Perspective* (3rd edn Juta & Co, Lansdowne 2005) 235.

A7 No reference to any international document, treaty, or case was made in the decision. Only previous decisions of the South African Supreme Court were used to determine issues concerning international law, which were decided in accordance with the principles of Roman-Dutch law.

Date of Analysis: 18 December 2012
Analysis by: Jan Norval

Cases cited in the full text of this decision:

South African domestic courts

Nduli and another v Minister of Justice and ors, South African Supreme Court of Appeal judgment 1978 (1) SA 893 (A) 24 November 1977

S v Ebrahim 1991, South African Supreme Court of Appeal judgment (2) SA 553 (A) 26 February 1991

To access full citation information for this document, see the Oxford Law Citator record

Decision - full text

Paragraph numbers have been added to this decision by OUP

Flynote : Sleutelwoorde

1 Trial — Jurisdiction — Accused arrested in Ciskei by members of Ciskei Police and with his consent taken to South Africa where he was arrested by members of South African Police — No question of 'international delinquency' — South African Court has jurisdiction to try accused.

Headnote : Kopnota

2 The two accused appeared on charges of murder, attempted murder and robbery allegedly committed in the district of Stutterheim within the Republic of South Africa. When they were called upon to plead to the charges they indicated that they objected to the jurisdiction of the Court, contending that they had been unlawfully arrested in the Republic of Ciskei and unlawfully brought into the Republic of South Africa resulting in the South African Court not having jurisdiction to try them for the alleged offences. Evidence was led on this issue and the parties argued on the merits thereof. The Court held that accused No 2 had in fact been arrested in South Africa and not in Ciskei as he alleged: he had been briefly searched at the side of the road in Ciskei and was asked to accompany the police to Stutterheim which he did. In respect of accused No 1 the evidence was to the effect that the South African Police had asked the Ciskei Police to arrest him in Ciskei. The arrest appeared to be a lawful arrest in terms of s 40(1)*(k)* of the Criminal Procedure Act 51 of 1977 (Ck). The accused was then, with his consent, taken to East London where he was arrested by the South African Police. The Court held that the State had not been guilty of any 'international delinquency' and there was accordingly no reason why the Court should refuse to exercise jurisdiction.

Case Information

3 Determination of an issue of jurisdiction in a criminal trial. The facts appear from the reasons for judgment.

L Mpati for the accused at the request of the Court.

Miss G van Hasseln for the State.

Cur adv vult.

Postea (May 21).

Zietsman JP:

Judgment

4 The two accused are charged on five counts in respect of offences allegedly committed by them in the Stutterheim district, within the Republic of South Africa, and within the jurisdiction of this Court, on 23 January 1991. The allegations against them, briefly, are that on the night in question they broke into a house occupied by two elderly ladies, robbed them of various articles, murdered one of them and attempted to murder the other one. When called upon to plead to the charges they indicated their intention to object to the jurisdiction of the Court, it being their allegation that in breach of international law they were unlawfully arrested in the Republic of Ciskei and/or unlawfully removed from the Republic of Ciskei into the Republic of South Africa with the result that the Court situated

in the Republic of South Africa lacks jurisdiction to try them for the alleged offences. Notice that this point would be taken and argued was given to the State in terms of s 106(3) of the Criminal Procedure Act 51 of 1977.

5 The facts surrounding the arrests of the two accused are disputed and in order to try to establish the true facts evidence was given by several State witnesses and the two accused also testified.

6 The two leading cases referred to in argument by counsel are the cases of *Nduli and Another v Minister of Justice and Others* 1978 (1) SA 893 (A) and *S v Ebrahim* 1991 (2) SA 553 (A). Both cases concerned accused persons apprehended in Swaziland and brought across the border into South Africa to face charges in respect of offences committed in South Africa. In *Nduli's* case the Court found that the accused had been seized and abducted while in Swaziland by South African policemen who had, however, acted contrary to specific instructions given to them not to cross the Swaziland border and apprehend the accused persons there. The Court found accordingly that the accused's abductors had acted without the authority of the South African State and that the Court accordingly had jurisdiction to try them. The question whether the Court would have had the necessary jurisdiction if the abductors had acted with State authority when abducting the accused was left open. This position was considered in *Ebrahim's* case and it was there decided that where such an abduction was carried out by persons who were acting on behalf of the South African State the Court would not have jurisdiction to try the accused.

7 Before considering the *ratio decidendi* of these two cases it will be convenient to deal with the facts concerning the present two accused.

8 It is common cause that the two accused arrived together at the State witness Melani's house in the Ciskei. They asked him whether he wanted to purchase a generator. The two accused both live at Stutterheim within the Republic of South Africa. The generator was at their home. It was then agreed that Melani, his nephew Monwabise Bululu and accused No 2 would proceed in Melani's vehicle to the accused's house to have a look at the generator. They arrived there, loaded the generator on to Melani's bakkie, and then set off again for Melani's home. Their route would take them through King William's Town.

9 The South African Police in the meantime had been looking for the persons suspected of having committed the crimes in question. The police in Stutterheim received information that one of the suspects they were looking for was travelling in Melani's vehicle in the direction of King William's Town. They telephoned the King William's Town Police and asked them to stop the vehicle, to take the occupants to the King William's Town police station and to keep them there pending the arrival of the police from Stutterheim.

10 King William's Town is a town surrounded by Ciskei territory. A person travelling along the main tarred road from King William's Town to Stutterheim travels for the first five kilometres or so in the Republic of South Africa. He then travels in the Ciskei for approximately 35,8 kilometres, and again enters the Republic of South Africa 13,7 kilometres from the town of Stutterheim. In terms of an agreement concluded between the Government of the Republic of South Africa and the Government of Ciskei the South African Government sees to the maintenance of the said road and certain persons, who are not Ciskei citizens, are given free and unlimited access to the said road. There are no border posts between the Republic of South Africa and the Ciskei and in practice citizens of the

Republic of South Africa and of the Ciskei, and in particular members of the police forces of the two countries, use the road freely and enter and leave the countries unhindered.

11 When the police in King William's Town received the message from the Stutterheim police they set off in two vehicles to look for the vehicle described to them. They met the vehicle in the Ciskei, stopped it, and they all then proceeded to Stutterheim where accused No 2 was arrested by the South African Police.

12 The police in Stutterheim learned from Melani that the other suspect, accused No 1, was at Melani's home in the Ciskei. They accordingly contacted the Ciskei Police and arranged for the arrest of accused No 1 by a member of the Ciskei Police Force. This was done and accused No 1 was arrested by a Ciskei policeman at Melani's shop, which is next to his home, in the Ciskei. He was then taken to the Zwelitsha police station, in the Ciskei, where he was detained. From there he was taken by members of the South African Police Force to East London where he was formally arrested by the South African Police.

13 Both of the accused left the Ciskei in the company of members of the South African Police. The circumstances however differ, and it will be necessary to deal separately and in greater detail with the facts concerning the arrests of the two accused. Accused No 1 was, at the request of the South African Police, arrested in the Ciskei by a Ciskei policeman, taken to Zwelitsha and detained there by the Ciskei Police. The proper records relating to his arrest and detention at Zwelitsha in the Ciskei were duly completed. When the South African Police arrived at the Zwelitsha police station accused No 1 was taken from the cell into the charge-office where he was questioned by Captain (then Lieutenant) McClaren of the South African Police. What was then said and done is the subject of dispute. Dectective Sergeant Yiba of the Ciskei Police, Captain McClaren and Detective Lance Sergeant Sabbagh all stated that accused No 1 was told of the allegations against him and was asked whether he was prepared to go with the South African Police across the border into South Africa. He was told that if he did not consent to accompany them steps would be taken for his extradition to South Africa. According to the State witnesses accused No 1 agreed to accompany the South African Police and he was then taken by them to East London, within the Republic of South Africa, where he was formally arrested.

14 Captain McClaren fetched accused No 2 from Stutterheim before proceeding to Zwelitsha. He stated that accused No 2 remained in the vehicle with Lance Sergeant Petzer while he and Lance Sergeant Sabbagh spoke to accused No 1 in the Zwelitsha charge-office. The two accused stated that accused No 2 entered the Zwelitsha charge-office with Captain McClaren and Lance Sergeant Sabbagh and they state that he was present when Captain McClaren spoke to accused No 1. The two accused denied that accused No 1 was asked, and agreed, to go with the South African policemen to South Africa. According to them he was simply taken by the South African Police, put in their vehicle, and taken to East London.

15 Captain McClaren stated that he was aware of the need of extradition proceedings if accused No 1 declined to agree to accompany him into the Republic of South Africa. When the position was explained to accused No 1, and he agreed to go with them, Captain McClaren took the precaution of making an entry to this effect in his pocket-book and of getting accused No 1 to sign it. The pocket-book was handed in as exh C. The entry reads: 'Interviewed Herbert Mahala. He was informed that Xolani had been arrested. He is willing to accompany me to East London.' Underneath this entry appears a signature alleged to be that of accused No 1. A later entry, at p 26 of the pocket-book, was admittedly signed by accused No 1. In our view there can be no doubt about the fact that the two signatures were done by the same person. Accused No 1 did not seriously dispute this fact. He stated that McClaren must have surreptitiously added his pocket-book to other documents which

accused No 1 was asked to sign in East London and that that must be how his signature was obtained on p 10 of the pocket-book.

16 Captain McClaren's evidence on this point is confirmed by that of Lance Sergeant Sabbagh and Detective Sergeant Yiba and we have no hesitation in accepting the evidence that accused No 1 did in fact sign the entry at p 10 of the pocket-book in the Zwelitsha charge-office before he was taken therefrom to East London.

17 It is common cause that the necessary entries were made in their books by the Ciskei Police at Zwelitsha freeing accused No 1 from his detention there, and returning his private property to him, before he left with the members of the South African Police for East London.

18 Mr *Mpati*, for the accused, has submitted that we should reject the evidence of the police witnesses because of certain errors made by Detective Sergeant Yiba in his evidence. He first stated that accused No 1 was not placed in a cell at the Zwelitsha police station. When confronted with the cell register and other record books he admitted that he must be mistaken on this point. He also first stated that he signed the register releasing accused No 1 from his detention at Zwelitsha. In fact the release was signed by another policeman. Mr *Mpati* has submitted that we should find that Detective Sergeant Yiba was not in the charge-office at Zwelitsha when accused No 1 was released, and that we should reject his evidence and also that of Captain McClaren and Lance Sergeant Sabbagh, that accused No 1 signed Captain McClaren's pocket-book in the Zwelitsha charge-office. We find Captain McClaren, Lance Sergeant Sabbagh and Detective Sergeant Yiba to be trustworthy witnesses and we have no doubt at all that the pocket-book was signed by accused No 1 at Zwelitsha. We reject the evidence given by accused No 1 and accused No 2. According to accused No 2 there was no reason at all for him to enter the charge-office at Zwelitsha and the police witnesses all say that he was not there. He stated that he was merely curious to see what it looked like in the charge-office and that he requested Captain McClaren to allow him to accompany him into the charge-office. According to him he did so, and Lance Sergeant Petzer remained alone sitting in the police vehicle. It is common cause that Lance Sergeant Petzer did not enter the Zwelitsha charge-office at all. As I have already stated, we do not accept the evidence of the two accused to the effect that accused No 2 entered the charge-office, and we find as a fact that accused No 1 did sign the entry in Captain McClaren's pocket-book.

19 It is clear that the South African Police were aware of the fact that they could not themselves arrest accused No 1 in the Ciskei. For this reason they sought the assistance of the Ciskei Police and accused No 1 was properly arrested, detained and then released by the Ciskei Police. We find as a fact that Captain McClaren was fully aware of the need for extradition proceedings if accused No 1 refused to allow the South African Police to take him into the Republic of South Africa. It is our finding that accused No 1 was questioned, and that he agreed to accompany the South African Police to East London.

20 A fact which causes concern is the fact that leg-irons were placed on accused No 1's legs before he got into the South African Police vehicle at Zwelitsha. The reason given by Captain McClaren for this was that accused No 2 was already in the vehicle, in leg-irons, having been properly arrested in Stutterheim. The vehicle is a sedan motor car and not a police van. They had to travel with the two suspects sitting on the back seat of their vehicle and they considered it necessary or advisable that leg-irons be placed also on accused No 1.

21 I come now to deal with the facts concerning accused No 2. Accused No 2 was in Melani's vehicle which was stopped by the South African Police on a portion of the road between Stutterheim and King William's Town which falls within the Ciskei. Accused No 2 and Melani's nephew, Monwabise Bululu, climbed into the police vehicle and a policeman climbed into Melani's vehicle. The two vehicles proceeded to Stutterheim where Melani, Monwabise and accused No 2 were questioned after which accused No 2 was arrested.

22 The South African Police left King William's Town in two vehicles. Warrant Officer Pretorius and Sergeant Olsen travelled in the front vehicle and they were followed by Warrant Officer Pieterse, Sergeant Erasmus and Constable Vosloo in the other vehicle. Pretorius and Olsen passed the vehicle they were looking for and sent a radio message to this effect to the occupants of the other vehicle. They then stopped their vehicle on the side of the road and waited. When Melani's vehicle reached them they indicated to him that he should stop his vehicle. This he did and the police then approached the occupants of Melani's vehicle. In the meantime Warrant Officer Pretorius and Sergeant Olsen had turned their vehicle and they also arrived at the scene.

23 Sergeant Erasmus was the only one among the policemen I have just mentioned to give evidence. Evidence was, however, also given by Melani and by Monwabise.

24 Sergeant Erasmus stated that he was aware of the fact that he was in the Ciskei and that the South African Police could not arrest persons there. There is in fact no suggestion that any formal arrest was carried out at that place. Sergeant Erasmus stated that he approached the passenger side of Melani's vehicle and asked the occupants to get out of the vehicle. This they did. He then told them that the police at Stutterheim wanted to question them and he asked them to accompany them to Stutterheim. They agreed to do so. He then asked the two passengers (Monwabise and accused No 2) to get into the police van. They agreed to do so. He opened the back door of the van and they climbed in. He asked Constable Vosloo to get into Melani's vehicle. This he did. The two vehicles then proceeded to Stutterheim, within the Republic of South Africa, where accused No 2 was subsequently arrested.

25 Melani largely confirmed Sergeant Erasmus' evidence. He stated that he was briefly searched by a policeman after they had been stopped and a pistol which was in his possession was taken from him. This was later returned to him when the police were satisfied that he was entitled to possess it. He stated that he was then asked to go to Stutterheim for questioning in connection with a police investigation there. He agreed to go. He stated that none of them was arrested, and that they were not in any way forced or ordered to go to Stutterheim. He did say that he felt obliged to do what the police wanted him to do because they are people of the law.

26 Monwabise gave evidence similar to that given by Melani. He stood next to accused No 2 at the side of the road after their vehicle had been stopped. He also stated that they were briefly searched and that they were then requested to go with the police to Stutterheim. He and accused No 2 were asked to get into the police van. He confirmed that they were not arrested and he stated specifically that neither he nor accused No 2 offered any verbal or physical resistance to the requests made to them by the police.

27 Accused No 2 stated that, after being searched at the side of the road, he and Monwabise were told to get into the back of the police van. He said that he felt obliged to do so because the police were people of the law. He stated also that when Warrant Officer Pieterse and Sergeant Olsen arrived at the scene they drew their revolvers but were told by Sergeant Erasmus to reholster them. This was denied by Sergeant Erasmus and neither Melani nor Monwabise could confirm accused No 2's evidence. During the course of his evidence accused No 2 stated that he had in the past been arrested by police and that what

happened at the side of the road was quite different. Later on in his evidence he stated that he thought he and Monwabise were being arrested. He confirmed that he was not handcuffed or restrained in any way before they reached Stutterheim. Accused No 2 stated that he was at no time told why he was later detained. He stated that he did not ask why he was being detained because he could not do so. His evidence on this aspect of the case was, to say the least, unconvincing.

28 What is in our opinion clear is that accused No 2 was not arrested in the Ciskei. He was arrested later in Stutterheim. On the side of the road, in the Ciskei, he, Melani and Monwabise were briefly searched and they were then asked to go with the police to Stutterheim. Monwabise and accused No 2 went in the police vehicle and a policeman accompanied Melani who drove his own vehicle to Stutterheim.

29 The question now to be determined is whether this Court has jurisdiction to try the two accused for the offences allegedly committed within this Court's area of jurisdiction.

30 In *Nduli's* case *supra* the accused were abducted and brought across the border into the Republic of South Africa by policemen who were not acting with the consent or acquiescence of the South African State, and it was held that the Court did have jurisdiction to try the accused. The following appears at 909B-G of the judgment:

> 'It seems to me that a distinction must be drawn between a State acting in its own territory and acting in the territory of another State. That would happen, for example, if an authorised official of State B were to seize a person in State A, without the consent or acquiescence of State A or its officials, and remove him to state B for arrest and trial. Thus Oppenheim *International Law (Lauterpacht*) 8th ed at 295 states "a State must not perform acts of sovereignty in the territory of another State". Obviously, if that were to happen it would be a violation of international law. Whether or not that negates the jurisdiction of the municipal courts of State B to try the person was much debated before us. There are several decisions and *dicta* by overseas Courts that indicate that, even in such cases, the Courts of State B are not thereby deprived of their jurisdiction. But some writers on international law either distinguish or doubt the correctness of those decisions and *dicta*. We need not pursue that particular line of enquiry. For here the factual premises set out above for appellants' invocation of international law are different. Here the difficulty that arises is when a person is seized in State A by an unofficial person or by an unauthorised official of State B and is brought to State B and charged with an offence in State B. By "unauthorised official" I mean an official of State B who acts in the seizure without any authority from State B to do so, as in the present case. This is not an international delinquency since State B itself does not perform or purport to perform any act of sovereignty in State A. Hence, in my view, the jurisdiction of the municipal courts of State B to try the person seized would not then be affected. Possibly the unauthorised official might be amenable to the civil or criminal municipal laws of State A or B for the seizure, or State B might be responsible or deem it diplomatically expedient to release and surrender the person seized, but that depends upon other considerations which need not be considered here.'

31 *Ebrahim's* case also dealt with a situation where the accused was abducted in Swaziland and brought into the Republic of South Africa. In this case, however, the Court found that the abduction was carried out by persons who were acting for and on behalf of

the South African State, and it was held that the Court did not have jurisdiction to try the accused. The following was stated by M T Steyn JA (at 582B-E):

> 'Na my mening is voormelde reëls van die Romeins-Hollandse reg steeds deel van ons huidige reg. Verskeie fundamentele regsbeginsels is teenwoordig in daardie reëls, te wete, dié ter behoud en bevordering van menseregte, goeie interstaatlike betrekkinge en gesonde regspleging. Die individu moet beskerm word teen onwettige aanhouding en teen ontvoering, die grense van regsbevoegdheid moet nie oorskry word nie, staatkundige soewereiniteit moet eerbiedig word, die regsproses moet billik wees teenoor diegene wat daardeur geraak word en die misbruik daarvan moet vermy word om sodoende die waardigheid en integriteit van die regspleging te beskerm en te bevorder. Die Staat word ook daardeur getref. Wanneer die Staat self 'n gedingsparty is, soos byvoorbeeld in strafsake, moet dit as 't ware "met skoon hande" hof toe kom. Wanneer die Staat dan self betrokke is by 'n ontvoering oor die landsgrense heen soos in die onderhawige geval, is sy hande nie skoon nie.'

