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 IX

Annexes 183 through 202

ANNEX 183

STATE RESPONSIBILITY

[Agenda item 3]

DOCUMENT A/CN.4/498 and Add.1–4

Second report on State responsibility, by Mr. James Crawford, Special Rapporteur

[*Original: English/French*]
[*17 March, 1 and 30 April, 19 July 1999*]

CONTENTS

Multilateral instruments cited in the present report

	Source
Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles) (Versailles, 28 June 1919)	*British and Foreign State Papers, 1919*, vol. CXII (London, HM Stationery Office, 1922), p. 1.
Treaty of Peace between the Allied and Associated Powers and Austria (Peace Treaty of Saint-Germain-en-Laye) (Saint-Germain-en-Laye, 10 September 1919)	Ibid., p. 317.
General Agreement on Tariffs and Trade (Geneva, 30 October 1947)	United Nations, *Treaty Series*, vol. 55, No. 814, p. 187.
Convention on the Prevention and Punishment of the Crime of Genocide (New York, 9 December 1948)	Ibid., vol. 78, No. 1021, p. 277.
Geneva Conventions for the Protection of War Victims (Geneva, 12 August 1949)	Ibid., vol. 75, Nos. 970–973, pp. 31 et seq.
Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field	Ibid., p. 31.
Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea	Ibid., p. 85.

	Source
Geneva Convention relative to the Treatment of Prisoners of War	Ibid., p. 135.
Geneva Convention relative to the Protection of Civilian Persons in Time of War	Ibid., p. 287.
Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) (Geneva, 8 June 1977)	Ibid., vol. 1125, No. 17512, p. 3.
Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (Rome, 4 November 1950)	Ibid., vol. 213, No. 2889, p. 221.
Protocol to the above-mentioned Convention (Paris, 20 March 1952)	Ibid.
Convention on the Territorial Sea and the Contiguous Zone (Geneva, 29 April 1958)	Ibid., vol. 516, No. 7477, p. 205.
Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961)	Ibid., vol. 500, No. 7310, p. 95.
Convention on the Settlement of Investment Disputes between States and Nationals of other States (Washington, D.C., 18 March 1965)	Ibid., vol. 575, No. 8359, p. 159.
Convention on Transit Trade of Land-locked States (New York, 8 July 1965)	Ibid., vol. 597, No. 8641, p. 42.
International Convention on the Elimination of All Forms of Racial Discrimination (New York, 21 December 1965)	Ibid., vol. 660, No. 9464, p. 195.
International Covenant on Civil and Political Rights (New York, 16 December 1966)	Ibid., vol. 999, No. 14668, p. 171.
Optional Protocol to the International Covenant on Civil and Political Rights (New York, 16 December 1966)	Ibid.
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	Ibid., vol. 1155, No. 18232, p. 331.
American Convention on Human Rights: "Pact of San José, Costa Rica" (San José, 22 November 1969)	Ibid., vol. 1144, No. 17955, p. 123.
International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (Brussels, 29 November 1969)	Ibid., vol. 970, No. 14049, p. 211.
Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal, 23 September 1971)	Ibid., vol. 974, No. 14118, p. 178.
Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques (New York, 10 December 1976)	Ibid., vol. 1108, No. 17119, p. 151.
United Nations Convention on Contracts for the International Sale of Goods (Vienna, 11 April 1980)	Ibid., vol. 1489, No. 25567, p. 3.
United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982)	Ibid., vol. 1833, No. 31363, p. 3.
Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986)	A/CONF.129/15.
Statute of the International Tribunal for the Former Yugoslavia (New York, 25 May 1993)	United Nations, *Basic Documents* (Sales No. E/F.98.III.P.1).
Statute of the International Tribunal for Rwanda (New York, 8 November 1994)	ICTR(093)/D637/No. 1 (August 1999).
United Nations Convention on the Law of the Non-navigational Uses of International Watercourses (New York, 21 May 1997)	*Official Records of the General Assembly, Fifty-first Session, Supplement No. 49*, resolution 51/229, annex.
Rome Statute of the International Criminal Court (Rome, 17 July 1998)	United Nations, *Treaty Series*, vol. 2187, No. 38544, p. 90.

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Scope of the present report[1]

1. The present report continues the task, begun in 1998,[2] of systematically considering the draft articles in the light of the comments of Governments and developments in State practice, judicial decisions and in the literature. In later parts of the report it is also proposed to deal with certain general issues raised by parts two and three of the draft articles, and to begin considering the articles in part two.[3]

[1] The Special Rapporteur would like to thank Mr. Pierre Bodeau, Research Associate, Lauterpacht Research Centre for International Law, University of Cambridge, for his substantial assistance in the preparation of this report, and the Leverhulme Trust for its financial support. A group of younger scholars (with financial assistance from the Humanities Research Board of the British Academy) provided assistance with the literature on State responsibility in various languages: they were Mr. Andrea Bianchi, University of Siena; Mr. Carlos Esposito, Autonomous University of Madrid; Mr. Yuji Iwasawa, University of Tokyo; Ms. Nina Jorgensen, Inns of Court School of Law, London; Ms. Yumi Nishimura, Sophia University; and Mr. Stephan Wittich, University of Vienna.

[2] See the first report on State responsibility, *Yearbook … 1998*, vol. II (Part One), p. 1, document A/CN.4/490 and Add.1–7.

[3] Since the first report (see footnote 2 above), further Government comments have been received: see *Yearbook … 1998*, p. 81, document A/CN.4/488 and Add.1–3, and A/CN.4/492, reproduced in the present volume. So far as these relate to articles 16 et seq., they are taken into account in what follows. It is proposed to reserve discussion of further comments on draft articles 1–15 until all the draft articles have been dealt with, at which point they will have to be looked at again in their ensemble.

Review of draft articles in part one

A. Part one, chapter III. Breach of an international obligation

1. INTRODUCTION

(a) *Overview*

2. Chapter III of part one consists of 11 articles dealing with the general subject of "breach of an international obligation". The matters dealt with in chapter III on analysis fall into five groups:[4]

(*a*) Articles 16, 17 and 19, paragraph 1,[5] deal with the notion of breach itself, emphasizing the irrelevance of the source of the obligation or its subject matter;

(*b*) Article 18, paragraphs 1 and 2, deals with the requirement that the obligation be in force for the State at the time of its breach;

(*c*) Articles 20–21 elaborate upon the distinction between obligations of conduct and obligations of result, and in similar vein article 23 deals with obligations of prevention;

(*d*) Articles 24–26 deal with the moment and duration of breach, and in particular with the distinction between continuing wrongful acts and those not extending in time. They also develop a further distinction between composite and complex wrongful acts. Article 18, paragraphs 3–5, seeks to specify when continuing, composite and complex wrongful acts have occurred, and deals with issues of inter-temporal law in relation to such acts;

(*e*) Article 22 deals with an aspect of the exhaustion of local remedies rule, which is analysed within the specific framework of obligations of result.

For reasons that will emerge, it is proposed to deal with the articles in this order.

3. Taken together, the articles in chapter III seek to analyse further the requirement, already laid down in principle by article 3 (*b*), that in every case of State responsibility there must be a breach of an international obligation *of* a State *by* that State. But there is a difficulty in taking this analysis much further without transgressing the

[4] For the *travaux* on chapter III see:

Fifth report: *Yearbook … 1976*, vol. II (Part One), p. 3, document A/CN.4/291 and Add.1 and 2;

Sixth report: *Yearbook … 1977*, vol. II (Part One), p. 3, document A/CN.4/302 and Add.1–3;

Seventh report: *Yearbook … 1978*, vol. II (Part One), p. 31, document A/CN.4/307 and Add.1 and 2;

Yearbook … 1978, vol. I, pp. 232–237 (plenary debate); and pp. 269–270 (report of the Drafting Committee);

Yearbook … 1978, vol. II (Part Two), pp. 76–78 (summary of the *travaux*);

Yearbook … 1976, vol. II (Part Two), pp. 75–122;

Yearbook … 1977, vol. II (Part Two), pp. 11–50;

Yearbook … 1978, vol. II (Part Two), pp. 79–98 (text of the draft articles and commentaries thereto).

[5] Article 19, paragraphs 2–4, deals with the definition of international crimes of States. The issues it raises are addressed in the context of the discussion on the distinction between "criminal" and "delictual" responsibility (see, for example, the Special Rapporteur's first report (footnote 2 above), paras. 43–60).

sion. In reaching this conclusion, it was not enough to rely on the apparently clear language of the Declaration:

> The Tribunal must analyze the matter further. Obligations under General Principle B are, generally speaking, obligations of "result", rather than of "conduct" or "means". Although it could be said that the United States, by suspending the litigation rather than terminating it, failed to comply with its obligations under the Algiers Declarations, the Tribunal cannot confine itself to a strictly literal or grammatical interpretation of those Declarations but must also test the method chosen by the United States … against the object and purpose of those Declarations. The answer to the question whether suspension fulfilled the function of termination depends on practice. Thus, the test is in factual evidence.
>
> Unless otherwise agreed by treaty, general international law permits a state to choose the means by which it implements its international obligations within its domestic jurisdiction … Nonetheless, a state's freedom with respect to the choice of the means for implementing an international obligation is not absolute. The means chosen must be adequate to satisfy the state's international obligation, and they must be lawful.[141]

The Tribunal went on to hold that, "by adopting the suspension mechanism provided for in Executive Order 12294, the United States adhered to its obligations under the Algiers Declarations only if, in effect, the mechanism resulted in a termination of litigation as required by those Declarations".[142] The test of whether the litigation had been "in effect" terminated was whether the Islamic Republic of Iran was "reasonably compelled in the prudent defense of its interests to make appearances or file documents in United States courts subsequent to 19 July 1981" in respect of pending litigation within the jurisdiction of the Tribunal, or any other claims filed with the Tribunal until they were dismissed for want of jurisdiction.[143] The costs of such prudent defence, including the reasonable costs of monitoring suspended cases, would be recoverable in a second phase of the proceedings.

67. Pending the determination of these factual issues, the case is incomplete, and detailed comment on it would not be appropriate. Two points can be made, however. First, the Tribunal did apply the distinction between obligations of conduct and result, very much in the way envisaged in the commentary to articles 20–21 (though it made no reference to those articles). The effect of doing so was to give the United States some flexibility in the way it implemented General Principle B, though it was still required to produce the "result" of termination for cases within the jurisdiction of the Tribunal.[144] Secondly, the Tribunal reached its conclusions exclusively by the interpretation of the relevant agreements in their context and having regard to their object and purpose; in other words, at that stage of the proceedings it was not concerned with the secondary rules of responsibility at all. To that extent the decision confirms that the distinction between obligations of conduct and result concerns the classification of primary obligations, i.e. it concerns primary not secondary rules of responsibility. Thirdly, however, it is not apparent that the Tribunal's decision would have been any different in substance, if not in form, had it classified the obligation as an obligation of conduct (the conduct of terminating the litigation) rather than an obligation of result (the result of the litigation being terminated). Presumably, the same considerations would have applied to the obligation in either case.

68. This brief review suggests that the distinction between obligations of conduct and result can be used as a means of the classification of obligations, but that it is not used with much consistency. In each case the question was one of interpretation of the relevant obligation, and the value of the distinction lies in its relevance to the measure of discretion left to the respondent State in carrying out the obligation. That discretion was necessarily constrained by the primary rule, and the crucial issue of appreciation was, to what extent? The distinction may help in some cases in expressing conclusions on this issue: whether it helps in arriving at them is another matter.

(v) *Human rights obligations as "obligations of result"*

69. The commentary to article 21 insists that standard obligations as to the treatment of persons by the State, whether in the field of human rights or diplomatic protection, involve what might be called "extended obligations of result", and that they are covered by article 21, paragraph 2. The consequence is that these obligations are not breached by the enactment of legislation until that legislation is definitively given effect. In other words, it is the application of the legislation in the particular case, taken together with the subsequent failure of the State to remedy any resulting grievance, that constitutes the breach. Until then, the breach is merely apprehended. This view is graphically represented by Combacau in the following terms:

> [W]hen the International Covenant on Civil and Political Rights provides, on the one hand, that "No one shall be subjected to arbitrary arrest or detention" … and, on the other hand, that "Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation" … it lays down two rules that have as their counterpart in domestic law two State obligations, the one primary and the other subsidiary; however, with regard to international law, it establishes only one, which provides that the State cannot lawfully fail to comply successively with both of these domestic obligations, and which—admitting the somewhat unpleasant nature of this formulation—is ultimately interpretable as follows: "No State may arbitrarily arrest or detain an individual *without offering him or her compensation.*"[145]

But human rights courts and committees do not treat these rights in this way, as the following brief and selective survey shows.

70. Under the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), petitions may be lodged by "any person, non-governmental organization or group of individuals claiming to be the victim of a violation" of the rights in the Convention. In addition, inter-State cases may be referred to the Court in relation to "any alleged breach of

[141] Award No. 590-A15(IV)/A24-FT (see footnote 138 above), paras. 95–96.

[142] Ibid., para. 99.

[143] Ibid., para. 101.

[144] Thus, the Tribunal held, for the United States to allow new cases to be filed solely for the purposes of tolling limitations was a breach of General Principle B: tolling limitations could have been lawfully achieved by means other than allowing the filing of suit, but General Principle B specifically prohibited "all further litigation" in claims within the Tribunal's jurisdiction for any reason at all (ibid., para. 131).

[145] Combacau, loc. cit., p. 191. *Contra*, see for example Higgins, "International law and the avoidance, containment and resolution of disputes: general course on public international law", pp. 203–204.

the provisions of the Convention" and Protocols.[146] Article 41 provides that:

> If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.

This clearly implies that a violation of the Convention can be established prior to and independently of the question whether reparation for such a violation is available under the relevant internal law. And that proposition has never been doubted by the Convention organs. As the Court said in one case:

> Article 25 [now 34] of the Convention entitles individuals to contend that a law violates their rights by itself, in the absence of an individual measure of implementation, if they run the risk of being directly affected by it … [147]

71. The International Covenant on Civil and Political Rights likewise distinguishes between individual and inter-State communications. Under article 1 of the Optional Protocol, individuals subject to the jurisdiction of a State party to the Protocol who "claim to be victims of a violation by that State Party" of rights set forth in the Covenant may present communications to the Human Rights Committee.[148] In considering those communications, the Committee has always required that the impact of State action be such that the person concerned is individually a "victim", and it has refused to examine State legislation in the abstract. On the other hand, it does not require that a victim should necessarily have been prosecuted or otherwise penalized. In certain cases the mere existence of legislation may involve a breach of the Covenant; in other cases a sufficiently imminent and direct threat of action will justify treating a person as a victim. The test has been summarized in the following words:

> [P]rovided each of the authors is a victim within the meaning of article 1 of the Optional Protocol, nothing precludes large numbers of persons from bringing a case under the Optional Protocol. The mere fact of large numbers of petitioners does not render their communication an *actio popularis* …
>
> For a person to claim to be a victim of a violation of a right protected by the Covenant, he or she must show either that an act or an omission of a State party has already adversely affected his or her enjoyment of such right, or that such an effect is imminent, for example on the basis of existing law and/or judicial or administrative decision or practice.[149]

These limitations derive from the provisions of the Optional Protocol, as interpreted by the Committee. Inter-State communications are subject to a different formula. Under article 41, paragraph 1, of the Covenant, such communications may be brought by a State Party which has accepted the procedure and which claims that another such State Party "is not fulfilling its obligations".[150] So far this procedure has not been used, but it could conceivably involve a challenge to a law as such.

72. The Inter-American Court of Human Rights applies essentially the same principle in determining whether there has been a breach of the American Convention on Human Rights. In its advisory opinion on international responsibility for the promulgation and enforcement of laws in violation of the American Convention on Human Rights, the Inter-American Court was asked several general questions arising from a controversy about a draft law which, if enacted, would have clearly violated commitments of the State concerned under the Convention. On the question whether a mere law could of itself violate an obligation of result, the Court said:

> [A] law that enters into force does not necessarily affect the legal sphere of specific individuals. The law may require subsequent normative measures, compliance with additional conditions, or, quite simply, implementation by state authorities before it can affect that sphere. It may also be, however, that the individuals subject to the jurisdiction of the norm in question are affected from the moment it enters into force … Non-self-executing laws simply empower the authorities to adopt measures pursuant to them. They do not of themselves constitute a violation of human rights.
>
> In the case of self-executing laws … the violation of human rights, whether individual or collective, occurs upon their promulgation. Hence, a norm that deprives a portion of the population of some of its rights—for example, because of race—automatically injures all the members of that race.[151]

After analysing the specific provisions of the Convention, and referring with approval to the European jurisprudence, the Court concluded that:

> The contentious jurisdiction of the Court is intended to protect the rights and freedoms of specific individuals, not to resolve abstract questions. There is no provision in the Convention authorizing the Court, under its contentious jurisdiction, to determine whether a law that has

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[146] European Convention on Human Rights (as amended by Protocol 11), arts. 33–34. Local remedies must be exhausted, and a petition must be brought "within a period of six months from the date on which the final decision was taken" (art. 35).

[147] *Norris* case, European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 142, *Judgment of 26 October 1988* (Council of Europe, Strasbourg, 1989), para. 31, citing the *Klass and Others* case, ibid., vol. 28, *Judgment of 6 September 1978*, para. 33; the *Marckx* case, ibid., vol. 31, *Judgment of 13 June 1979*, para. 27; and the *Johnston and Others* case, ibid., vol. 112, *Judgment of 27 November 1986*, para. 42. See also, inter alia, the *Dudgeon* case, ibid., vol. 45, *Judgment of 22 October 1981*, para. 41; and the case of *Modinos* v. *Cyprus*, ibid., vol. 259, *Judgment of 22 April 1993*, para. 24.

[148] The exhaustion of local remedies rule applies (art. 5, para. 2 (*b*).

[149] Human Rights Committee, Communication No. 429/1990, decision of 8 April 1993, *E. W. et al.* v. *The Netherlands* (*Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40* (A/48/40 (Part II)), annex XIII.G), paras. 6.3–6.4. See also, inter alia, Human Rights Committee, Communication No. R.9/35, *Shirin Aumeeruddy-Cziffra and 19 other Mauritian women* v. *Mauritius* (ibid., *Thirty-sixth Session, Supplement No. 40* (A/36/40), annex XIII), para. 9.2; Communication No. R.14/61, *Leo R. Hertzberg and Others* v. *Finland* (ibid., *Thirty-seventh Session, Supplement No. 40* (A/37/40), annex XIV), para. 9.3; Communication No. 163/1984, *Disabled and handicapped persons in Italy* v. *Italy* (ibid., *Thirty-ninth Session, Supplement No. 40* (A/39/40), annex XV), p. 198, para. 6.2; Communications Nos. 359/1989 and 385/1989, *John Ballantyne and Elizabeth Davidson, and Gordon McIntyre* v. *Canada* (ibid., *Forty-eighth Session, Supplement No. 40* (A/48/40, annex XII.P), para. 10.4 ("where an individual is in a category of persons whose activities are, by virtue of the relevant legislation, regarded as contrary to law, they may have a claim as 'victims' within the meaning of article 1 of the Optional Protocol"); Communication No. 488/1992, *Nicholas Toonen* v. *Australia* (ibid., *Forty-ninth Session, Supplement No. 40* (A/49/40), vol. II, annex IX.EE), para. 5.1; and Communication No. 645/1995, *Vaihere Bordes et al.* v. *France* (A/51/40), vol. II, annex IX.G, paras. 5.4–5.5.

[150] The requirement is stated slightly differently in article 41, paragraph 1 (*a*): "is not giving effect to the provisions of the present Covenant". There is no requirement that the communication relate to any specified individual, but available local remedies must have been exhausted (art. 41, para. 1 (*c*)).

[151] *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (arts. 1 and 2 of the American Convention on Human Rights)*, Inter-American Court of Human Rights Advisory Opinion OC–14/94 of 9 December 1994, Series A, No. 14, paras. 41–43.

not yet affected the guaranteed rights and freedoms of specific individuals is in violation of the Convention …

The Court finds that the promulgation of a law that manifestly violates the obligations assumed by a state upon ratifying or acceding to the Convention constitutes a violation of that treaty and, if such violation affects the guaranteed rights and liberties of specific individuals, gives rise to international responsibility for the state in question.[152]

The suggestion in this passage that international responsibility arises, following a manifest violation of the treaty, only "if such violation affects the guaranteed rights and liberties of specific individuals" requires some explanation. Read literally, it suggests that there can be a violation of a treaty without any responsibility, which is not in accordance with the conception of State responsibility contained in the draft articles.[153] It seems however that the Court was distinguishing here between State responsibility for violation of the treaty per se and international responsibility under the Convention's procedures for direct violation of the rights of individuals, which alone falls within the Court's contentious jurisdiction.

73. To summarize, this brief review shows a substantially common approach to the problem on the part of the various human rights bodies.[154] Legislation itself, provided that it is directly applicable to individuals or that its application is directly threatened, can constitute a breach of the convention concerned, although whether it does so in a given case requires an examination of the facts of that case. Subsequent processes within the State may provide reparation for such a breach, but they are not constitutive of it.[155]

74. A review of the field of diplomatic protection would also, it is believed, reach the same general conclusion. The point was succinctly made by the United Kingdom:

In general terms, the United Kingdom's view is that in a case where international law requires only that a certain result be achieved, the situation falls under draft article 21, paragraph 2. The duty to provide a fair and efficient system of justice is an example. Corruption in an inferior court would not violate that obligation if redress were speedily available in a higher court. In the case of such obligations, no breach occurs until the State has failed to take any of the opportunities available to it to produce the required result. If, on the other hand, international law requires that a certain course of conduct be followed, or that a certain result be achieved within a certain period of time, the violation of international law arises at the point where the State's conduct diverges from that required, or at the time when the period expires without the result having been achieved. Denial of a right of innocent passage, or a failure to provide compensation within a reasonable period of time after the expropriation of alien property, are instances of violations of such rules. Recourse to procedures in the State in order to seek "correction" of the failure to fulfil the duty would in such cases be instances of the exhaustion of local remedies.[156]

75. Of course, there may be specific contexts in which the State does have a right to affect the rights of individuals provided compensation is payable. This is, in general, the case with expropriation of property for a public purpose, and the reason is precisely because in that context the right of eminent domain is recognized. But there is no right of eminent domain in relation to the arbitrary treatment of persons. There are also cases where the obligation is to have a *system* of a certain kind, e.g. the obligation to provide a fair and efficient system of justice. There, systematic considerations enter into the question of breach, and an aberrant decision by an official lower in the hierarchy, which is capable of being reconsidered, does not of itself amount to an unlawful act.[157] This is the example given by the United Kingdom in the passage quoted above. Systematic obligations have to be applied to the system as a whole. But many human rights obligations are not of this kind: for example, in cases of torture or arbitrary killing by State officials, the violation would be immediate and unqualified.[158]

76. It may be (as the United Kingdom notes) that the problem which has been analysed here is more one of the commentary to article 21 than of the text itself.[159] But the analysis suggests a number of conclusions.

(vi) *The primacy of primary rules and of their interpretation*

77. First, while it may be possible accurately to classify certain obligations as obligations of conduct or result, and while that may illuminate the content or application of the norms in question, such a classification is no substitute for the interpretation and application of the norms themselves, taking into account their context and their object and purpose. The problem with articles 20–21 is that they imply the need for an intermediate process of classification of obligations before questions of breach can be resolved. But in the final analysis, whether there has been a breach of an obligation depends on the precise terms of the obligation, and on the facts of the case. For example, it makes a difference that the obligations of States in the field of humanitarian law are expressly "to 'respect'"

[152] Ibid., paras. 49–50; also in *International Legal Materials*, vol. XXXIV, No. 5 (September 1995), pp. 1199–1201.

[153] Especially articles 3 and 16; see paragraph 11 above.

[154] Under the 1981 African Charter on Human and Peoples' Rights, there is provision both for communications from States and for other communications (arts. 47 and 55) to the Commission. There has so far been no public indication of the Commission's approach to the questions discussed here. Although similarities may be found in that respect in the context of European Union law (see, for example, *Brasserie du Pêcheur SA* v. *Bundesrepublik Deutschland*, case C–46/93, *Reports of Cases before the Court of Justice and the Court of First Instance* (Luxembourg, Office for Official Publications of the European Communities, 1996), p. I–1029, especially paras. 51 and 56), the specific character of European law limits the value of the comparison. For a general approach to State liability under European law see, for example, Craig and de Búrca, *EU Law: Texts, Cases, and Materials*, pp. 240–282.

[155] On the possibility that the enactment of a legislation may per se constitute a breach by a State of its obligations, provided it has a direct application on the individual, see, among others, Amerasinghe, *Local Remedies in International Law*, pp. 209–210; Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law*, pp. 201–206; and Dipla, *La responsabilité de l'État pour violation des droits de l'homme: problèmes d'imputation*, pp. 20–22. *Contra*, see Cahier, "Changements et continuité du droit international: cours général de droit international public", pp. 261–263.

[156] *Yearbook … 1998* (see footnote 7 above), p. 124.

[157] Similarly, a temporary swamping of the system by litigation, causing unexpected delays, does not involve a breach "if the State takes appropriate remedial action with the requisite promptness" (*Union Alimentaria Sanders SA Case*, European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 157, *Judgment of 7 July 1989* (Council of Europe, Strasbourg, 1989), p. 15, para. 40.

[158] On further analysis it is probable that an obligation to provide a fair and efficient system of justice contains diverse elements, including certain obligations "of result" (e.g. the right to a judge) and others "of conduct". In short, it is a hybrid. See Tomuschat, "What is a 'breach' … ?", p. 328. Another clear example is the obligation of respect for family life: see the decision of the European Court of Human Rights as analysed in the *Marckx* case (footnote 147 above), and later decisions.

[159] The issue re-emerges, however, in the context of article 22 (Exhaustion of local remedies): see paragraphs 138–146 below.

ANNEX 184

33 F.Supp.3d 1003
United States District Court,
N.D. Illinois, Eastern Division.

Jenny RUBIN, Deborah Rubin, Daniel Miller, Abraham Mendelson, Stuart E. Hersch, Renay Frym, Noam Rozenman, Elena Rozenman, TZVI Rosenman, Plaintiffs,
v.
The ISLAMIC REPUBLIC OF IRAN, The Iranian Ministry of Information and Security, Ayatollah Ali Hoseini Khamenei, Ali Akbar Hashemi–Rafsanjani, Ali Fallahian–Khuzestani, Defendants.
The University of Chicago, The Field Museum of Natural History, Citation Respondents.

No. 03 C 9370
|
Signed March 27, 2014

Synopsis
Background: Following award of damages, at 281 F.Supp.2d 258, against Islamic Republic of Iran, its Ministry of Information and Security (MOIS), and Senior Iranian officials, in action brought under Foreign Sovereign Immunities Act (FSIA) by several American citizens severely injured as a result of Iran-sponsored terrorist group's suicide bombing, and by their family members, various plaintiffs sought to execute the judgment against Iranian antiquities currently on loan to the University of Chicago and the Field Museum of Natural History. Both museums and Republic of Iran moved for summary judgment, asserting that the artifacts were not subject to attachment.

Holdings: The District Court, Robert W. Gettleman, J., held that:

United States museum was not an agent of Republic of Iran, for purposes of commercial activity exception to FSIA;

mandate rule did not preclude plaintiffs from arguing FSIA amendment's applicability to attachment of museum collection; but

FSIA amendments did not provide a separate basis for attachment; and

attachment was not permitted pursuant to Terrorism Risk Insurance Act (TRIA), since artifacts were not blocked.

Motion granted.

Attorneys and Law Firms

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Thomas Anthony Doyle, Matthew G. Allison, Baker & McKenzie LLP, Chicago, IL, for Citation Respondents.

MEMORANDUM OPINION AND ORDER

Robert W. Gettleman, United States District Judge

In this action, plaintiffs seek to attach and execute on numerous ancient Persian artifacts in the possession of the University of Chicago and the Field Museum of Natural History ("the Museums") to satisfy a default judgment entered against the Islamic Republic of Iran ("Iran").[1] Both the Museums and Iran (collectively, "defendants") ***1006** have moved for summary judgment, asserting that the artifacts are not subject to attachment under any of the statutes cited by plaintiffs. For the reasons described below, the defendants' motions for summary judgment are granted.

BACKGROUND[2]

The facts of this case have been described in previous district court and appellate opinions, *see Rubin v. The Islamic Republic of Iran,* 637 F.3d 783, 786 (7th Cir.2011),[3] and the court will not rehash those facts in detail here. In short, on September 4, 1997, Hamas carried out a horrific triple suicide bombing in Jerusalem that killed five individuals and

wounded 200. Plaintiffs are American citizens who were either wounded or suffered severe emotional and loss-of-companionship injuries as a result of the attack. Plaintiffs sued Iran in the federal district court in Washington, D.C., alleging that Iran was responsible for the bombings as a result of the training and support it had provided to Hamas, and obtained a $71.5 million default judgment. Plaintiffs now seek to collect on that judgment by attaching alleged assets of Iran located within the United States. The assets relevant to this case are a number of collections of artifacts [4] currently in the possession of the Museums.

The Persepolis and Chogha Mish Collections are in the possession of the University of Chicago. Both belong to the National Museum of Iran and are on long-term loan to the University of Chicago's Oriental Institute ("the Institute") for scholarly study.

The Chogha Mish Collection consists of a small number of clay seal impressions recovered from excavations in Iran in the 1960s. Iran loaned the Chogha Mish Collection to the Institute for the purpose of academic study in the 1960s, and most of the collection was returned in 1970. In 1982, Iran informed the Institute that some items in the collection were missing. The Institute agreed to search for and return any inadvertently retained artifacts. In 1983, Iran filed a claim in the Iran–U.S. Claims Tribunal ("the Tribunal") seeking the return of the missing objects. Since the claim was filed, the Institute has located some of the missing objects, but has not returned those objects due to the citation entered in this case on May 20, 2004. [5]

The Persepolis Collection consists of approximately 30,000 clay tablets and fragments in the possession of the Institute. In 1937, Iran agreed to loan the Persepolis Collection to the Institute to be read and translated. The terms of the agreement allowed the Institute to retain 500 bricks upon completion of the deciphering operation, with the remaining 29,500 bricks to ***1007** be returned to Iran. Over the years, Iran has made numerous inquiries into the timeline for the return of the bricks. Most recently, in 2004, the Institute entered into an agreement with Iran to return 300 tablets and to deliver the remainder to Iran "gradually and soon."

The Museums allege that the remaining artifacts of Iranian origin are the property of the Museums, while plaintiffs argue that they are the property of Iran. The Herzfeld Collection is a collection of roughly 1,200 prehistoric Persian artifacts purchased by the Field Museum in 1945 from Dr. Ernst Herzfeld, a German archeologist who worked in Persia from 1905 to 1936. The Field Museum purchased the collection in April 1945 for $7,300. The Field Museum subsequently sold part of the collection to the Institute in 1945, but took back six pieces in December 1946. Plaintiffs allege that Herzfeld is widely believed to have removed antiquities from Iran without the permission of Persian officials, and that he failed to provide evidence of his right to own and possess the items. Because of the lack of provenance of the items, plaintiffs argue that the Herzfeld Collection remains the property of Iran.

The remaining artifacts are small collections that the Museum defendants refer to collectively as "the OI collection." [6] The Institute states these items were acquired through a division of joint excavation finds with Iran or as gifts from third parties, and claims that the Institute owns the items. Plaintiffs claim that the items were improperly removed from Iran and remain Iranian property.

Defendants have each moved for summary judgment, arguing that no legal mechanism exists that would permit the attachment of these antiquities. Iran seeks summary judgment with regard to the Persepolis Collection and the Chogha Mish Collection. The Museums seek summary judgment with respect to the Herzfeld Collection and the OI Collection. Specifically, defendants argue that there is no basis for plaintiffs to attach the artifacts under the exceptions to the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 *et seq.*, or the Terrorism Risk Prevention Act, 28 U.S.C. § 1610 note.