32 The basis of the two decisions referred to seems to be that international law, as determined in accordance with the principles of Roman-Dutch law, must be applied. A fundamental principle is that a State cannot perform, or purport to perform, an act of sovereignty in another State. To do so constitutes 'international delinquency' and is a violation of international law. The principle that a litigant must come to court 'with clean hands' applies also to the State and the State is a litigant where a criminal prosecution is instituted. If the State, acting through its authorised officials, unlawfully seizes and abducts a person within the territory of another State the court will refuse to exercise jurisdiction over that person even where he is subsequently arrested within the Court's area of jurisdiction and tried for a crime committed within the Court's area of jurisdiction. Where the State has not been guilty of any 'international delinquency' there is, it seems, no reason why the Court should refuse to exercise jurisdiction over a person who is within its area of jurisdiction and who is charged with having committed a crime within that area.

33 In the case of accused No 1 the South African Police did not themselves purport to arrest him in the Ciskei. They requested the Ciskei Police to do so, and he was properly arrested and detained by them. The purpose of his arrest was not to have him tried by a Ciskei court but for offences he is alleged to have committed within the Republic of South Africa. In an unreported judgment of this Court in the consolidated cases of *Harry Mgangema Kulekile and Mthunzi Christopher Koketi v The Minister of Police and Another* (cases Nos I694/78 and I770/78) Howie J came to the conclusion that, where the South African Police had arrested the two plaintiffs in South Africa, not with the intention of having them tried in a South African Court but in order to hand them over to the Transkei Police so that they could be tried in a Transkei court for offences committed there, the arrests by the South African Police were unlawful, and they were awarded damages. In the course of his judgment Howie J stated that 'in effect … the police on both sides of the border simply avoided all formalities by arranging informal extradition as and when it suited them'. In the present case it was the Ciskei Police who carried out an arrest so that the accused could be tried in a South African Court for offences allegedly committed in South Africa. It was, however, submitted by Miss *Van Hasseln*, for the State, that the arrest was a lawful one because of the provisions of s 40(1)*(k)* of Act 51 of 1977 which provisions have been incorporated by the Ciskei and form part of the law of Ciskei. The section in question reads as follows:

'**40(1)** A peace officer may without warrant arrest any person —

...

> **(k)** who has been concerned in or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists that he has been concerned in any act committed outside the Republic which, if committed in the Republic, would have been punishable as an offence, and for which he is, under any law relating to extradition or fugitive offenders, liable to be arrested or detained in custody in the Republic.'

It seems to me that this section is in fact applicable and that the arrest of accused No 1 by the Ciskei Police was a lawful arrest.

34 We accept the fact that accused No 1 appended his signature to the entry in Captain McClaren's pocket-book and that he in fact agreed to go with the South African Police to East London. He was then placed in leg-irons although he was, according to the South African Police, not arrested by them. Certainly no formal arrest took place until they reached East London but he was undoubtedly restricted in his movements while he was still on Ciskeian territory. If this constituted an illegal act on the part of the South African Police, does this mean that this Court should hold that it lacks jurisdiction to try the case against him? If the basis of a lack of jurisdiction is an invasion of the sovereignty of another State (the Ciskei), I do not think that this is the position here. The South African Police, in taking accused No 1 from the Ciskei into South Africa, acted with the express consent and assistance of the Ciskei Police and in the circumstances I do not think it can be said that the South African State impinged upon, or invaded, the sovereignty of the Ciskei. Whether or not accused No 1 would have a claim for damages against any person or State need not concern us since it would not affect the question of this Court's jurisdiction to try the accused on the charges levelled against him.

35 The conclusion we have reached is that this Court has the necessary jurisdiction in respect of accused No 1.

36 As far as accused No 2 is concerned this Court would not have jurisdiction to try him if the evidence had been that he was arrested and abducted from the Ciskei into the Republic of South Africa. The evidence shows, however, that no arrest took place and that he, together with Melani and Monwabise, agreed to accompany the members of the South African Police to Stutterheim. Our conclusion is that this Court has jurisdiction also in respect of accused No 2.

37 In the result the objection by accused No 1 and accused No 2 to this Court's jurisdiction is dismissed.

ANNEX 106

THE GENERAL PRINCIPLES OF INTERNATIONAL LAW CONSIDERED FROM THE STANDPOINT OF THE RULE OF LAW

FIRST PART: MAINLY PHILOSOPHICAL

CHAPTER I

INTRODUCTION

1. The basis of the present Course [1]

In view of the impossibility of effecting any comprehensive survey of the general principles of international law within the alloted compass of this Course [2], and the consequent necessity for selectiveness, some predetermined standpoint must

1. The author has purposely refrained from appending to the text of this Course footnotes of the kind that give numerous references to authorities and precedents. This is partly for reasons of space, but partly also for other reasons. For many of the statements in the text no particular authority is necessary, or else it can readily be found by any one reasonably conversant with the subject involved. Other statements, *per contra*, concern propositions the value of which depends more on their intrinsic merit, and on the soundness of the reasoning on which they are based, than on the authority that can be advanced in support of them—and even if authority were cited, its own value would, in the end, depend equally on similar considerations. If such propositions have any value therefore, it must lie in themselves, and after all, the original lectures could not be delivered with footnotes appended.

The author must, however, make special mention of three or four works which, in a general way, have been of especial use to him in the preparation of this Course, namely the late Professor Brierly's analogous Course delivered in 1936 (58 Recueil des Cours; 1936, Vol. IV, p. 5)—as a model of what such a course should be—and the same author's *Le fondement du caractère obligatoire du droit international* in 23 Recueil des Cours; 1928, Vol. III, p. 467—one of the best short monographs on the philosophy of the basis of legal obligation ever written; Professor Paul Guggenheim's *Traité de Droit International Public* (2 Vols., Georg, Geneva, 1953)—for the clarity and succinctness of its exposition; Sir Hersch Lauterpacht's *The Function of Law in the International Community*, Oxford, 1933—an almost inexhaustible quarry of legal ideas; and last but very far from least, Professor Alf Ross' *A Textbook of International Law*, Longmans, 1947—for the originality of its outlook on many important topics.

2. The time may have existed, perhaps even 30 years ago, when this could

a treaty provision by another State as a justification for a non-performance on the part of itself, if it was its own action which prevented the other State from complying with the treaty. This was the basis of the well-known decision of the Permanent Court of International Justice in the *Chorzow Factory* case, and of course these principles apply not merely as regards treaty obligations but to general international law obligations also. The Permanent Court in the *Chorzow Factory* case said that it was a generally accepted principle that one party to a dispute "... cannot avail himself of the fact that the other has not fulfilled some obligation ... if the former party has by some illegal act, prevented the latter from fulfilling the obligation in question ..."[1] In the field of treaties, an important application of these principles exists in relation to the question of the termination of treaties by means other than those provided for in the treaty itself, or in any other relevant agreement of the parties. For instance, a party may claim that circumstances have arisen making further performance of the treaty a literal impossibility. This claim may be accurate on the facts, yet if that party has itself created the impossibility in question, or contributed to it by its own action, although the treaty may indeed be terminated in the sense that it can no longer be performed, an obligation will arise to make reparation for the wrong suffered by the other parties in the loss of the benefits of the treaty, and the party at fault cannot take advantage of the wrong. Again a party which purports to terminate a treaty because of an alleged fundamental breach of it by the other, or by another party, cannot be regarded as having a right to do so if it was itself a party to the breach, or by its own action contributed to or connived at it. Equally, as was pointed out by Judge Read in the *Peace Treaties* case (second phase) before the International Court of Justice, a government which prevents the setting up of an arbitral tribunal by refusing to take the steps (*e.g.* nomination of its arbitrator) specified for that purpose by an arbitration agreement to which it is a party, may be unable to complain

1. P.C.I.J. Reports (question of competence), Series A, No. 9, p. 31.

if the tribunal is set up by other means, and may be prevented from contesting the validity of any decision it gives [1]. Another example of the same principle is to be found in the fact that although international law does not apply any direct rule of temporal prescription to international claims, causing them to become time-barred if not brought within a certain period, yet if by unnecessary delay in bringing the claim, the other party to the dispute has in fact been prejudiced (*e.g.* by the death of essential witnesses, destruction of evidence etc.), it is open to the tribunal to find in its favour on the ground that the claimant party would derive advantage from its own *laches* if the case proceeded. This is also an application of the maxim of equity, *vigilantibus non dormientibus jura subveniunt.*

70. The place of reprisals

Certain English principles of equity find an application in the international field through the same basic idea, such as that "He who seeks equity must do equity", and that "He who comes to equity for relief must come with clean hands." [2] Thus a State which is guilty of illegal conduct may be deprived of the necessary *locus standi in judicio* for complaining of corresponding illegalities on the part of other States, especially if these were consequential on or were embarked upon in order to counter its own illegality—in short were provoked by it. In some cases, the principle of legitimate reprisals will remove any aspect of illegality from such counter-action. But even where the act remains *per se* illegal, it may be that the State suffering from it is deprived by its own prior illegality of juridical grounds of complaint. However, three important provisos or qualifications to this position must be noted. *First*, an illegality by one State cannot justify a totally unconnected illegality by another, except as a professed exercise of a legitimate reprisal. *Secondly*, even where reprisals are concerned, they must be proportionate to the original illegality; and similarly, a State whose own

1. I.C.J. Reports, 1950, pp. 241 and 244.
2. See any standard English text-book on the principles of Equity.

wrongful act has provoked or contributed to illegal (or what would normally be illegal) action by another, will retain its right of complaint if such action was out of reasonable proportion or relation to the provocation or contributory acts—if for instance these have been seized upon as pretexts for action not necessitated by, proportioned to, or appropriate in the circumstances. *Thirdly*, there are certain forms of illegal action that can never be justified by or put beyond the range of legitimate complaint by the prior illegal action of another State, even when intended as a reply to such action. These are acts which are not merely illegal, but *malum in se*, such as certain violations of human rights, certain breaches of the laws of war, and other rules in the nature of *jus cogens*—that is to say obligations of an absolute character, compliance with which is not dependent on corresponding compliance by others, but is requisite in all circumstances, unless under stress of literal *vis major*. In the conventional field, may be instanced such things as the obligation to maintain certain standards of safety of life at sea. No amount of non-compliance with the conventions concerned, on the part of other States, could justify a failure to observe their provisions.

71. Apparent exceptions to the rule "ex injuria non oritur jus"

International law, while in general insisting on this maxim, nevertheless does not always refuse to recognize the validity, or at any rate the fact, of certain *situations* brought about by illegal action, though it will continue to characterise as illegal, and to refuse to validate, the action itself. Certain cases were noticed in the preceding Chapter of what are in a sense examples of this process, namely the possibility that breaches of the law may bring about changes in the law, or that a State may, by breaches in the law acquiesced in by other States, build up a prescriptive or historic right to behave or act in a certain way, as the International Court found in the *Norwegian Fisheries* case. Another example of the same kind, is the acquisition of title to territory by the process of what is known as acquisitive

ANNEX 107

OPINION----------

I, ALBERTO NISMAN, Attorney General in charge of the Attorney General's Unit investigating the terrorist attack against the AMIA premises, *in re* ***8566, "Pasteur 633 – atentado (homicidio, lesiones, daño) – Damnificados: AMIA and DAIA (Asociacion Mutual Israelita Argentina and Delegación de Asociaciones Israelitas Argentinas)"*** [Pasteur 633 Terrorist Attack (homicide, bodily harm, property damage) – Injured Parties AMIA and DAIA] being heard by Federal Criminal Court in and for the City of Buenos Aires No. 6, Court Clerk's Office No. 11 – Annex AMIA – respectfully represent as follows:----------

CHAPTER ONE----------

a. Case background----------

On July 18, 1994 at approximately 9:53 am, a "Renault Trafic" vehicle driven by Ibrahim Hussein Berra – active member of the Lebanese terrorist organization Hezbollah – and loaded with explosives in a quantity estimated (in its equivalent to TNT) at 300-400 kilograms of ammonium nitrate, aluminum, a heavy hydrocarbon, TNT and nitro-glycerin, exploded against the front of the building located at 633 Pasteur Street in this City of Buenos Aires, where the premises of the Asociación Mutual Israelita Argentina (AMIA) and the Delegación de Asociaciones Israelitas Argentinas (DAIA), among other institutions, were located. As a result of the blast, the front of the building collapsed, and eighty-five people were killed, while at least one hundred fifty-one individuals suffered slight to severe injuries. There was great physical damage to properties within a range of about 200 meters.----------

From its beginning, the criminal investigation conducted to elucidate the attack considered numerous hypotheses about the perpetrators and accomplices of the terrorist attack. As a result, in 1999, a group of individuals suspected of having taken part in the attack were prosecuted in an oral and public trial to determine responsibility for what amounted to the most serious attack by Islamic terrorists in all of the Americas.

At the conclusion of the trial, Federal Criminal Court for Oral Trials No. 3 issued a verdict of acquittal with respect to all the individuals who had been prosecuted and also ordered, among other matters, that a new investigation be opened to examine irregularities, deviations and obstacles that had been verified during the preliminary evidentiary stage of the proceedings. [translated excerpt ends here]

[translated excerpt resumes here] … and ordered the registration of a red notice against Ali Fallahijan, Mohsen Rezai, Ahmad Vahidi, Mohsen Rabbani and Ahmad Reza Asguari.----------

Furthermore, we cannot overlook the fact that this Opinion, far from changing the procedural status of the individuals mentioned above, strengthened our findings and confirmed the conclusions reached in the Opinions issued in 2006 and 2009, and has revealed that the attack against the AMIA premises was not an isolated and separate event, but on the contrary, it was one manifestation of the Islamic Republic of Iran's policy of exporting the revolution.----------

That being said, more than five years after the decision approved by the General Assembly of INTERPOL, it was demonstrated that two of the accused (Mohsen Rezai and Ahmad Vahldi) made a number of trips to different countries that are member states of the International Criminal Police Organization.----------

In June 2008, Rezai travelled to the Kingdom of Saudi Arabia, and in October 2009 he travelled to the Republic of Turkey; while Ahmad Vahldi travelled in December 2009 to the Syrian Arab Republic; in 2010, he travelled to Qatar; in May, he travelled to the Republic of Tajikistan; in August, he travelled to the Sultanate of Oman and in September to the Republic of Azerbaijan; in April 2011, his presence was corroborated in the Republic of Iraq; in May, in the Islamic Republic of Mauritania and the Plurinational State of Bolivia; in June, in the Islamic Republic of Afghanistan, and in October, in the Republic of Azerbaijan; all of which were duly reported to INTERPOL (pp. 128.029, 126.382 for the trips made by Rezai, and pp. 128.151, 128.816, 129.093, 129.403, 129.714, 131.186, 131.358, 131.418 and 131.816 for the trips made by Vahidi).

Thus, despite the fact that it was verified that two of the accused in these proceedings whose arrest warrants are under INTERPOL's red notice have repeatedly left the Islamic Republic of Iran and travelled to member states of INTERPOL, and considering that even after INTERPOL was informed of this fact on each occasion, as of the date hereof none of the accused has been arrested; we shall request that the International Criminal Police Organization (ICPO – INTERPOL) make every effort to implement the mechanisms for the arrest of the suspects, or else take any other course of action that, within the scope of its authority, will result in the effective fulfillment of that request.----------

CHAPTER EIGHT----------

Conclusions----------

From several facts duly proven in this Opinion, we have formulated throughout the previous chapters of this Opinion a series of conclusions that, due to the length of this presentation, are briefly summarized below:----------

* The seminar on Ideal Islamic Government, held in Teheran in March 1982, was a turning point in the Islamic Republic of Iran's implementation of its expansionist program for the export of the revolution, consecrated in the Constitution of 1979.----------

* As a consequence of the mass meeting attended by around 380 clerics from 70 countries, violence would thenceforth be a valid way to remove obstacles to the dissemination of the principles on which the triumphant revolution was based. This methodology was explicitly described by the First Commander of the Islamic Revolutionary Guard Corps, Javad Mansouri: *Our revolution can only be exported with grenades and explosives."*----------

* As a direct result of the path chosen by the leaders at the highest levels of the Iranian government then in office, and as far as this region is concerned, the activities of at least three agents of the regime began in 1983: Mohsen Rabbani in our country, Abdul Kadir in Guyana and other Caribbean countries, and Mohamed Taghi Tabatabaei Einaki in Brazil, began laying the groundwork for executing the expansionist strategy agreed upon in Teheran.----------

* In Argentina, Mohsen Rabbani, under the cover of a commercial representation and in the role played by him as sheik of "At-Tauhid" mosque, while establishing the undercover espionage structure that ultimately turned out to be a complete intelligence station, gradually became the point man for South America of Iranian expansionism.----------

* The task performed by this intelligence station established and directed by Rabbani in Argentina later provided key logistical and operative support for the operation that culminated in the bombing of the AMIA building, as a result of which the then cultural attaché was charged as one of the individuals primarily responsible for the bloody attack, and his national and international arrest warrant under INTERPOL's red notice was issued.----------

* Another Latin American country where the infiltration of the Iranian regime under the violent principles set forth at the 1982 seminar was the Republic of Guyana. In this case, its main point man was Abdul Kadir, an Iranian intelligence agent closely connected to Mohsen Rabbani who was in charge of establishing an espionage structure in Guyana serving the interests of the Islamic Republic of Iran and spreading its effects and influence to neighboring countries.--

* As was the case in Argentina, the intelligence structure that Abdul Kadir established in Guyana and in neighboring countries also provided crucial support for an international terrorist act: the conspiracy to bomb JFK Airport in New York. As a result, the Guyanese citizen, along with other co-conspirators, was convicted in the courts of the United States and sentenced to life in prison.----------

* Because this symmetrical establishment of intelligence bases in Argentina and Guyana was proven in court, it is possible to demonstrate that the attack carried out on July 18, 1994 against the AMIA premises was not an isolated and separate event. On the contrary, this evidence has reinforced the conclusions drawn in the Opinions issued by this Attorney General's Unit in 2006 and 2009, which supported the accusations against the authorities at the highest levels of the government of Iran then in office. It has also provided the context surrounding the attack against the Jewish community, in that it is part of an extensive regional strategy reflected in the establishment in certain countries of intelligence bases which, through the dual use of political, religious and cultural institutions, were positioned to provide, if needed, essential support for committing acts of terrorism.----------

* The deployment of these espionage structures assembled by the Iranian regime in several countries, which in this Opinion have been called "Intelligence Stations" and which have been proven in court both in Argentina and in Guyana, follows common patterns, including the following:----------

a) financing and indoctrination from the Iranian regime;----------

b) total conflation of politics and religion in speeches and activities developed by the representatives of the regime:----------

c) intensive activity intended to recruit and educate agents who adhere to the fundamentalist cause;

d) preparation and delivery of intelligence reports on the relevant countries where they settle;-----

f) [sic] dual use of embassies or diplomatic representations that may act as an integral part of the intelligence bases;----------

g) use of commercial enterprises as a cover for illegal activities;----------

h) dual use of cultural centers or mosques that, in addition to spreading religion or Islamic culture, may serve – through purported study trips, pilgrimages or financial movements – to support terrorist activities.----------