DISCUSSION

I. Standard

A movant is entitled to summary judgment under Rule 56 when the moving papers and affidavits show that there is no ***1008** genuine issue of material fact and the movant is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Unterreiner v. Volkswagen of Am., Inc.,* 8 F.3d 1206, 1209 (7th Cir.1993). Once a moving party has met its burden, the nonmoving party must go beyond the pleadings and set forth specific facts showing there is a genuine issue for trial. *See* Fed. R. Civ. P. 56(c); *Becker v. Tenenbaum–Hill Assocs., Inc.,* 914 F.2d 107, 110 (7th Cir.1990). The court considers the record as a whole and draws all reasonable inferences in the light most favorable to

the party opposing the motion. *See Green v. Carlson,* 826 F.2d 647, 650 (7th Cir.1987) ("[W]hen considering the qualified immunity issue on a motion for summary judgment, a district court should consider all of the undisputed evidence in the record, read in the light most favorable to the non-movant."); *Fisher v. Transco Services–Milwaukee Inc.,* 979 F.2d 1239, 1242 (7th Cir.1992).

A genuine issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Stewart v. McGinnis,* 5 F.3d 1031, 1033 (7th Cir.1993). The nonmoving party must, however, do more than simply show that there is some metaphysical doubt as to the material facts. *Matsushita Elec. Indus. Co., v. Zenith Radio Corp.,* 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). "The mere existence of a scintilla of evidence in support of the [nonmoving party's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmoving party]." *Anderson,* 477 U.S. at 252, 106 S.Ct. 2505.

II. Foreign Sovereign Immunities Act

Both Iran and the Museums have moved for summary judgment on the ground that plaintiffs may not attach the artifacts under the FSIA. Under the FSIA, all "property in the United States of a foreign state shall be immune from attachment" unless exempted by an enumerated exception. 28 U.S.C. § 1609. All defendants argue that no exception to the FSIA applies to the collections, and thus no mechanism exists under the FSIA to attach the artifacts.[7] Plaintiffs bear the burden of demonstrating that the property is not immune from attachment. *Rubin v. The Islamic Republic of Iran,* 637 F.3d 783, 799 (7th Cir.2011); *Enahoro v. Abubakar,* 408 F.3d 877, 882 (7th Cir.2005).

A. Commercial Activity Exception

Plaintiffs argue that one of the enumerated exceptions to the FSIA detailed in Section 1610, the commercial activity exception, allows the attachment of the Persepolis Collection. Section 1610 provides that "[t]he property in the United States of a foreign state ... used for a commercial activity in the United States, shall not be immune from attachment...." 28 U.S.C. § 1610(a). Commercial activity is defined in Section 1603(d) as "either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." Plaintiffs do not ***1009** argue that Iran used any of the artifacts in a commercial manner to satisfy this exception; rather, plaintiffs contend that the Institute acts as Iran's agent, and therefore any commercial activity on the part of the Institute may properly be attributed to Iran. The parties dispute whether: (1) the commercial use must be conducted solely by the sovereign to subject the artifacts to attachment; (2) whether the Institute may be characterized as Iran's agent and their actions therefore attributed to Iran; and (3) whether the acts performed by the Institute in the course of studying and displaying the artifacts constitute "commercial activity."

Section 1610 does not explicitly restrict the commercial activity exception to activity conducted solely by the sovereign. For this reason, plaintiffs argue that the exemption should not be construed as limited to Iran's activities and may cover actions by the Museums. Plaintiffs note that Section 1605 of the FSIA, which discusses the exceptions to jurisdictional immunity, contains a discussion of how a sovereign's commercial activities may subject it to the jurisdiction of U.S. courts. Subsection (a)(2) of Section 1605 provides that a foreign state will not be immune from jurisdiction in a case "in which the action is based upon a commercial activity carried on in the United States by the foreign state[.]" Because that subsection explicitly provides that the commercial activity must be carried on by the foreign state, plaintiffs argue that the drafters of the FSIA could have included that same explicit language in Section 1610, but chose not to do so. Therefore, as a matter of statutory construction, plaintiffs argue that the drafters must have intended not to restrict Section 1610 to activities carried on solely by the foreign state.

The court disagrees with plaintiffs' interpretation of the statute. First, Section 1603 defines a number of terms used throughout the FSIA. In Section 1603, a "commercial activity carried on in the United States by a foreign state" is defined as "commercial activity carried on by such state and having substantial contact with the United States." The defined term, therefore, does not simply refer to actions conducted only by the foreign nation, but contains the additional clause requiring that activity to have substantial contacts with the United States. The defined term does not require that the commercial activity actually take place within the borders of the United States, but rather that the activity have substantial contacts with the United States. In contrast, the language of Section 1610 provides that the property must be "used for a commercial activity in the United States." 28 U.S.C.

§ 1610(a). An equally reasonable explanation for Congress' decision not to use the defined phrase in Section 1610 is to avoid expanding that Section to property used for a commercial activity having substantial contact with the United States. The drafters' exclusion of the phrase "carried on in the United States by a foreign state" is therefore not dispositive of an intention to broaden the scope of Section 1610 to actions conducted by other entities.

Further, Section 1602 of the FSIA articulates Congress' declaration of purpose in passing the Act. It states that "[u]nder international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities." 28 U.S.C. § 1602. A plain reading of that subsection demonstrates that it is the sovereign's commercial activities that subject the property to attachment.

***1010** Various courts have also examined the legislative history of the FSIA and determined that Congress intended Section 1610 to be limited to acts of the sovereign. *See Rubin v. Islamic Republic of Iran,* 456 F.Supp.2d 228, 234 (D.Mass.2006) (holding that the plain language, legislative history, and prevailing principles of international law compel the conclusion that the exception in Section 1610 should be interpreted to apply only where the sovereign itself conducts the activity); *Connecticut Bank of Commerce v. Republic of Congo,* 309 F.3d 240, 251–60 (5th Cir.2002) (applying the principles of international law to the FSIA); *De Letelier v. Republic of Chile,* 748 F.2d 790, 795–98 (2d Cir.1984) (holding that FSIA's exceptions for executional immunity are narrower than its exceptions for jurisdictional immunity); *Flatow v. Islamic Republic of Iran,* 76 F.Supp.2d 16, 21–24 (D.D.C.1999) (holding that the Supreme Court's analysis of the FSIA in *Republic of Argentina v. Weltover,* 504 U.S. 607, 611–14, 112 S.Ct. 2160, 119 L.Ed.2d 394 (1992), compels the conclusion that Congress intended Section 1610 to apply to the actions of the sovereign). This court agrees with the district courts that have interpreted Section 1610 to require action on the part of the sovereign for the commercial use exception to apply.

Plaintiffs further argue that a foreign state cannot conduct commercial activities on its own and must act through agents. With respect to the Persepolis Collection, [8] plaintiffs argue that the Institute is Iran's agent because the Institute has a fiduciary relationship with Iran and serves as bailee of Iran's property. As evidence of this alleged agency relationship, plaintiffs point to Iran's "working relationship" with the Institute, and equates that relationship to a fiduciary relationship. Plaintiffs also reference filings in this case where Iran has admitted to a bailor-bailee relationship with the Institute, and equate that relationship with an agency relationship. Plaintiffs argue that an agency relationship exists because the Institute must account to Iran for its activities, and that Iran has the right to exercise control over the Institute with regard to the artifacts.

Under Illinois law, a "principal-agent relationship is a legal concept founded upon a consensual and fiduciary relationship between two parties." *Knapp v. Hill,* 276 Ill.App.3d 376, 380, 212 Ill.Dec. 723, 657 N.E.2d 1068, 1071 (1st Dist.1995). The central question is "whether the principal had the right to control the activities of the agent." *Id.* Agents also owe duties of good faith, fidelity, and loyalty to the principal. *ABC Trans Nat. Transport, Inc. v. Aeronautics Forwarders, Inc.,* 62 Ill.App.3d 671, 20 Ill.Dec. 160, 379 N.E.2d 1228 (1st Dist.1978).

Although the Institute and Iran have a "working relationship," the record does not demonstrate that the relationship is an agency relationship such that Iran controls the Institute. The relationship between the parties regarding the Persepolis Collection is set forth in a loan agreement between Iran and the Institute, and the terms of the relationship are governed by that agreement. Under the agreement, the Institute has possession of the Collection for the purposes of study and translation, and is obligated to return the Collection once it completes its studies. This relationship is not the equivalent of an agency relationship because Iran (the alleged principal) cannot control the activities of the Institute (the alleged agent) ***1011** other than to obtain possession of the Collection when the Institute, in its judgment, is finished with its studies. The relationship is therefore more a bailment than an agency.

"Under Illinois law, bailment is the delivery of goods for some purpose, upon a contract, express or implied, that after the purpose has been fulfilled the goods shall be redelivered to the bailor, or otherwise dealt with according to his directions, or kept till he reclaims them." *In re Mississippi Valley Livestock, Inc.,* 59 Bankr.Ct.Dec. 54 (7th Cir.2014) (internal quotations and citations omitted). But a bailment is not equivalent to an agency relationship. Plaintiffs cite *In Re Couthamel Potato Chip Co.,* 6 B.R. 501, 507 (Bkr.E.D.Pa.1980), wherein the bankruptcy court stated that bailment is a "true agency relationship." However, in the very next paragraph of that

opinion, the court goes on to discuss the distinct definitions of a bailment and an agency, noting that they are not one and the same, but similar. *Id.* Indeed, although a bailee may be an agent of a bailor in certain circumstances, not every bailee is an agent. *See Lionberger v. United States,* 371 F.2d 831, 840 (Ct.Cl.1967). Because a bailment relationship by itself does not give the bailor control of the bailee, the concepts and relationship are different than an agency. *Id.* (Noting that "[w]here the one who acts in another's behalf is not at the same time also subject to his control, then the relationship, though otherwise a bailment, is not also an agency."). The record does not demonstrate that the Institute had any duties above and beyond the responsibilities articulated in the agreement with Iran, or that Iran directed the activities of the Institute such that the bailee relationship was elevated to an agency relationship.

It should also be noted that the Institute is conducting this academic study for its own research purposes, and not for Iran's benefit. Under the agreement, the Institute consented to provide to Iran "two copies of each of the works, review articles, collections of photographs or drawings it publishes based on the facts made known or the objects found during the work" at the Persepolis excavation, but the letter memorializing the agreement does not place further burdens or substantial conditions on the Institute. [9] There is no indication in the record that the Institute ever claimed more than a present possessory interest in the collection, or manifested anything other than an intention to work in its own interest. Plaintiffs' claim that the Institute is controlled by Iran are therefore unconvincing.

Because Section 1610 requires the commercial activity to be conducted by the sovereign, and there is no evidence that the Institute may properly be considered an agent of Iran, the court finds that the assets are not subject to attachment under Section 1610 of the FSIA. [10]

B. Section 1610(g)

In 2008, Congress passed the National Defense Authorization Act ("NDAA"), Pub.L. No. 110–181, which, among other things, amended 28 U.S.C. § 1610 to add subsection (g). That section provides that:

> ***1012** (1) In general.—Subject to paragraph (3), the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of—
>
> (A) the level of economic control over the property by the government of the foreign state;
>
> (B) whether the profits of the property go to that government;
>
> (C) the degree to which officials of that government manage the property or otherwise control its daily affairs;
>
> (D) whether that government is the sole beneficiary in interest of the property; or
>
> (E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

Plaintiffs argue that the passage of this provision allows the execution against all terror states' assets, regardless of whether they are blocked assets. Plaintiffs rely heavily on *In re Islamic Republic of Iran Terrorism Litigation,* 659 F.Supp.2d 31, 62 (D.D.C.2009) ("*In re Terrorism Litigation* "), in which Chief Judge Lamberth stated that the NDAA added "new provisions that are plainly intended to limit the application of foreign sovereign immunity."

Defendants argue that plaintiffs did not raise the applicability of Section 1610(g) in the previous appeal of this case to the Seventh Circuit, and are therefore precluded from arguing its applicability on summary judgement because of the mandate rule. They further argue that Section 1610(g) is not an independent exception to immunity, but rather was intended to aid in the execution against property regardless of whether the property belongs to a foreign sovereign or an agent or instrumentality of the sovereign. According to defendants, Congress passed this amendment to Section 1610 to counter the Supreme Court's ruling in *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba,* 462 U.S. 611, 627–28, 103 S.Ct. 2591, 77 L.Ed.2d 46 (1983) ("*Bancec*"), which held that the separate juridical status of a foreign state's instrumentalities and agencies should be respected, and those entities should be accorded a presumption of independent status.

The mandate rule dictates that "any issue that could have been but was not raised on appeal is waived and thus not

remanded." *United States v. Chaidez,* 2013 WL 3819658, at *3 (N.D.Ill. July 22, 2013). In 2009, Iran appealed two discovery-related orders by the district judge previously assigned to this case. The first order found that "the immunity codified in § 1609 is an affirmative defense personal to the foreign sovereign and must be specially pleaded[;]" the second order allowed discovery regarding all Iranian-owned assets located in the United States. *Rubin v. The Islamic Republic of Iran,* 637 F.3d 783, 785 (7th Cir.2011). Defendants argue that plaintiffs should have raised the application of Section 1610(g) before the Seventh Circuit in that appeal when arguing that Iran's assets were not immune from attachment and that plaintiffs were therefore entitled to general asset discovery.

The court concludes that the mandate rule does not preclude plaintiffs from arguing the applicability of Section 1610(g). The Seventh Circuit's previous decision dealt narrowly with discovery-related issues and made no findings about ***1013** whether any assets would be subject to attachment. At this early stage of the proceedings, the Seventh Circuit discussed the issue of "discovery in the context of attachment proceedings against foreign-state property in the United States under the FSIA," noting that courts must "proceed narrowly, in a manner that respects the statutory presumption of immunity." *Id.* at 796. The court made no specific findings about the potential basis for immunity or any exceptions that would limit plaintiffs' Section 1610(g) argument at this juncture.

However, plaintiffs' Section 1610(g) argument nonetheless fails. First, if Section 1610(g) provided a separate basis for attachment that allowed the execution against all terror states' assets, regardless of whether they are blocked assets, certain subsections of Section 1610 would be unnecessary. Subsection (a)(7) provides that when "the judgment relates to a claim for which the foreign state is not immune under section 1605A or section 1605(a)(7)," the property of the foreign state used for a commercial activity is not immune from attachment "regardless of whether the property is or was involved with the act upon which the claim is based." Similarly, subsection (b)(3) provides the same for agencies and instrumentalities of the foreign state. Essentially, under those subsections, plaintiffs who obtain judgments under Section 1605A may invoke the commercial activity exception. If Section 1610(g) simply allowed the attachment of all property whether used for commercial activity or not, then subsections (a)(7) and (b)(3) would be inconsistent, because they require a relation to commercial activity. It is the court's duty "to give effect, if possible, to every clause and word of a statute." *United States v. Menasche,* 348 U.S. 528, 538–539, 75 S.Ct. 513, 99 L.Ed. 615 (1955) (internal quotations and citations omitted). Plaintiffs' interpretation of Section 1610(g) is therefore inconsistent with that cannon of statutory interpretation. Additionally, plaintiffs have virtually no support for their contention that Section 1610(g) expands the bases for attachment. As the court noted in *In re Terrorism Litigation,* upon which plaintiffs rely heavily, acknowledge that the "implications of § 1610(g) are far from clear." 659 F.Supp.2d at 62.

The new subsection includes the key phrase that "the property of a foreign state ... and the property of an agency or instrumentality of such a state ... is subject to attachment in aid of execution, and execution, upon that judgment *as provided in this section.*" 28 U.S.C. § 1610(g) (emphasis added). The plain language indicates that Section 1610(g) is not a separate basis of attachment, but rather qualifies the previous subsections. In light of this reading, defendants' argument that Section 1610(g) was enacted to supercede *Bancec* is consistent with the construction of the statute. As the United States points out in its Statement of Interest, subsections (A) through (E) of Section 1610(g) mirror the factors suggested in *Bancec* as determinative of whether an instrumentality of a foreign government functions as an alter ego of that government. *See Walter Fuller Aircraft Sales, Inc. v. Republic of Philippines,* 965 F.2d 1375, 1381 (5th Cir.1992). As other courts have held, the purpose of Section 1610(g) is to counteract the Supreme Court's decision in *Bancec*, and to allow execution against the assets of separate juridical entities regardless of the protections *Bancec* may have offered. *See Estate of Heiser v. Islamic Republic of Iran,* 885 F.Supp.2d 429, 442 (D.D.C.2012) *aff'd sub nom. Heiser v. Islamic Republic of Iran,* 735 F.3d 934 (D.C.Cir.2013).

***1014** The court therefore finds that Section 1610(g) does not provide a new basis for plaintiffs to attach the assets of Iran, and does not subject the collections in question to attachment and execution.

III. Attachment under the Terrorism Risk Insurance Act

Plaintiffs claim that Section 201 of the Terrorism Risk Insurance Act ("TRIA"), 28 U.S.C. § 1610 note, permits the attachment of all the Iranian artifacts in question. Section 201 provides:

> Notwithstanding any other provision of law, and except as provided in subsection (b) [of this note], 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 (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.

Plaintiffs argue that Iran is a "terrorist party" as defined in TRIA, and that plaintiffs obtained a judgment on a claim for which Iran was not immune under 28 U.S.C. § 1605(a)(7). Plaintiffs further argue that the artifacts in question are "blocked assets" under TRIA, and therefore subject to attachment. Defendants dispute that the artifacts are "blocked assets."

Section 201(d)(2)(A) defines a "blocked asset" as any asset "seized or frozen by the United States under section 5(b) of the Trading with the Enemy Act or under sections 202 and 203 of the International Emergency Economic Powers Act." In 1979, President Carter's Executive Order 12170 ("EO 12170") froze all Iranian assets in the United States, including the collections in question. Defendants argue that the Algiers Accords [11] and the subsequent executive orders that implemented the Accords, including Executive Order 12281, 46 Fed.Reg. 7.923 (Jan. 19, 1981) ("EO 12281"), then unblocked the assets and that the assets remain unblocked. Plaintiffs contend that neither EO 12281 or the Accord unblocked the assets.

EO 12281 mandated that "[a]ll persons subject to the jurisdiction of the United States in possession or control of properties ... owned by Iran ... transfer such properties[ ] as directed ... by the Government of Iran." 1–101. EO 12281 and Algiers Accords unblocked most Iranian assets that existed in the U.S. at the time. See *Weinstein v. Islamic Rep. Of Iran,* 609 F.3d 43, 55 (2d Cir.2010). Under Treasury Department regulations, some exceptions to EO 12281 allowed certain Iranian assets to remain blocked. The Treasury Department regulation defines the properties unblocked by EO 12281 as ***1015** "all uncontested and non-contingent liabilities and property interests of the Government of Iran, its agencies, instrumentalities, or controlled entities." 31 C.F.R. § 535.333(a). That regulation further states that a property interest is "contested only if the holder thereof reasonably believes that Iran does not have title or has only partial title to the asset." 31 C.F.R. § 535.333(c).

Because different facts apply to the ownership of each of the collections, and thus the "blocked" or "unblocked" status of the artifacts, the court will address them separately.

A. The Persepolis Collection and the Chogha Mish Collection

In their briefs, both Iran and the Institute agree that the Persepolis Collection and the Chogha Mish collection ultimately belong to Iran. Plaintiffs argue that the history of the Persepolis Collection has long been disputed, and that in a previous filing defendants had characterized Iran's interest in the objects as a "reversionary interest" only. According to plaintiffs, this characterization demonstrates a contest as to ownership, despite defendants' claims. Further, because Iran filed a claim in the Iran–U.S. Claims Tribunal against the United States in 1983 regarding the objects missing from the Chogha Mish Collection, plaintiffs argue that ownership of that collection is also disputed.

Regarding the Persepolis Collection, the filing that plaintiffs cite containing the language about the reversionary interest is a motion for a protective order filed by the University of Chicago and the Institute in June 2004 in the instant case. Although the motion does state that the National Museum of Iran "has only a reversionary interest[,]" the motion goes on to explain that this reversionary interest is a "right to ultimate ownership and return." Plaintiffs attempt to argue that a reversionary interest leaves a party with only a portion of the title of the object, but they cite no cases demonstrating that granting a current possessory interest to the Museums divests Iran of its title. The Museums' assertion of a possessory interest is not equivalent to a claim that Iran does not own the collections. The terms of the academic loan require the Institute to return that collection to Iran after the academic study is complete. Thus, plaintiffs' argument that

the Museums have disputed the ownership of the Persepolis Collection is without merit.

Regarding the Chogha Mish collection, defendants claim that there is no dispute as to the ownership of the collection. As an initial matter, the proceedings in the Tribunal are not between Iran and the Museums, but are instead between the United States and Iran. Any conflict between those parties does not presume an objection on the part of the possessing museum. As the government points out in its Statement of Interest, the Treasury department regulations implementing the Algiers Accords make it clear that for an asset to be "contested," the contest must be between Iran and the property holder. *See also Rubin v. Islamic Republic of Iran,* 709 F.3d 49, 56–58 (1st Cir.2013). Further, the record confirms that ownership of the collection is not one of the issues in the claim before the Iran–U.S. Claims Tribunal. Iran's claim before the Tribunal focuses on returning the objects that were not turned over in 1970 with the rest of the collection. Ownership of the collection is not disputed, and therefore, the objects are not "blocked" assets under TRIA.

Plaintiffs further argue that Executive Order No. 13,599, 77 Fed.Reg. 6,659 (Feb. 5, 2012) ("EO 13,599") made the collections ***1016** "blocked assets." EO 13,599, however, does "not apply to property and interests in property of the Government of Iran that were blocked pursuant to Executive Order 12170 of November 14, 1979, and thereafter made subject to the transfer directives set forth in Executive Order 12281 of January 19, 1981, and implementing regulations thereunder." *Id.* at 6,660. Because this court has already found that the assets were blocked under EO 12170 and unblocked under EO12281, EO 13,599 does not apply to the collections and does not render the assets "blocked" under TRIA.

Because the assets in question are not "blocked" under TRIA, they are not subject to attachment by the plaintiffs under that statute.

B. The Museum Collections

The Museums argue that the Museum Collections are not subject to attachment under TRIA because the Museum Collections are not the assets of Iran and are not "blocked" assets. Regarding the second point, the Museums rely on EO 12281, the Order that unblocked "all uncontested and non-contingent liabilities and property interests" of Iran. As noted above, property is contested "only if the holder thereof reasonably believes that Iran does not have title or has only partial title to the asset." 31 C.F.R. 535.333(c). The Museums assert that Iran does not have title to the assets, but they cite the First Circuit's opinion in *Rubin v. Islamic Republic of Iran,* 709 F.3d 49, 57–58 (1st Cir.1013), for the proposition that an asset cannot be considered blocked under TRIA unless Iran itself asserts a claim of ownership over it. The Museums argue that Iran has never asserted ownership of the Museum Collections, and therefore those collections are unblocked assets not subject to attachment.

Plaintiffs argue that the Museum Collections were not unblocked by EO 12281 because the artifacts were contested at the time of the order. According to plaintiffs, the lack of evidence of provenance demonstrates Iran's ownership interest in the antiquities, and ownership of the antiquities is contested. Further, plaintiffs state that Iran "always contests ownership of items taken without permission."

The record does not demonstrate that Iran has asserted any claim of ownership over the Museum Collections, despite plaintiffs' broad statement that Iran "always contests" the ownership of its antiquities removed from the country. Plaintiffs support this argument with a number of cases before British courts wherein Iran contested the removal of artifacts that it alleged had been improperly removed. [12] These cases and submissions do not, however, indicate that Iran has offered any claim of ownership over the Museum Collections at issue here. As a result, the record does not support plaintiff's argument that Iran has disputed the ownership of these particular collections.

Although plaintiffs correctly argue that the First Circuit's decision in *Rubin v. Islamic Republic of Iran,* 709 F.3d 49 (1st Cir.2013), is not controlling, it is well-reasoned and persuasive. The First Circuit considered the submission of the United States Department of the Treasury's Office of Foreign Assets Control (OFAC), which cited and interpreted the language of EO 12281 and the Treasury regulations. ***1017** Those regulations required a transfer of properties only "as directed ... by the Government of Iran." 46 Fed.Reg. at 7,923; 31 C.F.R. § 535.215(a). OFAC argued that this language applied to the rest of the regulations regarding the transfer of assets such that Iran must actively direct the transfer of an asset or assert ownership in order to render an asset contested. The First Circuit deferred to OFAC's interpretation of the regulations, finding that "an asset can be 'contested' for purposes of 31 C.F.R. § 535.333 only if Iran itself has claimed an interest in the asset." *Rubin v. Islamic Republic of Iran,* 709 F.3d at 57–58.

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The court finds the reasoning of the First Circuit and the interpretation by OFAC compelling.[13] The language cited by OFAC demonstrates that EO 12281 and Treasury's implementing regulations intended that only assets contested by Iran, and not by third parties such as judgment creditors, would remain blocked and therefore subject to attachment. The court therefore holds that Iran itself must contest the ownership of the property in order to render an asset contested, and therefore blocked, under the TRIA. Because Iran has not claimed ownership of the antiquities in the Herzfeld Collection or the OI Collection, those assets are not contested or blocked, and therefore are not subject to attachment under TRIA.[14]

CONCLUSION

The court recognizes the tragic circumstances that gave rise to the instant action, but finds that the law cited by plaintiffs does not offer the remedy they seek.

For the foregoing reasons, none of the statutes cited by plaintiffs provide a basis for the attachment and execution against any of the artifacts in the Persepolis, Chogha Mish, Herzfeld, or OI Collections. Consequently, the court grants defendants' motions for summary judgment.

All Citations

33 F.Supp.3d 1003

Footnotes

1 Jurisdiction for the underlying action was predicated on the exceptions to sovereign immunity detailed in 28 U.S.C. § 1605(a)(7).

2 The following facts are, unless otherwise specified, undisputed and come from the parties' L.R. 56.1 statements.

3 In 2011, the Museums appealed two orders by the district judge previously assigned to this case regarding discovery issues and the propriety of the assertion of an affirmative defense. *See Rubin v. The Islamic Republic of Iran,* 637 F.3d 783, 785 (7th Cir.2011). That opinion dealt with these preliminary issues and remanded the case to the district court. The details of the opinion are discussed below.

4 The court uses the terms “artifacts” and “collections” to describe all of the assets collectively. When an argument applies to a subset of those collections, the court will name the collection individually.

5 On May 20, 2004, plaintiffs issued a Citation to Discover Assets to the Museums. Because those artifacts are the subject of pending litigation, the Institute has not turned them over to Iran.

6 Plaintiffs separately identify each of the small collections that make up the OI collection, including: the Gremliza Collection, the Adams Collection, the Cooper Collection, “Bronze Bands with Striding Griffins,” the Alizadeh Collection, and Accession 3699. The Gremliza Collection came into the possession of the Institute in 1988 from a traveling medical doctor, Dr. Gremliza, who visited Iranian villages in the mid–1960s. Plaintiffs allege that Dr. Gremliza did not lawfully possess or own the items, and that he did not have permission to export them. The “Bronze Bands with Striding Griffins” are four sections of a bronze band that are part of the residual OI collection, and plaintiffs note that there are no records of how the items came into the possession of the Institute. The Adams Collection was acquired through Robert Adams, but plaintiffs assert that Adams did not own the items and that the Institute's evidence as to provenance is insufficient. The Cooper Collection was donated by Dr. Cooper, who found the items while stationed near Persepolis during World War II. Plaintiffs allege that Cooper's ownership of the collection is questionable. The Alizadeh Collection was given to the Institute in 1995 by a staffer, Abbas Alizadeh, who stated that he found them in a former staffer's home. Plaintiffs argue that the Institute has no records as to the ownership or authorizations by the staffer. Accession 3699 is a Persian tile “probably” given to the Institute by Otis Ellery Taylor. Plaintiffs argue that its chain of ownership is unknown.

7 The Museums argue that the Herzfeld and OI Collections are not the property of a foreign state, and that the FSIA therefore cannot serve as the basis for attachment. Because the question of commercial activity, discussed below, resolves the FSIA question for all the collections, the court need not reach the question of whether the items in the Herzfeld and OI Collections are the property of Iran.

8 Plaintiffs have abandoned their FSIA argument regarding the Chogha Mish Collection and do not argue that the commercial activity exception applies to the Museum Collections; therefore, the court will discuss only the Persepolis Collection.

9 The record also includes letters from the Institute to Iran wherein the Institute promises to "a full account of our activities in behalf of [Iran]," and other assurances, but these documents do not grant Iran the power to direct the work of the Museums.

10 Because the court finds that the commercial activity must be conducted by the sovereign, it need not reach the issue of whether the Museums' activities may be characterized as commercial activity.

11 The Algiers Accords, 20 I.L.M. 224, was an agreement between the U.S. and Iran signed on January 19, 1981. Under the Accords, "the United States agreed to "restore the financial position of Iran, in so far as possible, to that which existed prior to November 14, 1979," *ibid.,* and (with some exceptions) to "arrange, subject to the provisions of U.S. law applicable prior to November 14, 1979, for the transfer to Iran of all Iranian properties," *id.,* at 227. *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Elahi,* 556 U.S. 366, 370, 129 S.Ct. 1732, 1736, 173 L.Ed.2d 511 (2009) (internal quotations and citations omitted). Subsequent to the signing of the Accords, President Regan lifted legal prohibitions against transactions involving Iranian property. *See* Exec. Orders Nos. 12277–12282, 3 CFR 105–113 (1981 Comp.); 31 C.F.R. §§ 535.211–535.215 (1981).

12 For example, plaintiffs cite a letter from a British law firm on behalf of Iran to a London gallery regarding a number of items that the London gallery had advertised for sale. The letter states that those items were considered of historical interest, and as such, proper authorization was required before those items could be removed. The letter further states that it is the position of the law firm that ownership of those items remained with Iran.

13 Plaintiffs urge the court not to rely on OFAC's interpretation because the U.S. is a litigant in any case interpreting the TRIA, and because an agency's interpretation should only be used when the regulation is ambiguous. *Chase Bank USA, N.A. v. McCoy,* 562 U.S. 195, 131 S.Ct. 871, 178 L.Ed.2d 716 (2011). Both parties' readings of the regulation are plausible and the court must therefore turn to the agency's interpretation of the regulation for guidance, unless that interpretation is "plainly erroneous or inconsistent with the regulation." *Id.* (internal citations and quotation marks omitted). Plaintiffs further argue that courts should not defer to the position the U.S. when that position is announced during litigation in which the U.S. is participating. However, as the First Circuit noted, "[t]he fact that blocked assets play an important role in the conduct of United States foreign policy may provide a further reason for deference to the views of the executive branch in this case." *Rubin v. Islamic Republic of Iran,* 709 F.3d 49, 57 (1st Cir.2013) (citing *Rep. of Austria v. Altmann,* 541 U.S. 677, 701–02 (2004), and *Estate of Heiser v. Islamic Rep. of Iran,* 885 F.Supp.2d 429, 440–41 (D.D.C.2012).

14 In support of their argument that TRIA and the FSIA are applicable to the Herzfeld and OI Collections, plaintiffs contend that Iran owns the artifacts, not the Museums. Because the court has found that even if the artifacts were owned by Iran, the commercial activities exception would not apply and the artifacts do not qualify as "blocked" assets, it is unnecessary for the court to reach the question of ownership.

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ANNEX 185

830 F.3d 470
United States Court of Appeals, Seventh Circuit.

Jenny RUBIN, et al., Plaintiffs-Appellants,
v.
ISLAMIC REPUBLIC OF IRAN, Defendant-Appellee,
and
Field Museum of Natural History, et al., Respondents-Appellees.

No. 14-1935
|
Argued April 23, 2015
|
Decided July 19, 2016

Synopsis

Background: American citizens and their families, who had obtained judgment against Islamic Republic of Iran under Foreign Sovereign Immunities Act (FSIA) for injuries sustained in terrorist group's suicide bombing, 281 F.Supp.2d 258, brought action to execute judgment against Iranian antiquities currently on loan to university and museum. The United States District Court for the Northern District of Illinois, Robert W. Gettleman, J., 33 F.Supp.3d 1003, granted summary judgment against the plaintiffs, concluding that the artifacts were not subject to attachment. Plaintiffs appealed.

Holdings: The Court of Appeals, Sykes, Circuit Judge, held that:

university's alleged commercial use of artifacts did not trigger FSIA exception to execution immunity for property of a foreign state "used for a commercial activity" in the United States, and

FSIA provision allowing attachment of and execution against property held by foreign terrorist state's instrumentality "that is a separate juridical entity" was not freestanding "terrorism" exception to execution immunity, overruling *Gates v. Syrian Arab Republic*, 755 F.3d 568, and *Wyatt v. Syrian Arab Republic*, 800 F.3d 331.

Affirmed.

Hamilton, Circuit Judge, filed opinion dissenting from denial of en banc review.