* The new evidence gathered in these proceedings has demonstrated the role played by Mohsen Rabbani as coordinator of the Iranian policy for the export of the revolution to South America, giving a new meaning to the links, relations and activities developed by the Iranian cleric in other regional countries and thereby substantially increasing the evidentiary basis on which the accusation against him was initially built.----------

* Evidence revealing the substantial role of Mohsen Rabbani in establishing the intelligence station that the Islamic Republic of Iran had decided to set up in Argentina, which was essential to the perpetration of the attack against the AMIA premises, has thus been reinforced. Moreover, the new evidence gathered in these proceedings has revealed that the attack executed on July 18, 1994 in particular, and the acts of Rabbani in Latin America in general, are not isolated events but instead one of the most complete manifestations of the policy of exporting the Iranian revolution to South America.----------

* Analysis of the abundant evidence available to the investigation has revealed that many of the patterns mentioned, which were inherent to the intelligence stations shown to have been operated in Argentina and Guyana, had aspects in common to other acts seen in other Latin American countries (Brazil, Uruguay, Paraguay, Colombia and Chile) that have not suffered the scourge of Islamic terrorism.----------

* Consequently, the courts' determination of the existence of these entities in Argentina and Guyana and of their role in acts of terrorism, added to the aforementioned verification of all or some of these patterns in other States, on one hand, and on the other, the public stance of the regime's point men, are decisive factors compelling Argentina to inform the various competent authorities about the Considerations and Conclusions of this Opinion, in

compliance with the international obligations it has assumed with respect to international legal assistance and cooperation.----------

CHAPTER NINE----------

NOW THEREFORE, it is incumbent upon us:----------

1) TO INFORM the legal authorities having jurisdiction in the **Federative Republic of Brazil, the Republic of Paraguay, the Eastern Republic of Uruguay, the Republic of Colombia, the Republic of Chile, the Republic of Guyana, the Republic of Trinidad and Tobago, and the Republic of Suriname,** of the Considerations and Conclusions contained in this Opinion, by virtue of the commitments assumed by the Argentine State for international legal assistance and cooperation, as detailed in Chapter Six hereof, and taking into account that crimes against public order are likely to be committed.----------

2) TO INFORM the United States Department of Justice of the Considerations and Conclusions contained in this Opinion, insofar as they could be of interest and supplementary to the evidence considered at the time of the prosecution of those who were eventually convicted for the conspiracy to bomb John F. Kennedy Airport in New York, within the scope of the reciprocity and international cooperation established in the Treaty of Mutual Legal Assistance in Criminal Matters signed by the two countries (Law No. 24.034).----------

3) TO REQUEST that the International Criminal Police Organization (ICPO – INTERPOL) make every effort to implement the mechanisms for the arrest of all the suspects, both those subject to a "red notice" and those not subject to it but whose national and international arrest has been ordered by the judge hearing the case, and take any other course of action that, within the scope of its authority, will result in the effective fulfillment of that request. For such purpose, an official letter shall be issued.----------

4) For the purposes established in 1) and 2) above, the relevant Letters Rogatory shall be issued. Without prejudice to the aforesaid, the Letters Rogatory issued to the United States of America, the Federative Republic of Brazil, the Republic of Guyana, the Republic of Trinidad and Tobago, and the Republic of Suriname shall be translated, as appropriate, into English, Portuguese and Dutch, and be duly sent.----------

Be it known to the Referring Judge.----------

Attorney General's Investigations Unit, May 29, 2013.----------

[There is an illegible signature followed by a seal that reads:] Alberto Nisman. Attorney General.

Before me. [There is an illegible signature followed by a seal that reads:] José Pablo Vásquez. Clerk of the Attorney General's Office.----------

ANNEX 108

2013 WL 1155576
Only the Westlaw citation is currently available.
United States District Court,
S.D. New York.

Deborah D. PETERSON, Personal Representative of the Estate of James C. Knipple (Dec.), et al., Plaintiffs,
v.
ISLAMIC REPUBLIC OF IRAN, Bank Markazi a/k/a Central Bank of Iran, Banca Ubae SpA, Citibank, N.A., and Clearstream Banking, S.A., Defendants.

No. 10 Civ. 4518(KBF).
|
March 13, 2013.

OPINION AND ORDER

KATHERINE B. FORREST, District Judge.

***1** Before this Court are eighteen groups of judgment creditors, comprised of more than a thousand individuals, who seek assets of the Islamic Republic of Iran and related entities (collectively "Iran" unless stated otherwise). [1] Each group of victims or their estates has obtained judgments against Iran for injury or wrongful death arising from acts of terrorism Iran sponsored, led, or in which it participated. Together, plaintiffs have obtained billions of dollars in judgments against Iran, the vast majority of which remain unpaid. These judgments were—long ago—duly registered in this district. As amongst themselves, plaintiffs have informed the Court that they have reached agreement as to the priority and manner of distribution of any recovery. (*See* Tr. of Nov. 27, 2012, Status Conf. at 15:19–22, ECF No. 293.)

Each group of plaintiffs seeks turnover of assets currently held at Citibank, N.A. ("Citibank"), as part of efforts to satisfy these outstanding judgments. (Second Am. Compl., ECF No. 160.) Citibank is a stakeholder without interest in the ultimate outcome of this dispute. (Third Party Pet. in Nature of Interpleader ("Citibank Interpleader"), ECF No. 38.) Its interest is in resolution of ownership of funds held in the account so that it may, if and when requested, ensure that the funds are appropriately disbursed. (*See* Letter of Sharon L. Schneier to the Hon. Katherine B. Forrest, Dec. 14, 2012, ECF No. 300 (noting "Citibank is a neutral stakeholder in this proceeding")).

These actions have been litigated in fits and starts; some of the delays are certainly attributable to the fact that established procedures for obtaining writs of attachment, restraining funds and executing judgments thereon are not well suited to large, complex actions such as this. For instance, for a number of years many of the actions were categorized as "miscellaneous" and were not assigned to any particular judge. Additionally, litigation against any sovereign inserts legal complexities. Finally, the basic fact that billions of dollars are at stake virtually insures vigorous litigation. And without a doubt these actions have been vigorously litigated. All matters as to each of the eighteen creditor groups have been collected together and proceeded before this Court since December 10, 2012.

Defendants do not dispute the validity of plaintiffs' judgments. They do, however, dispute that the assets held at Citibank are subject to turnover, and that this Court has jurisdiction over those assets or over certain defendants. Defendants Bank Markazi, UBAE and Clearstream have also raised issues of state, federal (including a number of constitutional arguments), and international law to oppose turnover.

Currently before this Court are five groups of motions:

First, defendants UBAE S.p.A. ("UBAE") and Clearstream Banking S.A. ("Clearstream") have separately moved to dismiss the claims against them for lack of personal jurisdiction. (ECF Nos. 295, 299, 301.) Plaintiffs have opposed these motions. (ECF Nos. 302, 306, 313, 323, 324.)

***2** Second, Bank Markazi has moved to dismiss the claims against it for lack of subject matter jurisdiction. (ECF No. 205.) Plaintiffs have opposed that motion. (ECF No. 219.)

Third, defendant Clearstream has renewed its earlier motion to vacate restraints. (ECF No. 174.) Plaintiffs oppose this motion. (ECF No. 199.)

Fourth, all plaintiffs have moved (or joined in the motion) for partial summary judgment for turnover of the assets held at Citibank. (ECF Nos. 209, 307.) Defendants Bank Markazi, UBAE, and Clearstream oppose this motion; defendant Citibank takes no position beyond its reliance on

the arguments raised by the other parties. (ECF Nos. 261, 282, 284, 286, 300, 328.)

Fifth, the Bland judgment creditors have moved to authorize execution and/or attachment against assets of Iran. (ECF No. 305.)

Altogether, these motions and supporting materials consume several thousands of pages. For the reasons set forth below, this Court denies each of the defendants' motions, grants plaintiffs' motion for partial summary judgment and turnover and grants the Bland plaintiffs' motion to execute.

I. FACTUAL BACKGROUND

The following facts are undisputed unless otherwise noted. Bank Markazi is the Central Bank of Iran, an agency of the Iranian Government. By 2008, Bank Markazi had over $2 billion in bonds (the "Markazi Bonds") denominated in U.S. dollars held in an account with defendant Clearstream S.A. Those bonds have subsequently been split into two groups relevant to this action: first, $1.75 billion in cash proceeds of the bonds are held in an account at Citigroup in New York; these proceeds are subject to restraints imposed by the Court, by Executive Order, and by statute. The proceeds are the subject of, *inter alia,* plaintiffs' motion for partial summary judgment and turnover and Clearstream's motion to vacate the restraints. The second group consists of two securities—with a face value of $250 million—that were originally part of the Markazi Bonds. Following a June 2008 evidentiary hearing in which Judge Koeltl lifted the restraints as to those two securities, they were sold on the open market. The $250 million are relevant to several of plaintiffs' claims, but are not addressed by the pending turnover motion or the motion to vacate the restraints.

Prior to maturity, each Markazi Bond (from both groups) had been issued in physical form and was registered with either the Federal Reserve Bank of New York ("FRBNY") or the Depository Trust Company ("DTC"), also located in New York. Accordingly, prior to maturity, the FRBNY and the DTC were the custodians of the Markazi Bonds.

For a period of years, Bank Markazi maintained an account with Clearstream S.A. which, in turn, maintained a correspondent account on its behalf at Citibank to handle funds associated with the bonds, including interest and principal payments.

Clearstream Luxembourg is an "international service provider for the financial industry offering securities settlement and custody-safekeeping services." (*See* Clearstream Consolidated Mem. of L. in Support of its Renewed Mot. to Vacate Restraints at 1.) "Clearstream serves as an intermediary between financial institutions worldwide to ensure that transactions from one bank to another are efficiently and successfully completed." (*Id.* at 1–2.) "As a post trade services provider currently covering the international and 52 domestic markets, Clearstream has over 2,500 financial institutions from all over the world among its customer base ..." (*Id.* at 2.)

***3** One of Clearstream's offices is in New York City. At all times relevant to these motions, the office that Clearstream maintained in New York engaged in sales, marketing and administrative activities relating to Clearstream's international financial services business. The New York office employed New York-based staff. Those New York employees had access to facilities supportive of sales and marketing efforts such as office space, telephones, email access and addresses and fax lines. Clearstream paid its New York staff out of bank accounts maintained in New York. Since 2002, Clearstream has been registered with New York State to maintain a representative office and conduct certain activities in New York. There is no evidence in the record that Clearstream's New York office was a depository institution. Nor is there evidence in the record that Clearstream's Luxembourg office attempted to maintain any corporate separation from its New York office. Indeed, based on Clearstream's submissions in this matter, its New York office was intended to act as a sales and marketing arm for its Luxembourg operations. Clearstream Luxembourg used its New York office to seek additional business for its Luxembourg-based financial organization and also used it to ensure seamless service to clients by maintaining points of contact in New York.

Over the years, Citibank has maintained an account in New York for Clearstream, to which the proceeds of the Markazi Bonds were posted. The parties dispute the extent to which Clearstream's New York office was involved in activities relating to the account it maintained at Citibank in New York on behalf, first, of Bank Markazi and later on behalf of defendant UBAE—in connection with services provided with respect to the Markazi Bonds. However, as set forth below, the resolution of that factual dispute is unnecessary to resolution of the instant motions.

From time to time, interest was paid on the bonds and posted to Clearstream's account at Citibank. As the bonds matured, the proceeds were credited to that same account.

In 2008, UBAE, a bank located in Italy, opened a new account with Clearstream, its second such account.[2] The record evidence supports UBAE's position that this account was opened at Clearstream's Luxembourg office. Following the opening of that account, Clearstream recorded a transfer of the entirety of the Markazi Bonds from Bank Markazi to UBAE—plaintiffs point to evidence that this transfer was marked "free of payment".

According to UBAE, in 2008, Bank Markazi asked that UBAE close and sell two securities—with a face value of $250 million[3]—held in the new UBAE custodial account located at Clearstream Luxembourg. (Reply Decl. of Biagio Matranga to Pls.' Opp. to Def. UBAE's Mot. to Dismiss ("Matranga Reply Decl.") ¶ 7, ECF No. 308 .) UBAE negotiated a selling price and offered to buy the securities from Bank Markazi at a price slightly lower than the negotiated selling price, the difference representing its fee for the transaction. (*Id.* ¶ 8.) The sale to the third party customers occurred in Luxembourg and customers of Clearstream Luxembourg purchased both securities. (*Id.* ¶¶ 9–10.) UBAE concedes that this sale was performed at the request of and for the benefit of Bank Markazi. (*Id.* ¶ 13.)

***4** Plaintiffs allege that, despite any allegations that the sale of the $250 million in Markazi Bonds occurred in Luxembourg, the defendants arranged for the transfer of the dollar-denominated bond proceeds from the Citibank account in New York to UBAE. (SAC ¶ 98 .) Clearstream allegedly instructed Citibank to transfer the cash proceeds of the $250 million from the holding account to Clearstream's cash account. (*Id.*) Next, Clearstream instructed Citibank to make an electronic funds transfer ("EFT") of the cash from Citibank to UBAE's correspondent bank in New York, HSBC. (*Id* . ¶¶ 100, 214.) Finally, UBAE, acting on behalf of Bank Markazi, then wired the cash from HSBC to UBAE in Italy.

After the sale of the $250 million, over $1.75 billion in proceeds the Markazi Bonds thus remain in the UBAE / Clearstream account currently at Citibank in New York. On a number of occasions, Bank Markazi has stated that it owns the Markazi Bonds and all proceeds associated with them (now held in the Citibank account). It has stated that "Over $1.75 billion in securities belonging to Bank Markazi ... are frozen in a custodial Omnibus Account at [Citibank]"; that the "Restrained Securities are the property of Bank Markazi, the Central Bank of Iran", that the "aggregate value of the remaining bond instruments, *i.e.* the Restrained Securities that are the property of Bank Markazi and the subject of the Turnover Action—is thus $1.753 billion"; that the "Restrained Securities are the property of a Foreign Central Bank ..."; that the "Restrained Securities are presumed to be the property of Bank Markazi"; and "the Restrained Securities are prima facie the property of a third party, Bank Markazi ...." (*See* Bank Markazi's First Mem. of L. in Support of its Mot. to Dismiss the Am. Compl. ("Markazi's First MOL") at 1, 5, 9, 10, 36, ECF No. 18.) In addition, two officers of Bank Markazi have sworn under penalty of perjury that the Blocked Assets are the "sole property of Bank Markazi and held for its own account." (Aff. of Gholamossein Arabieh ¶ 2, Decl. of Liviu Vogel in Support of Pls.' Mot. for Partial Summ. Judgment ("Vogel Decl."), Ex. J, Oct. 17, 2010, ECF No. 210; Aff. of Ali Asghar Massoumi ¶ 2, Vogel Decl. Ex. K, Oct. 17, 2010, ECF No. 210). UBAE has similarly asserted that it does not have a "legally cognizable interest in the restrained bonds." (*See* UBAE Mem. of L. in Opp. to Pls.' Mot. for Summ. J. ("UBAE S.J. Opp. Br.") at 2, ECF No. 328.)

All initial transactions relating to payment of interest and principal for the Markazi Bonds have occurred in New York. Clearstream's Citibank account has been credited with any such payments. Prior to the 2008 "free of payment" transfer, Clearstream's procedure was then to credit Bank Markazi's Clearstream account with the appropriate amounts; following the transfer, Clearstream has credited such amounts to UBAE. UBAE concedes that it has paid interest to Bank Markazi related to the bonds; such interest payments were credited to Bank Markazi's account with UBAE in Rome. (*See* Decl. of Biagio Matranga ("Matranga Decl.") ¶ 15, ECF No. 95.) UBAE maintained its correspondent account at HSBC in New York until at least some time in 2009. (*Id.* ¶ 5.)

***5** UBAE acknowledges that at the close of each day, and sometimes more than once a day, its treasurer (located in Italy) arranges for electronic transfers of the balance of any of its proprietary international U.S. Dollar accounts to its U.S. Dollar correspondent account at HSBC in New York, where they are pooled and may be transferred to Italy. (*See Id.*)

In 2012, the last of the Markazi Bonds matured. Clearstream's account at Citibank currently consists of cash associated with the bonds.[4]

UBAE sold the bonds and Clearstream, on behalf of UBAE, instructed Citibank New York to transfer the cash proceeds of the sale from Citibank New York to Clearstream's account at Citibank New York. As with the $250 million sale, when UBAE requested a withdrawal, Clearstream instructed Citibank to make an EFT through Clearstream's correspondent bank, JP Morgan Chase in New York, to UBAE's correspondent bank in New York, HSBC.

On June 12, 2008, this Court issued a writ of execution as to the Blocked Assets. (ECF No. 84.) This writ was levied upon Citibank as of June 13, 2008. The legal effect of levying this writ upon the Markazi Bonds and associated bank accounts was to restrain those assets. On October 17, 2008, this Court issued a second writ of execution, this time against Clearstream Banking S.A. (ECF No. 118.) Plaintiffs served Citibank and Clearstream Banking S.A. with Restraining Notices and Amended Restraining Notices later in June 2008. On June 27, 2008, this Court ordered that the Markazi Bonds and associated accounts (all encompassed within the category of "Blocked Assets") remain restrained until further order. (ECF No. 103.) Various extensions of the original restraints were issued by this Court in June 2009, May and June 2010. (ECF No. 171; Vogel Decl. Ex. G, Order Extending Levy, 18 Misc. 302(BSJ) (S.D.N.Y. May 10, 2010), ECF No. 210; *Id.* Ex. H, Order Extending Levy, 18 Misc. 302(BSJ) (S.D.N.Y. June 11, 2010).)

On June 8, 2010, following two years of legal activity in the Southern District of New York relating to the Blocked Assets (including registering judgments, obtaining restraining orders, and issuing writs of attachment, *see generally* Vogel Decl. Exs. B, C, D, U), the Peterson plaintiffs filed the original complaint which commenced this action, seeking, *inter alia,* turnover of the Blocked Assets. This had the legal effect of continuing the restraints on those assets pursuant to N.Y. C.P.L.R. § 5232(a), until transfer or payment in the amount of the Blocked Assets is made.

The First Amended Complaint was filed on October 20, 2010 (ECF No. 3), and the Second Amended Complaint ("SAC"), the operative complaint in this matter, was filed on December 7, 2011. (ECF No. 160.) The SAC asserts eight causes of action including (1) a declaration that Bank Markazi is an agent and/or alter ego of Iran, the Restrained Bonds are beneficially owned by Iran and are subject to execution for enforcement of Plaintiffs' judgments, and that the Restrained Bonds are not covered by 28 U.S.C. § 1611(b)(1); (2),(3) rescission of allegedly fraudulent conveyances by Iran, Bank Markazi, and Clearstream under New York Debtor and Creditor Law §§ 276(a) and 273–a; (4),(5) turnover of the Markazi Bonds under N.Y. C .P.L.R. §§ 5225 and 5227; (6) equitable relief against all defendants; (7) tortious interference with collection of money judgment, and (8) prima facie tort against UBAE and Clearstream.