***472** Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 03 C 9370 —**Robert W. Gettleman**, *Judge*.

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Before Bauer and Sykes, Circuit Judges, and Reagan, Chief District ***473** Judge.[*]

Opinion

Sykes, Circuit Judge.

In September 1997 three Hamas suicide bombers blew themselves up on a crowded pedestrian mall in Jerusalem. Among those grievously injured were eight U.S. citizens who later joined with a handful of their close relatives to file a civil action against the Islamic Republic of Iran for its role in providing material support to the attackers. Iran was subject to suit as a state sponsor of terrorism under the terrorism exception to the Foreign Sovereign Immunities Act ("FSIA"), then codified at 28 U.S.C. § 1605(a)(7). A district judge in the District of Columbia entered a $71.5 million default judgment. Iran did not pay.

So began more than a decade of unsuccessful litigation across the country to attach and execute on Iranian assets in order to

satisfy the judgment. *See* Rubin v. Islamic Republic of Iran, No. Civ. A. 01–1655, 2005 WL 670770, at *1 D.D.C. Mar. 23, 2005, *vacated*, 563 F.Supp.2d 38 (D.D.C. 2008) (granting and then vacating writs of execution against two domestic bank accounts used by Iranian consulates); *Rubin v. Islamic Republic of Iran*, 810 F.Supp.2d 402 (D. Mass. 2011), *aff'd*, 709 F.3d 49 (1st Cir. 2013) (rejecting an effort to attach Iranian antiquities in the possession of various museums); *Rubin v. Islamic Republic of Iran*, 33 F.Supp.3d 1003 (N.D. Ill. 2014) (same). This appeal concerns the last decision on this list.

The plaintiffs sought to execute on four collections of ancient Persian artifacts located within the territorial jurisdiction of the Northern District of Illinois: the Persepolis Collection, the Chogha Mish Collection, and the Oriental Institute Collection, all in the possession of the University of Chicago; and the Herzfeld Collection, split between the University and Chicago's Field Museum of Natural History. The case was last here on some procedural issues early in the attachment proceeding. *See* Rubin v. Islamic Republic of Iran, 637 F.3d 783 (7th Cir. 2011), *cert. denied*, —— U.S. ——, 133 S.Ct. 23, 183 L.Ed.2d 692 (2012). It now returns on the merits.

A foreign state's property in the United States is immune from attachment and execution, *see* 28 U.S.C. § 1609, but there are a few narrow exceptions. The plaintiffs identified three possible paths to reach the artifacts: subsections (a) and (g) of 28 U.S.C. § 1610, both part of the FSIA; and section 201 of the Terrorism Risk Insurance Act of 2002 ("TRIA"), Pub. L. No. 107-297, 116 Stat. 2322 (codified at 28 U.S.C. § 1610 note), which permits holders of terrorism-related judgments to execute on assets that are "blocked" by executive order under certain international sanctions provisions. The district court entered judgment against the plaintiffs, finding no statutory basis to execute on the artifacts.

We affirm. The assets are not blocked by existing executive order, so execution under TRIA is not available. Nor does § 1610(a) apply. That provision permits execution on a foreign state's property "used for a commercial activity in the United States." We read this exception to require commercial use by the foreign state itself, not a third party. Iran did not put the artifacts to any commercial use.

Lastly, § 1610(g) is not itself an exception to execution immunity. Instead, it partially abrogates the so-called *Bancec* doctrine, which holds that a judgment against a foreign state cannot be executed on property owned by its juridically separate instrumentality. ***474** *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba* ("*Bancec*"), 462 U.S. 611, 626–29, 103 S.Ct. 2591, 77 L.Ed.2d 46 (1983). The *Bancec* rule can be overcome in two ways: The holder of a judgment against a foreign state may execute on the property of its instrumentality if the sovereign and its instrumentality are alter egos or if adherence to the rule of separateness would work an injustice. *Id.*

Section 1610(g) lifts the *Bancec* rule for holders of terrorism-related judgments, allowing attachment in aid of execution "as provided in this section" without regard to the presumption of separateness—that is, without the requirement of establishing alter-ego status or showing an injustice. The phrase "as provided in this section" refers to the immunity exceptions found elsewhere in § 1610, one of which must apply to overcome execution immunity. So although subsection (g) substantially eases the enforcement process for terrorism victims by removing the *Bancec* barrier, it is not a freestanding terrorism exception to execution immunity.

I. Background

The artifacts at issue here arrived in the United States over a 60-year timespan beginning in the 1930s. In 1937 Iran loaned the Persepolis Collection—roughly 30,000 clay tablets and fragments containing some of the oldest writings in the world—to the University of Chicago's Oriental Institute for research, translation, and cataloguing. In 1945 the Field Museum purchased a collection of approximately 1,200 prehistoric artifacts from Dr. Ernst Herzfeld, a German archaeologist active in Persia in the early 20th century (the Herzfeld Collection). In the 1960s Iran excavated clay seal impressions from the ancient Chogha Mish settlement and loaned them to the University's Oriental Institute for academic study (the Chogha Mish Collection). Most items in this collection were returned to Iran in 1970, but the University has since located some objects previously missing from the collection. In the 1980s and 1990s, the Oriental Institute received several small donations of Persian artifacts from Iran and other donors. These artifacts are not really a discrete collection, but the parties refer to them as the "Oriental Institute Collection," so we'll do the same.

The plaintiffs are American victims of a suicide-bomb attack carried out by Hamas in Jerusalem on September 4, 1997, with material support from Iran. In 2003 the survivors and their close family members filed suit against Iran in federal

court in the District of Columbia, proceeding under the terrorism exception to jurisdictional sovereign immunity, then codified at § 1605(a)(7) of the FSIA. (In January 2008 Congress repealed § 1605(a)(7) and enacted a new terrorism exception to jurisdictional sovereign immunity codified at 28 U.S.C. § 1605A. *See* National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083, 122 Stat. 3, 338–44.)

The plaintiffs won a $71.5 million default judgment, *see Campuzano v. Islamic Republic of Iran*, 281 F.Supp.2d 258 (D.D.C. 2003), and quickly commenced enforcement actions around the country in an effort to collect. As relevant here, the plaintiffs registered the judgment in the Northern District of Illinois, initiating attachment proceedings for the purpose of executing on the four collections then in the possession of the University and the Field Museum. [1] (We'll refer to the University and the Field Museum collectively as "the Museums" unless the context requires otherwise.)

***475** Significant procedural battles ensued. We resolved these disputes in our earlier opinion and need not repeat that litigation history. *See Rubin*, 637 F.3d at 786–89. For present purposes it's enough to note that the plaintiffs initially proposed two possible ways to overcome Iran's execution immunity. First, they invoked § 1610(a), the "commercial activity" exception to execution immunity. Second, they pointed to TRIA, which permits execution on the blocked assets of a state sponsor of terrorism (or its agency or instrumentality) to satisfy a judgment obtained under the terrorism exception to jurisdictional sovereign immunity.

After we sent the case back to the district court, the parties engaged in discovery on the four collections, and Iran and the Museums moved for summary judgment. The district judge granted the motion. First, he rejected the plaintiffs' claim that the artifacts are subject to execution under § 1610(a). The judge read this exception as limited to property used for a commercial activity *by the foreign state itself*. Because Iran hadn't used the artifacts for commercial activity, the judge held that § 1610(a) does not apply.

The judge also held that because the assets in question are not blocked—i.e., frozen—by any current executive order, execution under TRIA is likewise unavailable.

Finally, in their response to the summary-judgment motion, the plaintiffs identified a third possible path to reach the artifacts: § 1610(g), which they argued is an independent exception to execution immunity available to victims of state-sponsored terrorism. The judge rejected this argument too, concluding that subsection (g) abrogates the *Bancec* rule for terrorism-related judgments but is not a freestanding terrorism exception to execution immunity.

Finding no statutory basis to execute on the artifacts, the judge entered judgment for Iran and the Museums. The plaintiffs appealed, reprising all three arguments.

II. Discussion

A. Which Artifacts Remain at Issue?

Our first task is to identify which of the four collections is even potentially subject to attachment and execution at this juncture. Two basic criteria apply: (1) the artifacts must be owned by Iran, and (2) the artifacts must be within the territorial jurisdiction of the district court. *See Republic of Argentina v. NML Capital, Ltd.*, —— U.S. ——, 134 S.Ct. 2250, 2257, 189 L.Ed.2d 234 (2014) ("Our courts generally lack authority in the first place to execute against property in other countries....") (citation omitted); *see also Autotech Techs. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 750 (7th Cir. 2007) ("The FSIA did not purport to authorize execution against a foreign sovereign's property, or that of its instrumentality, wherever that property is located around the world. We would need some hint from Congress before we felt justified in adopting such a breathtaking assertion of extraterritorial jurisdiction.").

There's no dispute that the Persepolis Collection is owned by Iran and is in the physical possession of the University. The three other collections, however, are outside the reach of this proceeding for reasons relating to their present location or the absence of Iranian ownership.

As we've just explained, when the district court entered judgment, the University had possession of remnants of the Chogha Mish Collection. But intervening developments have placed these artifacts beyond the grasp of the federal courts. After filing their notice of appeal, the plaintiffs asked us to stay the district ***476** court's judgment pending appeal. We denied the motion. The State Department then informed the University that the United States was obligated to return the Chogha Mish artifacts to Iran. The University, in turn, notified us that it would return the Chogha Mish artifacts to Iran within 45 days unless the court ordered otherwise. We did not order otherwise. So the University delivered the artifacts

to Iran's National Museum in Tehran and filed notice with the court that Iran received and accepted them. Accordingly, the Chogha Mish Collection is no longer within the territorial jurisdiction of the district court.

The Herzfeld and the Oriental Institute Collections remain within the court's territorial jurisdiction, but they are not Iranian property. The plaintiffs have tried to cast doubt on the legitimacy of their removal from Iran, arguing that Dr. Herzfeld is regarded by some in the academic community as a plunderer and that the artifacts in these collections are covered by Iran's National Heritage Protection Act of 1930, which gives the government of Iran an option to exercise control over certain antiquities unearthed in the country. The Museums, on the other hand, maintain that they were bona fide purchasers or recipients of these collections; the plaintiffs have not meaningfully contested this point.

We don't need to resolve any questions about the provenance of the Herzfeld and Oriental Institute Collections or explore the circumstances under which the Museums acquired them. As the plaintiffs concede, Iran has expressly disclaimed any legal interest in the two collections, and the district judge found that no evidence supports Iranian ownership of these artifacts. The plaintiffs have not given us any reason to disturb this ruling, and we see none ourselves.

Because the Chogha Mish Collection is no longer within the territorial jurisdiction of the district court and Iran has disclaimed ownership of the Herzfeld and Oriental Institute Collections, we confine our merits review to the Persepolis Collection.

B. Statutory Framework

We traced the history of the foreign sovereign immunity doctrine and the enactment of the FSIA in our earlier opinion. *See Rubin*, 637 F.3d at 792–94. A brief repetition is helpful to a proper understanding of the statutory-interpretation questions presented here.

Foreign sovereign immunity "is a matter of grace and comity on the part of the United States," and for much of our nation's history was left to the discretion of the Executive Branch. *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983). As such, federal courts "consistently ... deferred to the decisions of the political branches—in particular, those of the Executive Branch—on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities." *Id.* Under the common-law doctrine, a diplomatic representative of the foreign state would request a "suggestion of immunity" from the State Department, and if the State Department obliged, the court would surrender jurisdiction without further inquiry; absent a suggestion of immunity, the court would decide the immunity question itself based on policies established by the State Department. *Rubin*, 637 F.3d at 793. Either way, "[t]he process ... entailed substantial judicial deference to the Executive Branch." *Id.*

Even if a court acquired jurisdiction and awarded judgment against a foreign state, "the United States gave absolute immunity ***477** to foreign sovereigns from the execution of judgments." *Autotech*, 499 F.3d at 749. Successful plaintiffs had to rely on voluntary payment by the foreign state. *Id.*

In 1952 the State Department adopted a "restrictive" theory of foreign sovereign immunity, conferring jurisdictional immunity in cases arising out of a foreign state's "public acts" but withholding it in "cases arising out of a foreign state's strictly commercial acts." *Verlinden*, 461 U.S. at 487, 103 S.Ct. 1962. "Under the restrictive, as opposed to the 'absolute,' theory of foreign sovereign immunity, a state is immune from the jurisdiction of foreign courts as to its sovereign or public acts (*jure imperii*), but not as to those that are private or commercial in character (*jure gestionis*)." *Saudi Arabia v. Nelson*, 507 U.S. 349, 359–60, 113 S.Ct. 1471, 123 L.Ed.2d 47 (1993). Even under this theory, however, foreign sovereign property remained absolutely immune from execution. *Autotech*, 499 F.3d at 749.

The State Department's shift to the restrictive theory of jurisdictional immunity " 'thr[ew] immunity determinations into some disarray,' since 'political considerations sometimes led the Department to file suggestions of immunity in cases where immunity would not have been available.' " *NML Capital*, 134 S.Ct. at 2255 (brackets in original) (quoting *Republic of Austria v. Altmann*, 541 U.S. 677, 690, 124 S.Ct. 2240, 159 L.Ed.2d 1 (2004)). Essentially, "sovereign immunity determinations were [being] made in two different branches, subject to a variety of factors, sometimes including diplomatic considerations. Not surprisingly, the governing standards were neither clear nor uniformly applied." *Verlinden*, 461 U.S. at 488, 103 S.Ct. 1962.

In 1976 Congress stepped in and enacted the FSIA, which "largely codifies the so-called 'restrictive' theory of foreign sovereign immunity first endorsed by the State Department in 1952." *Republic of Argentina v. Weltover, Inc.*, 504 U.S.

607, 612, 112 S.Ct. 2160, 119 L.Ed.2d 394 (1992). The Act establishes a "comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state." *Verlinden*, 461 U.S. at 488, 103 S.Ct. 1962. "The key word ... is *comprehensive*." *NML Capital,* 134 S.Ct. at 2255. "[A]ny sort of immunity defense made by a foreign sovereign in an American court must stand on the Act's text. Or it must fall." *Id.* at 2256.

The Act codifies the two common-law immunities we've just discussed—jurisdictional immunity (28 U.S.C. § 1604) and execution immunity (*id.* § 1609). Only the latter is at issue here. Section 1609 states that "the property in the United States of a foreign state shall be immune from attachment[,] arrest[,] and execution except as provided in sections 1610 and 1611 of this chapter." Accordingly, the Persepolis Collection is immune from attachment and execution unless an exception listed in § 1610 applies. (Section 1611 of Title 28 of the U.S. Code lists exceptions to the exceptions and is not implicated here.)

The most prominent are the so-called commercial-activity exceptions found in subsections (a) and (b) of § 1610. Under § 1610(a) a person who holds a judgment against a foreign state may execute it on the foreign state's property "used for a commercial activity in the United States" *if* one of seven listed conditions is met. Similarly, under § 1610(b) a person who holds a judgment against a foreign state's instrumentality may execute it on "any property in the United States of [the] ... instrumentality ... engaged in commercial activity in the United States" *if* one of three listed conditions is met.

***478** So to summarize, at common law execution immunity was absolute, *Autotech*, 499 F.3d at 749, but subsections (a) and (b) of § 1610 together codify a narrower version of the restrictive theory of jurisdictional immunity for the execution of judgments, allowing successful claimants to attach and execute on foreign sovereign property "used for a commercial activity" in this country, at least in some circumstances. [2]

The plaintiffs point to § 1610(a) and § 1610(g) as possible paths to reach the artifacts. They also rely on section 201(a) of TRIA. We turn to these arguments now.

C. 28 U.S.C. § 1610(a)

As we've just explained, § 1610(a) establishes rules for executing a judgment against a foreign state on the foreign state's property; § 1610(b) establishes rules for executing a judgment against a foreign state's instrumentality on the instrumentality's property. The judgment here is against Iran, and Iran owns the Persepolis Collection, so subsection (a) is the relevant subsection.

Generally speaking, § 1610(a) permits the holder of a judgment against a foreign state to execute on property of the foreign state "used for a commercial activity in the United States" but only if one of seven enumerated conditions is satisfied. For example, a judgment creditor may proceed against a foreign state's property "used for a commercial activity in the United States" if the foreign state has expressly or impliedly waived execution immunity, § 1610(a)(1); or if the property in question "was used for the commercial activity upon which the claim is based," § 1610(a)(2); or if "the judgment is based on an order confirming an arbitral award," § 1610(a)(6).

At issue here is subsection (a)(7), which permits attachment and execution if the following terms are met:

> **(a)** The *property in the United States of a foreign state, ... used for a 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 or of a State after the effective date of this Act, *if*—
>
> **...**
>
> > **(7)** *the judgment relates to a claim for which the foreign state is not immune under section 1605A or section 1605(a)(7)* [the present and former terrorism exceptions to jurisdictional immunity] ... regardless of whether the property is or was involved with the act upon which the claim is based.

§ 1610(a)(7) (emphases added).

The plaintiffs obtained their judgment against Iran in 2003 under § 1605(a)(7), the terrorism exception to jurisdictional immunity then in effect. In 2008 Congress replaced § 1605(a)(7) with § 1605A, and the plaintiffs converted their judgment to one under the new statute. So there's no question that the special condition in subsection (a)(7) is satisfied.

That leaves the basic "commercial activity" requirement of § 1610(a). The dispute here centers on the key statutory phrase identifying the property that may be subject to execution under this exception: "property in the United States of a foreign state ... used for a commercial activity in the United

States." § 1610(a). The passive-voice ***479** phrasing of this sentence raises an interpretive question: *Used by whom?*

The plaintiffs contend that *a third party's* commercial use of the property triggers § 1610(a) and that the University's academic study of the Persepolis Collection counts as a commercial use. Iran and the University counter that the foreign state *itself* must use its property for a commercial activity, and regardless, academic study isn't a commercial use. The United States has weighed in as an amicus curiae on the side of the interpretation urged by Iran and the University—namely, that the exception in § 1610(a) applies *only* when the foreign sovereign itself (not a third party) uses the property for a commercial activity.

We're skeptical that academic study qualifies as a commercial use, but we'll put that question aside and focus on the antecedent one: *Whose commercial use counts?*

The Fifth Circuit has held that § 1610(a) is triggered only when the foreign state *itself* uses its property in the United States for a commercial activity. *See Conn. Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 256 n. 5 (5th Cir. 2002) ("[W]hat matters under the statute is how the *foreign state* uses the property, not how private parties may have used the property.").

The Second and Ninth Circuits agree. *See Aurelius Capital Partners v. Republic of Argentina*, 584 F.3d 120, 131 (2d Cir. 2009) ("The commercial activities of the private corporations who managed these assets are irrelevant to this inquiry.... [B]efore the retirement and pension funds at issue could be subject to attachment, the funds *in the hands of the Republic* must have been 'used for a commercial activity.' "); *Af–Cap, Inc. v. Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1090–91 (9th Cir. 2007) (adopting the Fifth Circuit's interpretation).

We think these circuits have understood § 1610(a) correctly. It's true that a legislature's use of the passive voice sometimes reflects indifference to the actor. *See Dean v. United States*, 556 U.S. 568, 572, 129 S.Ct. 1849, 173 L.Ed.2d 785 (2009) ("The passive voice focuses on an event that occurs without respect to a specific actor...."). But attributing indifference to Congress in this instance would be inconsistent with the FSIA's statutory declaration of purpose, which explicitly invokes the international law understanding of foreign sovereign immunity: "Under international law, states are not immune from the jurisdiction of foreign courts insofar as *their* commercial activities are concerned, and *their* commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with *their* commercial activities." 28 U.S.C. § 1602 (emphases added).

Section 1602 thus instructs courts to interpret the immunities and exceptions in the FSIA against the backdrop of the international law norm that foreign sovereigns do not have immunity for "*their* commercial activities" or immunity from execution on "*their* commercial property." This suggests that a foreign sovereign's property is subject to execution under § 1610(a) only when the sovereign *itself* uses the property for a commercial activity. While the passive-voice phrasing in § 1610(a) introduces some ambiguity about whose commercial use matters, § 1602's declaration of purpose clarifies that foreign states may lose execution immunity only by virtue of *their own* commercial use of their property in the United States, not a third party's.

The plaintiffs object that the declaration of purpose isn't relevant because resort to legislative history is not necessary ***480** when the statutory language is unambiguous. We disagree for two reasons. First, § 1602 is *legislation*, not legislative history. It was written, debated, and enacted by Congress and signed into law by the President—in the same manner and at the same time as § 1610. None of the standard objections to judicial reliance on legislative history inhibit our resort to a *statutory* declaration of purpose for help in interpreting a part of the statute to which it applies. [3]

Second, as we've just noted, the passive-voice phrasing of § 1610(a) creates uncertainty about *whose* commercial use of the property suffices to forfeit a foreign state's execution immunity. The text itself raises the question, and the uncertainty is all the more apparent when subsection (a) is considered in its broader statutory context. *See King v. Burwell*, —— U.S. ——, 135 S.Ct. 2480, 2489, 192 L.Ed.2d 483 (2015) ("[O]ftentimes the 'meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.' So when deciding whether the language is plain, we must read the words 'in their context and with a view to their place in the overall statutory scheme.' " (citation omitted) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000))). The FSIA starts with a baseline rule of execution immunity; the exceptions are few and "narrowly drawn." *Autotech*, 499 F.3d at 749.

Given the broad protective stance of the statutory scheme in general, we cannot say with confidence that § 1610(a)

unambiguously abrogates a foreign sovereign's execution immunity when a third party uses its property for a commercial activity. Rather, the statutory declaration of purpose suggests that a narrower interpretation is correct: A foreign state may lose its execution immunity only by *its own* commercial use of its property in the United States.

Trying another tack, the plaintiffs direct our attention to the language of § 1605(a), the commercial-activity exception to jurisdictional immunity, which specifically states that the commercial activity must be "carried on in the United States *by the foreign state*" before immunity is lost. (Emphasis added.) The absence of similar language in § 1610(a), they argue, means that the commercial-activity exception to execution immunity is broader than its parallel in § 1605(a) and applies whenever a third party uses a foreign state's property for a commercial activity.

This argument contradicts the settled principle that the exceptions to execution immunity are narrower than, and independent from, the exceptions to jurisdictional immunity. *NML Capital*, 134 S.Ct. at 2256; *Rubin*, 637 F.3d at 796; *De Letelier v. Republic of Chile*, 748 F.2d 790, 798–99 (2d Cir. 1984). This principle is both well established and based on a critical diplomatic reality: Seizing a foreign state's property is a serious affront to its sovereignty—much more so than taking jurisdiction in a lawsuit. Correspondingly, judicial seizure of a foreign state's property carries potentially far-reaching implications for American property abroad.

The plaintiffs' interpretation of § 1610(a) turns this important principle on its head. A third party's commercial use of a foreign state's property, which cannot establish jurisdiction over the foreign state, would suffice to strip the foreign ***481** state's property of its execution immunity. That cannot be right.

Accordingly, we join the emerging consensus of our sister circuits and hold that a third party's commercial use of a foreign state's property does not trigger the § 1610(a) exception to execution immunity. Rather, § 1610(a) applies only when *the foreign state itself* has used its property for a commercial activity in the United States; the actions of third parties are irrelevant.

Nothing in the record suggests that Iran itself used the Persepolis Collection for a commercial activity in the United States. Indeed, the plaintiffs do not argue otherwise. The district court reached the correct conclusion: Section 1610(a) does not apply. [4]

D. 28 U.S.C. § 1610(g)

Alternatively, the plaintiffs argue that § 1610(g) provides an independent basis to execute on the artifacts. A bit of background is necessary before we take up this argument.

Congress enacted § 1610(g) as part of the National Defense Authorization Act of 2008, which ushered in several changes to the FSIA as applied in cases of state-sponsored terrorism. We've already mentioned one: Section 1605A replaced § 1605(a)(7), the previous terrorism exception to jurisdictional immunity. Section 1605A includes an identical exception to jurisdictional immunity but "is more comprehensive and more favorable to plaintiffs because it adds a broad array of substantive rights and remedies that simply were not available in actions under" the previous law. *In re Islamic Republic of Iran Terrorism Litig.*, 659 F.Supp.2d 31, 58 (D.D.C. 2009).

The other major change was the creation of § 1610(g), which applies to execution proceedings to enforce judgments obtained under § 1605A and eases the collection process for victims of state-sponsored terrorism by eliminating the *Bancec* rule that foreign sovereigns and their instrumentalities are treated separately for execution purposes. The 2008 legislation also provided that certain judgments obtained under the old § 1605(a)(7) could be converted to judgments under § 1605A so that judgment creditors could access the benefits of § 1610(g). The plaintiffs successfully converted their judgment, and they now contend that § 1610(g) makes *all* Iranian assets available for execution without proof of a nexus to commercial activity—that is, without having to satisfy § 1610(a). They argue, in other words, that subsection (g) is a freestanding exception to execution immunity for terrorism-related judgments.

Iran and the University dispute that interpretation. They agree that subsection (g) was intended to—and does—make it easier for terrorism victims to enforce their judgments. But they maintain that it does so *only* by abrogating the *Bancec* doctrine for § 1605A judgments; subsection (g) is not itself an exception to execution immunity. The United States supports this interpretation and joins Iran and the University in urging us to adopt it.

We begin with the *Bancec* doctrine, which derives from the Supreme Court's 1983 decision known by that name. *Bancec*

established a general presumption that a judgment against a foreign state may not be executed on property owned by a juridically separate agency or instrumentality. ***482** 462 U.S. at 626–27, 103 S.Ct. 2591 ("Due respect for the actions taken by foreign sovereigns and for principles of comity between nations leads us to conclude ... that government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such.") (citation omitted). That's the general rule in the law of private corporations, and the Court applied it to the juridically separate instrumentalities of foreign governments. *Id.* The Court recognized two exceptions: The holder of a judgment against a foreign state may execute on the property of its instrumentality if the sovereign and its instrumentality are alter egos or if adherence to the rule of separateness would work a fraud or injustice. *Id*. at 628–33, 103 S.Ct. 2591.

The Court expressly declined to elaborate on these exceptions, however. *Id.* at 633, 103 S.Ct. 2591 ("Our decision today announces no mechanical formula for determining the circumstances under which the normally separate juridical status of a government instrumentality is to be disregarded."). So the lower courts had to fill the gap. Soon after *Bancec* was decided, the federal courts began to coalesce around a set of five factors for determining when the exceptions applied. *See, e.g.*, *Flatow v. Islamic Republic of Iran*, 308 F.3d 1065, 1071 n. 9 (9th Cir. 2002); *Walter Fuller Aircraft Sales, Inc. v. Republic of Philippines*, 965 F.2d 1375, 1380–82, 1380–81 n. 7 (5th Cir. 1992). The following formula from the Fifth Circuit is typical; courts should consider:

> (1) The level of economic control by the government; (2) whether the entity's profits go to the government; (3) the degree to which government officials manage the entity or otherwise have a hand in its daily affairs; (4) whether the government is the real beneficiary of the entity's conduct; and (5) whether adherence to separate identities would entitle the foreign state to benefits in United States courts while avoiding its obligations.

Walter Fuller Aircraft, 965 F.2d at 1380 n. 7.

Fast forward to 2008 and the enactment of the National Defense Authorization Act, which created § 1605A and § 1610(g). In relevant part, § 1610(g) states:

> [T]he property of a foreign state against which a judgment is entered under section 1605A, *and* the property of an agency or instrumentality of such a state, ... is subject to attachment ... and execution ... *as provided in this section*, regardless of—
>
> **(A)** the level of economic control over the property by the government of the foreign state;
>
> **(B)** whether the profits of the property go to that government;
>
> **(C)** the degree to which officials of that government manage the property or otherwise control its daily affairs;
>
> **(D)** whether that government is the sole beneficiary in interest of the property; or
>
> **(E)** whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

(Emphases added.)

Put more succinctly, subsection (g) permits a terrorism victim who wins a § 1605A judgment to execute on the property of the foreign state *and* the property of its agency or instrumentality *"as provided in this section"* but *"regardless of"* the five factors listed in subsections (A)–(E).

As the careful reader no doubt has grasped, the five factors made irrelevant ***483** by subsection (g) mirror almost exactly the factors developed by the lower courts under the *Bancec* doctrine. For ease of comparison, we've prepared this chart:

Bancec Doctrine Factors	Factors Made Irrelevant by Subsection (g)
(1) the level of economic control by the government;	(A) the level of economic control over the property by the government of the foreign state;
(2) whether the entity's profits go to the government;	(B) whether the profits of the property go to that government;
(3) the degree to which government officials manage the entity or otherwise have a hand in its daily affairs;	(C) the degree to which officials of that government manage the property or otherwise control its daily affairs;
(4) whether the government is the real beneficiary of the entity's conduct; and	(D) whether that government is the sole beneficiary in interest of the property; or
(5) whether adherence to separate identities would entitle the foreign state to benefits in United States courts while avoiding its obligations.	(E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

The nearly identical language is either a stunning coincidence or Congress drafted subsection (g) to abrogate the *Bancec* doctrine for terrorism-related judgments. It's impossible to ignore the clear textual parallels between subsection (g), the *Bancec* rule, and the preexisting caselaw. Indeed, we've already noted that subsection (g) overrides the *Bancec* doctrine for terrorism-related judgments. *See Gates v. Syrian Arab Republic*, 755 F.3d 568, 576 (7th Cir. 2014).

The key question here—a question not expressly decided in *Gates*—is whether, as the plaintiffs contend, subsection (g) goes further and establishes a freestanding "terrorism" exception to execution immunity.

***484** Iran and the University—with support from the United States—caution against reading a corrective measure so plainly aimed at eliminating the *Bancec* barrier as creating a new and independent exception to execution immunity for all terrorism-related judgments. They direct our attention to language in subsection (g) specifically limiting its scope: The text says that for § 1605A judgments, the property of a foreign state and the property of its agency or instrumentality are "subject to attachment ... and execution ... *as provided in this section*." The highlighted phrase makes very little sense—indeed, is entirely superfluous—if subsection (g) is itself a freestanding exception to execution immunity. The plaintiffs' reading of subsection (g) thus violates the "cardinal principle" that a statute should be interpreted to avoid superfluity. *TRW, Inc. v. Andrews*, 534 U.S. 19, 31, 122 S.Ct. 441, 151 L.Ed.2d 339 (2001).

The plaintiffs suggest that the phrase "as provided in this section" refers to only the "non-substantive rules" set forth in § 1610. But they offer no basis for limiting the phrase in that manner, nor have they identified which non-substantive rules they think Congress meant to include in subsection (g). Moreover, it would be very odd to read "as provided in this *section*" as referring only to certain unidentified *sub*sections of § 1610. The word "section" must mean what it says: Subsection (g) modifies *all* of § 1610.

Treating § 1610(g) as an independent basis for execution also creates superfluities in other parts of the statute. For example, subsections (a)(7) and (b)(3) of § 1610 relate specifically to judgments obtained under § 1605A, the current terrorism exception to jurisdictional immunity, and its predecessor, § 1605(a)(7). If subsection (g) paves a dedicated lane for all execution actions by victims of state-sponsored terrorism, then § 1610(a)(7) and (b)(3) serve no purpose at all. [5]

In their reply brief, the plaintiffs seek refuge in our decision in *Gates*, which they say has already resolved this interpretive question in their favor. We disagree, though we can see how *Gates* might be read in that way. *Gates* involved a lien-priority contest between two sets of terrorism victims holding § 1605A judgments against Syria. 755 F.3d at 572–73. Both sets of victims—the "Gates plaintiffs" and the "Baker plaintiffs"—sought to execute on the same assets owned by Syrian instrumentalities but held by an American bank and a telecommunications company and located within the territorial jurisdiction of the Northern District of Illinois. *Id.* at 573–74. The dispute concerned compliance with the procedural requirements of § 1610(c). That subsection provides that

> [n]o attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

§ 1610(c). The cross-referenced provision establishes rules for obtaining a default judgment against a foreign state or its ***485** agency or instrumentality. 28 U.S.C. § 1608(e).

The Gates plaintiffs obtained a § 1610(c) order from the district court in the District of Columbia, where their judgment was entered, then registered the judgment in the Northern District of Illinois, where the assets of the Syrian instrumentality were located. A few days later, the Baker plaintiffs also registered their judgment in the Northern District of Illinois, but "[u]nlike the Gates plaintiffs, ... [they] sought and obtained a new § 1610(c) order from the Northern District of Illinois." *Gates*, 755 F.3d at 574. The Baker plaintiffs then argued that their lien had priority because the Gates plaintiffs hadn't obtained a new § 1610(c) order in the Northern District of Illinois. The Gates plaintiffs responded with two arguments: First, "§ 1610(c) does not apply at all," and second, "even if it does, one order per judgment suffices for attachment and execution anywhere in the United States." *Id*. at 575.