***6** On February 5, 2012, President Obama issued Exec. Order No. 13,599 ("E.O.13599"), 77 Fed.Reg. 6659. E.O. 13599 declared that "[a]ll property and interests" in property of Iran and held in the United States, were "blocked" under his authority pursuant to the International Emergency Economic Powers Act ("IEEPA"), 50 U .S.C. § 1701.

E.O. 13599 had the effect of turning any restrained assets owned by the Iranian government (or any agency or instrumentality thereof) into "Blocked Assets". As Bank Markazi is the Central Bank of Iran, any of its assets located in the United States as of February 5, 2012, became "Blocked Assets" pursuant to E.O. 13599.

Citibank complied with its obligations under E.O. 13599 by reporting the Clearstream account proceeds to the Office of Foreign Assets Control ("OFAC") and placing proceeds relating to the Markazi Bonds into a segregated interest bearing account (this has been referred to from time to time as the "omnibus" account). That account is maintained in the Southern District of New York. As of April 2012, the Blocked Assets in that Citibank account now consist solely of cash.

II. LAW RELEVANT TO ALL MOTIONS

A. *The Foreign Sovereign Immunities Act*

Generally, U.S. law provides that a foreign sovereign is entitled to immunity from legal action in the United States. *See* Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602–1611.

The FSIA codifies "the restrictive theory of sovereign immunity." *Verlinden B.V. v. Cent. Bank of Nigeria,* 461 U.S. 480, 488, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983). The Supreme Court found that when Congress enacted the FSIA, it intended to ensure that "duly created instrumentalities of a foreign state are to be accorded a presumption of independent status." *See First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba* ("Bancec"), 462 U.S. 611, 627, 103 S.Ct. 2591, 77 L.Ed.2d 46 (1983). The "presumption of

independent status" is not to be "lightly overcome." *Hercaire Intl, Inc. v. Argentina, 821 F.2d 559, 565 (11th Cir.1987)*. Such "instrumentalities" include a foreign state's "political subdivisions and agencies or instrumentalities," as set forth in the statute. *See Hester Int'l Corp. v. Federal Republic of Nigeria,* 879 F.2d 170, 176 n.5 (5th Cir.1989) (emphasis added).

The property of a sovereign's central bank is immune from attachment under certain circumstances, including if the property is that of a central bank held for its own account. 28 U.S.C. § 1611(b)(1).

The FSIA does, however, provide exceptions to immunity in connection with legal proceedings seeking attachment to fulfill a judgment:

> (b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States ... if—
>
> ***7** (2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2), (3) or (5) or 1605(b), or 1605A of this chapter ...

28 U.S.C. § 1610 (emphasis added).

Section 1605A, the "Terrorism Exception to the Jurisdictional Immunity of a Foreign State", provides:

> (a) In general—
>
> (1) No immunity—A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state ...

28 U.S.C. § 1605A.

According to § 1603 of the FSIA, a "foreign state" includes, "a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b)." 28 U.S.C. § 1603(a). Subsection (b) provides:

> (b) An 'agency or instrumentality of a foreign state' means any entity—
>
> (1) Which is a separate legal person, corporate or otherwise, and
>
> (2) Which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) Which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

28 U.S.C. § 1603(b).

Thus, in order to pierce through the FSIA, including its provision for central bank immunity, the Court must undertake various analyses. The first question is whether the assets at issue are in fact "Iranian" and the judgments in compensation for acts of terrorism. This analysis complies with 28 U.S.C. §§ 1603, 1605A, and 1610. Next, for central bank assets, specifically, the Second Circuit has adopted a functional test that asks whether those assets are used for central bank functions as normally understood, irrespective of their commercial nature. *See NML Capital, Ltd. v. Banco Central de la Republica Argentina,* 652 F.3d 172, 194 (2d Cir.2011). Under *NML,* if the property at issue is that of a central bank, to execute against such property, a plaintiff must demonstrate "with specificity that the funds are not being used for central banking functions as such functions are normally understood." *Id.* at 194. However, other statutes (as discussed below) provide for alternative ways to reach such assets.

B. *TRIA*

The Terrorism Risk Insurance Act of 2002 ("TRIA"), codified in a note to the FSIA, allows a plaintiff to execute against "blocked" assets of a terrorist party. TRIA states, in relevant part:

> *Notwithstanding any other provision of law* ... in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, or for which a terrorist party is not immune under section 1605(a)(7) of title 28 United States Code, the blocked assets of that terrorist party ... shall be subject to execution or attachment in aid of execution in order to satisfy any judgment to the extent of any

compensatory damages for which such terrorist party has been adjudged liable.

***8** TRIA § 201(a), Pub.L. No. 107–297, Title II, 116 Stat. 2337 (2002) (emphasis added).

TRIA defines the term "terrorist party" as "a terrorist, terrorist organization ...., or a foreign state designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C.App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371)." TRIA § 201(d)(4). Iran has been designated as a "state sponsor of terrorism" under section 6(j) of the Export Administration Act of 1979 since January 19, 1984. State Sponsors of Terrorism, U.S. Dep't of State, at http://www.state.gov/j/ct/c14151.htm (last visited July 27, 2012). TRIA's broad language—"notwithstanding any other provision of law ... in every case"—provides one basis pursuant to which a separate "central bank" analysis becomes unnecessary; TRIA trumps the central bank provision in 28 U.S.C. § 1611(b)(2).

C. *The IEEPA and E.O. 13599*

In 1977, Congress enacted the International Emergency Economic Powers Act ("IEEPA"). 50 U.S.C. §§ 1701, 1702. The IEEPA authorizes the president to take broad-ranging action against the financial assets and transactions of those entities he determines pose an "unusual and extraordinary threat" to the national security of the United States. *Id.* On February 6, 2012, pursuant to his authority under IEEPA, President Obama issued Executive Order ("E.O.") 13599. E.O. 13599 provides that:

> [a]ll property and interests in property of the Government of Iran, *including the Central Bank of Iran,* that are in the United States, that are or hereafter come within the United States, or that hereafter come within the possession or control of any United States person, including any foreign branch, are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in.

Exec. Order No. 13,599, 77 Fed.Reg. 26 (Feb. 6, 2012) (emphasis added). For purposes of E.O. 13599, the "Government of Iran" is "any political subdivision, agency or instrumentality thereof, ... and any [individual or entity] owned or controlled by, or acting for or on behalf of, the Government of Iran." *Id.* That definition is similar to the definition promulgated by the Department of Treasury:

> (a) The state and the Government of Iran, as well as any political subdivision, agency or instrumentality thereof; (b) Any entity owned or controlled directly or indirectly by the foregoing; (c) Any person to the extent that such person is, or has been, or to the extent that there is reasonable cause to believe that such person is, or has been, since the applicable effective date, acting or purporting to act directly or indirectly on behalf of any of the foregoing.

31 C.F.R. § 560.304.

Thus, as a matter of law, Bank Markazi's (indisputably the Central Bank of Iran) assets were "blocked" on February 6, 2012. "Blocking" Bank Markazi's assets located in the U.S.—and, here, in the Southern District of New York—has the effect of restraining them and prevents any transfer or dealing in those assets. The writs of attachment previously obtained had already restrained Bank Markazi's assets held at Citibank. However, to the extent UBAE asserts it has any control relating to those assets, it (as discussed below) simply fits within E.O. 13599's provision for a person acting "directly or indirectly" on behalf of Iran.

***9** The Office of Foreign Assets Control ("OFAC"), operating under the United States Department of Treasury, has determined that "E.O. 13599 requires U.S. persons to block all property and interests in property of the Government of Iran, unless otherwise exempt under OFAC." Frequently Asked Questions and Answers, U.S. Dep't of Treasury (hereinafter "OFAC FAQs"), available at http://www.treasury.gov/reso urce-center/faqs/Sanctions/Pages/answer.aspx (last visited July 25, 2012); *see also* 31

C.F.R. § 501.603(a)(1) ("Any person ... holding property blocked pursuant to this chapter must report."). According to the OFAC "Fact Sheet", "[a]mong other things, the E .O. [13599] freezes all property of the Central Bank of Iran and all other Iranian financial institutions, as well as all property of the Government of Iran ...". *See* OFAC Regulations for the Financial Community, Dep't of the Treasury § V(A) (Jan. 24, 2012); Fact Sheet: Implementation of National Defense Authorization Act Sanctions on Iran, U.S. Dep't of Treasury, available at http://www.treasury.gov/pres s-center/press-releases/Pages/tg1409.aspx (last visited July 25, 2012).

OFAC periodically publishes a list of "Specially Designated Nationals and Blocked Persons" (the "SDN list"). The SDN list aids the Court to determine which entities are known to be blocked. That list, however, purports to be neither exhaustive nor exclusive. It cannot be used as a sole reference point in connection with a determination as to whether a particular entity's assets are in fact "blocked" pursuant to E.O. 13599. In general, and therefore left to judicial determination, "E.O. 13599 blocks the property and interests in property of any individual or entity that comes within its definition of the term 'Government of Iran' regardless of whether it is listed on the SDN List...." OFAC FAQs. The Government of Iran and Bank Markazi are on the SDN list. Clearstream and UBAE are not.

The SDN list is updated when individuals, entities or the Treasury report assets owned by Iran. According to OFAC, "E.O. 13599 requires U.S. persons to block all property and interests in property of the Government of Iran, unless otherwise exempt under OFAC." *See* 31 C.F.R. § 501.603(a)(1) ("Any person ... holding property blocked pursuant to this chapter must report.") In connection with its OFAC reporting obligations, in February 2012—four years after the "free of payment" transfer of the bonds to UBAE—Citibank reported to the U.S. Treasury the account it maintained for Clearstream in connection with the Bank Markazi Bonds.

D. *The Newest Act: 22 U.S.C. § 8772*

On August 10, 2012, the Iran Threat Reduction and Syria Human Rights Act of 2012 (the "2012 Act") went into effect. 22 U.S.C. § 8701, et seq. The 2012 Act does not eliminate any of the authority and bases for blocking or executing against certain assets as set forth under the FSIA or TRIA. It does, however, provide a separate and additional basis for execution on assets in aid of fulfilling judgment. Section 502 of the 2012 Act (22 U.S.C. § 8772) states:

> (a) Interests in blocked assets
>
> (1) In general
>
> ***10** Subject to paragraph (2), *notwithstanding any other provision of law, including any provision of law relating to sovereign immunity and preempting any inconsistent provision of State law,* a financial asset that is—
>
> (A) held in the United States for a foreign securities intermediary doing business in the United States;
>
> (B) a blocked asset (whether or not subsequently unblocked) that is the property described in subsection (b); and
>
> (C) equal in value to a financial asset of Iran, *including an asset of the central bank* or monetary authority of the Government of Iran *or any agency* or *instrumentality of that Government,* that such foreign securities intermediary or a related intermediary holds abroad,
>
> shall be subject to execution or attachment in aid of execution in order to satisfy any judgment to the extent of any compensatory damages awarded against Iran for damages for personal injury or death ...
>
> (2) Court determination required
>
> In order to ensure that Iran is held accountable for paying the judgments described in paragraph (1) and in furtherance of the broader goals of this Act to sanction Iran, prior to an award turning over any asset ... *the court shall determine* whether Iran holds equitable title to, or beneficial interest in, the assets described in subsection (b) and that no other person possesses a constitutionally protected interest in the assets described in subsection (b) under the Fifth Amendment to the Constitution of the United States. To the extent the court determines that a person other than Iran holds—
>
> (A) equitable title to, or a beneficial interest in, the assets described in subsection (b) ...; or
>
> (B) a constitutionally protected interest in the assets described in subsection (b),

> Such assets shall be available only for execution or attachment in aid of execution to the extent of Iran's equitable title or beneficial interest therein ...
>
> (b) Financial assets described
>
> The financial assets described in this section are the financial assets that are identified in and the subject of proceedings in the United States District Court for the Southern District of New York in *Peterson, et al. v. Islamic Republic of Iran, et al....* that were restrained by restraining notices and levies secured by plaintiffs in those proceedings ...
>
> ...
>
> (3) Financial asset; securities intermediary
>
> ...
>
> The term "Iran" means the Government of Iran, including the central bank or monetary authority of that Government and any agency or instrumentality of that Government.

22 U.S.C. § 8772 (emphases added).

As the statute relates specifically to the instant action, its interpretation is a matter of first impression.

On its face, the statute sweeps away the FSIA provision setting forth a central bank immunity, 28 U.S.C. § 1611(b)(1); it also eliminates any other federal or state law impediments that might otherwise exist, so long as the appropriate judicial determination is made. 22 U.S.C. § 8772(a)(2). If UBAE is merely an agent acting directly or indirectly on behalf of Iran, then the 2012 Act provides that assets it holds for Iran are subject to execution if its requirements are met; the 2012 Act therefore provides a separate basis—in addition to the FSIA and TRIA—for execution.

III. DEFENDANTS' MOTIONS TO DISMISS

***11** Each defendant—Clearstream, UBAE, and Bank Markazi—has filed a separate motion to dismiss.

A. *UBAE and Clearstream Motions to Dismiss*

Clearstream and UBAE have moved pursuant to Fed.R.Civ.P. 12(b)(2) to dismiss all claims against them for lack of personal jurisdiction. It is undisputed that each is a nonresident defendant. Both Clearstream and UBAE argue that they are based in Europe and have no presence in New York.

i. *Standard of Review for Personal Jurisdiction*

Plaintiffs bear the burden to establish personal jurisdiction as to each defendant. *See MacDermid Inc., v. Deiter,* 702 F.3d 725, 727–28 (2d Cir.2012) (*citing Seetransport Wiking Trader Schiffarhtsgellschaft MBH & Co., Kommanditgesellschaft v. Navimpex Centrala Navala,* 989 F.2d 572, 580 (2d Cir.1993)). Jurisdiction is measured at the time that plaintiffs filed suit. (*See* Banca UBAE Mem. of L. in Suppt. of Mot. to Dismiss ("UBAE MTD Br.") at 3 .) *See Klinghoffer v. S.N.C. Achille Lauro,* 937 F.2d 44, 52 (2d Cir.1991). Prior to trial, when a motion to dismiss for lack of personal jurisdiction is based on affidavits and other written materials, a plaintiff need only make a prima facie showing. *See MacDermid,* 703 F.3d at 727. The Court is required to accept the allegations in the complaint as true so long as they are uncontroverted by defendant's affidavits. *Id.*

In order for this Court to exercise personal jurisdiction, such jurisdiction must have a statutory basis and comport with the due process clause of the Fifth Amendment. *See* Fed.R.Civ.P. 4(k); *Chloe v. Queen Bee of Beverly Hills, LLC,* 616 F.3d 158, 163–65 (2d Cir.2010); *Grand Rivers Enters. Six Nations, Ltd. v. Pryor,* 425 F.3d 158, 165 (2d Cir.2005).

ii. *Discussion*

Plaintiffs argue that Fed.R.Civ.P. 4(k)(1)(A)—which permits this Court to exercise personal jurisdiction to the extent of the applicable New York statutes—provides the basis for personal jurisdiction. The Court agrees with that assessment, but finds two additional bases on which personal jurisdiction is proper: first, general jurisdiction exists over Clearstream under Rule 4(k)(1)(A). Second, even if jurisdiction is not proper under the New York long arm statute, Fed.R.Civ.P. 4(k)(2) provides an alternative basis for personal jurisdiction as to UBAE.

As to Rule 4(k)(1)(A)—the sole basis of jurisdiction asserted by plaintiffs—this Court must determine whether either general or specific personal jurisdiction exists under the relevant New York statutes.

a. *General Jurisdiction under C.P.L.R. § 301*

Under NY. C.P.L.R. § 301, "general jurisdiction is established if the defendant is shown to have 'engaged in continuous, permanent, and substantial activity in New York.' " *See, e.g., United Mobile Technologies, LLC v. Pegaso PCS, S.A. de C.V.,* 11–2813–CV, 2013 WL 335965 (2d Cir. Jan. 30, 2013). For general jurisdiction over a foreign corporation, this requires a showing that the corporation is "doing business" in New York, "not occasionally or casually, but with a fair measure of permanence and continuity." *See, e.g., Gallelli v. Crown Imports, LLC,* 701 F.Supp.2d 263, 271 (E.D.N.Y.2010) (*quoting Hoffritz for Cutlery, Inc. v. Amajac, Ltd.,* 763 F.2d 55, 58 (2d Cir.1985)). The claim over which plaintiffs seek to assert personal jurisdiction over the defendants need not relate to the activity that gives rise to general jurisdiction. *See Hoffritz for Cutlery,* 763 F.2d at 58.

***12** To determine whether a corporate defendant is "doing business" in New York, courts look factors such as "the existence of an office in New York; the solicitation of business in the state; the presence of bank accounts and other property in the state; and the presence of employees of the foreign defendant in the state." *See Id.*

b. *Specific Jurisdiction under C.P.L.R. § 302(a)(1)*

Even in the absence of the systematic presence needed for "doing business" jurisdiction, a plaintiff may properly assert specific jurisdiction based on its "transacting business" in New York—*i.e.,* where a defendant, itself " 'or through an agent ... transacts any business within the state, so long as the plaintiff's 'cause of action aris[es] from' that 'transact[ion].' " *See Licci ex rel. Licci v. Lebanese Canadian Bank, SAL* (hereinafter *"Licci I"*), 673 F.3d 50, 60 (2d Cir.2012); *Best Van Lines, Inc. v. Walker,* 490 F.3d 239, 240 (2d Cir.2007).

To establish that an entity or its agent has transacted business within New York, a plaintiff must demonstrate a defendant's purposeful availment of the privilege of conducting business in New York. *Licci,* 673 F.3d at 61. The central inquiry relates to the "quality" of a defendant's contacts with New York—*i.e.,* whether the contacts indicate an intent to invoke the benefits and privileges of New York law. *Id.; see also Deutsche Bank Sec., Inc. v. Montana Bd. of Invs.,* 7 N.Y.3d 65, 72 (2006); *see also Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 472 (1985).

It is perhaps counterintuitive—but nonetheless well-established—that for purposes of establishing that a defendant has "transacted business" within New York, the defendant or its agent need not have physically entered New York; the question is whether the defendant or its agent engaged in purposeful activities in New York. *See Best Van Lines,* 490 F.3d at 249.

Purposeful availment is thus a fact-based inquiry: a single telephone call to place a single order in New York that would be sent to another state or the transitory presence of a corporate official may not be sufficient under certain circumstances. *Licci I,* 673 F.3d at 62. Yet, in another case, *Deutsche Bank,* the Court found that a sophisticated investor who may use electronic devices to "enter" New York to conclude a substantial transaction, met the "transacting business" requirement. 7 NY.3d at 72.

A court is thus required to look at the totality of the circumstances. *See Licci* I, 673 F.3d at 62. Instructive in this regard—especially for this case—is the Second Circuit's recent opinion in *Licci I.* In *Licci I,* the Second Circuit certified to the New York Court of Appeals the question of whether a defendant's maintenance and frequent use of a correspondent bank in New York (to effect international wire transfers) met the requirements of the New York long-arm statute. *Id.* at 66. The New York Court of Appeals found that, under the circumstances there presented, it did.