The panel sided with the Gates plaintiffs, ruling in their favor on both grounds, either of which was independently sufficient to support the judgment. *Id*. at 578 ("For two independent reasons, then, § 1610(c) does not bar the priority of the Gates plaintiffs' liens...."). Addressing the first argument, the panel noted that the Gates plaintiffs "are not seeking attachment under § 1610(a) or (b). They seek attachment under § 1610(g), which authorizes attachment of property of foreign state sponsors of terrorism and their agencies or instrumentalities to execute judgments under § 1605A for state-sponsored terrorism." *Id*. at 575. The panel continued: "Section 1610(g) is not mentioned in § 1610(c). By its terms, then, § 1610(c) simply does not apply to execution or attachment under § 1610(g)." *Id*.

Alternatively, the panel held that "[e]ven if § 1610(c) applie[s] to attachment efforts under § 1610(g)," one order "suffices for attachment efforts throughout the United States." *Id*. at 577. The § 1610(c) order issued by the D.C. district court was thus sufficient; the Gates plaintiffs "were not required to seek a duplicative determination of the same question by the Northern District of Illinois before attaching the Syrian assets." *Id*. at 578.

Notably, *Gates* assumes rather than decides the crucial antecedent question—that is, whether § 1610(g) is itself a freestanding exception to execution immunity. Instead, it simply describes subsection (g) in a way that implies an affirmative answer. Perhaps that's not surprising; the issue was not developed by the parties. To be sure, the *Gates* opinion touches on the *Bancec* doctrine, observing that § 1610(g) "was intended to avoid limits the Supreme Court had imposed on the ability of litigants to attach the assets of foreign state agencies and instrumentalities." *Id*. at 576. And there's no doubt that the opinion *treats* § 1610(g) as if it *were* an independent exception to execution immunity, albeit without actually deciding the question. Indeed, that's the premise of the panel's holding that § 1610(c) does not apply.

But nowhere does the *Gates* opinion grapple with the fundamental interpretive question presented here. Instead, the parties and the court appear to have assumed without further inquiry that subsection (g) is an independent basis for attachment and execution for all terrorism-related judgments. Tellingly, there's no mention in *Gates* of the limiting phrase in subsection (g) "as provided in this section," nor any reference to the statutory superfluities created by the broader interpretation advanced by the Rubin plaintiffs here.

A second appeal from the same attachment proceeding—this time involving a dispute between the Gates plaintiffs and the "Wyatt plaintiffs"—again found for the ***486** Gates plaintiffs but likewise neither raised nor decided the antecedent interpretive question. *See Wyatt v. Syrian Arab Republic*, 800 F.3d 331, 342–43 (7th Cir. 2015). The Wyatt plaintiffs mounted a collateral challenge to the § 1610(c) order that the Gates plaintiffs had obtained from the D.C. district court. *Id*. at 334–35, 342. The panel did not directly address this argument, relying instead on the holding of *Gates* that " '§ 1610(c) simply does not apply to the attachment of assets to execute judgments under § 1610(g) for state-sponsored terrorism.' " *Id*. at 343 (quoting *Gates*, 755 F.3d at 575). As in *Gates*, the opinion in *Wyatt* does not mention the fundamental interpretive question about the scope of § 1610(g). *Wyatt* thus left the unexamined premise of *Gates* unexamined.

In the meantime, the Ninth Circuit has been wrestling with the precise question presented here in a case involving assets of Bank Melli, an instrumentality of Iran. A panel of that court initially adopted the interpretation urged by the Rubin plaintiffs here—that § 1610(g) is a freestanding exception to execution immunity for terrorism-related judgments. *Bennett v. Islamic Republic of Iran*, 799 F.3d 1281, 1287 (9th Cir. 2015). Bank Melli petitioned for rehearing, and three weeks later the panel invited the views of the United States on the proper interpretation of § 1610(g). The United States

responded, taking the same position it advances in this case. On February 22, 2016, the panel withdrew its earlier opinion and issued an amended one again holding that subsection (g) contains a freestanding exception to execution immunity. *Bennett v. Islamic Republic of Iran*, 817 F.3d 1131, 1141 (9th Cir. 2016). Judge Benson disagreed with the majority's interpretation of subsection (g) and filed a partial dissent on that issue. *Id*. at 1149–51. The panel expressly invited Bank Melli to file another petition for panel and en banc rehearing. *Id*. at 1136.

Bank Melli did so, and on June 14, 2016, the panel issued a second amended opinion. *See Bennett v. Islamic Republic of Iran*, Nos. 13–15442 & 13–16100, 825 F.3d 949, 959, 2016 WL 3257780 (9th Cir., June 14, 2016). The majority reaffirmed its earlier conclusion that "subsection (g) contains a freestanding provision for attaching and executing against assets of a foreign state or its agencies or instrumentalities." *Id*. at 959, 2016 WL 3257780 at *6. Judge Benson again dissented. *Id*. at 965–70, 2016 WL 3257780 at *11–14. With this latest decision, the Ninth Circuit appears to be done with the case; the panel's order indicates that no judge requested a vote on Bank Melli's petition for en banc rehearing. *Id*. at 954–55, 2016 WL 3257780 at *2.

The *Bennett* majority purported to explain away the "as provided in this section" language in subsection (g) by interpreting it to apply only to § 1610(f). *Id*. at 959, 2016 WL 3257780 at *6 ("When subsection (g) refers to attachment and execution of the judgment 'as provided in this section,' it is referring to procedures contained in § 1610(f)."). That strikes us as a highly strained interpretation. First, as we've already noted, it implausibly reads the word "section" as "*sub*section," so the phrase "as provided in this section" actually means "as provided in *sub*section (f)."

Second, and importantly, § 1610(f) *never became operative*. It was adopted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, § 117, 112 Stat. 2681, 2681-491 (1998), and pertains to execution on property associated with certain regulated and prohibited financial transactions. Congress originally authorized the President to waive subsection (f)'s provisions "in the interest of national security." *Id*. § 117(d), 112 Stat. at 2681-492. President Clinton immediately issued a blanket ***487** waiver. Presidential Determination No. 99-1, 63 Fed. Reg. 59,201 (Oct. 21, 1998). Congress briefly repealed the President's waiver authority in the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 2002(f)(2), 114 Stat. 1464, 1541, 1543, but quickly restored it, *id*. § 2002(f)(1)(B), 114 Stat. at 1543, codifying the Executive's waiver authority in 28 U.S.C. § 1610(f)(3): "The President may waive any provision of paragraph (1) in the interest of national security." President Clinton issued another blanket waiver that same day. Presidential Determination No. 2001-03, 65 Fed. Reg. 66,483 (Oct. 28, 2000).

So subsection (f), being inoperative from the start, does not allow *any* form of execution. Congress enacted subsection (g) just eight years later. If the Ninth Circuit's reasoning is correct, subsection (g) was effectively a nullity upon passage. That cannot be the correct interpretation. *See Voisine v. United States*, —— U.S. ——, 136 S.Ct. 2272, 2280, 195 L.Ed.2d 736 (2016) (explaining that Congress is presumed to legislate against the backdrop of the "known state of the laws" (quoting *United States v. Bailey*, 34 U.S. (9 Pet.) 238, 256, 9 L.Ed. 113 (1835))). It therefore makes no sense to say, as the *Bennett* majority does, that the phrase "as provided in this section" in subsection (g) refers only to subsection (f), an inoperative part of the statute. If that were the case, then execution "as provided in this section" would mean no execution at all.

For these reasons, we disagree with the Ninth Circuit's interpretation of subsection (g). We note that the *Bennett* majority drew support for its conclusion from our decisions in *Gates* and *Wyatt*, apparently reading them as the plaintiffs do here. *See Bennett*, 825 F.3d at 960–61, 2016 WL 3257780, at *7. That's understandable for the reasons we've already explained. To the extent that *Gates* and *Wyatt* can be read as holding that § 1610(g) is a freestanding exception to execution immunity for terrorism-related judgments, they are overruled. [6]

To summarize: Section 1610(g) is not itself an exception to execution immunity for terrorism-related judgments; rather, it abrogates the *Bancec* rule for terrorism-related judgments. Accordingly, terrorism victims with unsatisfied § 1605A judgments against foreign states may execute on the foreign state's property *and* the property of its agency or instrumentality—without regard to the *Bancec* presumption of separateness—but they must do so "as provided in this section." § 1610(g). That is, they must satisfy an exception to execution immunity found elsewhere in § 1610—namely, subsections (a) or (b).

E. The Terrorism Risk Insurance Act

Finally, the plaintiffs argue that the Persepolis Collection is subject to attachment and execution under section 201(a) of TRIA, which permits a person who holds a judgment against a state sponsor of terrorism to execute on the foreign state's assets (and those of certain agencies and instrumentalities) if the assets have been blocked by executive order under certain international sanctions provisions. Pub. L. No. 107-297, § 201(a), 116 Stat. 2322, 2337 (2002). An asset is deemed to be blocked when it has been "seized or ***488** frozen" by the United States under section 5(b) of the Trading with the Enemy Act or under sections 202 or 203 of the International Emergency Economic Powers Act. *Id.* § 201(d)(2)(A), 116 Stat. at 2339.

In response to the 1979 Iran hostage crisis, President Carter invoked his authority under the International Emergency Economic Powers Act and issued Executive Order 12170, which froze all Iranian assets in the United States. Exec. Order No. 12170, 44 Fed. Reg. 65,729 (Nov. 14, 1979). The hostage crisis was resolved in 1981 with the Algiers Accords, and in accordance with commitments made in that agreement, President Carter issued Executive Order 12281, which unblocked all uncontested property interests of the Iranian government. Exec. Order No. 12281, 46 Fed. Reg. 7923 (Jan. 19, 1981). The order gave implementing authority to the Treasury Department. *Id.* at 7924. The Treasury Department's Office of Foreign Assets Control issued regulations broadly defining unblocked property as "all uncontested and non-contingent liabilities and property interests of the Government of Iran, its agencies, instrumentalities, or controlled entities." 31 C.F.R. § 535.333(a). A property interest is considered "contested only if the holder thereof reasonably believes that Iran does not have title or has only partial title to the asset," and a belief is considered reasonable "only if it is based on a bona fide opinion, in writing, of an attorney licensed to practice within the United States stating that Iran does not have title or has only partial title to the asset." *Id.* § 535.333(c).

There's no evidence that the University contests Iran's title to the Persepolis Collection. To the contrary, the University has reaffirmed the terms of the long-term academic loan, which unambiguously requires it to return the artifacts to Iran when study is complete. Nor has the University sought or obtained an attorney's opinion that Iran lacks title or has only partial title to the artifacts.

The plaintiffs argue that the Persepolis Collection remains a blocked asset subject to execution because the University asserted in a June 2004 district-court filing that it maintained a "superseding possessory right." But no one disputes that the University has a present *possessory interest* in the Persepolis Collection. Iran nonetheless retains full *ownership*. The plaintiffs place great emphasis on the fact that Iran has periodically inquired about the progress of the study and has occasionally requested the return of the artifacts. That simply reinforces the University's present possessory interest; it's not evidence of contested title.

Alternatively, the plaintiffs claim that the artifacts have been "reblocked" by President Obama's Executive Order 13599. 77 Fed. Reg. 6659, 6659 (Feb. 8, 2012). But section 4(b) of this order expressly exempts all "property and interests in property of the Government of Iran that were blocked pursuant to Executive Order 12170 of November 14, 1979, and thereafter made subject to the transfer directives set forth in Executive Order 12281 of January 19, 1981." *Id.* at 6660.

The plaintiffs argue that "transfer directives" means a directive from Iran, and because Iran has never directed that these particular artifacts be transferred to it, the exception in section 4(b) doesn't apply to the Persepolis Collection. This argument misreads the 2012 order, which refers to "transfer directives set forth in" President Carter's 1981 Executive Order that all property meeting certain specified criteria be returned to Iran. That is, the directive is categorical rather than contingent on a particularized demand by Iran.

***489** Accordingly, the district judge was right to conclude that attachment and execution under section 201 of TRIA is unavailable.

AFFIRMED.

Hamilton, Circuit Judge, dissenting from denial of en banc review.

The panel opinion in *Rubin v. Islamic Republic of Iran*, No. 14-1935, both creates a circuit split and overrules, in part, two recent decisions of this court. Either step by itself would ordinarily trigger our Circuit Rule 40(e), which requires circulation within the court before publication to see if a majority of active judges wish to rehear the case en banc.

In this case, a majority of active judges do not even have the opportunity to vote. A majority are disqualified, so it is impossible to hear this case en banc. In this rare situation, the panel apparently has the *power* to overrule circuit precedent

and to create a circuit split without meaningful Rule 40(e) review. Yet that step is a mistake that should not go without comment. Also, most Rule 40(e) decisions settle the legal issue in the circuit. In this rare situation, one panel's decision to overrule another's decisions should not be treated as settling the legal issue in this circuit. I respectfully dissent.

The issue is whether a provision of the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1610(g), offers a freestanding basis for executing judgments against state sponsors of terrorism, independent of § 1610(a) and (b). As dry and technical as that sounds, the issue has important practical consequences for victims of state-sponsored terrorism. Most important, the *Rubin* panel's view restricts execution to foreign sovereign assets that are used: (a) by the foreign sovereign itself, (b) for a commercial activity, and (c) in the United States. That reading shelters from execution a wide range of assets of state sponsors of terrorism, such as the museum collection here.

If, on the other hand, § 1610(g) offers a freestanding basis for execution, then victims are not limited to property the sovereign uses commercially in the United States. Victims of state-sponsored terrorism may execute judgments against a broader range of foreign sovereign assets. That's the view of the Ninth Circuit in *Bennett v. Islamic Republic of Iran*, 825 F.3d 949, 958–61 & nn. 4–7(9th Cir. 2016), which held that § 1610(g) provides a freestanding basis for executing judgments for state-sponsored terrorism. That reading should enable the plaintiffs in *Bennett* to execute on assets that were not used commercially in the United States. See *id*. at 956–57 (cash in United States that was owed to Iranian state bank for use of credit cards in Iran). That same reasoning would extend to the museum collection at issue here.

Whether § 1610(g) provides a freestanding basis also affects the procedures that victims of state-sponsored terrorism must follow to execute their judgments. We dealt with procedural issues in both *Wyatt v. Syrian Arab Republic*, 800 F.3d 331, 342–43 (7th Cir. 2015), and *Gates v. Syrian Arab Republic*, 755 F.3d 568, 575–77 (7th Cir. 2014) (alternative holding). In both cases, we adopted the view that § 1610(g) is freestanding, which broadens the rights of victims v. state sponsors of terrorism, while still assuring due process of law.

The details of the textual arguments are laid out well in *Bennett* and *Rubin*, and I will not repeat them. Both readings of the text, I believe, are reasonable, meaning that the text is ambiguous. The courts must choose between two statutory readings: one that favors state sponsors of ***490** terrorism, and another that favors the victims of that terrorism.

The FSIA contains detailed protections for foreign governments in most civil litigation. But over the years, Congress has added special provisions for cases of state-sponsored terrorism, including the addition of § 1610(g) as part of § 1083 of Public Law 110-181, the National Defense Authorization Act for Fiscal Year 2008. Those special provisions, including § 1610(g), work together to make it easier for victims of state-sponsored terrorism to pursue foreign sovereign assets in the United States. In 2008, Congress even took the unusual step of applying the new provisions to pending cases. P.L. 110-181, § 1083(c). See also *Bennett*, 825 F.3d at 961–62 (legislative history of 2008 amendments shows broad intent to facilitate execution of judgments against *any* property owned by state sponsors of terrorism).

I recognize that "no legislation pursues its purposes at all costs," and that it "frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 525–26, 107 S.Ct. 1391, 94 L.Ed.2d 533 (1987). But in interpreting an ambiguous statutory text, we can and should draw on statutory purpose and legislative history. We must choose one side or the other. The balance here should weigh in favor of the reading that favors the victims. We should not attribute to Congress an intent to be so solicitous of state sponsors of terrorism, who are also undeserving beneficiaries of the unusual steps taken by the *Rubin* panel.

We should continue to follow *Gates* and *Wyatt*, and we should avoid creating a conflict with *Bennett*, especially in a case where the en banc court cannot act. We should allow the *Rubin* plaintiffs to pursue broader categories of Iranian property, including the Persepolis Collection at the University of Chicago.

All Citations

830 F.3d 470

Annex 185

Footnotes

* Of the Southern District of Illinois, sitting by designation.

1 The plaintiffs later converted their § 1605(a)(7) judgment to one under § 1605A. *See* *Rubin v. Islamic Republic of Iran*, 270 F.R.D. 7, 9 & n. 3 (D.D.C. 2010).

2 Section 1610 also permits in rem execution of certain foreclosure judgments against a foreign state's vessels. 28 U.S.C. § 1610(e). Other parts of § 1610 address, for example, certain procedural requirements for execution, *see, e.g.*, *id.* § 1610(c), and the sensitive matter of prejudgment attachment of foreign sovereign property, *id.* § 1610(d).

3 We're not suggesting, however, that a legislative statement of purpose provides statutory meaning independent of the operative statutory text.

4 Our holding makes it unnecessary to decide whether the University's academic study of the Persepolis Collection is a commercial use.

5 Moreover, as we've noted, subsection (g) was enacted at the same time as § 1605A. In the same 2008 legislation, subsections (a)(7) and (b)(3) of § 1610 were amended to make the commercial-activity exceptions applicable to judgments obtained under § 1605A, the new exception to jurisdictional immunity for terrorism-related cases. If, as the plaintiffs claim, subsection (g) were a freestanding exception to execution immunity for § 1605A judgments, then these amendments—enacted at the same time—were completely unnecessary.

6 Because this opinion overrules circuit precedent and creates a conflict with the Ninth Circuit, it has been circulated to all judges in active service in accordance with Circuit Rule 40(e). Chief Judge Wood and Circuit Judges Posner, Flaum, Easterbrook, and Rovner did not participate, so a majority did not vote to rehear this case en banc. Circuit Judge Hamilton has filed a dissent from the denial of en banc review, which is attached to this opinion.

End of Document

Annex 185

ANNEX 186

Piercing the Veil of State Enterprises in International Arbitration

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Published by:
Kluwer Law International
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
Website: www.kluwerlaw.com

Sold and distributed in North, Central and South America by:
Aspen Publishers, Inc.
7201 McKinney Circle
Frederick, MD 21704
United States of America
Email: customer.service@aspenpublishers.com

Sold and distributed in all other countries by:
Turpin Distribution Services Ltd
Stratton Business Park
Pegasus Drive, Biggleswade
Bedfordshire SG18 8TQ
United Kingdom
Email: kluwerlaw@turpin-distribution.com

Printed on acid-free paper.

ISBN 978-90-411-5162-9

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

§3.01 WHY IS MUNICIPAL LAW RELEVANT?

There are municipal institutions that have flourished at the international level. One of them is the corporation.[3] Every corporation has its *siège social* in a particular country, and it is incorporated under the laws of that country. This territorial bond creates rights and duties into that state. However, as we saw in Chapter 2, corporations can acquire rights and duties in another state, as well as against it. Corporations can sue and be sued by states. Yet, what laws govern corporations in *international* disputes? Are they subject to the law of the state of incorporation, to the law of the respondent state, or to international law? In some occasions, the language of an existing treaty defines what a corporation is.[4] So, as between treaty Member States, corporations may be preferentially ruled by treaty-based rules.[5] In the absence of a treaty, corporations should be governed by "rules generally accepted by municipal legal systems".[6] The application of municipal rules on the international plane is not a twist of contemporary law. The idea was first formulated centuries back, but it crystallized in 1920 with the adoption of the Statute of the Permanent Court of International Justice (PCIJ), the extinct predecessor of the International Court of Justice (ICJ).[7] In Article 38.1(c) of its current version, the Statute adopts "the general principles of law recognized by civilized nations" as the third source of international customary law.[8] Historically, such adoption was aimed to prevent *non liquet* cases which might otherwise arise if, eventually, the international

3. In *Barcelona Traction, Light and Power Company, Limited* (*Belgium v. Spain*), 5 Feb. 1970 (1970) ICJ Reports 1970, at para. 34, the ICJ referred to the corporate entity as one of the "municipal institutions, which have transcended frontiers and have begun to exercise considerable influence on international relations".
4. See, for example, the definition of "enterprise" in Art. 201(1) of NAFTA and the National Treatment provisions with regard to restrictions on the minimum equity level of corporations in Art. 1102(4)(a) of NAFTA.
5. The priority of treaties over domestic laws was affirmed in the *Wimbledon* case (1923) PICJ, Ser. A, no. 1, p. 29; *German Interests in Polish Upper Silesia* (1926) PCIJ, Ser. A. no. 7, p. 19; *Free Zones* case (1932) PCIJ, Ser. A/B, no. 46, p. 167; *Chorzow Factory* (Merits) (1928) PCIJ, Ser. A, no. 17., pp. 33-34; Adv. Op. in the *Greco-Bulgarian Communities* case (1930) PCIJ, Ser. B, no. 17, p. 32; *Polish Nationals in Danzing* (1931) PCIJ, Ser. A/B, no. 44, p. 24.
6. See *Barcelona Traction, Light and Power Company Limited* (*Belgium v. Spain*), 5 Feb. 1970 (1970) ICJ Reports 1970, at para. 50: "If the Court were to decide the case in disregard of the relevant institutions of municipal law it would, without justification, invite serious legal difficulties. It would lose touch with reality, for there are no corresponding institutions of international law to which the Court could resort. Thus the Court has, as indicated, not only to take cognizance of municipal law but also to refer to it. It is to rules generally accepted by municipal legal systems which recognize the limited company whose capital is represented by shares, and not to the municipal law of a particular State, that international law refers. In referring to such rules, the Court cannot modify, still less deform them." See also *ibid.* at para. 38.
7. Baron Descamps, Chairman of the Advisory Committee of Jurists appointed by the League of Nations for the establishment of the PCIJ, was the first who proposed "the rules of international law as recognized by the legal conscience of civilized nations" as a source of international law next in line after the conventions and the commonly recognized custom. For an insight to the genesis of Art. 38.1(c) see Cheng, B. *General Principles of Law as Applied by International Courts and Tribunals* (1953, Cambridge University Press), at p. 6.
8. Article 38 of the ICJ Statute: "1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply (...) c. the general principles of law recognized by civilized nations." Picker, C. *International Law's Mixed Heritage: A Common/ Civil Law Jurisdiction*, 41 Vanderbilt Journal of Transnational Law (2008), 1083, at p. 1093. See,

law rules revealed insufficient or inadequate in a particular case.[9] However, this justification is a historical one. It belongs to a time in which international justice was a feud of states alone and non-state actors had no voice at all. Yet this is not the case anymore. The situation changed severally as non-state actors, like individuals, organizations or companies, gained access to international justice. Non-state actors necessitated rules and principles of a municipal order because international law could not give solutions adjusted to their reality. This is how the universally accepted municipal rules were, and still are, carried over internationally. Yet, how far this process goes? To what extent municipal law should permeate international law?

There is a long-standing debate around these questions.[10] However, if we stick to facts alone, we cannot deny that many theories, rules and principles of domestic law are frequently invoked in the adjudication of international claims. This practice has also been adopted by non-adjudicatory bodies "in a non-litigious manner".[11] However, it has spread more visibly amongst the international courts and tribunals. Brownlie raises concerns against "a mechanical system of borrowing from domestic law after a census of domestic systems",[12] but he concedes that "in practice tribunals show

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generally, Friedmann, W. *The Uses of 'General Principles' in the Development of International Law*, 57 The American Journal of International Law (1963) 279.

9. Bogdan, M. *General Principles of Law and the Problem of Lacunae in the Law of Nations*, 46 Nordisk Tidsskrift International Ret 37, 1977. On the *non liquet* problem see Lauterpacht, H. *Non Liquet and the Completeness of the Law*, Symbolae Verzijl 196; or Stone, J. *Non Liquet and the Function of Law in the International Community*, British Year Book of International Law (1959) 145.
10. The doctrine is divided between those who support the admissibility of municipal law analogies into the international legal relations, and those who do not. For the first, see e.g. De Visscher, C. *Problèmes d'Interprétation Judiciaire en Droit International Public* (Paris, 1963), at p. 39: "Dans l'ordre juridique international, ou les lacunes du droit obligent le juge a concevoir largement le rôle de l'interprétation, l'analogie, plus que partout ailleurs, doit être envisagée comme un procède normal du raisonnement juridique." For the second group, see e.g. Lauterpacht, H. *Private Law Sources and Analogies of International Law (with special reference to international arbitration)* (London, 1927), Preface, at p. vii: "It is now generally accepted that the recourse to private law, which was, perhaps, justified in the formative period of international law owing to the then prevalent patrimonial conception of State, has subsequently impeded the growth of international law, and ought to be discouraged."
11. Friedmann, W. *The Uses of 'General Principles' in the Development of International Law*, 57 The American Journal of International Law (1963) 279, at p. 281. By way of example, Friedmann points out the following non-litigious instruments: "... international loan contracts, concession agreements and other types of international transactions; through the practices of international administrative agencies, and of the tribunals constituted as part of these organizations; or through the administrative and judicial organs of more closely knit communities, such as the European Economic Community."
12. Brownlie, I. *Principles of Public International Law*, Oxford, 7th ed., 2008, at p. 16. See also Judge Tanaka at p. 262 of his Dissenting Opinion in the *South West Africa Cases (Second Phase)*, ICJ Reports 1966: "So far as the 'general principles of law' are not qualified, the 'law' must be understood to embrace all branches of law, including municipal law, public law, constitutional and administrative law, private law, commercial law, substantive and procedural law, etc. Nevertheless, analogies drawn from these laws should not be made mechanically, that is to say, to borrow the expression of Lord McNair, 'by means of importing private law institutions 'lock, stock and barrel' ready-made and fully equipped with a set of rules' (ICJ Reports 1950, p. 148.)." See also Shahabuddeen, M. *Municipal law reasoning in international law*, in Lowe and Fitzmaurice eds., *Fifty Years of the International Court of Justice*, Cambridge University Press, 1996, at p. 101.

considerable discretion in the matter".[13] There are no constraints to the exercise of discretion in Article 38.1(c) of the ICJ Statute. The only requirement is then that the principles so adopted must be cloaked with a "general" character. The term "general" has been often equated to "universal". Proving that a principle, other than one of *jus cogens*,[14] has a universal character, or that the same is recognized by all civilized nations, is a thorny task. Some say that the term "general" in Article 38.1(c) should be construed as a reference to the "major legal systems of the world",[15] others say that it is meant to refer to a "fair number of civilized nations",[16] and a third group reads it as a call to "all or almost all"[17] nations. To make matters more complicated, we wonder if, in order to support the universality of a principle, all legal systems count alike, or if the size, the history and the importance of each system makes a difference in counting. We could also argue that the legal systems are not representative enough, and that the families or traditions of law are what really counts for the task.[18] Howsoever it may be, we can affirm that the corporation, as a legal *genus*, is present in all legal systems and traditions of law. So, it is indeed a "general principle of law recognized by civilized nations".

Our next question is whether, the attributes of independence, legal personality and limited liability, which are inextricably linked to corporations, can be considered "general principles of law recognized by civilized nations". By default, legal principles are very difficult to classify. They come in a bewildering number and forms, and intertwine forming clusters and families.[19] For example, the principle of preclusion of acts, also known as estoppel, is intimately linked, yet symmetrically opposed, to the principle of fair and legitimate expectations. A person is precluded by his or her conduct where such conduct creates legitimate expectations on other persons.

13. *Ibid.*, p. 17.
14. Rights of *jus cogens* are protected by "fundamental peremptory norms that apply to states regardless of their consent." Picker, C. *International Law's Mixed Heritage: A Common/Civil Law Jurisdiction*, 41 Vanderbilt Journal of Transnational Law (2008) at p. 1083, 1091. *Jus cogens* covers, for example, "genocide, slavery, forced disappearances, and torture or other cruel, inhuman, or degrading treatment or punishment." Shelton, D. *Normative Hierarchy in International Law*, 100 American Journal of International Law (2006) 291, at p. 314.
15. Grieg, *International Law* (London, 1970), at p. 29; Friedmann, W. *The Uses of 'General Principles' in the Development of International Law*, 57 The American Journal of International Law (1963) 279, at p. 284.
16. Scwarzenberger, A. *Manual of International Law* (5th ed., London, 1967), at p. 34.
17. Akehurst, *A Modern Introduction to International Law* (London, 1970), at p. 52; O'Connel, *International Law* (2nd ed., vol. 1, London 1970), at p. 11; Gutteridge, *Comparative Law* (2nd ed., 1949) at p. 65.
18. The families or traditions of legal systems can be grouped as the Romano Germanic, the common-law, the socialist, the African, the Moslem and the Far East. See David and Brierley, *Major Legal Systems in the World Today* (London, 1968) at pp. 9-20, and others, followed by Bogdan, M. in *General Principles of Law and the Problem of Lacunae in the Law of Nations*, 46 Nordisk Tidsskrift International Ret (1977), at p. 46. According to Picker all legal systems may fall in two groups: "... those of the Western legal tradition-namely the common and civil law traditions - and those of the non-Western traditions, such as Islamic law, Hindu law, and tribal or indigenous law." Picker, C. *International Law's Mixed Heritage: A Common/Civil Law Jurisdiction*, 41 Vanderbilt Journal of Transnational Law (2008) 1083, at p. 1095.
19. For the connection between the general principles of law and natural law see Cheng, B. *General Principles of Law as Applied by International Courts and Tribunals* (1953, Cambridge University Press), at p. 3.

Moreover, while some principles take the form of undecipherable Roman aphorisms, like, for example, *pacta sunt servanda*, others are formulated as fundamental aphorisms of ethics or moral, like the requirement of good faith, or the use of equity in the interpretation of legal relations and documents. In the midst of this disarray, how do we look at veil-piercing?