***13** In certifying the question, the Second Circuit examined cases in which personal jurisdiction was based on the use of a correspondent bank. It found that in some instances the mere presence of having a correspondent bank account might be insufficient to confer jurisdiction, *id.* at 63–64, yet in others the use of a correspondent bank account might be sufficient. *Id.*

For instance, in *Amigo Foods Corp. v. Marine Midland–Bank–N.Y.,* 39 N.Y.2d 391, 394 (1976), an out-of-state bank passed letters of credit through a correspondent New York bank. While the Appellate Division initially dismissed such use as insufficient to meet the requirements of New York's long-arm statute, the Court of Appeals reversed and remanded for jurisdictional discovery. *Id.* at 396. The Court of Appeals agreed that the mere presence of a correspondent bank in New York was not in and of itself sufficient to confer jurisdiction, but it allowed discovery as to whether there were other facts indicating sufficient use of the correspondent bank account to do so. *Id.*

In a later case, the Court of Appeals found that use of a correspondent bank in connection with securities transactions was sufficient to meet the requirements of C.P.L.R. § 302(a).

See Ehrlich–Bober & Co. v. Univ. of Houston, 49 N.Y.2d 574, 577, 580–82 (1980).

Similarly, the Court of Appeals upheld the exercise of personal jurisdiction over a Russian bank that maintained and used a correspondent bank account through which it engaged in currency-exchange options transactions with the plaintiff. *See Indosuez International Finance B.V. v. National Reserve Bank,* 98 N .Y.2d 238, 247 (2002).

In addition, the Second Circuit noted in *Banco Ambrosiano v. Artoc Bank & Trust,* 62 N.Y.2d 65, 72 (1984) that the use of the correspondent account to effect the transactions at issue in the lawsuit was sufficient to meet the requirements of due process for quasi-in rem jurisdiction. *Licci I,* 673 F.3d at 64. (The holding in that case was based on considerations of due process; the Second Circuit found it nonetheless relevant insofar as statutory and constitutional inquiries in New York have become entangled. *Id.* at 64 (quoting from *Best Van Lines,* 490 F.3d at 242.))

Resolving any ambiguities in these cases, the Court of Appeals answered the Second Circuit's certified question in the affirmative; a defendant's maintenance and frequent use of a New York correspondent account can be sufficient for "transacting business" jurisdiction under C.P.L.R. § 302(a). *See Licci v. Lebanese Canadian Bank, SAL* (hereinafter *"Licci II"*), 2012 WL 5844997 (N.Y. Nov. 20, 2012).

The facts of *Licci II* bear certain similarities to those before this Court such that they bear reciting in some detail. There, plaintiffs were several dozen American, Canadian and Israeli citizens who were injured or whose family members were injured or killed in rocket attacks allegedly launched by Hizballah in 2006. *Id.,* at *1. Hizballah had been declared a terrorist organization by the United States Department of State. *Id.* Plaintiffs commenced a lawsuit in the Southern District of New York against the Lebanese Canadian Bank, SAL ("LCB"), alleging that LCB had assisted Hizballah in its terrorist acts by facilitating certain financial transactions. LCB did not operate branches or offices, or maintain employees in New York. Its sole "point of contact with the United States was a correspondent bank account with AmEx in New York." *Id.,* at *2. The complaint alleged that LCB used the correspondent bank account to transfer funds that enabled, *inter alia,* the attacks which killed or injured plaintiffs or their relatives. *Id.*

***14** In its analysis, the Court of Appeals acknowledged the fact-specific nature of an inquiry as to whether personal jurisdiction can be based on maintenance and use of a correspondent bank. *Id.,* at *3. Ultimately the Court found that "complaints alleging a foreign bank's repeated use of a correspondent account in New York on behalf of a client—in effect, a 'course of dealing'... show purposeful availment of New York's dependable and transparent banking system, the dollar as a stable and fungible currency, and the predictable jurisdictional and commercial law of the United States." *Id.,* at *3. The Court further found that there had to be some relatedness between the use of the correspondent bank and the claim at issue—the claim could not be "completely unmoored" from the transaction utilizing the correspondent account. In that case, the complaint alleged that LCB used the correspondent account repeatedly to support a terrorist organization. *Id.* *4.

Under New York law, then, a foreign bank's maintenance and use of a correspondent account in New York can be sufficient to support personal jurisdiction, at least where transactions indicate purposeful availment of New York's banking system and those transactions relate to the claim at issue.

c. *Statutory Jurisdiction under Rule 4(k)(2)*

Even if personal jurisdiction under the C.P.L.R. is not proper, however, that does not signify that a nondomiciliary entity is automatically outside this Court's jurisdiction. Assuming, *arguendo,* that no C.P.L.R.-based jurisdiction exists, to the extent federal questions are at issue—and plaintiffs have asserted such questions here—the Court might still exercise personal jurisdiction under the federal question personal jurisdiction statute, Fed.R.Civ.P. 4(k)(2).

Rule 4(k)(2) subjects a defendant to this Court's personal jurisdiction where plaintiff demonstrates that (1) the claim arises under federal law; (2) the defendant is not "subject to jurisdiction in any state's courts of general jurisdiction"; and (3) the exercise of jurisdiction is "consistent with the United States Constitution and laws"—*e.g.,* it comports with due process. *See Porina v. Marward Shipping Co., Ltd.,* 521 F.3d 122, 127 (2d Cir.2008).

As with 4(k)(1)(A) jurisdiction, plaintiff need only raise a prima facie case that 4(k)(2) jurisdiction is proper to survive a Rule 12(b)(2) motion to dismiss. *See, e.g., Catlin Ins. Co. (UK) Ltd. v. Bernuth Lines Ltd.,* 12–1773–CV, 2013 WL 406273 (2d Cir. Feb. 4, 2013) (stating prima facie standard in context of 4(k)(2) analysis).

d. *Due Process Analysis*

If this Court determines that statutory jurisdiction—either under Rule 4(k)(1) or Rule 4(k)(2)—is proper, it must finally ask whether such jurisdiction comports with due process.

1. *Minimum contacts*

In doing so, the Court first asks whether sufficient minimum contacts exist between that nonresident defendant and either New York (under Rule 4(k)(1)) or the United States generally (under Rule 4(k)(2)), such that maintenance of the suit does not offend traditional notions of fair play and substantial justice. *International Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945); *Worldwide Volkswtagen Corp. v. Woodson,* 444 U.S. 286, 291 (1980).

***15** The minimum contacts necessary to comport with the New York jurisdictional statutes, C.P.L.R. §§ 301 and 302, necessarily comport with the Due Process Clause since New York law requires a greater showing of minimum contacts than would be required by the Due Process Clause alone. *See Licci I,* 673 F.3d at 60–61 ("The New York long-arm statute does not extend in all respects to the constitutional limits established by *International Shoe."*) Thus, the "purposeful availment" analysis for specific jurisdiction under C.P.L.R. 302(a) satisfies a similar purposeful availment analysis under the Due Process Clause. *See Burger King Corp.,* 471 U.S. at 472 (setting forth purposeful availment standard under the Due Process Clause).

In contrast, the "minimum contacts" prong for federal question personal jurisdiction under Rule 4(k)(2) focuses on whether the defendant "has the requisite aggregate contacts with the United States" as a whole. *Eskofot A/S v. E.I. Du Pont De Nemours & Co.,* 872 F.Supp. 81, 87 (S.D.N.Y.1995). The Second Circuit has held that those contacts may be satisfied by "1) transacting business in the United States, (2) doing an act in the United States, or (3) having an effect in the United States by an act done elsewhere." *See Id.* at 87 (*citing Leasco Data Processing Equipment Corp. v. Maxwell,* 468 F.2d 1326, 1340 (2d Cir.1972)).

2. *Reasonableness Factors*

Lastly, if the defendant has sufficient minimum contacts, the Court must also determine that the exercise of personal jurisdiction over this defendant is reasonable. *Chloe,* 616 F.3d at 172–73; *MacDermid,* 702 F.3d. at 730–31. The Supreme Court has established five factors this Court must consider in order to determine whether the exercise of personal jurisdiction is reasonable:

1. The burden on the defendant;
2. The interests of the forum State
3. The plaintiffs' interests in obtaining relief;
4. The interstate judicial system's interest in obtaining the most efficient resolution of controversies; and
5. The shared interest of the Several States in furthering substantive social policies.

Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 113–14 (1987); *Chloe,* 616 F.3d at 172–73.

The mere fact that a defendant is foreign and would have to travel to New York is insufficient to defeat a finding of reasonableness. *See MacDermid,* 702 F.3d at 730–31 (holding that the fact that defendant was Canadian was insufficient to defeat minimum contacts; the defendant's act of accessing a computer server located within New York from outside the state satisfied the minimum contacts requirement); *Kernan v. Kurz–Hastings., Inc.,* 175 F.3d 236, 244 (2d Cir.1999) (holding that burden on Japanese defendant to defend suit in the United States was insufficient to overcome its minimum contacts-particularly in light of the ease of modern travel and communication).

e. *Personal Jurisdiction over UBAE*

***16** UBAE asserts that plaintiffs are unable to make out a prima facie basis for personal jurisdiction. This Court disagrees. Plaintiffs have alleged sufficient facts which, when analyzed against the legal framework set forth above, leave no doubt that either specific jurisdiction over UBAE exists pursuant to C.P.L.R. 302(a)(1) or, in the alternative, that jurisdiction exists under the federal question provision, Rule 4(k)(2).

1. *Specific Jurisdiction*

Plaintiffs base personal jurisdiction as to UBAE on the New York long-arm statute, C.P.L.R. § 302. They suggest that jurisdiction is proper under the "transacting business" provision, § 302(a)(1), as well as the provisions for personal jurisdiction based on tortious acts committed within New York, C.P.L.R. § 302(a)(2), and those committed without New

York, C.P.L.R. § 302(a)(3)(ii). The Court need not address the tortious acts basis for specific jurisdiction since plaintiffs clearly make out a prima facie case of "transacting business" jurisdiction.

While the parties do not agree as to how and why certain transactions relating to the bonds were structured and occurred as they did, the allegations in the complaint, UBAE's factual concessions contained in the Matranga declaration (ECF No. 95), and the materials presented in the Vogel Declaration in opposition to UBAE's Rule 12(b)(2) motion (ECF No. 323) are sufficient to meet the standard for "transacting business" in New York.

UBAE admits that a series of acts occurred relating to the Markazi Bonds—but it argues that those acts all occurred outside of the United States, and further, that UBAE has no presence in the United States at all. (*See* Matranga Decl. ¶ 3 ("UBAE did not advertise, solicit business, or market its services in New York, or anywhere in the United States.") In this regard, UBAE asserts that it followed Bank Markazi's directive to sell two of the Markazi Bonds securities with a combined face value of $250 million. (Matranga Reply Decl. ¶ 7.) Though the securities were physically held in New York, UBAE would work exclusively from Luxembourg to buy the $250 million in securities from Bank Markazi and negotiate a higher price on the open market. (*Id.* ¶ 8.) It would then pocket the difference between the two as its fee. (*Id.*)

While the structure of the transaction did not cause UBAE to send personnel into New York, UBAE ignores the crucial fact that the bonds were physically located in New York at the time of sale; therefore, by definition UBAE engaged in sales transactions for bonds physically located in New York. In addition, plaintiffs present evidence from UBAE's own sales records that indicate that UBAE distributed sales proceeds and interest payments from the Markazi Bonds via its correspondent account at HSBC in New York. (*See* Decl. of Liviu Vogel in Opp. to UBAE Mot. to Dismiss ("Vogel UBAE MTD Decl.") Exs. C–F.)

This pathway of proceeds through New York is enough to constitute § 302 "transacting business". N.Y. C.P.L.R. § 302(a)(1). The fact that UBAE may have been making all of the arrangements relating to the sales outside of the U.S. cannot erase the fact that the bonds and proceeds relating thereto physically transferred in New York. UBAE used its correspondent account to process the proceeds of the sale because it offered the stability and security of the New York banking laws—purposeful availment analogous to that in *Licci II.*

***17** Finally, UBAE argues that since it was unaware of plaintiffs' judgment until June 2008, there cannot be any causal connection between its March 2008 actions and trying to avoid that judgment. This argument also fails. The New York long-arm statute provides that an entity or its agent may engage in conduct which supports jurisdiction. *See, e.g., Kreutter v. McFadden Oil Corp.,* 71 N.Y .2d 460, 467 (N.Y.1988) (finding C.P.L.R. § 301(a)(1) jurisdiction proper where corporation never entered New York, but its agent engaged in "purposeful activities in this State in relation to his transaction for the benefit of and with the knowledge and consent [of the corporation] ... and that they exercised some control over [the agent].")

Even if UBAE itself was not transacting business in New York, its agents most certainly were. Plaintiffs have sufficiently alleged, and the facts in the record support, that Bank Markazi and Clearstream were aware of plaintiffs' judgments at the time that UBAE was engaged to open an account and engage in a sale transaction on behalf of Bank Markazi. (SAC ¶¶ 13, 15, 24, 37, 41.) UBAE's own concession that Clearstream was acting on its behalf in the United States and its more recent statements in opposition to plaintiffs' motion for partial summary judgment[5] are sufficient to support an agency relationship. (*See* Matranga Reply Decl. ¶¶ 8–10.)

2. *Rule 4(k)(2) Jurisdiction*

By arguing that it has no presence in the United States and did not engage in transactions in New York sufficiently related to the instant dispute to constitute "transacting business" jurisdiction, however, UBAE has in fact established the necessary predicate for personal jurisdiction pursuant to Fed.R.Civ.P. 4(k)(2). It is undisputed that this case raises federal claims—the execution of the judgments obtained by plaintiffs is governed by federal laws FSIA, TRIA, E.O. 13599, and 22 U.S.C. § 8772. Rule 4(k)(2) applies to just such situations.[6] UBAE argues strenuously that it has no presence in the United States that would subject it to general personal jurisdiction in any state. (*See* Matranga Decl. ¶ 4.) Provided that exercising jurisdiction over UBAE anywhere in the United States comports with due process, in personam jurisdiction in this Court is proper. Fed.R.Civ.P. 4(k)(2).

3. *Due Process Analysis*

Indeed, under the New York long-arm statute—and thus under the Due Process Clause itself—there are sufficient minimum contacts (under *International Shoe* and its progeny) between New York / the United States and UBAE to exercise jurisdiction, and doing so would undoubtedly be reasonable.

First, UBAE itself has conceded that it uses the services of its correspondent bank on a daily basis to manage its U.S. dollar holdings. (*See* Matranga Decl. ¶ ¶ 5–6.) In addition, its actions with respect to the bonds were aimed at New York—and it caused transfers between a number of New York financial institutions in order to complete (*e.g.* the FBNY, DTC, Citibank, JP Morgan Chase, just to name those as to which even UBAE cannot assert a lack of involvement.)

***18** The *Asahi* "reasonableness" factors are also met both for jurisdiction pursuant to Rule 4(k)(2) and/or pursuant to New York's long arm statute. The burden on UBAE of defending this suit is minimal in comparison to the interests of New York and the United States in providing a forum to adjudicate disputes over bond proceeds physically located in New York. In addition, plaintiffs have a strong interest in—and right to—seek relief from Iran. That relief would be stymied if UBAE, acting as agent of Bank Markazi, was able to take those precise acts Bank Markazi would have taken with respect to the Blocked Assets present in New York, but evade jurisdiction here. Likewise, bringing UBAE before this court will enable efficient resolution of plaintiffs' claims as to these assets in a single proceeding, putting an end to the years of disjointed litigation and delays. Finally, only by subjecting UBAE to this Court's jurisdiction will the Court be able to enforce the policies behind the anti-terrorism provisions of FSIA, TRIA and Section 8772—as Congress clearly intended.

As the requirements of the Due Process Clause are met with respect to UBAE, this Court therefore finds that plaintiffs make out a prima facie case of specific personal jurisdiction under Fed.R.Civ.P. 4(k)(1)(A), incorporating C.P.L.R. § 302(a). In the alternative, Rule 4(k)(2) jurisdiction is proper. UBAE's Rule 12(b)(2) motion to dismiss is denied.

f. *Analysis regarding Clearstream*

Clearstream's motion to dismiss for lack of personal jurisdiction also fails. As an initial matter, it is rather remarkable that Clearstream has spent the time to make such an argument given the existence and persistence of its New York operations supportive of its overall business. The Court finds that there are bases to suggest both general jurisdiction and specific jurisdiction over Clearstream under Rule 4(k)(1). [7]

Clearstream is clearly doing business in New York and thus subject to general jurisdiction under C.P.L.R. § 301. For such a determination it is unnecessary that Clearstream conduct all of its business in New York—or even that the specific facts relating to the issues in this case relate to specific acts taken in New York. *See Gelfand v. Tanner Motor Tours. Ltd.*, 385 F.2d 116, 121 (2d Cir.1967) ("[A] foreign corporation is doing business in New York 'in the traditional sense' when its New York representative provides services beyond 'mere solicitation' and these services are sufficiently important to the foreign corporation that if it did not have a representative to perform them, the corporation's own officials would undertake to perform substantially similar services."). It is enough that as a general matter it is in fact doing business in New York. This is evidenced by the presence of a Clearstream office in New York, which employs Clearstream employees for the purpose of obtaining and also supporting business for Clearstream Luxembourg from New York. As the evidence demonstrates, Clearstream in New York is not merely soliciting business—it provides support services for its Luxembourg operations and is part of Clearstream's overall strategy to "provide[ ] global services to the securities industry ... close to its customers in all major time zones". (*See* Letter of Liviu Vogel to Hon. Barbara S. Jones Ex. 1 at 2, Aug. 14, 2009, ECF No. 178.) These activities demonstrate the "permanence and continuity" required for § 301 general jurisdiction. *Cf. Hoffritz for Cutlery, Inc. v. Amajac, Ltd.*, 763 F.2d at 58 (finding no general § 301 jurisdiction where nonresident defendant lacked an office in New York, did not solicit business in the state and did not have bank accounts, other property or employees in the state).

***19** However, even if this Court were to analyze whether there is a sufficient basis for long-arm jurisdiction over Clearstream Luxembourg, the answer would still clearly—and resoundingly—have to be "yes." Clearstream Luxembourg's contacts with New York relate directly to plaintiffs' allegations regarding the Markazi Bonds that were maintained at the FBNY and DTC in New York. Even if this Court were to ignore the presence of Clearstream's office on Broad Street in New York, the fact that Clearstream Luxembourg engaged in a series of financial transactions over an extended period of time with regard to these New York based bonds would require a finding of sufficient "transacting

business" for long-arm jurisdiction under C.P.L.R. § 302(a)—and, necessarily, also a finding of sufficient minimum contacts to satisfy due process.