In our view, we can affirm that veil-piercing is a general principle of law. Actually, it is a composite of, at least, three primary principles: the principle of good faith, the theory of the abuse of rights and the rule of equity. In the first place, the principle of good faith is a threshold of conduct that should apply in all aspects of the international life.[20] Good faith is presumed. In a second place, the theory of the abuse of rights has been upheld internationally too.[21] Cheng says that the theory of the abuse of rights is "an exercise of the right contrary to the principle of good faith".[22] He adds that the same "is merely an application of [the] principle [of good faith] to the exercise of rights".[23] In our opinion, whether it is a principle per se, or merely an application of the principle of good faith, is more a question of form than of substance.[24] The abuse of rights must be supported with evidence, and it is the party who seeks a finding to that effect who bears the burden of proof.[25] Third and last, the rule of equity also converges in the veil-piercing process. Equity provides a valuable test for asserting if a right is misused, and, if it is so misused, the extent to which the same can be restored.[26] Equity is recognized as a principle of international law akin to "equality, fairness and natural justice".[27] Save for cases decided *ex aequo et*

20. *North Atlantic Coast Fisheries Case* (*United Kingdom v. United States of America*), PCA, The Hague 7 Sep. 1910, at p. 16.
21. "The power to apply some such principles, as that embodied in the prohibition of abuse of rights, must exist in the background in any system of administration of justice in which courts are not purely mechanical agencies." Lauterpacht, H. *The Development of the International Law by the International Court*, London, Stevens & Sons Ltd. (1958) at p. 165; see also Gutteridge, H.C. *Abuse of Rights*, 5 Cambridge Law Journal (1933), at p. 22.
22. Cheng, B. *General Principles of Law as Applied by International Courts and Tribunals* (1953, Cambridge University Press), at p. 127.
23. Cheng, B. *General Principles of Law as Applied by International Courts and Tribunals* (1953, Cambridge University Press), at p. 121. Cheng's definition of the abuse of rights reads: "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." (*Ibid.*, p. 122).
24. The doctrine abuse of rights has been recognized as a *principle* in a number of international cases. See *Anglo-Norwegian Fisheries Case* (1951) (*United Kingdom v. Norway*), ICJ Reports, 1951, p. 116, at p. 142); *Free Zones Case* (*France v. Switzerland*) (1932) PCIJ, Ser. A/B, no. 46, para. 225; *Certain German Interests in Polish Upper Silesia* (1926) PCIJ, Ser. A, no. 7, 30; Also by the International Law Commission, Report of the Commission, 5th session, 1953, Doc. A/CN.4/76, p. 51.
25. "... such misuse cannot be presumed, and it rests with the party who states that there has been such misuse to prove his statement." In *Certain German Interests in Polish Upper Silesia* (1926) PCIJ, Ser. A, no. 7, p. 30; in a similar vein, see the *Free Zones Case* (*France v. Switzerland*) (1930) PCIJ, Ser. A, no. 24, p. 12.
26. See Cheng, B. *General Principles of Law as Applied by International Courts and Tribunals* (1953, Cambridge University Press), at p. 125.
27. *Diversion of Water from the River Meuse* case (1937) PCIJ, Ser. A/B, no. 70, pp. 76-77; *Wimbledon* case (1923) PICJ, Ser. A, no. 1, p. 32; *North Sea Continental Shelf Cases*, ICJ Reports

bono,[28] which employ equity as a justice-making rule, any adjudicatory decision is driven by the need to find an equitable solution within the limits of the law (i.e., *equity infra legem*).[29] Turning back to veil-piercing, we can say that the same encapsulates all three principles mentioned above: it is an *equitable* remedy aimed to address *the abuse of rights* and to ensure the exercise of *good faith* in relation to a body corporate. Whether the same is a doctrine, a theory or a principle, is irrelevant. In fact, veil-piercing has been coined as a "process" by the ICJ, which said that there is a "wealth of practice already accumulated on the subject in municipal law".[30] The following excerpt of *Barcelona Traction* is very significant:

> the process of lifting the veil, being an exceptional one admitted by municipal law in respect of an institution of its own making, is equally admissible to play a similar role in international law. It follows that on the international plane also there may in principle be special circumstances which justify the lifting of the veil in the interest of shareholders.[31]

The ICJ decision in the *Barcelona Traction* case was received with criticism by the international community. Remarkably divisive were the arguments upon which the ICJ denied *ius standi* to the Belgian shareholders. As a matter of fact, the approach taken by the ICJ in the *Barcelona Traction* with regard to jurisdiction was questioned in subsequent decisions, and it has even been said not to become black letter in customary international law.[32] However, the grounds upon which the Belgians should or should not be given standing to claim for wrongs caused to their company are not so important to us. What matters to us is that *Barcelona Traction* gave an international dimension to the veil-piercing theory on the basis that the same was a theory

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(1969) 3, at 46-52; *Fisheries Jurisdiction* case (*United Kingdom v. Iceland*) ICJ reports (1974) 3, at 30-35; *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, ICJ Reports (1982), p. 60, at para. 71.

28. A distinction must be made between equity as a statutory concept for the system of judicial administration *ex aequo et bono*, and equity as a principle of interpretation. While the first is recognized in Art. 38(2) of the ICJ Statute, the second should be allocated in Art. 38(1)(c). In this subchapter, we refer to the second sense only.
29. "It is not a matter of finding simply an equitable solution, but an equitable solution derived from the applicable law." (*Fisheries Jurisdiction*, ICJ Reports (1974), at p. 33, para. 78; p. 202, para. 69). See also *Barcelona Traction, Light and Power Company Limited* (*Belgium v. Spain*), 5 Feb. 1970, ICJ Reports (1970), at paras 92-101, where Belgium's call to equity did not persuade the Court to change its views on legal principles and policy considerations.
30. *Barcelona Traction, Light and Power Company Limited* (*Belgium v. Spain*), 5 Feb. 1970, ICJ Reports (1970), at para. 56.
31. *Barcelona Traction, Light and Power Company Limited* (*Belgium v. Spain*), 5 Feb. 1970, ICJ Reports (1970), at para. 58.
32. In *Elettronica Sicula S.p.A. (ELSI)* (*United States of America v. Italy*) 20 Jul. 1989, ICJ Reports (1989) 4, the ICJ allowed, without reasoning, the United States to espouse a claim against Italy on behalf of a US shareholder with respect to a wholly owned company incorporated in Italy. In p. 74 of his Separate Opinion, Judge Shigeru Oda denied standing to the US shareholder on the same principles stated in the *Barcelona Traction*. Recent arbitral tribunals have prioritized the *ELSI* approach over the *Barcelona Traction* one. In investment arbitration, see *Azurix v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Jurisdiction, 8 Dec. 2003, at para. 71; and *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Jurisdiction, 17 Jul. 2003, at para. 44.

widespread municipally. This is precisely why the present Chapter is dedicated to municipal law.

§3.02 ORIGINS OF THE CORPORATE VEIL

The corporation, as a theoretical concept, is part of the Roman legacy.[33] As a legal vehicle, the corporation was neglected throughout the medieval era and remained dormant for centuries. After all, until the fifteenth century every business was carried on by unincorporated entrepreneurs, merchants and artisans, who traded in very narrow geographical areas and with a marginal market share.[34] At that time, businesses did not enjoy a legal status of their own and were all governed by the laws of individual merchants. Over the sixteenth century and beginnings of the seventeenth, the corporation, as an individual legal entity, raised the interest of English scholars and academics.[35] Blackstone is one of the first who wrote about the corporation. He qualified the same as an "artificial person", a product of the human artifice and not of a natural process.[36] In the world of affairs, corporations were brought back to life by means of public privilege. To promote activities in the colonized territories, the Crown agreed to grant royal charters to companies engaged in the trade and exploration overseas. These companies were known as "chartered companies". Amongst them, the English East India Company, with a monopoly over the Eurasian trade in the 1600s, was one the most popular examples. Private investors were given permission to form "joint stocks" of capital and put these out into those companies, which operated under the management of "governors" or "directors" appointed by the investors. A different type of companies flourished too in the sixteenth and seventeenth centuries: the "statutory companies". Statutory companies were created by statute and, unlike chartered companies, their privileges originated from Act of Parliament. From its inception, statutory companies aimed to procure services to the community, like those

33. Ulpian's maxim is often cited to say that the concept of corporation as a separate juridical entity dates back from the Roman times: *"Si quid universitate debetur singulis non debetur, nec quod debet, universitas singuli debent."* (If anything is due to a corporation, it is not due to the individual members of it, nor do the members individually owe what the corporation owes). *Digest of Justinian*, tit. IV, no. 7(1), in Scott, S. *The Civil Law* (1932), at p. 32. According to Blackstone, "[t]he honor of originally inventing these political constitutions entirely belongs to the Romans." Blackstone, W. *Commentaries on the Law of England* (1st ed., vol. 1, 1765) at p. 468. Others consider the Roman legal form "societas" as the foundation stone of the modern "partnership". Buckland, W. *A Textbook of Roman from August to Justinian*, 504-507, 1921, cited by Hansmann, H., Kraakman, R. and Squire, R. *Law and the Rise of the Firm*, 119 Harvard Law Review (2005-2006) 1335, at p. 1333. For a summary of the historical origins, see generally Blumberg, P. I., *Blumberg on Corporate Groups* (Aspen Publishers, 2009) 2nd ed., vol. 1, part I, at 2.01.
34. Engracia Antunes, J. *The Liability of Polycorporate Enterprises*, 13 Connecticut Journal of International Law (1998-1999), 197.
35. Coke, E., *First Part of the Institute of the Laws of England or a Commentary upon Littleton* 250a (1st ed., 1628); *Case of Sutton's Hospital*, 10 Coke 23a, 77 English Rep. 960 (1612).
36. Blackstone, W. *Commentaries on the Law of England* (1st ed., vol. 1, 1765) at p. 467. The concept of corporations as artificial persons was embraced in later English decisions. See *Welton v. Saffery* [1897] AC 299, in which Lord Halsbury LC referred to the corporation "as an artificial creation" (*ibid.*, p. 305).

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activity turns out unlawful.[52] The new approach set by *Solomon v. Salomon* and the subsequent cases was steadily adopted and polished by different courts and tribunals all down the nineteenth century. The veil was stretched close to a breaking point, but it still took a few years to crack.

§3.03 AND THE VEIL CRACKS

In general, enterprises are aimed to procure wealth for a range of stakeholders, from capital investors to employees, including creditors, customers and suppliers. The creation of enterprises benefits the society, as a whole, by way of tax collection and prosperity in general. However, all that glitters is not gold. Enterprises may generate externalities in the form of contract loss, environmental risks or hazardous activities. The cost of externalities is, in some occasions, neglected by entrepreneurs. When that occurs, claimants and creditors may look beyond the enterprise in order to call its members to accountability. When the enterprise is incorporated, this practice is known as "piercing the corporate veil".[53] Piercing the corporate veil is synonymous with depriving shareholders of the right to limit their liability behind the corporate structure. "Piercing" and "lifting" the veil are used indistinctively,[54] although some authorities have distinguished one from the other.[55] We will generally use the term "piercing".

In England, *Foss v. Harbottle* was the first case where the legal personality of a company was at stake.[56] In that case, the minority shareholders of a company incorporated by Act of Parliament sued another shareholder, the directors, the architect and the solicitor of a company for fraudulent and illegal alienation of corporate assets. The action was dismissed for two reasons which, ever since, are cornerstones of corporate law. The first is that, where damage is been inflicted to a company, the proper claimant should be the company alone, and the minority shareholders have no right to bring an action on behalf of the company.[57] The second reason is that the courts should not intervene if the wrongs in question can be confirmed or ratified by a simple

52. *Princess of Reuss v. Bos* (1871) 40 LJ Ch 655.
53. The "veil-piercing" metaphor was first used by Maurice Wormser in his article *Piercing the Veil of Corporate Entity*, 12 Columbia Law Review (1912) 496.
54. *Yukong Line Ltd. v. Rendsburg Investments Corporation (No. 2)* [1998] 1 WLR 294, at p. 305.
55. See, for example, Staughton L.J. in *Atlas Maritime Co. S.A. v. Avalon Maritime Ltd. (No. 1)* [1991] 4 All ER 769, at p. 779: "To *pierce* the corporate veil is an expression that I would reserve for treating the rights or liabilities or activities of a company as the rights or liabilities or activities of its shareholders. To *lift* the corporate veil or look behind it, on the other hand, should mean to have regard to the shareholding in a company for some legal purpose." See also *Re G (Restraint Order)* [2001] EWHC 606 (Admin.) STC 391.
56. (1843) 2 Hare 461.
57. That rule was followed by *Prudential Assurance Co Ltd v. Newman Industries Ltd & Ors (No. 2)* [1982] Ch 204, and re-formulated as follows (at p. 223): "The rule is the consequence of the fact that a corporation is a separate legal entity. Other consequences are limited liability and limited rights. The company is liable for its contracts and torts; the shareholder has no such liability. The company acquires causes of action for breaches of contract and for torts which damage the company. No cause of action vests in the shareholder. When the shareholder acquires a share he accepts the fact that the value of his investment follows the fortunes of the company and that he can only exercise his influence over the fortunes of the company by the exercise of his voting rights in general meeting."

majority shareholders constituted in general meeting. In obiter dictum, the court made the following statement:[58]

> If a case should arise of injury to a corporation by some of its members, for which no adequate remedy remained, except that of a suit by individual corporators in their private characters, and asking in such character the protection of those rights to which in their corporate character they were entitled, I cannot but think ... that the claims of justice would be found superior to any difficulties arising out of technical rules respecting the mode in which corporations are required to sue.

From the passage above, it transpires that the two rules set therein could eventually be disobeyed if "a suit by individual corporators in their private characters" proves to be the only remedy available to the company. In other words, *Foss v. Harbottle* introduced the possibility that, *in extremis*, minority shareholders may be allowed to bring a claim on behalf of the company. *Foss v. Harbottle* did not thrive to pierce the veil, but it set the roads to it.[59] One of the earliest English decisions in which the corporate veil was pierced is *Re Darby ex p. Brougham*.[60] Phillimore J. decided to pierce the veil of a corporation that had been created to defraud prospective public investors. The defendants, Darby and Gyde, were two fraudsters so well-known at the time that they decided to conceal their identity. For that purpose, they set up a company and used it to perpetrate a scam under cover. Phillimore J. took the view that the corporation was merely an "alias" for Darby and Gyde. He said that, "they represented that some business was being done by or through the corporation and concealed the fact that it was being done by or through Darby and Gyde."[61] Thus, more than the fraud itself, what drove Phillimore J. to pierce the veil was the concealment or misrepresentation of their personal involvement into the business. One century after *Re Darby ex p. Brougham*, veil-piercing is still an ever-evolving doctrine. Not two cases are identical, and it is difficult to predict the outcome every time that the veil is called to question.[62] There is an overwhelming number of authorities about the subject, some advocating for piercing and others loathing it, but none being authoritative enough to be followed

58. *Foss v. Harbottle* (1843) 2 Hare 461, at p. 492.
59. Also in the United States, it was held at the beginning of the twentieth century that the veil could be pierced where the relationship between a parent and its subsidiary was "not for the purpose of participating in the affairs of a corporation in the normal and usual manner, but for the purpose of controlling a subsidiary company so that it may be used as a mere agency or instrumentality of the owning company." (*Chicago, Milwaukee & St. Paul Ry. Co. v. Minneapolis Civic & Commerce Ass'n*, 247 U.S. 490 (1918), quoted in *United States v. Bestfoods* 524 U.S. 51 (1998), at pp. 62-63).
60. [1911] 1 KB 95. The facts were as follows. A corporation was created by Darby and Gyde in Guernsey. It purchased a low-priced license to work a quarry. They incorporated a sham company, Welsh Slate Quarries Ltd., to acquire the license. Welsh Slate Quarries Ltd. paid the price of the license to the corporation in debentures, which were offered to the general public for subscription. Welsh Slate Quarries Ltd. never had a viable investment and all the investors lost their money, which had been paid to the corporation and, ultimately, subtracted by Darby and Gyde as secret profits. The liquidator of Welsh Slate Quarries Ltd. sought recovery from Darby and Gyde and not from the corporation in Guernsey.
61. *Ibid.*, p. 100. Phillimore J. said at p. 103: "I agree that the case runs on fine lines and that it is to a certain extent novel."
62. "The cases have not worked out what is meant by 'piercing the corporate veil'. It may not always mean the same thing." Per Clarke J. in *The Tjaskemolen* [1997] 2 Lloyd's Rep. 465, at p. 471.

blind.[63] There is a great range of tests to apply, and many inconsistencies arise between one case and another. To make matters worse, the metaphor is so graphic that often obviates the underlying rationale. As Toulson J. said, "a metaphor can be used to illustrate a principle [but] it may also be used as a substitute for analysis and may therefore obscure reasoning."[64]

Piercing the veil of a company for a specific action does not mean denying its personality for all and each aspect of its commercial life. A company cannot be deprived of its independent legal status in all and every instance but for a very exceptional reason. In English law, only where a company is created for an unlawful purpose, the validity of the company is called to question and its legal personality annulled. By saying that "a company may not be so formed for an unlawful purpose", Article 7(2) of the Companies Act 2006 sets out the high-water mark for the validity of the incorporation act. Save for such exceptional reason, the veil may be pierced only for a specific purpose and with regard to a particular situation. Yet, who is entitled to pierce the veil? The judiciary can pierce the veil in a particular case, but the legislature may do so generally by a statute or a decree. Both avenues are examined below.

Judicially, the veil-piercing doctrine is at odds with over-arching rules of corporate law, like the legal personality of companies, their independence from shareholders, and their limitation of liability. This clash is explained by the need to achieve a fair and equitable remedy in the particular case. However, this is not a settled ground. Some authorities advocate for justice ad hoc, yet others go for the strict observance of the law. Cumming-Bruce L.J., for example, said: "the court will use its power to pierce the corporate veil if it is necessary to achieve justice irrespective of the legal efficacy of the corporate structure under consideration".[65] Similarly, Auld L.J. affirmed "the readiness of the courts ... to draw back the corporate veil to do justice when common-sense and reality demand it."[66] On the contrary, others say that the interest of justice in a particular case is not a sufficiently good reason to challenge the letter of

63. The clash of views is illustrated by the opposing opinions of two judges. On one hand, Lord Denning M.R., in *Littlewoods Mail Order Stores Ltd. v. Commissioners of Inland Revenue* [1969] 1 WLR 1241, said (at p. 1254) that "the doctrine laid down in *Salomon v. A. Salomon and Co. Ltd.* [1897] AC 22 has to be watched very carefully It has often been supposed to cast a veil over the personality of a limited company through which the courts cannot see. But that is not true. The courts can. And often do, pull off the mask. They look to see what really lies behind. The legislature has shown the way with group accounts and the rest, and the courts should follow suit." Conversely, Richmond P., in *Re Securitibank Ltd. (No. 2)* [1978] 2 NZLR 136 expressed a very different opinion (at p. 159): "For myself and, with all respect, I would approach the question the other way round, that is to say on the basis that any suggested departure from the doctrine laid down in *Salomon v. A. Salomon and Co. Ltd.* should be watched very carefully."
64. *Yukong Line Ltd. v. Rendsburg Investments Corporation (No. 2)* [1998] 1 WLR 294 at p. 305. Similarly, in the United States, Justice Cardozo said: "The whole problem of the relationship between parent and subsidiary corporations is one that is still enveloped in the mists of metaphor. Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it." *Berkey v. Third Avenue Ry.*, 244 NY 84; 155 NE 58 (1926).
65. *Re a Company* [1985] BCLC 333, at pp. 337-338.
66. *N.C. Ratiu et al. v. D.P. Conway* [2005] EWA Civ. 1302, at para. 75.

law.[67] A commonplace is *Adams v. Cape Industries Plc.*, where the Court of Appeal refused to enforce a US judgment against an English parent company, which had been condemned, together with its American subsidiary, by an American court. In the English proceedings, Slade J. took the view that "... the court is not free to disregard the principle of *Salomon v. A. Salomon & Co. Ltd.* [1897] A.C. 22 merely because it considers that justice so requires".[68] The decision in *Adams v. Cape Industries Plc.* illustrates a rigid approach to veil-piercing, even in blatant cases of tort litigation. In that case, the Court of Appeal reasoned that, more than the need to achieve justice, what really justifies piercing the veil is the use of a company as a façade to conceal the true impropriate facts.[69]

In the legislative sphere, the veil is pierced too. Some statutes contain provisions that disregard the separation between shareholders and companies in civil and commercial matters. From a normative perspective, those laws that in a particular sector of activity challenge the separation rule would be in conflict with those others that uphold it as a general rule, like the Companies Act. The clash may be resolved under the rule *lex specialis derogat legi generali* and by means of statutory repeal. As Lord Diplock pointed out, the veil "can be pierced by some other statute if such other statute so provides", but he also remarked that "one would expect that any parliamentary intention to pierce the corporate veil should be expressed in a clear and unequivocal language."[70] Examples of statutory veil-piercing can be found in areas like insolvency, taxation or tenancy, to say a few. In some laws, the veil is pierced to grant shareholders with rights that are originally due to the corporation they have the majority of shares in.[71] Conversely, in other laws, the veil is pierced in order to allocate on the majority shareholders liabilities which are primarily attributed to the corporation.[72]

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67. See, in respect of veil-piercing, Morritt V. C. in *Trustor AB v. Smallbone and others* (No. 2) [2001] 1 WLR 1177, at p. 1185; Hobhouse L.J. in *Ord v. Belhaven Pubs Ltd.* [1998] BCC 607, at pp. 614-615.
68. [1990] Ch. 433, at p. 536. Oddly enough, in *Adams v. Cape Industries Plc.* their Lordships held that the assessment of damages adopted by the US judge against Cape Industries Plc. offended against English principles of "natural justice". Affirmed in *Ord v. Belhaven Pubs Ltd.* [1998] BCC 607, per Hobhouse L.J. at pp. 614-615.
69. *Adams v. Cape Industries Plc.* [1990] Ch. 433, at p. 542. That proposition was applied by Lord Keith of Kinkel in *Woolfson v. Strathclyde Regional Council* [1978] SLT 159, and it was followed by the Court of Appeal in *Re: H and others* [1996] 2 BCLC 500 and by Rimer J. in *Gencor ACP Ltd. v. Dalby* [2000] 2 BCLC 734. By contrast, the American courts show a more flexible approach to victims' claims for torts resulting from hazardous activities. According to Muchlinski, "the manifest failure of traditional legal concepts to deal adequately with cases such as Bhopal suggests that some changes in legal policy are required." Muchlinski, P.T. *Multinational Enterprises and the Law* (2nd ed., 2007, Oxford), at p. 321.
70. *Dimbleby and Sons Ltd. v. National Union of Journalists* [1984] 1 WLR 427, at p. 435.
71. See, for example, Section 30(1)(a) of the Landlord and Tenant Act 1954, amended by Section 14 of the Regulatory Reform (Business Tenancies) (England & Wales) Order 2003; and Sections 116, 117, 122 and 123 of the Inheritance Tax Act 1984.
72. See, for example, the status of Economic Interest Groupings within the EU under the Council Regulation (EEC) No. 2137/85 of 25 Jul. 1985, Official Journal L 199, 31/07/1985 P. Although Art. 1(3) says that each state will determine if the groupings registered in its territory have legal personality, Art. 24(1) establishes the "unlimited joint and several liability" of the members for the debts and other liabilities of the grouping. For domestic legislation applicable to Economic

According to Gower,[73] there are three circumstances in which the court may pierce the veil: (a) when construing a statute, contract or other document; (b) when the company is a mere facade, concealing the true facts; and (c) when it can be established that the company is an authorized agent of its controllers or its members, corporate or individuals. In the next sections, we will elaborate the latest two only. The first one, statutory veil-piercing, will not be addressed here as it would confine our work to the literal interpretation of specific statutory provisions.

§3.04 VEIL-PIERCING AND CORPORATE GROUPS

No unmovable rules dictate when the veil must be pierced and when not. The need to make justice in the particular case is, as we saw before, decisive. However, in the context of groups, the criterion of justice ad hoc is slightly distorted. Groups of companies are formed by clusters of corporate shareholders in lieu of individual shareholders. The structure of groups is designed to procure and distribute wealth within the group. The group, as a whole, matters more than any of its members. Each and every decision, at any level of the organization, pursues the group's benefit. Moreover, shareholding to a group is different than to a single company. The majority of shares of all the members to the group are concentrated in a holding or a parent company. Likewise, the role displayed by the holding or the parent goes far beyond that of individual shareholders in an ordinary company. Holding and parents are often tempted to get involved into the management of subsidiaries. They may take some of the subsidiaries' operational and strategic decisions, like supervising the accounts, implementing policies, authorizing transactions, or allocating profits and losses.

The idiosyncrasy of groups puts the independence and autonomy of their members into question. Historically, the separation between the company's finances and the shareholders' private affairs was conceived to cater for individuals, not for groups. On that basis, it might be inappropriate that corporate shareholders benefit from the separation rule.[74] On the other hand, it has been suggested that, as long as there is no fraud or impropriety, the separation rule should be upheld for each and every person without distinction, including legal persons. English law have supported this latter view.[75] However, when it comes down to groups, there are voices in the opposite.[76] In modern corporate law, there is a debate on the question if a group should

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Interest Groupings, see in the United Kingdom the Statutory Instrument 1989/638; in France, Art. L 251-6 of the *Code de Commerce* (as amended by the *Ordonnances* of 23 Sep. 1967, and of 13 de June de 1989).

73. Gower's *Principles of Modern Company Law* Sixth Edition, by Davies, P.L., Prentice, D. and Gower, L. (Barnes & Noble, London 1997), at p. 173.
74. Ireland, P. *Company Law and the Myth of Shareholding Ownership*, 62 Modern Law Review (1999) 32.
75. Schmitthoff, C.M. *The Wholly Owned and the Controlled Subsidiary*, Journal of Business Law (1987) 218, at p. 220.
76. "... the parent is not an individual, with little or no interest in the running of the subsidiary as if it were no more than a portfolio shareholder. It is the actual manager of the subsidiary. It is a direct investor and that means something very different in terms of responsibility. It means the parent controls and is, in a real business sense, *responsible* for that which it controls. To ignore

ANNEX 187

186 F.3d 1356
United States Court of Appeals,
Federal Circuit.

In re CAMBRIDGE BIOTECH CORPORATION.
Institut Pasteur and Genetic Systems Corporation, Plaintiffs–Appellants,
v.
Cambridge Biotech Corporation,
Defendant–Cross Appellant.

Nos. 98–1012, 98–1013, 98–1041, 98–1265 and 98–1276.
|
July 7, 1999.

Synopsis
Assignee of patents directed to structural components of and methods of detecting presence of two types of Human Immunodeficiency Virus (HIV), along with its United States licensee, brought infringement action in bankruptcy court against purported sublicensee, which claimed that it obtained sublicense from another licensee through cross-license agreement. On appeal, the United States District Court for the District of Massachusetts, Nathaniel M. Gorton, J., 212 B.R. 10, affirmed bankruptcy court's denial of plaintiffs' motion to dismiss certain portions of defendant's answer and counterclaim, affirmed grant of summary judgment that defendant did not infringe two of assignee's patents, and affirmed determination of 1% royalty rate as damages for past infringement and as compensation for future practice of third patent. Plaintiffs appealed, and defendant cross-appealed. The Court of Appeals, Lourie, Circuit Judge, held that: (1) Court of Appeals had jurisdiction over appeal; (2) action in bankruptcy court was "core proceeding"; (3) licensee that entered cross-license agreement with defendant was not indispensable party; (4) section of cross-license agreement requiring licensee to use its best efforts to recover right to sublicense patents was unambiguous; (5) assignee, through licensee, breached "best efforts" clause of cross-license agreement; (6) equity supported remedy of declaring that defendant was licensed to practice inventions of patents that were subject of cross-license agreement; and (7) 1% royalty rate for past infringement and future practice of third patent was proper.

Affirmed.

Attorneys and Law Firms

***1360** Albert J. Breneisen, Kenyon & Kenyon, New York, New York, argued, for plaintiffs-appellants. With him on the brief were Richard S. Gresalfi, Donna M. Praiss, and Frederick H. Rein.

William J.T. Brown, LeBoeuf, Lamb, Greene & MacRae, L.L.P., New York, New York, argued, for defendant-cross appellant. With him on the brief was Steven E. Levitsky. Of counsel was Henri–Frederic Hibon, Donovan Leisure Newton & Irvine, New York, New York.

Before LOURIE, Circuit Judge, ARCHER, Senior Circuit Judge, and RADER, Circuit Judge.

Opinion

LOURIE, Circuit Judge.

Institut Pasteur and Genetic Systems Corporation (collectively "appellants") appeal from the decisions of the United States District Court for the District of Massachusetts in their patent infringement suit against Cambridge Biotech Corporation ("Cambridge"). Appellants first appeal from the district court's affirmance of the bankruptcy court's denial of their motion to dismiss certain portions of Cambridge's "Answer and Counterclaim" under Rule 19 of the Federal Rules of Civil Procedure. *See Institut Pasteur v. Cambridge Biotech Corp. (In re Cambridge Biotech Corp.),* 212 B.R. 10, 15–19 (D.Mass.1997); *Institut Pasteur v. Cambridge Biotech Corp.,* No. 95–40189–NMG (D.Mass. Aug. 26, 1997) (order of dismissal). Second, appellants appeal from the district court's affirmance of the bankruptcy court's grant of summary judgment that Cambridge does not infringe Institut Pasteur's U.S. Patents 5,055,391 and 5,051,496 because these patents were licensed to Cambridge under a cross-licensing agreement. *See id.* Third, appellants appeal from the district court's affirmance of the bankruptcy court's determination of a 1% royalty rate as damages for past infringement and as compensation for future practice of the invention of Institut Pasteur's U.S. Patent 5,217,861. *See Institut Pasteur,* 212 B.R. at 19–21; *Institut Pasteur v. Cambridge Biotech Corp. (In re Cambridge Biotech Corp.),* No. 96–40025–NMG (D.Mass. Aug. 26, 1997) (order of dismissal). Finally, appellants appeal from the district court's August 15, 1997 informal order denying its motion requesting a jury trial. Cambridge cross-appeals, urging that we dismiss appellants' appeal under the equitable mootness doctrine. We affirm all of the district

court's rulings appealed by appellants and thus do not reach the issue raised by Cambridge's cross-appeal.

BACKGROUND

A. *The Patents*

The three patents at issue, all of which are assigned to Institut Pasteur, are directed to structural components of and methods of detecting the presence of two types of Human Immunodeficiency Virus ("HIV"), HIV–1 and the less common HIV–2. Infection with either type of HIV leads to Acquired Immune Deficiency Syndrome ("AIDS"), and thus assays that can detect HIV–1 and HIV–2 are crucial to diagnosing, treating, and arresting the spread of AIDS. The '861 patent generally pertains to certain HIV–1 peptides (amino acid sequences which comprise part of the structure of the virus) and methods for detecting the presence of HIV–1. The '391 patent is directed to diagnostic assays for detecting the presence of HIV–2, and the '496 patent claims a number of structural peptides of HIV–2. The issues central to this appeal focus on the interpretation ***1361** of licensing agreements that govern these patents, not on the claims or any other aspect of the patents themselves.

B. *The Parties and Related Companies*

1. *Institut Pasteur, Genetic Systems Corporation, and Related Entities*

Institut Pasteur is a scientific research institute headquartered in Paris, France, that specializes in biochemical and biomedical research. Institut Pasteur is among the world's premier institutions involved in HIV research. Genetic Systems Corporation, a biotechnology company located in the United States, acquired via license exclusive rights in the United States under the '861, '391, and '496 patents, including the right to bring suit for infringement. These patents are enmeshed in a complex web of licensing and cross-licensing agreements that have prompted the present dispute. To interpret these agreements, one must understand the corporate structures of which both Institut Pasteur and Genetic were a part during the time period in question.

During the relevant time period, Institut Pasteur and the French corporation Sanofi, S.A. owned nearly all of the stock (26% and 72%, respectively) of the company Pasteur Sanofi Diagnostics ("PSD," formerly known as Diagnostic Pasteur). PSD, in turn, wholly owned its subsidiary, Sanofi Diagnostics Pasteur ("SDP," formerly known as Kallestad Diagnostics). SDP ultimately acquired all of the stock of Genetic following a sequence of ownership changes in which: (1) Bristol–Myers transferred all of the outstanding capital stock of Genetic to Elf Sanofi, Inc., a subsidiary of Sanofi, S.A., and (2) Elf Sanofi, Inc. transferred this stock to SDP. In net effect, PSD ultimately owned all of the stock of SDP, which owned all of the stock of Genetic.

2. *Cambridge Biotech Corporation*

Cambridge Biotech Corporation (formerly known as Cambridge Bioscience Corporation) is a biotechnology company that manufactures and sells diagnostic kits for detecting the presence of HIV. Its facilities are located in Worcester, Massachusetts and Rockville, Maryland. On July 7, 1994, Cambridge filed a voluntary petition for bankruptcy under Chapter 11 of the United States Bankruptcy Code. Pursuant to its reorganization plan, Cambridge sold its stock to bioMérieux Vitek, a subsidiary of bioMérieux, S.A.

C. *The Licensing Agreements*

1. *The 1989 Agreement*

Regarding the '391 and '496 patents (the HIV–2 patents), the dispute centers on a cross-licensing agreement entered into by Cambridge and PSD on October 25, 1989 (the "1989 Agreement"). Institut Pasteur had received an assignment of these patents from the inventors, and Institut Pasteur had granted an exclusive license, with the right to sublicense, to PSD. Under the 1989 Agreement, each party granted to the other licenses under various patents; significantly, at the time the 1989 Agreement was signed, PSD had no right to grant licenses under the '391 and '496 patents, as it had exclusively sublicensed the patents to Genetic pursuant to a 1984 joint venture agreement which created Blood Virus Diagnostics (the BVD Agreement). Under ¶ 2.2 of the 1989 Agreement, however, PSD agreed to make "best efforts" to recover that right from Genetic. Paragraph 2.2 provided that:

> 2.2. The license granted to CBS [Cambridge] by DP [PSD] under paragraph 2.1 shall be automatically extended under the Licensed Patents as defined herein and as enclosed in Exhibit C upon recovery by DP [PSD] from GENETIC SYSTEMS of the right to practice DP's [PSD's] letter[s] patent included in Exhibit

> C [including the '391 and '496 patents], which DP [PSD] shall use its *best efforts* to recover. DP [PSD] represents that it is currently discussing such recovery with GENETIC SYSTEMS and will inform CBS [Cambridge] ***1362** with the progress and results of such discussions.

Joint App. at A1274 (emphasis added).