That transaction of business is clear from Clearstream's innumerable acts to maintain its New York-based Citibank account. It has repeatedly communicated with Citibank about the Blocked Assets and arranged for various transactions with Citibank. (*See, e.g.,* Decl. of Liviu Vogel in Opp. to Clearstream's Mot. to Vacate Restraints ("Vogel Vacate Restraints Opp. Decl.") Exs. 4, 16, ECF No. 299.). It is irrelevant whether its New York office had anything to do with those actions. It is enough that Clearstream's Luxembourg operations repeatedly had contacts with New York by virtue of its account at Citibank—and that the account has, at all relevant times, been connected with the Blocked Assets. *See Licci II,* 2012 WL 5844997 ("[T]he 'arise-from' prong [of C.P.L.R. § 302(a)(1)] limits the broader 'transaction-of-business' prong to confer jurisdiction only over those claims in some way arguably connected to the transaction.").

Finally, applying the *Asahi* factors suggests that exercising personal jurisdiction with respect to Clearstream is reasonable. The interests with respect to Clearstream are nearly identical to those for UBAE. And the burden on Clearstream to defend a suit in this Court is minimal given Clearstream's continuous and systematic contacts with New York.

Clearstream is subject to this Court's general personal jurisdiction and, in the alternative, plaintiff makes out a prima facie case of "transacting business" jurisdiction under the New York long-arm statute. Clearstream's Rule 12(b)(2) motion to dismiss is denied.

B. *Bank Markazi's Motion to Dismiss*

Bank Markazi has moved to dismiss plaintiffs' claims on the basis of a lack of subject matter jurisdiction, pursuant to Fed.R.Civ.P. 12(b)(1). Bank Markazi argues that (1) plaintiffs' TRIA § 201 claim raises a non-justiciable political question, (2) that the assets are technically not "of"—*i.e.,* not owned by—Bank Markazi, (3) that the situs of the bonds is outside the jurisdiction of this Court, (4) that execution would violate U.S. obligations under the 1955 Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran ("Treaty of Amity"), Aug. 15, 1955, 8 U.S.T. 899, and finally (5) that the assets are immune central banking assets under FSIA § 1611(b)(1).

i. *Rule 12(b)(1) Standard of Review*

***20** Federal district courts are courts of limited jurisdiction. Challenges to a court's subject matter jurisdiction are challenges to the ability of the Court to entertain an action in the first instance. The party invoking federal subject matter jurisdiction bears the burden of establishing that jurisdiction exists by a preponderance of the evidence. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561 (1992); *Makarova v. United States,* 201 F.3d 110, 113 (2d Cir.2000). Determining the existence of subject matter jurisdiction is a threshold inquiry; a case is properly dismissed under Fed.R.Civ.P. 12(b)(1) when the district court lacks the constitutional power to adjudicate it. *See Arar v.. Ashcroft,* 532 F.3d 157 168 (2d Cir.2008).

A defendant may challenge either the legal or factual sufficiency of plaintiffs' assertion of jurisdiction. *Nat. Union Fire Ins. Co. of Pittsburgh v. BP Amoco PLC,* 319 F.Supp.2d 352, 371 (S.D.N.Y.2004). In determining whether this Court has subject matter jurisdiction over plaintiffs' actions, it must accept as true all material factual allegations in the SAC, but because jurisdiction must be shown affirmatively, this Court must refrain from drawing inferences favorable to the parties asserting jurisdiction (here, plaintiffs). *See APWU v. Potter,* 343 F.3d 619, 623 (2d Cir.2003). The Court can resolve disputed factual issues by reference to evidence outside of the pleadings. *See Flores v. Southern Peru Copper Corp.,* 343 F.3d 140, 161 n.30 (2d Cir.2003); *see also Makarova,* 201 F.3d at 113.

ii. *Analysis as to Bank Markazi*

An analysis of the facts regarding the actions and assets of Bank Markazi in this district leaves no serious doubt that this Court has subject matter jurisdiction.

1. *Political Question*

Courts lack authority to decide non-justiciable political questions. *Zivotofsky ex rel. Zivotofsky v. Clinton,* 132 S.Ct. 1421, 1427, 182 L.Ed.2d 423 (2012). Bank Markazi argues that the European Union's ("E.U.") blocking regime has frozen all assets of the Central Bank of Iran and thereby created a non-justiciable political question with respect to any action this Court might take under U.S. law that would impact the holders of the Blocked Assets under European law.

In 2010, the E.U. enacted regulations that froze "all funds and economic resources belonging to, owned, held or controlled

by the persons, entities and bodies listed in [certain annexes].” *See* Council Regulation (EU) No. 961/2010, Article 16(1)-(3). These regulations also provide that “no funds or economic resources shall be made available, directly or indirectly, to or for the benefit of the natural or legal persons, entities or bodies listed in [certain annexes].” *Id.*

Bank Markazi was not listed on the original annexes. However, on January 24, 2012—just prior to the issuance of E.O. 13599 in the United States—it was added. *See* Council Implementing Regulation (EU) No. 54/2012 of January 23, 2012, Article 1.1 (Annex VIII ¶ 51).

***21** In addition, article 23(2) of an EU regulation passed in March 2012 consolidated previous regulations and explicitly maintained the freeze on assets of the Central Bank of Iran. Council Regulation (EU) No. 267/2012, Arendt III ¶¶ 51–52 & Exh. J. The freezing of funds prevents “any move, transfer, alteration, use of, access to, or dealing in funds in any way that would result in any change in their volume, amount, location, ownership, possession, character, destination, or other change that would enable the funds to be used, including portfolio management.” *Id.*

According to Bank Markazi, the EU regulations change everything. It argues that, even assuming that the Blocked Assets are assets “of” Bank Markazi (which, as discussed below, it argues is incorrect), the EU blocking regime presents direct competition with E.O. 13599—competition that implicates foreign relations concerns and must be resolved by the political—not judicial—branches of government. (*See* Bank Markazi Reply Mem. in Support of Mot. to Dismiss (“Markazi MTD Reply”) at 3–4 (adopting Clearstream Reply Memorandum in Support of its Renewed Mot. to Vacate Restraints (“Clearstream Mot. to Vacate Reply”) at 9–16, ECF No. 220).)

The facts giving rise to this conflict are both simple and technical: a debit to the Blocked Assets in Clearstream's Omnibus Account at Citibank in New York by virtue of turnover would require a corresponding debit in Clearstream's Luxembourg account-constituting a direct violation of the EU Regulation. [8]

In connection with this motion only, in order to allow the Court to decide the issue, Bank Markazi affirmatively makes the following factual assumptions: that the underlying beneficial owner of the Blocked Assets is Bank Markazi, that Bank Markazi's transfer to UBAE has been “undone” such that the assets remain in an account between Clearstream and Bank Markazi, that this Court can exercise personal jurisdiction over Clearstream in New York, and that all of the other actions by other banks and issuers occurred in New York. (*See Id.* at 4–6 (argument adopted by Bank Markazi as explained in Clearstream brief).)

2. *Political Question Analysis*

The E.U. and U.S. blocking regimes are not here in “competition”, and they do not create a non-justiciable political question.

Whether or not a question is “political,” and therefore non-justiciable, is determined by reference to six factors:

> [(1)] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [(2)] a lack of judicially discoverable and manageable standards for resolving it; or [(3)] the impossibility of deciding without an internal policy determination of a kind clearly for non-judicial discretion; or [(4)] the impossibility of the court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or [(5)] an unusual need for unquestioning adherence to a political decision already made; or [(6)] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

***22** *Baker v. Carr,* 369 U.S. 186, 217 (1962); *see also 767 Third Ave. Assocs. V. Consulate Gen. of Socialist Fed. Republic of Yugoslavia,* 218 F.3d 152, 160 (2d Cir.2000).

Bank Markazi argues that the EU and U.S. blocking regimes raise important questions of foreign relations, lack judicially manageable standards, and generally raise *Baker v. Carr* concerns. This Court disagrees.

To the extent that the differential treatment of the assets of terrorist states raises foreign relations concerns, the executive and legislative branches have demonstrated a clear intent that not only permits but affirmatively encourages the judiciary to resolve the issues surrounding restraint and turnover of such assets. As set out above, the sheer multitude of statutory and executive pronouncements directly and unquestionably applicable to the motions before this Court makes any political question argument baseless.

Bank Markazi can point to no aspect of the Constitution that commits the treatment of a hypothetical turnover of U.S.-based assets by a foreign legal system to a "coordinate political department". Instead, Congress and the President agree that it is the province of the judiciary to determine the effect, if any, of these competing regimes: provisions of the FSIA, as described above, enable courts to enforce judgments against sovereigns when those judgments relate to acts of terrorism; TRIA allows a court to execute against blocked assets of a terrorist party; E.O. 13599 provides that assets of Iran and the Central Bank of Iran are blocked; the SDN list indicates that Iran and Bank Markazi are on the list of blocked terrorist organizations; and finally, the most recent pronouncement, 22 U.S.C. § 8772, specifically provides that the assets at issue *in this very lawsuit* are subject to execution and attachment in aid of execution.

Nor can there be a suggestion of a lack of judicially manageable standards to resolve the potential friction between the U.S. and E.U. regimes. Congress enacted 22 U.S.C. § 8772 in *August 2012*—well after March 2012, when the EU promulgated the last of its blocking Regulations referred to by Clearstream. Congress certainly could have altered the statute in light of the E.U. regulations; it chose not to do so.

Instead, § 8772 gives this Court clear standards to rule on the questions before it with respect to these very assets. The statute spells out specific requirements for judicial determinations as to whether a non-Iranian entity has a constitutionally protected interest in the assets, or holds equitable or beneficial title or interest in the assets. *See* 22 U.S.C. § 8772(a)(2). Together, these various statutes and orders require this Court to find that it should rule on the very questions here presented. In addition, of course, it cannot be that a court must refrain from adjudicating a dispute where the potential exists for a foreign legal regime to impose penalties on a litigant based on the U.S. court's decision. Foreign ramifications alone do not create a non-justiciable political question. And they do not here.

3. *Ownership of the Blocked Assets*

***23** Bank Markazi next argues that the Blocked Assets are not assets "of" Bank Markazi. Bank Markazi states a showing of ownership is required for subject matter jurisdiction under TRIA § 201(a). [9]

Even if Bank Markazi were correct regarding TRIA (and it is not), that does not mean this court lacks subject matter jurisdiction. The 2012 Act, § 8772, specifically trumps "any other provision of law" and specifically permits execution on the assets specifically at issue in this litigation, rendering moot any ambiguity in TRIA. 22 U.S.C. § 8772(a)(1).

Even in the absence of § 8772, however, this Court finds that TRIA provides for subject matter jurisdiction with respect to Bank Markazi. It is true that TRIA authorizes execution of assets "of" a terrorist party. *See* 28 U.S.C. § 1610 n. (2006) ("[I]n every case in which a person has obtained a judgment against a terrorist party ... the blocked assets *of that terrorist party* ... shall be subject to execution ....") (emphasis added). In the case of the Blocked as Assets here at issue, Bank Markazi is the only owner. Clearstream—in whose name the Citibank account is listed—never claims it "owns" the assets. UBAE argues it has acted with respect to the assets merely on behalf of Bank Markazi. (*See* UBAE SJ Opp. Br. at 2 (stating UBAE "has not asserted a legally cognizable interest in the restrained bonds" and that "UBAE is not in 'possession or 'custody' of any of the restrained bonds"); Matranga Reply Decl. ¶¶ 7–10.) Citibank states that it is a neutral stakeholder. (*See* Letter of Sharon L. Schneier to the Hon. Katherine B. Forrest, Dec. 14, 2012, ECF No. 300).

Bank Markazi has repeatedly conceded at a variety of times in connection with this litigation—and Clearstream has stipulated for the limited purpose of resolving its motion to vacate the restraints, *infra*—Bank Markazi is "the" sole beneficial owner of the assets. [10]

Bank Markazi suggests that Judge Cote's decision in *Calderon–Cardona v. JPMorgan Chase Bank, N.A., 867 F.Supp.2d 389, 400 (S.D.N.Y.2011),* counsels a different result. [11] This Court disagrees.

The Court in *Calderon–Cardona* held that electronic funds transfers ("EFTs") allegedly related to North Korea were

not subject to attachment under TRIA and the FSIA. It is distinguishable in several respects: first, the *Calderon–Cardona* decision related to mid-stream EFTs—rapid funds transfers between a sending and receiving bank, processed by an intermediary bank—rather than the static proceeds of financial instruments. *Id*. A significant question in *Calderon–Cardona* was whether the EFTs were "owned" by North Korea at the time of the transfers. *Id.* In finding no such ownership, the Court noted Second Circuit precedent holding that—according to New York law—"EFTs are neither the property of the originator nor the beneficiary while briefly in the possession of an intermediary bank." *Id.* at 400 (*citing Shipping Corp. of India Ltd. v. Jaldhi Overseas Pte Ltd.*, 585 F.3d 58, 71 (2d Cir.2009)). Even if North Korea was the originator or beneficiary, then, it could not be the "owner" of the EFTs for the purposes of TRIA. *Id.* The Court concluded that "[t]he petitioners have pled no facts ... indicating that North Korea has an interest in any of the blocked accounts that exceeds that of an originator or beneficiary in a midstream EFT." *Id.* at 407.

***24** In contrast, here, nearly $2 billion in bond proceeds is sitting in an account in New York at Citibank—there are no fleeting or ephemeral interests like those that occur in EFTs. The only entity with any financial interest in the funds in the account is Bank Markazi—as it has stipulated for the purposes of this motion, but also as it has repeatedly asserted. Clearstream has no such interest; UBAE's interest is analogous to that of Clearstream (and, as it states, it has no legally cognizable interest). Any possible contrary interpretation under state law is expressly preempted by the express language of § 8772.

Accordingly, on these facts, this Court need not choose whether it is necessary to follow the *Calderon–Cardona* rationale or those of the other cases in this District involving EFTs. *See, e.g., Hausler v. JP Morgan Chase Bank, N.A.* (hereinafter "Hausler I"), 740 F.Supp.2d 525 (S.D.N.Y.2010); *Hausler v. JP Morgan Chase Bank, N.A.* (hereinafter "Hausler II"), 845 F.Supp.2d 553 (S.D.N.Y.2012); *Levin v. Bank of N.Y.*, No. 09 Civ. 5900, 2011 WL 812032 (S.D.N.Y. Mar. 4, 2011). All of the EFT cases attempt to answer whether transfers between financial institutions that pass through a banking institution within the U.S. are nonetheless "assets of" the terrorist party to whose benefit the transfers may ultimately inure. *See, e.g., Hausler I,* 740 F.Supp.2d at 526; *Hausler II,* 845 F.Supp.2d at 558–561; Levin, 2011 WL 812032, at *11. Only one of the cases—*Levin*—dealt with any proceeds of financial instruments; the Court in *Levin* issued a turnover order for those assets. *See Levin,* 2011 WL 812032, at *20–21 (finding no bar under New York law to turnover of non-EFT accounts allegedly owned by instrumentalities of Iran).

4. *Location of the Blocked Assets and Treaty of Amity*

Markazi's remaining arguments—(1) that the bonds are not located in the United States and therefore cannot be executed upon under FSIA and (2) that blocking the assets violates U.S. treaty obligations—fail for the same reason: 22 U.S.C. § 8772 obviates any need for this Court to rely on TRIA or the Treaty of Amity for resolution of this motion.

However, even if this Court were to ignore § 8772, the arguments nonetheless fail.

First, Bank Markazi argues that the Markazi Bonds are located in Luxembourg and thus outside this Court's jurisdiction. (*See* Markazi MTD Reply Br. at 6.) They cite this Court's decision in a related case, *Bank of Tokyo–Mitsubishi, UFJ, Ltd. New York Branch v. Peterson,* No. 12 Civ. 4038(BSJ), 2012 WL 1963382, at *2 (S.D.N .Y. May 29, 2012), for the proposition that assets held outside the United States are not subject to execution.

This "extra-territoriality" argument assumes that the Blocked Assets are located outside of the United States. This argument is sophistry: the Blocked Assets are located in a bank account at Citibank in New York (additional assets relating to the now liquidated $250 million in Markazi Bonds do not appear to be in New York, but their location is irrelevant to the resolution of this motion). It may well be that there are account entries on the books of entities in Europe—such as Clearstream Luxembourg—relating to the Blocked Assets. But the mere fact that the account at Citibank is listed under the Clearstream and UBAE names does not alter the fact that those entities are agents of Bank Markazi. Nor do mere book entries in Luxembourg transform the Citibank New York account into assets located in Luxembourg. [12]

***25** In addition, the Treaty of Amity provides no barrier to subject matter jurisdiction. Bank Markazi argues that Arts. III.2 and IV.1 of the Treaty entitle it to separate juridical status from Iran and, as such, its assets cannot be seized to satisfy a judgment against the sovereign state. (Markazi MTD Br. at 22.)

The treaty is inapplicable. First, irrespective of any interpretation of the language of the Treaty, in *Weinstein v. Islamic Republic of Iran,* 609 F.3d 43, 53 (2d Cir.2010) the Second Circuit stated that the phrase "notwithstanding any other provision of law" in FSIA effectively trumps any conflicting law. As to the textual interpretation of the Treaty itself, the *Weinstein* Court held that the Treaty of Amity provisions cited by Bank Markazi are inapposite; the purpose behind the Treaty of Amity was "simply to grant legal status to corporations of each of the signatory countries in the territory of the other, thus putting the foreign corporations on equal footing with domestic corporations ." *Id.* at 53. There is no basis to find that the Treaty was intended to be used or has been used to aid instrumentalities of foreign governments to circumvent congressional acts or authorized legal actions.

Lest any ambiguity remain, Congress inserted an additional "notwithstanding" clause in 22 U.S.C. § 8772(a)(1). That clause evinces clear Congressional intent to abrogate treaty language inconsistent with FSIA and § 8772. *Id.* (noting Circuit Courts have interpreted similar "notwithstanding" clauses to abrogate treaty language). To do otherwise would render FSIA a dead letter—something Congress and the President clearly did not intend.

Thus, the plain language of the Treaty of Amity renders it inapplicable to the Blocked Assets and, further, Congress has abrogated any application of the Treaty in the FSIA context.

5. *Central Bank Immunity*

Bank Markazi's final set of arguments assert FISA § 1611(b)(1) immunity from attachment for assets used for central banking purposes. FSIA § 1611(b)(1) provides that "the property ... of a foreign central bank or monetary authority held for its own account" is entitled to immunity from attachment and execution. The Court only has jurisdiction to hear a turnover action for sovereign assets where a valid exception to FSIA exists; the central banking rule negates any FSIA exception. *See Aurelius Capital Partners, LP v. Republic of Argentina,* 584 F.3d 120, 129–30 (2d Cir.2009) (citing FSIA § 1609).

Again, even if the Blocked Assets were, in fact, "held for [the central bank's] own account," TRIA § 201(a), E.O. 13599, and 22 U.S .C. § 8772 expressly preempt any immunity.

Congress is presumed to be aware of its previous enactments when it passes a new statute. *See Vimar Seguors y Reaseguros, S.A. v. M/V Sky Reefer,* 515 U.S. 528, 554 (1995) (*citing Cannon v. Univ. of Chicago,* 441 U.S. 677, 696–699 (1999)). TRIA's "notwithstanding" clause—enacted well after § 1611(b) was adopted in 1976—thus preempts central bank immunity to the extent it would apply. TRIA § 201(a). As the Supreme Court has observed, "a clearer statement" of intent to supersede all other laws than a "notwithstanding clause" is "difficult to imagine" *Cisneros v. Alpine Ridge Group,* 508 U.S. 10, 18 (1993).