After PSD's wholly-owned subsidiary, SDP, acquired Genetic, Cambridge believed that PSD had in fact satisfied its obligation to use "best efforts" to recover the right to sublicense the '391 and '496 patents. Accordingly, Cambridge forwarded royalties from its sale of HIV–2 products using the '391 and '496 subject matter to PSD. PSD refused to accept the royalties, arguing that Cambridge had no license to the patents and maintaining that it reserved the right to proceed against Cambridge.

2. *The 1987 Agreement*

Regarding the '861 patent, the "1987 Agreement" is of central importance. On March 30, 1987, Institut Pasteur, the United States Department of Health and Human Services ("HHS"), and the National Technical Information Services of the United States Department of Commerce ("NTIS") entered into an agreement entitled "Settlement Agreement" to resolve a dispute between AIDS researchers from France (led by Dr. Luc Montagnier from Institut Pasteur) and the United States (led by Dr. Robert Gallo from HHS) involving discovery of the HIV virus and certain HIV technology that arose from that work. The parties agreed, *inter alia*, that researchers associated with Montagnier and Gallo had concurrently isolated HIV and developed a diagnostic assay to detect the presence or absence of antibodies to the virus. The parties cross-licensed each other on a world-wide, royalty-free basis, including the right to sublicense, with or without royalties, the existing technology embodied within the claims of a pending Institut Pasteur patent application, as well as an HHS patent and applications.

Under § 2 of the 1987 Agreement, the parties also agreed to cross-license "improvement technology," which consisted of certain patents and patent applications belonging to Institut Pasteur and HHS. Included in this improvement technology was Institut Pasteur's application Serial No. 914,156, of which the '861 patent is a continuation. Section 2 reads in relevant part:

> 2. Licensing Improvements to Existing Technology
>
> [¶ 1] Each party agrees that any patent rights covering Improvement Technology that it owns or may own shall be made available to any current licensee of the other Party, as denoted in Attachment A or Attachment B, as the case may be, and to such additional licensees of either Party that may be granted a license from time to time under the Gallo et al. Patent or Montagnier et al. Application.
>
> [¶ 2] Improvement Technology made available under this ... [section] ... by one Party to the licensees of the other Party shall be made available by the licensor at a royalty rate and under conditions no less favorable than those offered to its own licensees.
>
> [¶ 3] For purposes of ensuring that a royalty rate charged a licensee of one Party for Improvement Technology is "no less favorable" than that offered to current licensees of the other Party, the Parties agree that in the event that a Party licenses Improvement Technology to one or more of its licensees under the Gallo et al. Patent or Montagnier et al. Application, and as a result of such licensing reduces the royalty rate it charges on the existing Gallo et al. Patent or Montagnier et al. Application so that such royalty rate is less than the "existing royalty rate," then (i) such a reduction shall be accompanied by a royalty-bearing agreement with such licensee (or licensees) which bears an aggregate royalty (existing technology plus Improvement Technology) which is no less than the royalty rate it had been charging that licensee (or those licensees) for the underlying license prior to said reduction, and (ii) such Party shall offer the licensees of the other Party a license for the Improvement Technology ***1363** at a royalty no greater than the difference between the largest aggregate royalty rate charged its own licensees and the "existing royalty rate."
>
> [¶ 4] In the event that a Party has not yet licensed to any of its own licensees the Improvement Technology requested by a licensee of the other Party, then that Party shall offer a license to said licensee of the other Party under terms and conditions that would normally pertain if it were licensing such technology to one of its own licensees and further, that Party may establish a reasonable royalty rate for such Improvement Technology and charge that royalty rate to the other Party's licensees. In such event, the Party

> shall charge that royalty rate to any of its own licensees subsequently requesting such Improvement Technology and upon licensing such Improvement Technology to the Party's own licensees, may not reduce the existing royalty rate on the existing Gallo et al. Patent or Montagnier et al. Application....
>
> [¶ 6] For purposes of this ... [section], ... the Parties agree that the "existing royalty rate" is five percent (5%) of net sales unless otherwise indicated in Attachment A or Attachment B.

See Joint App. at A1863–65. Significantly, for the time period at issue here, Institut Pasteur licensed the relevant technology to Genetic, via PSD, at a royalty rate of 6%. [1]

On February 1, 1989, NTIS licensed to Cambridge certain United States patents and related foreign patents and applications directed to methods of detecting the presence of antibodies to HIV. As an NTIS licensee, Cambridge sought the benefit of § 2 of the 1987 Agreement with respect to the '861 patent, arguing that Institut Pasteur was obligated to license the '861 patent to licensees of NTIS. Appellants do not presently dispute that Cambridge is in fact entitled to a license under the 1987 Agreement.

D. *The Bankruptcy Court and District Court Litigation*

Appellants sued Cambridge for infringement of the '391, '496, and '861 patents in the United States Bankruptcy Court for the District of Massachusetts on March 8, 1995. [2] Appellants filed their complaint in the bankruptcy court rather than the district court based on 11 U.S.C. § 362, the automatic stay provision of the Bankruptcy Code, and Local Rule 201 of the District Court of Massachusetts. [3] Appellants alleged that Cambridge infringed the '861 patent by making, using, and/or selling HIV diagnostic kits that contained at least one of the proteins claimed in the patent. *See* Compl. at 3. Appellants further alleged that Cambridge infringed the '391 and '496 patents by making, using, and/or selling diagnostic kits for detecting antibodies to HIV–2. *See id.* at 3–4. Based on these allegations, appellants sought damages and a permanent injunction. *See id.* at 4. Appellants further asserted that the proceeding was not a "core proceeding" as set forth in 28 U.S.C. § 157(b)(2) and that ***1364** they did not consent to the entry of any final order or judgment by the bankruptcy court. *See* Compl. at 1–2; *see also* 28 U.S.C. § 157(b)(1), (c)(1)-(c)(2). [4] Lastly, appellants demanded a jury trial for all of the issues raised in their complaint. *See* Compl. at 5.

In its Answer and Counterclaim, Cambridge denied that the proceeding was a non-core proceeding as well as appellants' allegations of infringement. *See* Answer and Countercl. at 1–3. Cambridge raised several affirmative defenses, including, inter alia, (1) that it possessed a license to make, use, and sell the inventions claimed in the '391 and '496 patents, (2) that appellants were estopped from or had waived their right to assert infringement claims regarding these patents, and (3) that the '861 patent was invalid and not infringed. *See id.* at 3–4. In the Answer and Counterclaim, Cambridge sought a declaration that Institut Pasteur, by way of its subsidiaries and affiliates, had provided Cambridge with a valid license to the '391 and '496 patents under the 1989 Agreement between Cambridge and PSD. *See id.* at 7. Alternatively, Cambridge requested the bankruptcy court to find that Institut Pasteur had breached the "best efforts" provision of the 1989 Agreement by failing, through PSD, to acquire the rights to these patents from Genetic and therefore that appellants were estopped from asserting an infringement claim against Cambridge. *See id.* at 8–9. Cambridge also sought a declaration that, inter alia, the '861 patent is invalid and not infringed. *See id.*

1. *Core Proceeding and Right to a Jury Trial*

Cambridge sought an order from the bankruptcy court declaring the adversary proceeding a "core proceeding" as defined by 28 U.S.C. § 157(b)(2). At a May 26, 1995 hearing, the bankruptcy court, from the bench, granted Cambridge's motion, concluding that the proceeding qualified as a "core proceeding" under § 157(b)(2)(B) or § 157(b)(2)(O). [5] The court concluded that the proceeding fell within ***1365** § 157(b)(2)(B) because, in essence, appellants were prosecuting a claim in bankruptcy against Cambridge's estate when they filed their infringement complaint, which was in reality a proof of claim. *See* Findings and Rulings at 41–43, *Pasteur I* (No. 94–43054). Alternatively, the court ruled that the proceeding was core because the dispute went to a central aspect of the reorganization, and thus would fall within the catchall provision of § 157(b)(2)(O). *See id.* at 43–44. Finally, the bankruptcy court denied appellants' request for a jury trial based on the core and equitable nature of the proceeding. *See* Findings and Rulings at 44, *Pasteur I* (No. 94–43054); *Pasteur I,* 186 B.R. at 12. [6]

2. *Rule 19 Joinder*

Under Rule 19 of the Federal Rules of Civil Procedure, [7] appellants moved to dismiss the portions of Cambridge's

counterclaim in which it requested a declaratory judgment that it possessed a license to the '391 and '496 patents, or that alternatively, Institut Pasteur, via PSD, had breached its best efforts obligation to acquire the right to grant a license and that appellants were thus estopped from asserting infringement. Appellants argued that the bankruptcy court could not adjudicate these counts of the counterclaim because PSD, the other party to the 1989 Agreement, was a necessary and indispensable party to the adjudication. *See Pasteur I,* 186 B.R. at 17. The bankruptcy court disagreed and held that PSD was not a necessary party under Rule 19(a). *See id.* at 19. The bankruptcy court observed that by its ruling that Cambridge was licensed under the '391 and '496 patents, PSD's rights were not affected, as it did not possess rights to the patents before or after the ruling. *See id.* at 18.

***1366** Despite the bankruptcy court's conclusion that PSD was not a necessary party, the court proceeded to balance the equities under Rule 19(b) and concluded that PSD was also not an indispensable party. *See id.* at 19. The bankruptcy court observed that there would be no prejudice to PSD because, as noted before, none of its rights had been altered, as it did not then possess rights to the patents. As to the other factors under Rule 19(b), the bankruptcy court reasoned that: (1) due to the absence of prejudice, there would be no need to "shape" the judgment to reduce the prejudice to the parties, (2) a judgment declaring the rights owned by Cambridge would give Cambridge adequate relief, and (3) Cambridge would not have an adequate remedy if the portions of its Answer and Counterclaim at issue were dismissed, as it would have to sue in France (where it could not sue Genetic), thus greatly hindering an efficient reorganization. *See id.* The bankruptcy court also noted several other equitable considerations in favor of Cambridge, including that PSD could easily have become a party to the lawsuit, thus eliminating any argument regarding prejudice, that both Genetic and Institut Pasteur, as related companies, adequately represented PSD, and that appellants were responsible for the nonjoinder, not Cambridge. *See id.*

On appeal, the district court affirmed. As to the 19(a) issue, the district court disagreed with the bankruptcy court and held that since PSD was a signatory to the 1989 Agreement, it was a necessary party. *See Pasteur III,* 212 B.R. at 18. However, the district court agreed with the bankruptcy court that it was proper to have proceeded without PSD under Rule 19(b) "based upon principles of 'equity and good conscience.' " *See id.* (quoting Fed.R.Civ.P. 19(b)).

3. *Declaration that the '391 and '496 Patents Were "Licensed Patents"*

Cambridge moved for summary judgment of noninfringement as to both the '391 and '496 patents. In support of its argument that it was licensed to practice the '391 and '496 patents pursuant to its 1989 Agreement with PSD, Cambridge principally asserted that since PSD was the sole owner of SDP, and because SDP then acquired all of the stock of Genetic, this acquisition constituted a "recovery" by PSD of the '391 and '496 patent sublicensing rights from Genetic under the 1989 Agreement. *See Pasteur I,* 186 B.R. at 16. The Bankruptcy Court rejected this argument, reasoning that (1) possessing the right to grant sublicenses and owning a corporation whose wholly-owned subsidiary possesses that right are not the same and (2) the acquisition of Genetic was not contemplated by the parties when the 1989 Agreement was signed. *See id.*

Turning to Cambridge's "best efforts" argument, however, the bankruptcy court, acting in equity, applied the equitable maxim "equity treats as done that which in good conscience should be done." *See id.* The court noted that although PSD had obligated itself to use best efforts to obtain the '391 and '496 patent rights, it had breached that obligation by failing to make *any* effort to recover the rights following the execution of the 1989 Agreement, despite wholly owning the company (SDP) that wholly owned Genetic. See *id.* The bankruptcy court essentially concluded that it would be inequitable for PSD not to be regarded as having recovered the rights. *See id.* The bankruptcy court thus declared the '391 and '496 patents "Licensed Patents" under the 1989 Agreement and dismissed appellants' infringement claims under these patents. *See id.* at 22.

Reviewing the bankruptcy court's grant of summary judgment of noninfringement de novo, the district court affirmed, concluding that there was no genuine issue of material fact. *See Pasteur III,* 212 B.R. at 17. The court observed that while there was a dispute as to the meaning and intent of the "best efforts" clause, it was clear that the clause required at least *some* effort, and it was undisputed that PSD made no effort to recover the ***1367** sublicensing rights from Genetic. *See id.* Accordingly, since the clause was unambiguous to that extent, the district court concluded that by making no effort, PSD had in fact breached the 1989 Agreement. See *id.* The district court further concluded that the bankruptcy court's application of equitable principles in declaring that Cambridge was licensed to practice the '391 and '496 patents was appropriate under the circumstances. *See id.*

4. *Award of a 1% Royalty Rate for Past Infringement and Future Practice of the '861 Patent*

Both Cambridge and appellants moved for summary judgment on the issue of infringement of the '861 patent. The bankruptcy court held that claims 1–4 were not invalid and were infringed by sales of Cambridge's HIV–1 diagnostic kit. *See Pasteur I,* 186 B.R. at 19–22. The bankruptcy court enjoined Cambridge from making, using, or selling its HIV–1 Western Blot kits for the remainder of the life of the patent, *see Pasteur I,* 186 B.R. at 22, although the bankruptcy court stayed the injunction pending its determination of Cambridge's rights under the 1987 Settlement Agreement, *see Pasteur II,* slip op. at 2. The bankruptcy court held a trial to determine the royalty rate which Cambridge was obligated to pay for future practice of the '861 patent under the 1987 Agreement, as well as the damages to which appellants were entitled for Cambridge's past infringement. Significantly, the parties did not dispute that Cambridge was entitled to a license of the '861 patent under the 1987 Agreement. *See id.* at 7.

The bankruptcy court first determined the appropriate royalty rate that Cambridge was obligated to pay Institut Pasteur for future practice of the '861 patent. The bankruptcy court noted that, contrary to Cambridge's assertion, ¶ 3 of § 2 of the 1987 Agreement did not squarely apply to this case, because that provision covers a scenario in which a licensor decides to license improvement technology to an existing licensee, and as part of that license, the licensor reduces the royalty payments that the licensee already pays for "existing technology." *See id.* at 8. In contrast, in this case, Genetic (the licensee) pays Institut Pasteur (the licensor), via PSD, one royalty rate (6%) for *all* of Institut Pasteur's technology, both existing and improvement. *See id.* at 8–9. The bankruptcy court further observed that the 1987 Agreement contains no provision expressly covering the facts of the present case.

The bankruptcy court nevertheless concluded that the best indication of how to determine the portion of the 6% attributable to improvement technology alone, such as the '861 patent, was to follow the procedure set forth in ¶ 3. The bankruptcy court therefore subtracted the "existing royalty rate" of ¶ 6(5%), from the "aggregate royalty" percentage (6%) to arrive at a 1% royalty rate for the improvement technology. *See id.* at 9–10. The bankruptcy court noted that while one might argue that the '861 patent is only part of the improvement technology, and thus that the royalty rate should be less than 1%, no evidence suggested otherwise how to allocate the charges for the various improvement technologies. *See id.* at 10. Accordingly, the bankruptcy court concluded that Institut Pasteur charged Genetic a 1% royalty for the '861 patent, *see id.* at 10, and that Cambridge was entitled under the 1987 Agreement to pay the same amount.

The bankruptcy court then calculated the damages owed by Cambridge for its past infringement. The bankruptcy court concluded that since appellants had failed to establish lost profits, appellants should be entitled under 35 U.S.C. § 284 to a "reasonable royalty," which the bankruptcy court had previously calculated as 1% of net sales. *See Pasteur II,* slip op. at 15–16. Applying this 1% rate, the bankruptcy court awarded appellants $29,601.17. *See Pasteur II,* slip op. at 16; *see also Institut Pasteur v. Cambridge Biotech Corp. (In re Cambridge Biotech Corp.),* No. 94–43054–JFQ, at 1 (Bankr.D.Mass. Jan. 5, 1996) (judgment). The bankruptcy court terminated ***1368** the injunction and declared a nonexclusive license of the '861 patent (with a royalty rate of 1% of Cambridge's net sales of its Western Blot kits), to be in effect between Institut Pasteur and Cambridge commencing January 1, 1996. *See Pasteur II,* slip op. at 16, 18–19; *see also Institut Pasteur v. Cambridge Biotech Corp. (In re Cambridge Biotech Corp.),* No. 94–43054–JFQ, at 1–2 (Bankr.D.Mass. Jan. 5, 1996) (judgment); *Institut Pasteur v. Cambridge Biotech Corp. (In re Cambridge Biotech Corp.),* No. 94–43054–JFQ, at 1–2 (Bankr.D.Mass. Feb. 12, 1996) (amended judgment).

The district court affirmed the bankruptcy court's grant of summary judgment of infringement and validity of the '861 patent. *See Pasteur III,* 212 B.R. at 15. Reviewing the bankruptcy court's damages determination under the clearly erroneous standard, the district court affirmed, concluding that it had "no compelling reason to interpret the agreement other than as did the Bankruptcy Court." *See id.* at 20. Likewise, the district court concluded that the bankruptcy court did not clearly err in its declaration of a license between Institut Pasteur and Cambridge. *See id.* at 21.

DISCUSSION

A. *Standards of Review*

Whether the district court had jurisdiction at least in part under 28 U.S.C. § 1338, and thus whether we have jurisdiction under 28 U.S.C. § 1295(a), are issues of law, *see Cedars–Sinai Med. Ctr. v. Watkins,* 11 F.3d 1573, 1577, 29 U.S.P.Q.2d 1188, 1191 (Fed.Cir.1993), that we review *de novo*, *see James M. Ellett Constr. Co., Inc. v. United States,*

93 F.3d 1537, 1541 (Fed.Cir.1996) ("Jurisdiction is a question of law which we review *de novo*.").

We review a district court's review of a bankruptcy court decision involving patent issues independently, applying the clearly erroneous standard to the factual determinations of the bankruptcy court and de novo review to its conclusions of law. *See e.g., Peterson v. Scott (In re Scott),* 172 F.3d 959, 966 (7th Cir.1999); *Gamble v. Brown (In re Gamble),* 168 F.3d 442, 444 (11th Cir.1999); *Charrier v. Security Nat'l of Or. (In re Charrier),* 167 F.3d 229, 232 (5th Cir.1999); *Grella v. Salem Five Cent Sav. Bank,* 42 F.3d 26, 30 (1st Cir.1994). We thus give the determinations of the district court no special deference. *See Gamble,* 168 F.3d at 444; *Charrier,* 167 F.3d at 232; *Grella,* 42 F.3d at 30. We review a bankruptcy court's grant of summary judgment, a conclusion of law, *de novo*. *See, e.g., Miller v. J.D. Abrams, Inc. (In re Miller),* 156 F.3d 598, 601 (5th Cir.1998); *Cumberland Farms, Inc. v. Florida Dep't of Envtl. Protection,* 116 F.3d 16, 18 (1st Cir.1997). Summary judgment is properly granted when "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). "In determining whether there is a genuine issue of material fact, the evidence must be viewed in the light most favorable to the party opposing the motion, with doubts resolved in favor of the opponent." *Chiuminatta Concrete Concepts, Inc. v. Cardinal Indus., Inc.,* 145 F.3d 1303, 1307, 46 U.S.P.Q.2d 1752, 1755 (Fed.Cir.1998).

In reviewing district court judgments in cases brought pursuant to 28 U.S.C. § 1338, we apply our own law with respect to issues of substantive patent law and certain procedural issues pertaining to patent law, but as to nonpatent issues, we apply the law of the circuit in which the district court sits. *See Biodex Corp. v. Loredan Biomed., Inc.,* 946 F.2d 850, 855–56, 20 U.S.P.Q.2d 1252, 1256–57 (Fed.Cir.1991); *see also Engel Indus., Inc. v. Lockformer Co.,* 166 F.3d 1379, 1384, 49 U.S.P.Q.2d 1618, 1622 (Fed.Cir.1999). Although the First Circuit has not ruled on the issue, we are confident that it would hold that a bankruptcy court's determination that a proceeding is a "core proceeding" is an issue of law that we must therefore review *de novo*. *See Insurance Co. of N. Am., v. NGC Settlement Trust & Asbestos Claims Management Corp. (In re National* ***1369** *Gypsum Co.),* 118 F.3d 1056, 1062 (5th Cir.1997). The First Circuit has held that rulings under Rule 19(b) are reviewed for an abuse of discretion. *See Traveler's Indem. Co. v. Dingwell,* 884 F.2d 629, 635 n. 10 (1st Cir.1989).

We review the construction of a license agreement de novo and interpret the licensing agreement under state law. *See Studiengesellschaft Kohle, M.B.H v. Hercules, Inc.,* 105 F.3d 629, 632, 41 U.S.P.Q.2d 1518, 1521 (Fed.Cir.1997) (citing *Cyrix Corp. v. Intel Corp.,* 77 F.3d 1381, 1384, 37 U.S.P.Q.2d 1884, 1887 (Fed.Cir.1996)). When we review a damages determination, the clearly erroneous standard applies to the review of the amount of damages, while the abuse of discretion standard applies to the review of the methodology chosen to compute damages. *See Unisplay, S.A. v. American Elec. Sign Co.,* 69 F.3d 512, 517 n. 8, 36 U.S.P.Q.2d 1540, 1544 n.8 (Fed.Cir.1995); *see also SmithKline Diagnostics, Inc. v. Helena Lab. Corp.,* 926 F.2d 1161, 1164–65 & n. 2, 17 U.S.P.Q.2d 1922, 1924–25 & n.2 (Fed.Cir.1991).

We review the grant of an equitable remedy for abuse of discretion. *See Power Lift, Inc. v. Weatherford Nipple–Up Sys., Inc.,* 871 F.2d 1082, 1084, 10 U.S.P.Q.2d 1464, 1466 (Fed.Cir.1989) (stating that reinstatement of license was an exercise of equitable powers, reviewable for abuse of discretion). "We review the trial court's exercise of discretion to determine whether (1) the decision was clearly unreasonable, arbitrary, or fanciful; (2) the decision was based on an erroneous conclusion of law; (3) the court's findings were clearly erroneous; or (4) the record contains no evidence upon which the court rationally could have based its decision." *Vaupel Textilmaschinen KG v. Meccanica Euro Italia S.P.A.,* 944 F.2d 870, 876, 20 U.S.P.Q.2d 1045, 1050 (Fed.Cir.1991).

B. *Appellate Jurisdiction*

Before proceeding to the merits we must first address the issue as to whether we possess jurisdiction to hear appellants' appeal. *See Bender v. Williamsport Area School Dist.,* 475 U.S. 534, 541, 106 S.Ct. 1326, 89 L.Ed.2d 501 (1986) ("[E]very federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' even though the parties are prepared to concede it.") (quoting *Mitchell v. Maurer,* 293 U.S. 237, 244, 55 S.Ct. 162, 79 L.Ed. 338 (1934)). Cambridge previously moved this court to dismiss appellants' appeal for lack of jurisdiction, a motion we denied in an unpublished order. *See Institut Pasteur v. Cambridge Biotech Corp. (In re Cambridge Biotech Corp.),* Nos. 98–1012, –1013, –1041 (Fed.Cir. Feb. 20, 1998), *motion for reconsideration denied,* (Fed.Cir. Apr. 29, 1998).

Upon reconsideration, we again conclude that we possess jurisdiction to hear appellants' appeal. Our jurisdiction, as

defined by § 1338(a), extends to "those cases in which a well-pleaded complaint establishes either that federal patent law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal patent law, in that patent law is a necessary element of one of the well-pleaded claims." *Christianson v. Colt Indus. Operating Corp.,* 486 U.S. 800, 809, 108 S.Ct. 2166, 100 L.Ed.2d 811, 7 U.S.P.Q.2d 1109, 1113 (1988); *see Cedars–Sinai,* 11 F.3d at 1577, 29 U.S.P.Q.2d at 1191 ("The critical inquiry is whether in fact the complaint asserted a claim arising under the patent laws.") (quotation omitted); *see also* 28 U.S.C. § 1338 ("The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents...."); 28 U.S.C. § 1295(a)(1) ("The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction—(1) of an appeal from a final decision of a district court of the United States ... if the jurisdiction of that court was based, in whole or in part, on section 1338 of this title...."). Appellants' complaint, while referred to the bankruptcy court, clearly invoked § 1338 by its multiple allegations of infringement. *See* ***1370** Compl. at 3–4. Moreover, we note that both the bankruptcy court and the district court decided substantial questions of federal patent law, including patent infringement and validity. Thus, while the district court reviewed the bankruptcy court's decisions under 28 U.S.C. § 158,[8] this does not affect the fact that the district court's jurisdiction was based at least in part on 28 U.S.C. § 1338. Accordingly, we conclude that we have jurisdiction over appellants' appeal under 28 U.S.C. § 1295(a)(1) (1994).

C. *Core Proceeding and Appellants' Right to a Jury Trial*

Appellants argue that the lower courts erred in denying them a jury trial. This argument is intertwined with the question whether the proceeding in the bankruptcy court constituted a "core proceeding." As discussed above, *see supra* note 4, whether the bankruptcy court correctly held that the proceeding before it was a "core proceeding" is pivotal with respect to whether the district court accorded proper deference to the bankruptcy court and thus whether we must remand the case for a different depth of review. Both issues turn on whether appellants' infringement allegations constituted "claims" in the bankruptcy court; we will address both issues concurrently.

Appellants first argue that their demand for a jury trial in their complaint containing patent infringement claims established their right to a jury trial. They argue that the bankruptcy court erred in holding that the proceeding was core and that appellants were therefore not entitled to a jury trial. Appellants assert that the infringement allegations in the complaint were not "claims" in the bankruptcy sense, and thus the complaint did not invoke 28 U.S.C. § 157(b)(2)(B). Appellants continuethat the case was brought to the bankruptcy court as a "non-core" proceeding because (1) the infringement claims were not based on the creation, recognition, or adjudication of bankruptcy rights, (2) these claims would have survived outside of bankruptcy, and (3) the resolution of the dispute had nothing to do with bankruptcy law. Cambridge responds that appellants had no right to a jury trial because the bankruptcy court correctly determined that this proceeding was a "core proceeding" under § 157(b)(2)(B), as appellants' allegations were "claims." Cambridge alternatively asserts that appellants waived their jury trial arguments by not properly raising them on appeal to the district court.

Both the core proceeding and jury trial issues hinge on whether the allegations in appellants' complaint were "claims" in the bankruptcy sense and thus whether appellants, in filing their complaint, effectively filed a proof of claim in the bankruptcy court. *See* 4 *Collier on Bankruptcy* ¶ 502.02 [1] [c], at 502–11 (Lawrence P. King, ed., 15th ed.1998) (hereinafter "*Collier* ") ("Explicit in the concept of filing a proof of claim is the idea that the proof of claim must set forth a 'claim.' "). The term "claim" is broadly defined by the bankruptcy code as a

> (A) *right to payment,* whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured....

11 U.S.C. § 101(5)(A) (emphasis added). *Collier on Bankruptcy* observes that the legislative history supports a broad definition of "claim." *See* 2 *Collier* ¶ 101.05[1], at 101–26 ("By fashioning a single definition of claim in the Bankruptcy Code, Congress ***1371** intended to adopt the broadest available definition of the term."). *Collier* also addresses the place of tort claims under the Code's definition of "claim":

> As distinguished from prior bankruptcy law, tort claims constitute claims, and thus are payable out of the estate, and constitute dischargeable debts.... Under the Code the fact that the tort claim may be unliquidated or disputed does not mean that it is not a claim.

Id. at ¶ 101.05[6], 101–36.3. Patent infringement is properly classified as a tort, albeit one created by federal statute. *See, e.g., 3D Sys., Inc. v. Aarotech Lab., Inc.,* 160 F.3d 1373, 1378, 48 U.S.P.Q.2d 1773, 1777 (Fed.Cir.1998).

We agree with the bankruptcy court's conclusion that the allegations in appellants' complaint constituted bankruptcy "claims." Appellants' complaint sought money damages, *i.e.,* a "right to payment," as compensation for the tort of infringement allegedly committed by Cambridge. Under the broad definition of "claim" provided for in § 101(5), and in view of Congress's intent that the term "claim" should be construed liberally, we are persuaded that appellants' allegations were clearly "claims." We thus conclude that appellants' complaint constituted a proof of claim.

We disagree with appellants that the proceeding is a "non-core proceeding" merely because it dealt with patent infringement and other issues which do not arise directly from the bankruptcy laws. By filing what amounted to a proof of claim, appellants initiated the "allowance or disallowance of claims against the estate ...," a core bankruptcy proceeding. *See* 28 U.S.C. § 157(b)(2)(B). The Supreme Court and our sister circuits have repeatedly held that the filing of a proof of claim is determinative in classifying the proceeding as a core proceeding. *See Langenkamp v. Culp,* 498 U.S. 42, 44, 111 S.Ct. 330, 112 L.Ed.2d 343 (1990) ("In *Granfinanciera* we recognized that by filing a claim against a bankruptcy estate the creditor triggers the process of 'allowance and disallowance of claims,' thereby subjecting himself to the court's equitable power.") (quoting *Granfinanciera, S.A. v. Nordberg,* 492 U.S. 33, 58–59 & n. 14, 109 S.Ct. 2782, 106 L.Ed.2d 26 (1989)); *see also Benedor Corp. v. Conejo Enters., Inc. (In re Conejo Enters., Inc.),* 96 F.3d 346, 352 (9th Cir.1996); *United States Abatement Corp. v. Mobil Exploration & Producing U.S., Inc. (In re United States Abatement Corp.),* 79 F.3d 393, 398 n. 9 (5th Cir.1996); *S.G. Phillips Constructors, Inc. v. City of Burlington, Vt. (In re S.G. Phillips Constructors, Inc.),* 45 F.3d 702, 705 (2d Cir.1995); *In re Meyertech Corp. v. Southeastern Sprinkler Co., Inc. (In re Meyertech Corp.),* 831 F.2d 410, 417 (3d Cir.1987). The fact that the bankruptcy court must apply the patent laws to assess the merits of patent infringement and validity does not alter our conclusion; in the process of allowing or disallowing claims under § 157(b)(2)(B), a bankruptcy court always applies relevant federal or state law. As noted by *Collier:*

> After objection is made to a proof of claim, one of the tasks of the court is to determine the "amount" of the claim. In determining the amount of a claim, the court must be guided by otherwise applicable state or federal law. In so determining the amount, the court is concerned with the proper existence of the claim under state or federal law, whether the claim is liquidated or contingent and any other issues which bear upon the amount of the claim.

4 *Collier* ¶ 502.03[1][a], at 502–21; *see also id.* at ¶ 502.03[2][b], at 502–27 ("The validity and legality of claims generally is determined by applicable nonbankruptcy law.").

We therefore hold that the bankruptcy court properly concluded that this proceeding, based on claims for patent infringement, was a "core proceeding." As noted previously, when the proceeding is a "core" proceeding, the bankruptcy court may enter judgments and orders, *see* 28 U.S.C. § 157(b)(1), in contrast to non-core related proceedings, in which the bankruptcy ***1372** court may enter only proposed findings of fact and conclusions of law, *see id.* at § 157(c)(1), unless the parties consent, *see id.* at § 157(c)(2). *See supra* note 4. As a consequence, we further hold that the bankruptcy court properly rendered final judgments and orders, and that the district court correctly reviewed the bankruptcy court's findings of fact for clear error and its conclusions of law de novo while acting in its appellate capacity under 28 U.S.C. § 158.

We also disagree with appellants that the lower courts improperly denied their request for a jury trial. The precedent is clear that once a party invokes the core jurisdiction of the

bankruptcy court by filing a proof of claim, that party has no Seventh Amendment right to a jury trial. *See Langenkamp v. Culp,* 498 U.S. at 44–45, 111 S.Ct. 330; *Granfinanciera,* 492 U.S. at 58–59, 109 S.Ct. 2782; *see also Germain v. Connecticut Nat'l Bank,* 988 F.2d 1323, 1329 (2d Cir.1993) (holding that "the *Katchen [v. Landy,* 382 U.S. 323, 86 S.Ct. 467, 15 L.Ed.2d 391 (1966) *], Granfinanciera,* and *Langenkamp* line of Supreme Court cases stand for the proposition that by filing a proof of claim a creditor forsakes its right to adjudicate before a jury any issue that bears directly on the allowance of that claim...."). Because we conclude that appellants were not entitled to a jury trial *ab initio*, we need not address Cambridge's arguments regarding waiver.

D. *Rule 19 Joinder Analysis*

Appellants argue that under Rule 19, the bankruptcy court erred in failing to dismiss the portion of Cambridge's Answer and Counterclaim in which it requested a declaratory judgment that it possessed a license under the 1989 Agreement to the '391 and '496 patents, or alternatively, that Institut Pasteur, via PSD, had breached its best efforts obligation under the agreement and that appellants were thus estopped from asserting infringement against Cambridge. While agreeing with the district court's conclusion that PSD is a necessary party under Rule 19(a), appellants argue that under the four-factor "equity and good conscience" test of Rule 19(b), the equities weigh in favor of not proceeding with the portion of Cambridge's counterclaim at issue without PSD. Cambridge, on the other hand, contends that the equitable factors cited by the lower courts weigh in favor of proceeding without PSD.

Whether a party is "indispensable" to an adjudication is determined by performing a two-step analysis under Rule 19 of the Federal Rules of Civil Procedure. *See Pujol v. Shearson/Am. Express, Inc.,* 877 F.2d 132, 135 (1st Cir.1989). The first step requires the court to inquire under Rule 19(a) whether the party *should* be joined if feasible, *i.e.,* is the party "necessary." *See id.* If the party is necessary, as the district court decided here, but it is not feasible to join that party, the court proceeds to step two, set forth in Rule 19(b).

In step two, the court weighs four factors or "interests" listed in Rule 19(b) "to determine whether, in equity and good conscience, the court should proceed without a party whose absence is compelled." *Provident Tradesmens Bank & Trust Co. v. Patterson,* 390 U.S. 102, 109, 88 S.Ct. 733, 19 L.Ed.2d 936 (1968) (footnote omitted); *see also Pujol,* 877 F.2d at 134. Application of this test determines whether or not a party is "indispensable." *See Pujol,* 877 F.2d at 134. Significantly, "[t]hese factors ... are not mutually exclusive, nor are they the only considerations that may be taken into account by the court in a particular case." *See* 7 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1607, at 88 (2d ed.1986). Indeed, the "equity and good conscience" test is flexible; thus, whether a particular party will be deemed "indispensable" will depend heavily on the circumstances of each case. *See id.* at 90. The First Circuit has observed that in applying Rule 19, a court must take into account that the purpose of the Rule is to obtain a practical objective, ***1373** which is to "involve as many apparently concerned persons as is compatible with efficiency and due process." *See Pujol,* 877 F.2d at 134 (quotation and internal quotation marks omitted).

Appellants' arguments do not persuade us that the bankruptcy court abused its discretion in concluding that PSD was not an indispensable party under Rule 19(b). As for the first interest, prejudice to PSD or other parties to the action, contrary to appellants' contentions, the bankruptcy court reasonably detected no prejudice to PSD. First, PSD did not possess sublicensing rights to the '391 or '496 patents before or after the bankruptcy court's ruling; second, its interests are adequately represented by Institut Pasteur, which holds a minority interest in PSD, and by Genetic, which does possess the sublicensing rights and is wholly owned by SDP, which is in turn wholly owned by PSD. *See Pasteur I,* 186 B.R. at 18–19; *cf. Dainippon Screen Mfg. Co., Ltd. v. CFMT, Inc.,* 142 F.3d 1266, 1272, 46 U.S.P.Q.2d 1616, 1620 (Fed.Cir.1998) (holding that when a parent corporation is a party to the litigation, an argument that a wholly owned subsidiary is not adequately represented is "wholly unconvincing"). Moreover, both parties' interests are closely aligned to those of PSD: Institut Pasteur is the assignee and licensor of the '391 and '496 patents, and Genetic possesses sublicenses to these patents. Because we conclude that there is effectively no prejudice to PSD or other parties due to PSD's absence, the second interest, the ability of the court to shape the judgment to lessen prejudice, also weighs in favor of proceeding without PSD. Here, the court needed to do nothing to reduce the prejudice to PSD or other parties because there was none.

Turning to the third interest, we must determine whether the relief granted "will be an adequate remedy for the alleged wrong to plaintiff or whether it will leave him only partially compensated, which may lead to further litigation." *See* 7 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, § 1608, at 116. The Supreme Court characterizes this interest

as "the interest of the courts and the public in complete, consistent and efficient settlement of controversies." *See Provident Tradesmens,* 390 U.S. at 111, 88 S.Ct. 733. The bankruptcy court correctly observed that the 1989 Agreement requires suits against PSD to be brought in France; accordingly, there is a strong likelihood that Cambridge could not simultaneously obtain jurisdiction over PSD and Genetic, as Genetic does business exclusively in this country. *See Pasteur I,* 186 B.R. at 19. Such piecemeal litigation would take considerable time and would greatly hinder Cambridge's reorganization. *See id.* Such an alternative would not only provide an inadequate remedy for Cambridge, but protracted and ongoing litigation would also not be in the interest of either the public or the courts. Accordingly, the bankruptcy court was reasonable in concluding that this factor weighs strongly in favor of Cambridge.

As for the fourth interest, whether Cambridge will have an adequate remedy if its defenses are dismissed, the bankruptcy court again reasonably concluded that this factor favors Cambridge. Cambridge would be left without an adequate remedy if its only defenses to appellants' allegations of infringement were dismissed for nonjoinder. *See id.; Pasteur III,* 212 B.R. at 18.

Finally, we note that the bankruptcy court reasonably concluded that additional equitable considerations also weigh heavily in favor of Cambridge. PSD could easily have become a party to this lawsuit, and in fact it appeared in the main bankruptcy case, represented by the same attorney representing appellants. *See Pasteur I,* 186 B.R. at 19. Cambridge is not responsible for the nonjoinder. Ironically, Institut Pasteur and Genetic protest the absence of PSD, yet it is difficult to believe that these two entities, which presumably exercise some influence over PSD in relation to the patents, could not prevail upon PSD to join the suit to resolve all the issues. It is incongruous for Genetic in ***1374** particular to argue that it suffers prejudice from the lower court's ruling when it possesses the sublicensing rights and it is its grandparent company that has refused to join the suit. Accordingly, we conclude that the bankruptcy court did not abuse its discretion in concluding that the litigation should proceed in the absence of PSD under Rule 19(b).

E. *The '391 and '496 Patents*

1. *Construction of the 1989 Agreement and Its Breach*

Appellants advance several arguments that the bankruptcy court erred in granting Cambridge's motion for summary judgment of noninfringement and that it abused its discretion in declaring Cambridge a sublicensee under the '391 and '496 patents. Appellants first argue that there are genuine issues of material fact regarding both the intent of the parties as to the recovery of rights clause (¶ 2.2) in the 1989 Agreement and the alleged breach of this provision. Appellants assert that fact-finding and consideration of parol evidence are necessary to resolve contractual ambiguity. Appellants further contend that the parties did not intend "best efforts" to require PSD to pursue the recovery of the HIV–2 license rights after Elf Sanofi, Inc. acquired Genetic, because ¶ 2.2 was limited to PSD's ongoing renegotiation of the 1984 BVD agreement with Genetic, *i.e.,* there was no continuing obligation, as indicated by the term "results" in ¶ 2.2. *See* Joint App. at 1274 ("DP represents that it is currently discussing such recovery with GENETIC SYSTEMS and will inform CBS [Cambridge] with the progress and results of such discussions"). Secondly, appellants argue that the court abused its discretion in declaring that the '391 and '496 patents were "licensed patents" under the 1989 Agreement. Appellants assert that the bankruptcy court abused its discretion in applying the maxim "equity treats as done that which in good conscience should be done" because, more accurately, "equity regards that as done which was *agreed* or *directed* to be done," thereby carrying out the intent of the parties. Here, appellants continue, PSD and Genetic did not agree, intend, or direct that PSD's best efforts obligation would continue after negotiations with Genetic failed. Moreover, appellants contend that the equities balance in favor of PSD in any case.

Cambridge responds that the 1989 Agreement raises no genuine issues of material fact because ¶ 2.2 is unambiguous, and under Massachusetts law it must be enforced according to its terms. Cambridge contends that appellants are attempting to use parol evidence to inject ambiguity into the contract as to the parties' intent, despite the presence of an integration clause, ¶ 8.2.[9] Cambridge further contends that there is no dispute as to the breach of ¶ 2.2, because doing nothing clearly breaches the "best efforts" clause. Lastly, Cambridge argues that the bankruptcy court properly granted equitable relief. Cambridge asserts that the bankruptcy court did look to the intent and meaning of the agreement and concluded that PSD had violated the best efforts clause. Cambridge additionally asserts that the bankruptcy court properly weighed the equities when it held for Cambridge.

Under Massachusetts law,[10] "it is ... elementary that an unambiguous agreement must be enforced according to its

terms," *see* ***1375** *Schwanbeck v. Federal–Mogul Corp.,* 412 Mass. 703, 592 N.E.2d 1289, 1292 (1992), and "a court considers extrinsic evidence to discern intent only when a contract term is ambiguous," *see Massachusetts Mun. Wholesale Elec. Co. v. Town of Danvers,* 411 Mass. 39, 577 N.E.2d 283, 289 (1991). Once the court assures itself that the written contract was intended by the parties to represent their complete agreement, parol evidence may not be considered. *See Carlo Bianchi & Co., Inc. v. Builders' Equip. & Supplies Co.,* 347 Mass. 636, 199 N.E.2d 519, 524 (1964); *see also Tilo Roofing Co. v. Pellerin,* 331 Mass. 743, 122 N.E.2d 460, 462 (1954) ("As the written agreement shows on its face that it was intended to set forth the entire agreement of the parties ... its terms cannot be varied or supplemented by parol evidence.").

Upon reviewing the construction of the 1989 Agreement de novo, we agree with Cambridge that ¶ 2.2 is unambiguous and therefore that extrinsic evidence of the intent of the parties is not relevant. Paragraph 2.2 could not be clearer—the parties agreed that PSD was to exercise its best efforts to recover the rights to the '391 and '496 patents. Despite appellants' contention that the parties intended ¶ 2.2 to be limited to PSD's renegotiation of the 1984 BVD agreement, that provision sets no qualifications, time limits, or restrictions on PSD's efforts to recover the sublicensing rights to the patents, and we do not interpret the term "results" to impart any temporal limit on PSD's best efforts obligation. That portion of ¶ 2.2 simply states that PSD will report to Cambridge on the progress of its recovery of rights negotiations with Genetic. We see no reason to resort to any extrinsic evidence to assist in the interpretation of this unambiguous provision, especially in view of the integration clause, which indicates that the parties' intent is reflected within the four corners of the writing. *See Tilo Roofing,* 122 N.E.2d at 462. Thus, we agree with the bankruptcy court that the "best efforts" clause means, at the very least, that PSD had to make a serious and continuing effort to recover the rights to the patents at issue.

It is likewise clear that Institut Pasteur (via PSD) breached ¶ 2.2, because it is undisputed that PSD made no real effort to recover the rights at issue. *See Macksey v. Egan,* 36 Mass.App.Ct. 463, 633 N.E.2d 408, 414 (1994) (stating that "best efforts" requires "that the party put its muscles to work to perform with full energy and fairness the relevant express promises and reasonable implications therefrom"). We therefore conclude that the bankruptcy court properly granted summary judgment in favor of Cambridge, as there was no genuine issue of material fact as to the intent of the parties regarding ¶ 2.2 or its breach.

2. *The Remedy for Breach of the 1989 Agreement*

Appellants next contend that the bankruptcy court abused its discretion in declaring that Cambridge was licensed under the 1989 Agreement as a remedy for the breach of the 1989 Agreement. Appellants principally assert that the bankruptcy court applied the wrong equitable standard and improperly weighed the equities in favor of Cambridge. Appellants' argument as to the wrong standard is easily dismissed; even if we were to accept the assertion that the bankruptcy court should have applied the equitable standard proposed by appellants, *i.e.,* "equity regards that as done which was agreed or directed to be done," the result is the same. The bankruptcy court effected what the parties intended, agreed, and directed would be done, which was that PSD would use its best efforts to recover the rights to the patents. As we concluded above, this intent was plainly expressed in ¶ 2.2.

Appellants further contend that the equities weigh in their favor. Appellants principally argue that PSD could not have granted rights which it did not possess (Genetic and PSD are distinct legal entities), and that the bankruptcy court's decision conflicts with the public policy against disregarding corporate entities absent illegitimate purposes. We disagree. ***1376** The concept of "piercing the corporate veil" is equitable in nature and courts will pierce the corporate veil "to achieve justice, equity, to remedy or avoid fraud or wrongdoing, or to impose a just liability." *See* 1 William M. Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations* § 41.20, at 598–601, 603 (Perm. ed.1999). Under Massachusetts law, [11] "corporations are generally to be regarded as separate from each other and from their respective stockholders where there is no occasion to look beyond the corporate form for the purpose of defeating fraud or wrong, or for the remedying of injuries. [However, t]he general principle is not of unlimited application." *My Bread Baking Co. v. Cumberland Farms, Inc.,* 353 Mass. 614, 233 N.E.2d 748, 751 (1968) (internal citations, quotations, and quotation marks omitted).

While Massachusetts law is clear that the corporate veil should only rarely be pierced to prevent "gross inequity," *see Gurry v. Cumberland Farms, Inc.,* 406 Mass. 615, 550 N.E.2d 127, 133 (1990) (citation omitted), we conclude that the bankruptcy court properly disregarded the corporate structures at issue here to achieve an equitable result. Appellants cannot enable PSD to shirk its contractual

obligations by permitting it to hide behind its wholly-owned subsidiary, SDP, a company which wholly owns Genetic, the holder of the sublicensing rights. *See* Fletcher, § 41.10, at 587 ("Wholly owned subsidiaries present a common situation ripe for piercing the corporate veil."). PSD could have satisfied its best efforts obligation by directing SDP to direct Genetic to transfer the right to operate under the patents, thereby satisfying its best efforts obligation. Instead, PSD did essentially nothing. In this case, "[t]o do equity among the parties, undue emphasis cannot fairly be placed upon strict compliance with corporate formalities." *Samia v. Central Oil Co. of Worcester,* 339 Mass. 101, 158 N.E.2d 469, 474 (1959). As to the other factors cited by appellants in their brief, we are not persuaded that the bankruptcy court was unreasonable in concluding that they do not sufficiently weigh in favor of appellants in view of both the corporate relationships in this case and the other factors weighed by that court. Accordingly, we hold that the bankruptcy court did not abuse its discretion in concluding that the equities favored Cambridge and in declaring that Cambridge was licensed to practice the inventions of the '391 and '496 patents.

F. *The 1% Royalty Rate for Past Infringement and Future Practice of the '861 Patent*

Appellants advance several reasons why the bankruptcy court allegedly erred in setting a 1% royalty rate under the 1987 Agreement as damages for past infringement and compensation for future practice of the '861 patent. Appellants first argue that the bankruptcy court misinterpreted the 1987 Agreement in concluding that Cambridge is entitled to the same license terms as Genetic for Institut Pasteur's improvement technology. Appellants contend that the court's interpretation that ¶ 2 covers pre-settlement exclusive licenses to PSD and Genetic reads ¶ 4 out of the Agreement. Appellants next argue that even if Cambridge were entitled to the same license terms for the improvement technology as Genetic, the court erred in using 6% as the total consideration paid by Genetic for all of Institut Pasteur's technology; this miscalculation, appellants continue, resulted in an artificially low 1% rate for improvement technology when the court subtracted the 5% "existing royalty rate" (see ¶ 6) as directed by ¶ 3. Appellants contend that in addition to the 6% royalty, Genetic is paying and has paid a significant amount of other consideration. Appellants lastly argue that the bankruptcy court erred in not considering a hypothetical negotiation in 1993, when infringement ***1377** began, and in not deciding that such a negotiation would have resulted in a license at 15% royalty, plus an up-front payment of $500,000.

Cambridge essentially responds that appellants should not be allowed to rewrite ¶ 2; since the 1987 Agreement is unambiguous, its plain language must be enforced under Maryland law. [12] Cambridge continues that based on a plain reading, the bankruptcy court's interpretation of ¶ 2 does not read ¶ 4 out of the agreement. As for the 1% rate, we understand Cambridge to argue that while Genetic provides and has provided consideration beyond the 6% royalty, the 1% royalty rate for the '861 patent alone is not artificially low because, unlike Cambridge, Genetic receives the benefit of *all* of Institut Pasteur's technology, in effect offsetting the additional consideration. Cambridge lastly asserts that the bankruptcy court properly disregarded the testimony of Genetic's President, Terrance Beiker, regarding a hypothetical negotiation.

"A reasonable royalty 'may be based upon an established royalty, if there is one, or if not upon a hypothetical royalty resulting from arm's length negotiations between a willing licensor and a willing licensee.' " *See Trell v. Marlee Elecs. Corp.,* 912 F.2d 1443, 1445, 16 U.S.P.Q.2d 1059, 1061 (Fed.Cir.1990) (quoting *Hanson v. Alpine Valley Ski Area, Inc.,* 718 F.2d 1075, 1078, 219 U.S.P.Q 679, 682 (Fed.Cir.1983).) "When a 'reasonable royalty' is the measure, the amount may again be considered a factual inference from the evidence, yet there is room for exercise of a common-sense estimation of what the evidence shows would be a 'reasonable' award." *Lindemann Maschinenfabrik, GmbH v. American Hoist & Derrick Co., Harris Press & Shear Div.,* 895 F.2d 1403, 1406, 13 U.S.P.Q.2d 1871, 1874 (Fed.Cir.1990).

It is well-established that Maryland follows the objective law of contracts. *See Adloo v. H.T. Brown Real Estate, Inc.,* 344 Md. 254, 686 A.2d 298, 304 (1996); *General Motors Acceptance Corp. v. Daniels,* 303 Md. 254, 492 A.2d 1306, 1310 (1985). In *General Motors,* the Court of Appeals of Maryland explained how a court should interpret a contract:

> A court construing an agreement under this test must first determine from the language of the agreement itself what a reasonable person in the position of the parties would have meant at the time it was effectuated. In addition, when the language of the contract is plain and unambiguous there is no

> room for construction, and a court must presume that the parties meant what they expressed.... [T]he clear and unambiguous language of an agreement will not give away [sic, way] to what the parties thought that the agreement meant or intended it to mean. As a result, when the contractual language is clear and unambiguous, and in the absence of fraud, duress, or mistake, parol evidence is not admissible to show the intention of the parties or to vary, alter, or contradict the terms of that contract.

See General Motors, 303 Md. 254, 492 A.2d 1306–10.

Based on the foregoing guidelines, we agree with Cambridge that the bankruptcy court did not abuse its discretion in using the 1987 Agreement as the basis for calculating a reasonable royalty, nor did the court clearly err in awarding appellants a 1% royalty. The parties do not dispute that Cambridge is entitled to a license under the 1987 Agreement, *see* Appellants' Br. at 38, so it is clear that the bankruptcy court did not abuse its discretion in looking to that agreement to calculate the proper damage award. Accordingly, we need not address appellants' arguments regarding alternate methods for computing damages, specifically hypothetical negotiation. We are left to consider ***1378** appellants' arguments concerning the interpretation of the 1987 Agreement and the resulting calculation of a 1% royalty rate.

Appellants argue that the bankruptcy court misinterpreted ¶ 2 to include pre-settlement exclusive licenses to PSD and Genetic, thereby reading ¶ 4 out of the agreement, and that moreover, ¶ 2 only covers separate improvement technology licenses. We agree with Cambridge, however, that such pre-settlement licenses are not excluded. The language of ¶ 2 plainly states that:

> Improvement Technology made available under subparagraph 2 by one Party to the licensees of the other party shall be made available by the licensor at a royalty rate and under conditions no less favorable than those offered to its own licensees.

Under Maryland law, we see no reason to interpret ¶ 2 other than by what it says, *i.e.,* that Institut Pasteur must license its improvement technology, the '861 patent, to Cambridge at the same rate as to its sublicensee Genetic. Moreover, this interpretation does not read ¶ 4 out of the Agreement, because that paragraph applies when a party, in this case Institut Pasteur, has not licensed the improvement technology at issue to its *own* licensee. In this case, Institut Pasteur *had already licensed* the improvement technology to its own sublicensee, Genetic (via PSD), as of 1990. Thus, ¶ 4 simply does not apply, and our construction of ¶ 2 does not render ¶ 4 a nullity as appellants contend.

We are likewise unpersuaded by appellants' argument that the bankruptcy court clearly erred in arriving at a 1% royalty rate. As noted previously by the bankruptcy court, the parties did not expressly provide for the present contingency in the 1987 Agreement, so the bankruptcy court reasonably followed the procedure of ¶ 3 of the agreement, which provides for calculating the royalty rate for improvement technology in the similar situation in which a licensor licenses both existing and improvement technology to a licensee. While appellants correctly indicate that Genetic has paid and is paying significant consideration in addition to the 6%, Cambridge, unlike Genetic, is only receiving the benefit of a portion of the improvement technology in the form of the '861 patent. Indeed, the bankruptcy court indicated that an argument could be made that 1% is in fact *too much*. *See Pasteur II,* slip op. at 10. Acknowledging the fact that determination of a reasonable royalty involves some degree of "common-sense estimation," *see id.,* we conclude that the bankruptcy court did not clearly err in determining that appellants were entitled to a 1% royalty rate.

We have considered the parties' other arguments but conclude that they do not alter our decision. Inasmuch as appellants' appeal has not succeeded, Cambridge's cross-appeal is moot.

CONCLUSION

The bankruptcy court did not err in holding that the proceeding before it was a "core proceeding," and it properly denied appellants' motion for a jury trial. The bankruptcy court also did not err in holding that PSD was not an

indispensable party under Rule 19, and thus it properly denied appellants' motion to dismiss certain portions of Cambridge's Answer and Counterclaim. The bankruptcy court did not err in granting summary judgment of noninfringement in favor of Cambridge as to the '391 and '496 patents, nor did it abuse its discretion in declaring that these patents were "licensed patents" under the 1989 Agreement. As for the '861 patent, the bankruptcy court did not abuse its discretion by looking to the 1987 Agreement to calculate a royalty rate for Cambridge's past acts of infringement as well as its future practice of the patent; the bankruptcy court did not clearly err in arriving at a 1% royalty rate. Because we conclude that the bankruptcy court properly ruled on all the issues before us on appeal, we have concluded that the district ***1379** court properly affirmed these rulings *in toto*. Accordingly, we

AFFIRM.

All Citations

186 F.3d 1356, 44 Fed.R.Serv.3d 595, 51 U.S.P.Q.2d 1321

Footnotes

1 To fully understand the origin of the 6% rate, one must look at additional licensing agreements between Institut Pasteur and its affiliates. The bankruptcy court concisely outlined these licensing agreements in *Institut Pasteur v. Cambridge Biotech Corp. (In re Cambridge Biotech Corp.),* No. 94–43054–JFQ, slip op. at 7 n.2 (Bankr.D.Mass. Jan. 5, 1996).

2 The bankruptcy court resolved all of the issues between the parties in two opinions, *Institut Pasteur v. Cambridge Biotech Corp. (In re Cambridge Biotech Corp.),* 186 B.R. 9 (Bankr.D.Mass.1995) (*Pasteur I*) and *Institut Pasteur v. Cambridge Biotech Corp. (In re Cambridge Biotech Corp.),* No. 94–43054–JFQ, slip op. (Bankr.D.Mass. Jan. 5, 1996) (*Pasteur II*). On appeal, the district court reviewed the relevant issues in both opinions in *Institut Pasteur v. Cambridge Biotech Corp. (In re Cambridge Biotech Corp.),* 212 B.R. 10 (D.Mass.1997) (*Pasteur III*).

3 Local Rule 201 provides that:

> Pursuant to 28 U.S.C. § 157(a), any and all cases arising under Title 11 United States Code and any and all proceedings arising under Title 11 or arising in or related to a case under Title 11 shall be referred to the judges of the bankruptcy court for the District of Massachusetts.

D.Mass. Rule 201.

4 Under 28 U.S.C. § 157(b)(1), a bankruptcy court may enter judgments and orders only when the proceeding is deemed a "core proceeding" as outlined in § 157(b)(2). Section 157(b)(1) states that:

> Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

28 U.S.C. § 157(b)(1). In such case, the district court, in its appellate capacity under 28 U.S.C. § 158, reviews the bankruptcy court's findings of fact under the clearly erroneous standard and its legal conclusions *de novo*.

In contrast, if a proceeding is not a "core proceeding" but is a "related proceeding," 28 U.S.C. § 157(c)(1) provides that the bankruptcy court may only enter proposed findings of fact and conclusions of law, none of which are entitled to deference by the district court:

> A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

28 U.S.C. § 157(c)(1). However, § 157(c)(2) provides that, even in a related proceeding, a bankruptcy court may enter orders and judgments as long as the parties all consent:

> Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

28 U.S.C. § 157(c)(2). Accordingly, the complaint makes clear that appellants sought to establish their position that not only was this proceeding not a "core proceeding," but that even if it were a "related proceeding" they would not consent to the bankruptcy court rendering final judgments or orders.

5 28 U.S.C. § 157(b)(2) provides in relevant part:

Core proceedings include, but are not limited to—

(B) allowance or disallowance of claims against the estate ...;
(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.

28 U.S.C. § 157(b)(2)(B), (b)(2)(O).

6 On June 5, 1995, appellants moved the district court for leave to appeal the bankruptcy court's order denying its demand for a jury trial. *See* Joint App. at 375. This motion was denied, without formal order, over two years later on August 15, 1997, *see* Joint App. at 25, after the bankruptcy court had entered its final judgment in *Pasteur I* (September 1, 1995) and its amended judgment in *Pasteur II* (February 12, 1996).

7 Rule 19 states in relevant part:

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.
(b) Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Fed.R.Civ.P. 19.

8 Section 158(a) states in relevant part:

The district courts of the United States shall have jurisdiction to hear appeals
(1) from final judgments, orders, and decrees ...
of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

28 U.S.C. § 158(a).

9 Article 8, ¶ 8.2 states:

This Agreement contains the entire understandings among the parties hereto with respect to the transactions contemplated herein, and no party shall be bound by, or shall be deemed to have made, any representations and warranties except those contained in this Agreement.

See Joint App. at A1277.

10 Under Article 10 of the 1989 Agreement, the parties agreed that the agreement would be governed by the law of Massachusetts. *See* Joint App. at A1278.

11 When a court considers disregarding the corporate entity, *i.e.,* "piercing the corporate veil," the court applies the law of the state of incorporation. *See Stromberg Metal Works, Inc. v. Press Mechanical, Inc.,* 77 F.3d 928, 933 (7th Cir.1996).

12 As to the interpretation of the 1987 Agreement, we will apply Maryland law, as the parties agreed in Article XIII that Maryland law should govern the agreement. *See* Joint App. at A1881.

ANNEX 188

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

CASE OF THE NATIONAL & PROVINCIAL BUILDING SOCIETY, THE LEEDS PERMANENT BUILDING SOCIETY AND THE YORKSHIRE BUILDING SOCIETY v. THE UNITED KINGDOM

(117/1996/736/933-935)

JUDGMENT

STRASBOURG

23 October1997

List of Agents

Belgium: Etablissements Emile Bruylant (rue de la Régence 67, B – 1000 Bruxelles)

Luxembourg: Librairie Promoculture (14, rue Duchscher (place de Paris), B.P. 1142, L – 1011 Luxembourg-Gare)

The Netherlands: B.V. Juridische Boekhandel & Antiquariaat A. Jongbloed & Zoon (Noordeinde 39, NL – 2514 GC ‘s-Gravenhage)

SUMMARY[1]

Judgment delivered by a Chamber

United Kingdom – applicants' legal claims to restitution of monies paid under invalidated tax provisions extinguished under the effects of retrospective legislation (section 53 of Finance Act 1991 and section 64 of Finance (No. 2) Act 1992)

I. ARTICLE 1 OF PROTOCOL No. 1

A. Whether there was an unlawful expropriation of applicants' assets

Interest paid in gap period would inevitably have been taxed had voluntary arrangements between building societies and Inland Revenue continued to apply – it was held in applicants' reserves waiting to be brought into account – in absence of transitional regulations applicants would have obtained a windfall in changeover to new tax regime – no support in domestic litigation for argument that interest subjected to double imposition – interest never in fact taxed – Parliament clearly intended interest to be taxed – cannot be maintained that it was misled in this respect – no unlawful expropriation of assets or double imposition of interest through operation of 1986 Regulations.

B. Whether there were "possessions" within meaning of Article 1

Court expresses no concluded view on whether any of applicants' claims could properly be considered "possessions" – Leeds and National & Provincial had not secured a final and enforceable judgment in their favour when they initiated first set of restitution proceedings notwithstanding favourable outcome of Woolwich 1 litigation – judicial review proceedings and second set of restitution proceedings launched by all three applicants cannot be said to be sufficiently established – in particular, applicants cannot maintain that they had a legitimate expectation that Government would not seek Parliament's consent to adopt retrospective legislation to validate impugned Treasury Orders.

Nevertheless, Court prepared to proceed on assumption that applicants' claims amounted to "possessions" and treat Article 1 as applicable given links between applicants' arguments on this issue and substance of their claims to have been unjustifiably deprived of their "possessions".

C. Whether there was an interference

Not disputed – Court will examine whether interference justified on working assumption that applicants' claims amounted to "possessions".

D. Whether the interference was justified

Reiteration of Court's case-law on approach to interpretation of Article 1 – Court will apply rule in second paragraph of Article 1 to facts to determine whether impugned measures were a control of use of property in general interest to secure payment of taxes – most natural approach in circumstances.

1. This summary by the registry does not bind the Court.

Obvious public-interest considerations at stake justifying Parliament's adoption of section 53 of 1991 Act and section 64 of 1992 Act – section 53 sought to reassert Parliament's original intention to tax interest paid in gap period – that intention thwarted by ruling in Woolwich 1 that 1986 Regulations void on technical grounds – Leeds and National & Provincial must be reasonably considered to have appreciated Parliament would adopt retrospective legislation to remedy technical defects in 1986 Regulations – section 64 designed to safeguard substantial sums of revenue placed at risk by applicants' challenge to validity of Treasury Orders – cannot be maintained in circumstances that sections 53 and 64 upset balance between protection of applicants' rights to restitution and public interest in securing payment of taxes due.

Conclusion: no violation (unanimously).

II. ARTICLE 1 OF PROTOCOL No. 1 TAKEN IN CONJUNCTION WITH ARTICLE 14 OF THE CONVENTION

Applicants not in relevantly similar situation to that of Woolwich – latter alone bore costs and risks of litigation and had secured victories in House of Lords and Court of Appeal before Leeds and National & Provincial had issued writs to launch their restitution proceedings – even if applicants could be so considered there was reasonable and objective justification for excluding Woolwich from scope of section 53 – understandable that Parliament did not wish to interfere with House of Lords ruling in Woolwich 1 – cannot be maintained that section 64 discriminated between applicants and Woolwich – measure was of general application.

Conclusion: no violation (eight votes to one).

III. ARTICLE 6 § 1 OF THE CONVENTION

A. Applicability

Applicable – both sets of restitution proceedings were private-law actions irrespective of fiscal dimension – judicial review proceedings clearly related to outcome of second set of restitution proceedings and therefore decisive of private rights.

B. Compliance

Effects of sections 53 and 64 were to render applicants' legal actions unwinnable – whether this result constituted an interference with applicants' right of access to a court must be determined in light of all circumstances of case – Court must in particular subject to careful scrutiny justifications adduced by authorities in view of retrospective nature of impugned measures.

Applicants clearly understood that Parliament intended to tax interest paid in gap period and can reasonably be considered to have anticipated that Treasury would react as it did to remedy technical defects in 1986 Regulations following Woolwich 1 ruling – Leeds and National & Provincial in effect tried to pre-empt adoption of remedial legislation by issuing writs in restitution immediately before official announcement that Parliament would be

asked to approve retrospective measures – section 53 not in fact specifically targeted at Leeds' and National & Provincial's restitution actions even if its effect was to stifle these actions – obvious public-interest considerations justifying adoption of section 53 with retrospective effect, having regard to Parliament's need and resolve to reassert its original intention.

Furthermore, compelling public-interest reasons for rendering Treasury Orders immune from legal challenge mounted by all applicants in taking judicial review proceedings and contingent restitution proceedings – these proceedings were in effect an indirect assault on Parliament's original intention to tax interest paid in gap period – even if section 64 adopted by Parliament in knowledge of initiation by applicants of judicial review proceedings, applicants themselves must be considered to have appreciated that Parliament would intervene as it did.