***26** Beyond the statutory language, E.O. 13599 suggests that Bank Markazi is not engaged in activities protected by § 1611(b), and thus is not entitled to immunity. The Order makes a finding that Bank Markazi's assets are blocked "in light of the deceptive practices of [Bank Markazi] and other Iranian banks to conceal transactions of sanctioned parties ... and the continuing and unacceptable risk posed to the international financial system by Iran's activities ..." E.O. 13599. This executive determination suggests that the activities of Bank Markazi are not central banking activities that would provide § 1611(b) immunity. *See NML,* 652 F.3d at 172 (setting forth functional test for central banking activities).

Finally, § 8772 also applies "notwithstanding any other provision of law, *including any provision of law relating to sovereign immunity* [.]" 22 U.S.C. § 8772(a)(1) (emphasis added). Assuming—as the Court finds below—that § 8772 is valid, it must also find no central bank immunity.

In light of the above conclusions, there is no doubt that this Court has subject matter jurisdiction with respect to claims asserted against Bank Markazi. Its motion to dismiss is denied.

IV. MOTION TO VACATE RESTRAINTS

A. *Background and Procedural History*

As set forth above, in 2008, plaintiffs obtained writs of attachment and execution against an account that Clearstream maintained at Citibank, imposing restraints—restrictions against the transfer or disposal of the assets in that account. That account was used to manage proceeds connected to the Markazi Bonds.

In June 2008, Clearstream challenged the restraints and this Court held an evidentiary hearing. At that hearing, Clearstream presented evidence that "at one time Clearstream's [customer, the Central Bank of Iran ("Bank

Markazi"), was the underlying beneficial owner of the securities entitlements identified in the restraints, but that in February 2008] Bank Markazi [transferred all but one of its securities entitlements to the bonds identified in the restraints from its account at Clearstream to an account with another Clearstream customer], Banca UBAE S.p.A." (*See* Clearstream's Consol. Mem. in Supp. Of Mot. To Vacate Restraints ("Clearstream Vacate Br.) at 3.) At that hearing, a Clearstream employee testified that he did not know whether Bank Markazi remained the beneficial owner of the securities entitlements. (*Id* .) At the conclusion of the hearing, Judge Koeltl lifted the restraints as to the two bonds that had been sold to customers other than UBAE (valued at approximately U.S. $250 million). The restraints were not lifted as to the remaining assets held in Clearstream's Omnibus Account at Citibank. (*Id.* at 4.)

At a June 27, 2008, hearing, Clearstream moved again to vacate the remaining restraints—this time pursuant to the Uniform Commercial Code ("UCC"), § 8–112(c). Clearstream argued that neither it nor Citibank was a proper "garnishee" under the provision. Clearstream further argued that the restraints should be lifted since the securities entitlements were Clearstream's and not Bank Markazi's. (*Id.*)

***27** On June 23, 2009, Judge Barbara Jones held that Clearstream was not a proper garnishee under § 8–112(c) of the UCC because all but one of the securities at issue were held at Clearstream in the name of UBAE, rather than Bank Markazi. (*See* Order, *Peterson et al. v. Islamic Republic of Iran et al.* (S.D.N.Y. June 23, 2009), ECF No. 171.) Bank Markazi, as an instrumentality of Iran, was the only proper garnishee under UCC § 8–112(c). The Order noted that it was possible, however, that the transfer of the Bank Markazi securities to the UBAE account was fraudulent and that Bank Markazi therefore remained the true holder of the securities. (*Id.*) She held that the restraints would remain in place pending a further judicial determination as to (1) whether such transfers could be fraudulent as a matter of law, (2) if they were, in fact, fraudulent, and (3) if Clearstream was (or could be made) a proper garnishee. (*Id.*)

The parties then briefed whether a judicial determination that the conveyance was fraudulent would alter the UCC analysis and whether Clearstream could in any event be a proper garnishee. (*See* Letter of Frank Panopoulos to Hon. Barbara S. Jones (hereinafter "Clearstream Restraints Br."), Aug. 14, 2009, ECF No. 181; Letter of Liviu Vogel to Hon. Barbara S. Jones (hereinafter "Pls.' Restraints Br."), Sept. 19, 2009, ECF No. 183). In the same briefing, plaintiffs also raised alternative theories supporting turnover of the same assets. (Pls.' Restraints Br. at 4–6.) The Court never issued a subsequent ruling addressing those arguments. Those arguments were then re-briefed and consolidated into Clearstream's motion to vacate now pending before this Court and resolved herein. (*See* Renewed Mot. To Vacate Restraints, ECF No. 174.)

Clearstream's motion to vacate initially relied upon the following five arguments:

- Clearstream is not a proper garnishee under UCC § 8–112(c);
- According to UCC § 8–110, Bank Markazi's assets or interests are located in Luxembourg and not this district and must be restrained there;
- Common law "situs" rules are not applicable as a basis to restrain or turnover the assets;
- The restrained assets are not "Blocked Assets" under TRIA;
- Equitable relief is unavailable to restrain and turnover the blocked assets.

In its reply memorandum on this motion, Clearstream adds a sixth argument—that the competing E.U. and U.S. blocking regimes present a non-justiciable political question, the same argument the Court rejected, *supra,* with respect to Bank Markazi's motion to dismiss.

In response to this series of arguments, plaintiffs contend that (1) the EU Regulation does not create a non-justiciable political question; (2) the UCC is inapplicable to the questions before this Court because TRIA preempts conflicting state law and the Blocked Assets are therefore subject to both the restraints and to turnover; (3) TRIA and E.O.13599 render the situs argument inapplicable; and (4) that the restrained assets are designated as Blocked Assets. According to plaintiffs, New York's CPLR permits enforcement of plaintiffs' judgments against the cash held in the Omnibus Account.

B. *Analysis*

***28** "Enough is enough" is the reductionist version of plaintiffs' response to Clearstream's motion to vacate. This Court agrees.

i. *Political Question*

The Court rejected the political question argument with respect to Bank Markazi's motion to dismiss and Clearstream's version of the argument is not materially different.

Clearstream adds only one novel aspect to its political question argument: it argues that a turnover order will subject it to inconsistent obligations in the United States and Europe. If the plaintiffs were to obtain a turnover order, the resulting debit in the Luxembourg book entry might violate the E.U. blocking regime and Clearstream's obligation to Bank Markazi.

However, even if a change in the Clearstream accounts in the U.S. will cause a book entry in Luxembourg—placing Clearstream at risk of violating of EU Regulations—that issue is one left to Clearstream to address in the EU. As stated above, if this Court were required to hypothesize as to the implications of foreign regulations with respect to actions before it, paralysis would result in numerous situations: U.S. courts would no doubt be inundated with such issues brought forward tactically. There is no such hardline rule, and in a world of transnational commerce there should not be.

ii. *Remaining Arguments for Vacating the Restraints*

The same statute—22 U.S.C. § 8772—crucial to resolving Bank Markazi's motion to dismiss also answers the remaining arguments Clearstream has raised in support of its motion to vacate. Section 8772 specifically preempts "any other provision of law" including "any inconsistent provision of state law." 22 U.S.C. § 8772(a) (1). Accordingly, this Court need not address the potpourri of UCC-based arguments raised by Clearstream: Section 8772 provides that, so long as the appropriate judicial determinations are made, there is no *legal* barrier to execution on the Blocked Assets.

Accordingly, the Court denies Clearstream's motion to vacate the restraints.

V. PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiffs have moved for partial summary judgment against defendants Clearstream, Bank Markazi, and UBAE [13] on their cause of action for turnover of the approximately $1.75 billion [14] in Blocked Assets, held in the Omnibus Account at Citibank. [15]

The Court has already determined that the assets at issue are properly restrained. The question before the Court is now whether there exist triable issues of fact as to whether those assets are subject to turnover.

While both Clearstream and Bank Markazi raise additional arguments (many of which were already raised in the prior motions), the crux of this motion is really a single question: is there a triable issue as to whether the Blocked Assets are owned by Bank Markazi? In the context of the motion to vacate the restraints, Clearstream had stipulated that UBAE had no beneficial interest and the transfer between UBAE and Bank Markazi was unwound. There is no such stipulation on this motion.

***29** For the reasons set forth below, this Court finds that the record evidence is clear and one-sided: there is no triable issue on this question. No rational juror could find that any person or entity—other than Bank Markazi—has a constitutional, beneficial or equitable interest in the Blocked Assets; plaintiffs are therefore entitled to turnover as a matter of law.

Defendants also argue that turnover would run afoul of certain constitutional rights: first, that the specific statutory provision, 22 U.S.C. § 8772 is an invalid legislative act of adjudication that violates Article III; second, that it constitutes an unlawful bill of attainder, U.S. Const. art. I, § 9, cl. 3; third, that turnover would amount to an unconstitutional taking in violation of their due process rights. *See* U.S. Const. amend. V. None of these arguments has merit.

A. *Legal Standard for Summary Judgment*

Summary Judgment, as to all or part of a claim, is warranted if the pleadings, the discovery and disclosure materials, along with any affidavits that are admissible, demonstrate that there is no genuine issue of fact necessitating resolution at trial. Fed.R.Civ.P. 56(c); *see also Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247 (1986); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322–323 (1986). A party moving for summary judgment bears the initial burden of demonstrating that no genuine issue of material fact exists; all reasonable inferences should be drawn in favor of the non-moving party. *See Anderson,* 477 U.S. at 255; *Grady v. Affiliated Cent., Inc.,* 130 F.3d 553,

559 (2d Cir.1997). The burden then shifts to the non-moving party to come forward with "admissible evidence sufficient to raise a genuine issue of fact for trial in order to avoid summary judgment." *See Jaramillo v. Weyerhauser Co.,* 536 F.3d 140, 145 (2d Cir.2008). Where the non-moving party would bear the ultimate burden of proof on an issue at trial, the moving party satisfies its burden on the motion by pointing to an absence of evidence to support an essential element of the non-movant's claim. *See Libraire v. Kaplan,* CV No. 06–1500, 2008 WL 794973 at *5 (E.D.N.Y. Mar. 24, 2008). Where it is clear that no rational trier of fact could find in favor of the non-moving party, summary judgment is warranted. *Gallo v. Prudential Residential Servs., Ltd.,* 22 F.3d 1219, 1223 (2d Cir.1994). The mere possibility that a dispute may exist, without more, is not sufficient to overcome a convincing presentation by the moving party." *Anderson,* 477 U.S. at 247–48. Mere speculation or conjecture is insufficient to defeat a motion. *W. World Ins. Co. v. Stack Oil, Inc.,* 922 F.2d 118, 121 (2d Cir.1990).

B. *Analysis*

As stated above, in opposition to this motion, defendants have filled the proverbial kitchen sink with arguments. As the Court has reviewed the thousands of pages of briefing on and in support of these motions, building in a crescendo to the instant motion, it cannot help but be reminded of the grand finale in a Fourth of July fireworks show—all arguments thrown in and set off at once. While this Court has carefully reviewed all of defendants' various arguments, it will not address each of them here. [16] It need not do so because the basic question and the dispositive legal principles do not require descent into those waters—or into that sink, to mix metaphors.

i. *The Blocked Assets are Bank Markazi's*

***30** Clearstream argues that there are triable issues as to whether Bank Markazi is the "owner of" the Blocked Assets. As with similar arguments made in the context of the motion to dismiss, the arguments made in support of this assertion are based on laws preempted by 22 U.S.C. § 8772.

As noted above, § 8772 requires the Court to determine who—other than an agency or instrumentality of Iran—has a constitutional, beneficial or equitable interest in the assets at issue. None of the defendants cite authority or facts supporting that any entity other than Bank Markazi has such an interest.

On this record and as a matter of law no other entity could have an equitable or beneficial interest. A beneficial interest is "[a] right or expectancy in something ... as opposed to legal title to that thing." Interest, Black's Law Dictionary (9th ed.2009). The key factor is whether "the property benefitted [the beneficial owner] as if he had received the property directly. *See Exp.-Imp. Bank of U.S. v. Asia Pulp & Paper Co., Ltd.,* 609 F.3d 111, 120 (2d Cir.2010) (*citing United States v. Coluccio,* 51 F.3d 337, 341 (2d Cir.1995)). Clearstream's only role with regard to the Blocked Assets is as the agent of Bank Markazi. Even absent the restraints, it fails to proffer any evidence that it has the right to use or move the Blocked Assets held at Citibank without express permission or direction from Bank Markazi. Nor does Clearstream have equitable title, "a beneficial interest in property [that] gives the holder the right to acquire formal legal title." *Lippe v. Genlyte Group Inc.,* 98 CIV. 8672(DC), 2002 WL 531010 (S.D.N.Y. Apr. 8, 2002) (*citing* Black's Law Dictionary 1493 (7th ed.1999)). Clearstream does not allege—and puts forward no facts—that it has legal title or the right to acquire that title for the Blocked Assets. UBAE disclaims any "legally congnizable interest" in the Citibank proceeds. [17] They are both merely account holders without authority to move or use the assets in the absence of direction. They simply—like Citibank—maintain that account on behalf of another, Bank Markazi.

In addition, Bank Markazi's arguments that it is immune from pre- or post-judgment attachment depend upon preempted provisions of the FSIA. *See* 22 U.S.C. § 8772(a).

Bank Markazi has repeatedly insisted that it is the sole beneficial owner of the Blocked Assets. As set forth above, but bears repeating in the context of the Court's analysis of this motion, in various submissions Bank Markazi has asserted that "Over $1.75 billion in securities *belonging to Bank Markazi* ... are frozen in a custodial Omnibus Account at [Citibank]"; that the "Restrained Securities are the *property of Bank Markazi,* the Central Bank of Iran", that the "aggregate value of the remaining bond instruments, *i.e.* the Restrained Securities that are the *property of Bank Markazi* and the subject of the Turnover Action—is thus $1,753 billion"; that the "Restrained Securities are the *property of a Foreign Central Bank* ..."; that the "Restrained Securities are presumed to be the *property of* Bank Markazi"; and "the Restrained Securities are *prima facie the property of a third party, Bank Markazi* .... " (*See* Bank Markazi's First Mem. of L. in Support of its Mot. to Dismiss the Am. Compl., May 11, 2011, ECF No. 18 ("Markazi's First MOL"), at 1, 5, 9, 10, 36

(emphases added).) In addition, two officers of Bank Markazi have sworn under penalty of perjury that the Blocked Assets are the "sole property of Bank Markazi and held for its own account ." (Aff. of Gholamossein Arabieh ¶ 2, Vogel Decl. Ex. J, Oct. 17, 2010, ECF No. 210; Aff. of Ali Asghar Massoumi ¶ 2, Vogel Decl. Ex. K, Oct. 17, 2010, ECF No. 210).

***31** There simply is no other possible owner of the interests here other than Bank Markazi; there is no triable issue of fact.

ii. *Constitutional Arguments*

Bank Markazi and Clearstream urge that, if this Court determines that the assets are subject to turnover pursuant to § 8772, prior to doing so it must consider whether that statute passes constitutional muster. In this regard, their arguments combine both general constitutional arguments with specific arguments directed at 22 U.S.C. § 8772. As set forth above, § 8772(a)(5) provides that this Court must make a judicial determination as to whether another person has a constitutionally protected interest in the assets. The Court has made such a determination, and no other person has such an interest.

Clearstream and Bank Markazi's various constitutional arguments are without merit. [18]

a. *Separation of Powers*

First, defendants Clearstream and Bank Markazi argue that, pursuant to Article III of the Constitution, 22 U.S.C. § 8772 is a congressional act violative of the separation of powers. (*See* Bank Markazi Supp. Mem. of L. in Opp. to Pls.' Mot. for Partial Summ. J. ("Markazi Supp. SJ Br.") at 10–12.) They argue that, in passing § 8772, Congress effectively dictated specific factual findings in connection with a specific litigation—invading the province of the courts. (*Id.*) *See U.S. v. Klein,* 80 U.S. 128, 146 (1871) (Congress may not prescribe rules of decision). According to Bank Markazi, the statute's requirement of judicial determinations does not save it since those determinations are "legislative fig lea[ves]" that pre-determine a finding that turnover is required. (Markazi Supp. SJ Br. at 12.)

This argument ignores the structure of the statute. The statute does not itself "find" turnover required; such determination is specifically left to the Court. The statute is not a self-executing congressional resolution of a legal dispute, but rather requires the Court to make determinations regarding (1) whether and to what extent Iran has a beneficial or equitable interest in the assets at issue, and (2) whether constitutionally-protected interest holders *other than* Iran are present. These determinations are not mere fig leaves; it is quite possible that the Court could have found that defendants raised a triable issue as to whether the Blocked Assets were owned by Iran, or that Clearstream and/or UBAE have some form of beneficial or equitable interest. Any such finding of true third party interest could limit—or even eliminate turnover (at least at this time). The statute merely "chang[es] the law applicable to pending cases;" it does not "usurp the adjudicative function assigned to the federal courts[.]" *See Axel Johnson, Inc. v. Arthur Andersen & Co.,* 6 F.3d 78, 81 (2d Cir.1993). There is frankly plenty for this Court to adjudicate.

b. *Bills of Attainder and Ex Post Facto Law*

Similarly, § 8772 does not violate the constitutional prohibition against bills of attainder or ex post facto laws. Bills of attainder exist when a congressional act (1) legislatively determines guilt, and (2) and inflicts punishment upon an identifiable individual, (3) without the protections accompanying a trial. *See Nixon v. Adm'r of Gen. Svcs.,* 433 U.S. 425, 468 (1977). A critical aspect of a bill of attainder is its retrospective nature—classically, defining conduct which has already occurred (and was legal when it occurred) as illegal. *Consol. Edison Co. v. Pataki,* 292 F.3d 338, 349 (2d Cir.2002). In short, it is an ex post facto declaration or finding of guilt by legislative act.

***32** Here, there is no retrospective "punishment" enacted against any defendant. As the Court found above, the financial intermediaries—UBAE and Clearstream—have no constitutional, beneficial, or equitable interest in the assets at issue; thus, it is impossible for seizure of those assets to constitute "punishment" as to them. As to Bank Markazi, now many years ago plaintiffs obtained default judgments as to liability and damages against the Iranian Government. Iran's conduct leading to such determinations was based on established common law principles. Iran's liability and its required payment of damages was therefore established years prior to the 2012 Act. At issue now is merely execution on assets present in this district, in connection with those judgments. Prior to the 2012 Act, the FSIA and TRIA, along with the CPLR, supported restraint and execution against those assets. Section 8772 is thus a legislative act that does not determine "guilt". The law is clear that forbidden legislative punishment is not involved "merely because [the act] imposes burdensome consequences." *Nixon,* 433 U.S. at 742.

Section § 8772 is therefore also not backward-looking; it did not change the reasonable expectations of parties as to which assets may be subject to attachment and turnover. Indeed, this litigation regarding attachment of the assets at issue was commenced long before the passage of § 8772.

c. *Takings*

Nor does the statute effect an unconstitutional taking without just compensation as to either Clearstream or Bank Markazi. The Takings Clause of the Constitution provides that "private property [shall not] be taken for public use, without just compensation." U .S. Const. Amdt. V.

Clearstream has no constitutionally protected property interest in the Blocked Assets. It makes a purely legal argument that such an interest arises from its alleged right to payment from Citibank. This argument is without merit. Clearstream is in no different position from Citibank: it is merely a stakeholder without any cognizable interest in the resolution of this dispute on the merits. No doubt it views it necessary for client relations to advocate forcefully against negative impacts to *its client's* (Bank Markazi) interests, but the fact remains that there is no record evidence that it is acting as anything other than an agent; it does not own the assets at issue.

The cases which Clearstream cites in support of its position do not alter this analysis. For instance, *Lucas v. S.C. Coastal Council,* 505 U.S. 1003, 1019 (1992), refers to a taking as extinguishing a property right. *Lucas* related to real property. Of course, Clearstream's interest in the Blocked Assets is one of account entry only—it provides services with respect to assets for its clients, UBAE, on behalf Bank Markazi. Nothing in the record supports that Clearstream could unilaterally choose to use those assets.

The regulatory takings doctrine set forth in *Penn Central Transp. Co. v. N.Y.,* 438 U.S. 104, 124 (1978), also cited by Clearstream, is similarly inapposite. There, the Supreme Court found that a regulation—structured in a particular manner—could result in a taking. When faced with such issues, courts are to ask about (1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation has interfered with distinct investment-backed expectations ... and (3) the character of the government action. Clearstream's only argument in support of such a regulatory taking is that as a stakeholder, if the assets are turned over, it might be exposed to claims from Bank Markazi. That is no different from Citibank's position. Clearstream does not have distinct investment-backed expectations—indeed, it cannot use these funds itself. The regulatory structure surrounding turnover provides for ample (and there certainly has been ample) due process in furtherance of an important and reasonable governmental interest in pursuing its national security goals.

***33** Finally, of course, Clearstream's rights and obligations are frankly no different under § 8772 than in the absence of that statute. The statute perhaps allows a court, if it were at the beginning of this process, to weed out baseless arguments. However, the outcome of this matter is neither entirely nor primarily dependent on the existence of § 8772. The combination of the FSIA, TRIA, and E.O.13599 would lead to the same result. Accordingly, § 8772 cannot be an independent "taking" of that to which Clearstream and UBAE are not entitled and Bank Markazi is no longer entitled.

For that reason Bank Markazi's suggestion that the statute effects a taking *per se*—completely appropriating Markazi's property and depriving it of all economically beneficial use—is incorrect. *See Lucas,* 505 U.S. at 1019. Markazi has no reasonable expectation in the assets at issue because, as the court held in *Hausler II,* once assets are blocked, "parties with interests in those assets have no reasonable expectation that their interests will not be diminished or extinguished."

Nor does § 8772 effect a taking for purely private use. Bank Markazi points out that the U.S. government "may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation." *Kelo v. Civy of New London, Conn.,* 545 U.S. 469, 477 (2005). The sole purpose of § 8772, Markazi argues, is to expropriate sovereign property for a purely private purpose. (*See* Markazi Supp. SJ Br. at 19.)

But the statute does not lack a public purpose. As the Court held in connection with another action seeking turnover of Iranian assets, awarding such assets does not violate the public use requirement where, as here, the Government seeks to address the " 'unusual and extraordinary threat to the national security, foreign policy, and economy of the United States' that ... Iran poses to the United States." *See In re 650 Fifth Ave. and Related Props.,* 777 F.Supp.2d 529, 576–77 (S.D.N.Y.2011) (*quoting* Exec. Order No. 12957, 60 FR 14615 (March 15, 1995)).

Moreover, even § 8772 requires that this Court make certain judicial determinations prior to ordering turnover: that no

party has a constitutional, beneficial or equitable interest in the property at issue. In connection with making these determinations, the Court has allowed many submissions; the many felled trees required for this Court to plow through are evidence of that process.

Finally, Clearstream's argument that turnover would violate Equal Protection also fails. The law is clear that legislation is presumed valid and will be upheld so long as it is reasonably related to a legitimate state interest. *See City of Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432, 440 (1985). There can be no serious dispute that § 8772 furthers the United States' legitimate interest in furthering its foreign policy with respect to Iran. Clearstream's argument that § 8772 unjustly discriminates against foreign intermediaries fails. The legislation is presumed valid—foreign intermediaries are entitled to no special treatment.

iii. *UBAE's Arguments*

***34** UBAE is in no different a position—it is another layer of stakeholder trying to shield Bank Markazi from turnover. Nowhere does UBAE assert—nor could it—that it is the true beneficial owner of the Blocked Assets. Indeed, it disclaims any legally cognizable interest. At most, it is a layer in the sandwich built to try and interfere with execution on those assets. Even if UBAE can control the Blocked Assets, that control is irrelevant; it simply fits within E.O. 13599's provision for a person acting "directly or indirectly" on behalf of Iran.

Nor has the notice given UBAE been deficient; it has been served with all motion papers and its counsel have attended the conferences in this action. UBAE makes no additional arguments here that could credibly change the outcome of this motion with respect to it, nor to the other defendants. As a mere agent of Bank Markazi, then, the Blocked Assets held in the name of UBAE are subject to turnover.

iv. *Defendants' other arguments against turnover*

Defendants' final array of arguments in opposition to this motion were already dispensed with on the basis of § 8772.

Defendants argue that (1) if this Court found that the assets are Bank Markazi's, allowing execution thereon would violate the Treaty of Amity; (2) if the assets are those "of" Bank Markazi, then plaintiffs have failed to demonstrate that there is no triable issue as to whether, under the FSIA § 1611(b)(1), they are assets used for central bank purposes; (3) that Bank Markazi is immune from pre-judgment and post-judgment attachment and that immunity cannot be waived, and (4) a variety of arguments regarding whether the assets are theoretically located in Luxembourg and not New York.

None of these arguments succeed. The Court specifically refers to earlier discussions relating to the arguments above. Section 8772 explicitly states the congressional intent that Iran be held accountable for the judgments against it. Importantly, the statute explicitly refers to those assets at issue in this action. Accordingly, Congress has itself swept aside defendants' final arguments.

On a motion for summary judgment, the Court must determine whether there is a triable issue of fact precluding turnover. As discussed above, there is not. Bank Markazi—the central bank of Iran—has repeatedly asserted it is the sole beneficial owner of the assets. No other party can raise a triable issue as to that, the ultimate question. And on the evidence in this record, no rational juror could find otherwise.

Plaintiffs' motion for partial summary judgment is granted.

VI. BLAND MOTION FOR EXECUTION

As a final matter, the Bland judgment creditors present a motion for execution under 28 U.S.C. § 1610.[19] The Bland group already possesses a § 1610 order, issued October 4, 2012, by the U.S. District Court for the District of Columbia. *See* Order, *Estate of Steven Bland, et al, v. Islamic Republic of Iran, et al,* 05–cv–2124 (RCL) (D.D.C. Oct. 4, 2012), ECF No. 84. They seek an additional order within this District.

***35** While the Court expresses no opinion as to the necessity of a § 1610(c) order in a TRIA action,[20] the Bland creditors make a sufficient showing for an order of execution under § 1610(c). That section of FSIA provides for execution of a valid judgment against an instrumentality of a terrorist state where (1) the Court "determine[s] that a reasonable period of time has elapsed following the entry of judgment", and (2) proper "notice required under section 1608(e)" has been given. 28 U.S.C. § 1610(c). Under § 1608(e), a defaulting foreign sovereign must be served in accordance with one of several methods, including "by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state ... to the Secretary of State" for transmittal via diplomatic note. 28 U.S.C. §§ 1608(a), (e).

The Bland judgment meets both of the § 1610(c) requirements. Claimants present a valid default judgment against Iran dated December 12, 2011. (Bland Mot. for Entry of Order Pursuant to 28 U.S.C. § 1610(c) ("Bland § 1610(c) Mot."), Ex. A, ECF No. 305.) Service on Iran via the Department of State was completed on July 4, 2012, in accordance with 28 U.S.C. § 1608(a). *See* Aff. of Service, *Estate of Steven Bland, et al, v. Islamic Republic of Iran, et al,* 05–cv–2124 (RCL) (D.D.C. Aug. 13, 2012), ECF No. 82. The Government of Iran has had more than 100 days as of the date of this Opinion and Order in which to respond to the Bland judgment; it has not. This period is reasonable for the purposes of § 1610(c). *See, e.g., Gadsby & Hannah v. Socialist Republic of Romania,* 698 F.Supp. 483, 486 (S.D.N.Y.1988) (two months constitutes a "reasonable period of time" under § 1610(c)); *Ferrostaal Metals v. S.S. Lash Pacifico,* 652 F.Supp. 420, 423 (S.D.N.Y.1987) (three months constitutes reasonable time under § 1610(c)).

The Bland creditors' motion for an order of attachment and/or turnover pursuant to 28 U.S.C. § 1610 is granted. They may proceed to collection of the Bland Judgment by attachment and/or execution, or by any other means permitted by applicable law against the assets of the Islamic Republic of Iran and the Iranian Ministry of Information and Security, in accordance with 28 U.S.C. §§ 1610(a), (b).

CONCLUSION

For these reasons and set forth more fully above, the following motions are DENIED:

- UBAE's Motion to Dismiss;
- Clearstream's Motion to Dismiss;
- Bank Markazi's Motion to Dismiss;
- Clearstream's Motion to Vacate the Restraints and Renewed Motion to Vacate the Restraints;

For the reasons set forth above, the following motions are GRANTED:

- Plaintiffs' Motion for Partial Summary Judgment;
- The Bland judgment creditors' motion for execution;

The parties shall confer and jointly and, not later than March 15, 2013, submit a proposed schedule to resolve the remainder of the case. If the parties are unable to agree, they shall set forth in a letter by the same date the matters and issues which they believe remain to be resolved and each party's proposed schedule.

***36** The Clerk of Court is directed to close the motions at ECF Nos. 174, 205, 209, 295, 299 (under seal), 301, and 305 (under seal).

SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2013 WL 1155576

Footnotes

1 The judgment creditor groups are defined as the plaintiffs in this action, as well as the third-party respondents named in defendant Citibank's interpleader petition. This includes the plaintiffs in the following actions: (1) *Peterson v. Islamic Republic of Iran* ("Peterson action"), No. 10 Civ. 4518(KBF) (S.D.N.Y.); (2) *Greenbaum et al. v. Islamic Republic of Iran, et al.* ("Greenbaum action"), 02 Civ. 2148(RCL) (D.D.C); (3) *Acosta, et al. v. Islamic Republic of Iran, et al.* ("Acosta action"), 06 Civ. 745(RCL) (D.D.C); (4) *Rubin, et al. v. Islamic Republic of Iran* ("Rubin action"), 01 Civ. 1655(RCL) (D.D.C); (5) *Estate of Heiser et al. v. Islamic Republic of Iran et al.* ("Heiser action"), 00 Civ. 2329 and 01 Civ. 2104(RCL) (D.D.C); (6) *Levin v. Islamic Republic of Iran* ("Levin action"), 05 Civ. 2494(GK) (D.D.C); (7) *Valore. et al. v. Islamic Republic of Iran, et al.* ("Valore action"), 03 Civ.1959(RCL) (D.D.C); (8) *Bonk, et al. v. Islamic Republic of Iran et al.* ("Bonk action"), 08 Civ. 1273(RCL) (D.D.C); (9) *Estate of James Silvia, et al.* ("Silvia action"), 06 Civ. 750(RCL) (D.D.C); (10) *Estate of Anthony K. Brown, et al. v. Islamic Republic of Iran, et al.* ("Brown action"), 08 Civ. 531(RCL) (D.D.C.); (11) *Estate of Stephen B. Bland v. Islamic Republic of Iran, et al.,* ("Bland action"), 05 Civ. 2124(RCL) (D.D.C); (12) *Judith Abasi Mwila, et al. v. Islamic Republic of Iran, et al.* ("Mwila action"), 08 Civ. 1377(JDB) (D.DC.); (13) *James Owens, et al. v. Republic of Sudan, et al.* ("Owens action"), 01 Civ. 2244(JDB) (D.D.C.); (14) *Rizwan Khaliq, et al. v. Republic of Sudan, et al.* ("Khaliq action"), 08 Civ. 1273(JDB) (D.D.C.). By orders dated June 27, 2011 (ECF No. 22) and July 28, 2011 (ECF No. 32), these

judgment creditors were added to the consolidated action 10 Civ. 4518. In June 2012, four additional actions by way of supplemental third-party respondents to the Citibank Interpleader were added: (15) *Beer et al. v. Islamic Republic of Iran et al.* ("Beer action"), 08 Civ. 1807(RCL) (D.D.C); (16) *Kirschenbaum et al. v. Islamic Republic of Iran et al.* ("Kirschenbaum action"), 03 Civ. 1708(RCL) (D.D.C); (17) *Arnold et al. v. Islamic Republic of Iran et al.* ("Arnold action"), 06 Civ. 516(RCL) (D.D.C), and (18) *Murphy et al. v. Islamic Republic of Iran et al.* ("Murphy action"), 06 Civ. 596(RCL) (D.D.C). While these actions came to this Court originally in different procedural postures, they are all seeking collection of judgments with regard to the same assets as set forth herein, and are treated by the Court for ease of reference as "plaintiffs" herein.

2 Plaintiffs urge that the timing of UBAE's actions with respect to opening its account with Clearstream and engagement in various transactions with Bank Markazi demonstrate that Bank Markazi was engaged in efforts to avoid the very turnover now at issue. In resolving these motions, this Court need not and does not refer to that timeline, or any inferences which a finder of fact might draw thereon.

3 The bonds associated with these transactions were those as to which Judge Koeltl had lifted the restraints following the evidentiary proceeding held in June 2008. One of plaintiffs' claims for fraudulent conveyance relate to the proceeds from those bonds.

4 The cash held in Clearstream's Citibank account is herein referred to as the "Blocked Assets." The terms "blocked" and "restrained" have particular legal importance. As discussed, *infra,* the Blocked Assets have been "blocked" pursuant to statute. The Blocked Assets were "restrained" pursuant to statute and by the writs of attachment previously obtained by the plaintiffs herein.

5 In its summary judgment opposition brief, UBAE admits both that it "has not asserted a legally cognizable interest in the restrained bonds" and that "UBAE is not in 'possession' or 'custody' of any of the restrained bonds." (UBAE SJ Opp. Br. at 2.)

6 As stated above, Rule 4(k)(2) provides: "For a claim that arises under federal law, serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if: (A) the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and (B) exercising jurisdiction is consistent with the United States Constitution and laws." Fed.R.Civ.P. 4(k)(2).

7 A basis for Rule 4(k)(2) jurisdiction may also exist over Clearstream, but—unlike UBAE—Clearstream has not alleged that it cannot be subject to general personal jurisdiction in any U.S. jurisdiction—a prerequisite for 4(k)(2) jurisdiction.

8 Markazi—via Clearstream—argues that the debit would constitute a "change in volume, amount, location, ownership, possession, character, [or] destination" of the Blocked Assets. (*See* Clearstream Vacate Restraints Reply Br. at 13.)

9 Section 201(a) refers to attachment only of the "blocked assets *of* th[e] terrorist party" (emphasis added).

10 Bank Markazi has stated that "Over $1.75 billion in securities belonging to Bank Markazi ... are frozen in custodial Omnibus Account at [Citibank]"; that the "Restrained Securities are the property *of* Bank Markazi, the Central Bank of Iran", that the "aggregate value of the remaining bond instruments, i.e. the Restrained Securities that are the property *of* Bank Markazi and the subject of the Turnover Action—is thus $1.753 billion"; that the "Restrained Securities are the property *of* a Foreign Central Bank ..."; that the "Restrained Securities are presumed to be the property *of* Bank Markazi"; and "the Restrained Securities are prima facie the property of a third party, Bank Markazi ...." (*See* Bank Markazi's First Mem. of L. in Support of its Mot. to Dismiss the Am. Compl., May 11, 2011, ECF No. 18 ("Mazkazi's First MOL"), at 1, 5, 9, 10, 36 (emphases added).) In addition, two officers of Bank Markazi have sworn under penalty of perjury that the Blocked Assets are the "sole property of Bank Markazi and held for its own account." (Aff. of Gholamossein Arabieh ¶ 2, Vogel Decl. Ex. J, Oct. 17, 2010, ECF No. 210; Aff. of Ali Asghar Massoumi ¶ 2, Vogel Decl. Ex. K, Oct. 17, 2010, ECF No. 210).

11 As with the political question arguments, Markazi expressly adopted this argument from Clearstream's memoranda in support of its motion to vacate the restraints. (*See* Markazi MTD Reply at 5.)

12 This is particularly true in light of 22 U.S.C. 8772, its preemption of any contrary law, and its required narrow judicial determinations.

13 UBAE did not file substantive opposition to plaintiffs' partial summary judgment motion initially. It argued that it should not be compelled to respond to plaintiffs' motion until its own Rule 12(b)(2) motion to dismiss had been decided. In the interests of judicial economy, the Court issued an Order on February 14, 2013, directing UBAE to file any opposition to plaintiffs' motion, and directed UBAE to "assume that the Court finds sufficient bases to exercise personal jurisdiction over it." (*See* Order, Feb. 14, 2013, ECF No. 325.) UBAE filed its substantive opposition brief on February 22, 2013. (ECF No. 328.)

14 UBAE correctly points out that the two securities with a face value of $250 million it is alleged to have conveyed fraudulently in early 2008 are not at issue in the plaintiffs' motion for partial summary judgment. (*See* UBAE S.J. Opp. Br." at 2 n.2.) The Court does not resolve any merits issues as regards claims based on this alleged conveyance.

15 As set forth above, plaintiffs have reached agreement regarding priority, as between themselves, of distribution of the assets. Accordingly, the Court does not address any such questions herein.

16 Defendants' UCC, situs of property and Treaty of Amity arguments, in particular, are mooted by the Court's determination with respect to 22 U.S.C. § 8772.

17 UBAE admits that it has "no legally cognizable interest" in the restrained bonds. (UBAE SJ Opp. Br. at 2–3.) UBAE thus admits that which plaintiffs wish to prove on summary judgment: there is no issue of material fact as to the ownership of the Markazi Bonds with respect to UBAE (and, as the remainder of the above analysis shows, nor does Clearstream have any such ownership interest).

18 Plaintiffs have asserted that Clearstream does not itself have standing to raise constitutional challenges because it does not own or even have a beneficial interest in the Blocked Assets. Because none of the constitutional challenges has merit —whether raised by Bank Markazi or Clearstream (and they are raised by both of those defendants)—the Court need not and does not reach the standing issue.

19 The Bland creditors are the plaintiffs in *Estate of Steven Bland, et al, v. Islamic Republic of Iran, et al,* 05–cv–2124 (RCL) (D.D.C).

20 The Peterson plaintiffs have argued in separate briefing that no § 1610(c) order is required to execute under TRIA. (*See* Pls.' Summ. J. Reply at 54–57.) As the Court finds that the requirements of § 1610(c) are met with respect to the Bland creditors, it need not address the order's relevance to TRIA.

Annex 108