Conclusion: no violation (unanimously).

IV. ARTICLE 6 § 1 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 14

Court's reasons supporting its earlier conclusion of no violation of Article 1 of Protocol No. 1 in conjunction with Article 14 of the Convention equally valid for a finding of no violation under this head.

Conclusion: no violation (eight votes to one).

COURT'S CASE LAW REFERRED TO

26.3.1992, Editions Périscope v. France; 9.12.1994, Stran Greek Refineries and Stratis Andreadis v. Greece; 23.2.1995, Gasus Dosier- und Fördertechnik GmbH v. the Netherlands; 20.11.1995, Pressos Compania Naviera S.A. and Others v. Belgium; 22.10.1996, Stubbings and Others v. the United Kingdom

In the case of the National & Provincial Building Society, the Leeds Permanent Building Society and the Yorkshire Building Society v. the United Kingdom[1],

The European Court of Human Rights, sitting, in accordance with Article 43 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court A[2], as a Chamber composed of the following judges:

Mr R. RYSSDAL, *President*,
Mr R. MACDONALD,
Mr N. VALTICOS,
Mrs E. PALM,
Mr R. PEKKANEN,
Sir John FREELAND,
Mr P. JAMBREK,
Mr K. JUNGWIERT,
Mr E. LEVITS,

and also of Mr H. PETZOLD, *Registrar*, and Mr P.J. MAHONEY, *Deputy Registrar*,

Having deliberated in private on 31 May and 27 September 1997,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") and by the Government of the United Kingdom of Great Britain and Northern Ireland ("the Government") on 16 September 1996 and 25 October 1996 respectively, within the three-month period laid down by Article 32 § 1 and Article 47 of the Convention. It originated in three applications (nos. 21319/93, 21449/93 and 21675/93) against the United Kingdom lodged with the Commission under Article 25 on 15 January 1993, 21 December 1992 and 11 January 1993 respectively by the National & Provincial Building Society (hereafter "the National &

Notes by the Registrar

1. The case is numbered 117/1996/736/933-935. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The third number indicates the case's position on the list of cases referred to the Court since its creation and the last two numbers indicate its position on the list of the corresponding originating applications to the Commission.

2. Rules of Court A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (1 October 1994) and thereafter only to cases concerning States not bound by that Protocol. They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

Provincial"), the Leeds Permanent Building Society (hereafter "the Leeds") and the Yorkshire Building Society (hereafter "the Yorkshire").

The Commission's request referred to Articles 44 and 48 and to the declaration whereby the United Kingdom recognised the compulsory jurisdiction of the Court (Article 46); the Government's application referred to Article 48. The object of the request and of the application was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 1 of Protocol No. 1 taken alone or in conjunction with Article 14 of the Convention and Article 6 § 1 of the Convention taken alone or in conjunction with Article 14.

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of Rules of Court A, the applicants stated that they wished to take part in the proceedings and designated the lawyers who would represent them (Rule 30).

3. The Chamber to be constituted included *ex officio* Sir John Freeland, the elected judge of British nationality (Article 43 of the Convention), and Mr R. Ryssdal, the President of the Court (Rule 21 § 4 (b)). On 17 September 1996, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr F. Gölcüklü, Mr R. Macdonald, Mr C. Russo, Mr N. Valticos, Mr R. Pekkanen, Mr P. Jambrek and Mr E. Levits (Article 43 *in fine* of the Convention and Rule 21 § 5). Mr Gölcüklü and Mr Russo were later prevented from taking part in the consideration of the case and were replaced by Mrs E. Palm and Mr K. Jungwiert respectively.

4. As President of the Chamber (Rule 21 § 6), Mr Ryssdal, acting through the Registrar, consulted the Agent of the Government, the applicants' lawyers and the Delegate of the Commission on the organisation of the proceedings (Rules 37 § 1 and 38). Pursuant to the order made in consequence, the Registrar received the Government's and the applicants' memorials on 31 January 1997.

On 10 March 1997 the Commission produced a number of documents from the file on the proceedings before it, as requested by the Registrar on the President's instructions.

5. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 28 May 1997. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) *for the Government*
Mr M.R. EATON, Deputy Legal Adviser,
Foreign and Commonwealth Office, *Agent*,
Mr S. RICHARDS,
Mr D. ANDERSON, *Counsel*,
Mr W.J. DURRANS, Inland Revenue,
Mr P.H. LINFORD, Inland Revenue, *Advisers*;

(b) *for the Commission*
Mrs J. LIDDY, *Delegate*;

(c) *for the applicants*
Lord LESTER OF HERNE HILL QC,
Mr J. GARDINER QC,
Mr P. DUFFY QC,
Mr J. PEACOCK,
Ms M. CARSS-FRISK, *Counsel*,
Mr H. ROSS, Solicitor, Clifford Chance
(for the Leeds),
Mr N. JORDAN, Solicitor, Clifford Chance
(for the Leeds),
Ms S. GARRETT, Solicitor, Addleshaw Booth & Co
(for the Yorkshire),
Ms F. FERGUSON, Solicitor, Slaughter and May
(for the National & Provincial), *Solicitors*.

The Court heard addresses by Mrs Liddy, Mr Gardiner, Lord Lester of Herne Hill and Mr Richards.

AS TO THE FACTS

I. GENERAL BACKGROUND

6. The applicants were at all relevant times building societies within the meaning of the Building Societies Act 1986. Building societies operate under the status of "mutual societies" under English law as opposed to the status enjoyed by companies under company law. A building society's members are made up of its investors who deposit savings with it and receive a rate of interest or a dividend in return, and its borrowers who are

charged interest on their loans. By and large, loans are taken out by borrowers to buy private residential property.

A. The income-tax liability of investors

7. Investors with a building society are liable to pay income tax in respect of the interest earned on their deposits. The income tax owed to the Inland Revenue for the purposes of the fiscal year running from 6 April of one year to 5 April of the following year was in practice calculated or measured with reference to a period of equal length preceding the actual fiscal year. The so-called "measurement principle" required that the period measured be always equal in length to the period taxed. The taxpayer was not in fact taxed on the income of the preceding year but assessed to tax on the income received in the current year, the amount of the current year's income being artificially computed by reference to the income of the previous year. Accordingly, in normal circumstances, individual investors with building societies would be obliged to declare in their tax returns for the fiscal year in question the amount of interest or dividends earned on their deposits in a preceding reference period of equal length to the fiscal year, and the Inland Revenue would have to make individual assessments to tax on the strength of the information supplied by the investor.

B. The voluntary arrangements for discharging investors' tax liability

8. However, in view of the very large number of building society investors, many of whom had only modest savings and were thus only liable to small amounts of income tax, or to no tax at all, it had for many years up to and including the fiscal year 1985/86 been the practice for the Inland Revenue to make voluntary arrangements with building societies for the payment by each society of a single annual composite amount. The effect of this payment by a building society was to discharge its investors' liability to income tax at the basic rate on the interest which they earned. These arrangements, which were for very many years operated on a non-statutory basis, were at the relevant time given statutory recognition under section 343 (1) of the Income and Corporation Taxes Act 1970 – "the 1970 Act".

9. The composite-rate payment under the voluntary arrangements was calculated for each fiscal year by reference to the global amount of interest paid by the society to its investors. However, in order to reflect the fact that some of the investors would not have been liable to tax at all given the modest amounts of their savings (see paragraph 8 above) a reduced rate of tax was applied. For this reason the annual

payments made under this scheme were known as "reduced-rate tax" or "composite-rate tax", or "CRT".

10. The amount paid to investors by way of interest on their investments took account of the fact that their liability to income tax was discharged by the building society via the payment of CRT to the Inland Revenue. Investors thus received their interest net of tax.

C. Setting the rate of CRT and the revenue-neutrality principle

11. In accordance with the "revenue-neutrality" principle, set out in section 26 of the Finance Act 1984, the CRT payment reflected only the amount which would have been paid by the investors themselves had they been obliged to declare and pay tax on the interest they earned through their deposits.

12. To achieve this, the Treasury, following negotiations with the Building Societies Associations, set each year, by statutory instrument, the CRT rate. In doing so, it was required to aim at a result whereby the same amount of tax was collected at source from building societies for the fiscal year in question as would have been collected from the individual depositors had they been taxed directly on the interest they received over a preceding reference period (see paragraphs 7 above and 13 below).

D. The prior-period system and the accounting-year period

13. Until 1985/86, a "prior-period" system applied in respect of CRT. The amount of CRT to be paid by each building society for each fiscal year (see paragraph 12 above) was calculated by reference to the interest which it paid to its investors not during the actual year being taxed, but during the society's own twelve months' accounting period ending within that fiscal year. The tax was in every case paid on or around 1 January of the year of assessment. As noted above (see paragraph 8 above), the legal effect of this payment representing income tax was to discharge investors' basic-rate liability on the interest earned in the year being taxed.

14. There was no legal requirement to have a harmonised accounting period. Different time frames were used by different building societies, but in all cases the time frames represented a period equal in length to the fiscal year, having regard to the requirements of the measurement principle (see paragraph 7 above). The following accounting periods were operated by each of the applicant societies:

- the Leeds: 1 October to 30 September;
- the National & Provincial: 1 January to 31 December;
- the Yorkshire: 1 January to 31 December.

Thus, on or around 1 January 1986, the three applicant societies paid to the Inland Revenue, to discharge their investors' liability to income tax at the basic rate for the fiscal year 6 April 1985–5 April 1986, sums measured by reference to the interest paid to their investors in their accounting periods ended 30 September 1985 (the Leeds) and 31 December 1985 (the National & Provincial and the Yorkshire). Under the effect of the voluntary arrangements (see paragraph 8 above), these payments completely discharged the income-tax liability of their investors in respect of the interest paid to them by the respective societies for the fiscal year 6 April 1985–5 April 1986.

On that basis each of the applicant companies paid the following amounts by way of CRT to the Inland Revenue:

– the Leeds: 144,500,000 pounds sterling (GBP), a sum measured by reference to the interest paid to its investors in its accounting period ended 30 September 1985;

the National & Provincial: GBP 125,926,662, a sum measured by reference to the interest paid to its investors in its accounting period ended 31 December 1985;

– the Yorkshire: GBP 34,001,214, a sum measured by reference to the interest paid to its investors in its accounting period ended 31 December 1985.

E. The aim and effect of the new legislation: section 40 of the Finance Act 1985

15. With a view to putting the taxation of the interest paid by building societies to investors on a similar footing to the scheme which had been introduced for banks by the Finance Act 1984, the Government proposed the introduction of a mandatory regime for the collection of tax on investors' interest and the payment of the tax quarterly on the last days of February, May, August and November instead of annually in January. In his budget statement on 19 March 1985 announcing the introduction of the new scheme, the Chancellor of the Exchequer declared that it would not produce any additional revenue. The proposal was adopted by Parliament in the form of section 40 of the Finance Act 1985.

16. Section 40 amended section 343 of the 1970 Act (see paragraph 8 above) by inserting a new sub-section (1A) which had the effect of bringing to an end the long-standing voluntary arrangements as from 6 April 1986. It also empowered the Inland Revenue Commissioners to make regulations introducing a new system of accounting for the fiscal year 1986/87 and for subsequent years. Under the Income Tax (Building Society) Regulations 1986 ("the 1986 Regulations"), which came into force on 6 April 1986, tax

was to be calculated on a quarterly basis on the actual interest paid during the actual year of assessment, as opposed to a prior period.

F. The problem of the "gap period"

17. However the ending of the voluntary arrangements exposed a gap ("the gap period") between the end of the applicant societies' accounting periods in 1985/86 (see paragraph 14 above) and the start of the first quarter under the new regime. In the case of the Leeds the gap period was from 1 October 1985 to 5 April 1986, and in the case of the National & Provincial and the Yorkshire it was from 1 January 1986 to 5 April 1986. In order to ensure that each payment of interest formed the basis of an assessment to tax, transitional regulations were introduced which deemed payments falling into the "gap period" to have been made in a later accounting period, with the result that they formed the basis for an assessment to tax under the new "actual-year" arrangements. In the view of the Government the legislative intention was to ensure that the same amount of tax was collected as would have been collected if the previous arrangements had continued and that the building societies did not receive an undeserved windfall in respect of the gap period.

18. Against this background, Regulation 11 (read in conjunction with Regulation 3) of the 1986 Regulations purported to require building societies to account for tax relating to payments of interest to their investors in their respective gap periods. Regulation 11 (4) provided for tax to be charged on interest paid in the gap period at 1985/86 rates, i.e. 25.25%, the basic rate of income tax being 30% for that year.

II. PARTICULAR CIRCUMSTANCES OF THE CASE

19. Each of the applicant societies took the view that the transitional regulations ran counter to the Government's declared intention that the new regime introduced by the Finance Act 1985 should not produce any additional revenue (see paragraph 15 above), which view was reaffirmed during the parliamentary debates on section 40 of that Act. They considered that the effect of Regulations 3 and 11 was to impose tax again on interest they had paid in 1985/86, a fiscal year for which liability on their investors' interest had already been discharged (see paragraph 14 above). For the applicants this had the result that, for twenty-four months' interest paid to its investors in the two fiscal years 1986/87 and 1987/88, a society like the Leeds, with a 30 September year-end, was required to pay tax on thirty months' interest. For the National & Provincial and the Yorkshire, each

would have to pay tax on twenty-seven months' interest for the twenty-four month period covered by the fiscal years 1986/87 and 1987/88. In the view of the applicant societies these consequences ran counter to the measurement principle according to which the measurement period forming the basis of assessment to tax can never exceed the length of the fiscal year (see paragraph 7 above).

Each of the three applicant societies did in fact pay the tax claimed to be due under the transitional provisions of the Regulations as follows:

– the National & Provincial: GBP 15,873,945;
– the Leeds: GBP 56,973,690;
– the Yorkshire: GBP 8,902,620.

20. The Government point out that the payments were made "without formal protest". However, the applicants assert that they made clear from the outset that they disputed the lawfulness of the tax and that they associated themselves with the proceedings initiated by the Woolwich Equitable Building Society ("the Woolwich") to challenge the lawfulness of the transitional provisions in Regulation 11. For its part the Leeds issued a press release when the Regulations were still at the draft stage, drawing attention to, *inter alia*, their complaint that the Regulations would have the objectionable effect of subjecting building societies to double taxation. The affidavit sworn by the Executive Vice-Chairman of the Woolwich referred to the Leeds' support for its decision to initiate legal proceedings against the transitional arrangements. Both the National & Provincial and the Yorkshire made requests for the repayment of the amounts they had paid to the Inland Revenue.

A. The Woolwich 1 proceedings for judicial review

21. On 18 June 1986 the Woolwich commenced judicial review proceedings seeking a declaration that Regulation 11 was unlawful as being outside the scope of the enabling legislation. It was further alleged that the transitional arrangements transgressed the fundamental principles of constitutional and taxation law and that the machinery adopted by the 1986 Regulations in order to implement the change in the system resulted in a double charge to tax over the gap period.

B. The legislative response to the launch of the Woolwich 1 proceedings: section 47 of the Finance Act 1986

22. On 4 July 1986 the Government introduced in Parliament a measure intended to validate retrospectively the impugned Regulations and to give effect to what they claimed to be the original intention of Parliament when adopting them (see paragraphs 15 and 17 above). The responsible Government minister informed Parliament that the Regulations did not affect the amount of tax collected, only the timing of payment and reiterated

that they would not bring extra tax to the Inland Revenue. On 25 July 1986 the Finance Act 1986 ("the 1986 Act") received the Royal Assent. Section 47 of the Act retrospectively amended section 343 (1A) of the 1970 Act (see paragraph 16 above) with the purpose of authorising the Inland Revenue Commissioners to make regulations requiring the taxation in the year 1986/87 and subsequent years of assessments of sums paid to investors in the gap period and not previously brought into account.

C. The Woolwich 2 proceedings for restitution

23. On 15 July 1987 the Woolwich issued a writ against the Inland Revenue claiming repayment of the sums paid by way of tax under the transitional provisions of the Regulations, as well as interest from the date of payment.

D. The decision of the High Court in the Woolwich 1 proceedings

24. On 31 July 1987 Nolan J granted the application in Woolwich 1 (see paragraph 21 above) and made a declaration that Regulation 11 was void in its entirety and that the remaining Regulations were void in so far as they purported to apply to payments made to investors prior to 6 April 1986. He held that:

(a) there was nothing in the enabling legislation to indicate that Parliament intended to authorise a departure from the principle that income tax should only be levied on the income of one year;

(b) the power to make regulations conferred by section 343 (1A) was to be exercised solely with respect to 1986/87 and later years and nothing in the section authorised the Revenue to go back on the arrangements with the building societies and impose further tax on interest paid to their members during the gap period;

(c) the fact that Regulation 11 (4) provided for tax to be charged at 1985/86 rates (which were higher than the 1986/87 rates) was itself a clear indication that the Regulations went beyond the powers conferred by section 343 (1A);

(d) the position was not affected by the amendment in section 47 (1) of the 1986 Act which, whatever its intention, still left the power conferred by section 343 (1A) as a power exercisable only with respect to 1986/87 and subsequent years.

25. The Inland Revenue appealed against the decision. They conceded that Regulation 11 (4) was invalid but contended that this partial invalidity did not invalidate the rest of the Regulation.

26. Towards the end of 1987, the Inland Revenue repaid to the Woolwich the sum of GBP 57,000,000 with interest from 31 July 1987 (the date of the order of Nolan J) but refused to pay interest from any earlier date. Thus, the remaining issue in the Woolwich 2 proceedings (see paragraph 23 above) came to be whether or not Woolwich had grounds for claiming interest on the payments made by them up to 31 July 1987.

E. The decision of the High Court in the Woolwich 2 proceedings

27. On 12 July 1988 Nolan J dismissed the Woolwich 2 action, holding that the Woolwich was not entitled to recover the sums in issue under any general principle of restitution or as having been paid under duress. He took the view that the sums had been paid under an implied agreement that they would be repaid if and when the dispute about the validity of the 1986 Regulations was resolved in favour of the Woolwich. Thus, the Woolwich had no cause of action to recover the money until the date of his order of 31 July 1987. The Woolwich appealed against the decision and order.

F. The decision of the Court of Appeal in the Woolwich 1 proceedings

28. On 12 April 1989 the Court of Appeal allowed the appeal of the Inland Revenue in the Woolwich 1 proceedings (see paragraph 25 above). The court held that:

(a) as a matter of ordinary construction, the words of section 47 of the 1986 Act were clear and enabled the Revenue to take account of, and to charge to tax, interest paid by the societies in the gap period; and

(b) subject to the invalidity of Regulation 11 (4), which was conceded by the Revenue, Regulation 11 was valid.

G. The decision of the House of Lords in the Woolwich 1 proceedings

29. On 25 October 1990 the House of Lords allowed the appeal of the Woolwich in the Woolwich 1 proceedings. The House of Lords, Lord Lowry dissenting, declared the transitional provisions in the 1986 Regulations to be *ultra vires* on the grounds that Regulation 11 (4), as the Inland Revenue had previously conceded, and Regulation 3, so far as it related to the period after February and before 6 April 1986, were *ultra vires* the empowering statute. The House of Lords considered that Regulation 11 (4) could not be severed from the rest of Regulation 11 and that the transitional provisions in the 1986 Regulations were therefore void in their entirety.

30. Lord Oliver, delivering the judgment of the majority, concluded:

> "... I confess that I find the conclusion irresistible that Parliament intended by these words [section 47 of the 1986 Act] to enable the Revenue to take account of and to charge to tax sums which, rightly or wrongly, it regarded as otherwise representing windfalls in the hands of building societies. One has only to look at the circumstances. The Regulations of 1986 had been made and had been objected to. They were made the subject of a direct challenge in legal proceedings, the evidence in support of which clearly adumbrated the arguments advanced before the judge and the Court of Appeal. The notion that Parliament should go to the trouble of enacting an expressly retrospective amendment in order to provide, unnecessarily, for the use of these sums as a measurement of tax liability – a matter never remotely in issue – is simply fanciful ...
>
> ... I am bound to say that I think it unfortunate that the Revenue, through Parliament, should have chosen by secondary rather than primary legislation to take what was, on ordinary principles, the very unusual course of seeking to tax more than one year's income in a single year of assessment, but section 47 of the Finance Act 1986 is, on any analysis, a very unusual provision and I have, in the end, found myself irresistibly driven to the conclusion that this was what Parliament intended should occur. It may be – I do not know – that the legislature did not appreciate fully that the effect of the arrangements made in 1985 was to discharge all liability for tax on interest paid in the year of assessment 1985/86, including tax on interest paid after the end of a society's accounting year, and that, accordingly, to tax those sums again in a subsequent year was, in a sense, to tax them twice. But even making that assumption it amounts to no more than saying that the legislature should not have intended to do that which it plainly set out to do. I would, for my part, therefore, reject the Woolwich's principal argument."

This ruling declaring Regulation 11 (4) void on technical grounds meant that no mechanism existed to achieve what the Government claimed to be Parliament's initial intention that interest payments made during the gap period should be assessed for tax. This led the Government to introduce new legislative provisions. A draft press release was circulated as early as 7 March 1991 for the approval of the Chancellor of the Exchequer. The draft indicated that the Chancellor in his budget-day speech on 19 March 1991 would introduce legislation to validate retrospectively the Regulations which had been struck down in the Woolwich 1 case (see paragraph 33 below).

H. The Leeds 1 and National & Provincial 1 proceedings for restitution

31. Following the House of Lords' decision in the Woolwich 1 proceedings, and after having made several requests for repayment, the Leeds commenced proceedings on 15 March 1991 against the Inland Revenue for the restitution of the sum of GBP 56,973,690 paid pursuant to the 1986 Regulations which had been declared void in the Woolwich 1 proceedings.

32. On 17 March 1991 the National & Provincial, which had also sought but was refused repayment, commenced proceedings against the Inland Revenue for the restitution of the sum of GBP 15,873,945 paid pursuant to the void Regulations.

I. The legislative response to the Woolwich 1 decision: the enactment of section 53 of the Finance Act 1991

33. On 19 March 1991, in his budget statement, the Chancellor of the Exchequer announced the introduction of legislation to remedy "the technical defects in the Regulations". This legislation became section 53 of the Finance Act 1991 ("the 1991 Act"), which entered into force on 25 July 1991. Section 53 provided, *inter alia*:

> "Section 343 (1A) of the [1970 Act] ... shall be deemed to have conferred powers to make all the provisions in fact contained in [the 1986 Regulations]."

34. The provision had retrospective effect, save that by subsection (4) it had no effect "in relation to a building society which commenced proceedings to challenge the validity of the Regulations before 18 July 1986". The Woolwich was the only building society which satisfied this condition.

35. In a letter dated 21 March 1991 the Director-General of the Building Societies Associations informed the Financial Secretary to the Treasury that the decision of the Government "[did] not come as any great surprise, although it will still be very disappointing to the societies concerned". In fact, the concrete effect of the measure was to stifle the Leeds 1 and National & Provincial 1 proceedings (see paragraphs 31and 32 above). Although they had shown support for the Woolwich's judicial proceedings (see paragraph 20 above) neither had formally commenced legal proceedings before 18 July 1986. At the costs hearing the Government conceded that they had no defence to the action brought by the Leeds and the National & Provincial had it not been for section 53 of the 1991 Act. Costs were awarded against the Government.

J. The Woolwich 2 proceedings in the Court of Appeal

36. On 22 May 1991 the Court of Appeal, by a majority, allowed the appeal by the Woolwich in Woolwich 2 and awarded the interest claimed.

37. The majority of the Court of Appeal accepted the Woolwich's primary submission that, where money was paid under an illegal demand for taxation by a government body, the payer had an immediate prima facie right to recover the payment.

K. The Leeds 2, National & Provincial 2 and Yorkshire 1 proceedings to challenge the validity of the Treasury Orders by way of judicial review

38. On 10 July 1991 the Leeds applied for leave to commence judicial review proceedings for a declaration that the Treasury Orders establishing the composite-rate tax for 1986/87 and for the following years were unlawful ("Leeds 2"). The Leeds claimed that:

(a) it was clear that in making the estimates for the years following 1986/87, and setting the rates of composite-rate tax on the basis of it, the Treasury had assumed the correctness of the Government's position that the Regulations collected no "extra" tax;

(b) this position had been shown by the judgments in Woolwich 1 to be wrong, with the result that the Treasury had underestimated the amount of tax collection under the composite-rate tax system and so set the rate of tax for those years substantially too high;

(c) this was of no significance so long as the Regulations were held to be invalid, because the "extra" tax was in law repayable to the building societies; however, by retrospectively validating them the Government had automatically invalidated the bases of the statutory instruments setting the rates;

(d) this, in principle, meant that all composite-rate tax paid in those years had to be repaid, but in its proceedings the Leeds made a binding commitment not to seek to recover more than the sums initially overpaid, namely GBP 57,000,000.

39. On 6 November 1991 the National & Provincial was granted leave to commence judicial review proceedings similar to those in Leeds 2 for a declaration that the Treasury Orders establishing the composite-rate tax for 1986/87 and subsequent years were unlawful because of the retrospective validation of the Regulations ("National & Provincial 2"). The application was joined with the Leeds 2 proceedings and with a similar application made by the Bradford and Bingley Building Society.

40. On 3 March 1992 the Yorkshire applied for leave to commence similar judicial review proceedings for a declaration that the Treasury Orders establishing the composite-rate tax for 1986/87 and subsequent years were unlawful ("Yorkshire 1").

L. The Leeds 3, National & Provincial 3 and Yorkshire 2 proceedings for restitution

41. Further proceedings were commenced by the Yorkshire on 11 May 1992 ("Yorkshire 2"), by the Leeds on 1 June 1992 ("Leeds 3") and by the National & Provincial on 12 June 1992 ("National & Provincial 3"). In those proceedings the applicant societies claimed restitution of the money due to them if the judicial review proceedings (Leeds 2 and National & Provincial 2, and Yorkshire 1) were successful (see paragraphs 38–40 above).

M. The legislative response to the applicants' proceedings for judicial review and restitution: section 64 of the Finance (No. 2) Act 1992

42. On 16 July 1992 section 64 of the Finance (No. 2) Act 1992 ("the 1992 Act") entered into force. This legislation had been anticipated as from 7 May 1992 when the Financial Secretary in a reply to a parliamentary question noted that his Government intended to introduce legislation to validate retrospectively the impugned Treasury Orders. Section 64 provided, with retrospective effect, that the Treasury Orders "shall be taken to be and always to have been effective". The Government acknowledged during the parliamentary debates on section 64 that the measure was intended to pre-empt the legal proceedings launched by the applicants to challenge the validity of the Treasury Orders and that it would result in the Woolwich being treated more favourably. However, they pointed out that the challenge to the composite rate for CRT in the fiscal years 1986/87 to 1989/90 threw into doubt the lawfulness of the collection of all sums from building societies, banks and other deposit institutions in the periods in question. While there was no doubt as to the lawfulness of the collection in respect of the vast majority of those sums, the effect of impugning the rates set would have been to render the collection of all sums unlawful. The amount at stake was in the region of GBP 15 billion.

43. The effect of section 64 was to extinguish the remaining proceedings lodged by the applicants for judicial review of the validity of the Treasury Orders and for restitution (see paragraphs 39–41 above).

N. The final outcome of the Woolwich 2 proceedings

44. On 20 July 1992 the House of Lords, by a majority, dismissed the Inland Revenue's appeal in the Woolwich 2 proceedings.

The House of Lords did not accept that, on the facts of the Woolwich case, there was any implied agreement for the repayment of the money paid under the invalid Regulations if and when the dispute was resolved in the taxpayer's favour. Nevertheless, by a majority, the House of Lords held:

(a) that money paid by a citizen to a public authority in the form of taxes or other levies pursuant to an *ultra vires* demand by the authority is prima facie recoverable by the citizen as of right;

(b) that, accordingly, since the building society's claims fell outside the statutory framework governing repayment of overpaid tax, it was entitled at common law to repayment of the sums and to interest in respect thereof from the date of payment.

III. RELEVANT DOMESTIC LAW

45. Section 343 (1A) of the 1970 Act (introduced by section 40 of the Finance Act 1985, and as amended by section 47 of the Finance Act 1986) provides as follows:

> "The Board may by regulations made by statutory instrument make provision with respect to the year 1986/87 and any subsequent year of assessment requiring building societies, on such sums as may be determined in accordance with the regulations **(including sums paid or credited before the beginning of the year but not previously brought into account under subsection (1) above or this subsection)**, to account for and pay an amount representing income tax ... and any such regulations may contain such incidental and consequential provisions as appear to the Board to be appropriate, including provisions requiring the making of returns." [The words in bold print were added by the 1986 Act.]

46. Section 53 of the Finance Act 1991 provides, so far as relevant, as follows:

> "(1) Section 343 (1A) of the Income and Corporation Taxes Act 1970 ... shall be deemed to have conferred power to make all the provisions in fact contained in the Income Tax (Building Societies) Regulations 1986 ...
>
> (4) In relation to a building society which commenced proceedings to challenge the validity of the Regulations before 18 July 1986, this section shall not have effect to the extent that the Regulations apply (or purport to apply) to payments or credits made before 6 April 1986."

47. Section 64 of the Finance (No. 2) Act 1992 provides as follows:

"(1) For the purposes of this section each of the following is a relevant order –

(a) the Income Tax (Reduced and Composite Rate) Order 1985 ...

(b) the Income Tax (Reduced and Composite Rate) Order 1986 ...

(c) the Income Tax (Reduced and Composite Rate) Order 1987 ...

(d) the Income Tax (Reduced and Composite Rate) Order 1988 ...

(2) If apart from this section a relevant order would not be so taken, it shall be taken to be and always to have been effective to determine the rate set out in the order as the reduced rate and the composite rate for the year of assessment for which the order was made."

PROCEEDINGS BEFORE THE COMMISSION

48. In their applications (nos. 21319/93, 21449/93 and 21675/93), lodged with the Commission on 15 January 1993, 21 December 1992 and 11 January 1993, the applicants alleged violations of Article 6 of the Convention and Article 1 of Protocol No. 1, taken alone and in conjunction with Article 14 of the Convention.

On 30 August 1994 the Commission joined the National & Provincial's application and the Yorkshire's application, and on 10 January 1995 joined the Leeds' application with the other two applications. On 13 January 1995 the Commission declared the applications admissible. In its report of 25 June 1996 (Article 31) the Commission expressed the opinion that there had been no violation of Article 1 of Protocol No. 1 (thirteen votes to three); that there had been no violation of Article 1 of Protocol No. 1 taken in conjunction with Article 14 of the Convention (fourteen votes to two); that there had been a violation of Article 6 § 1 of the Convention (nine votes to seven); and that it was not necessary to examine the complaint under Article 6 § 1 of the Convention taken in conjunction with Article 14 of the Convention (fourteen votes to two). The full text of the Commission's opinion and of the four separate opinions contained in the report is reproduced as an annex to this judgment[1].

1. *Note by the Registrar*. For practical reasons this annex will appear only with the printed version of the judgment *(Reports of Judgments and Decisions* 1997), but a copy of the Commission's report is obtainable from the registry.

FINAL SUBMISSIONS TO THE COURT

49. The applicant societies requested the Court to find that the facts disclosed breaches of Article 1 of Protocol No. 1 and of Article 6 of the Convention, taken alone or in conjunction with Article 14 of the Convention, and to award them just satisfaction.

The Government for their part requested the Court to decide and declare that the facts gave rise to no breach of the Convention.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1

50. The applicants claimed to be victims of a breach of Article 1 of Protocol No. 1, which provides as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

A. As to the alleged expropriation of the applicant societies' assets

51. The applicant societies maintained that it had never been suggested during the passage of section 40 of the Finance Act 1985 (see paragraphs 15 and 16 above) or at the time when the 1986 Regulations had been laid before Parliament (see paragraphs 17 and 18 above) that the gap period would be brought into account on a second occasion for tax purposes. The Government had given repeated assurances, including during the parliamentary discussions on section 47 of the Finance Act 1986, that the new arrangements would not produce any additional revenue (see paragraph 22 above). However, this indeed was the effect of the Regulations since they taxed twice interest which had already been assessed to tax for the fiscal year 6 April 1985 to 5 April 1986. The tax had been paid on or around 1 January 1986 in order to discharge their investor's liability for that fiscal year (see paragraph 14 above). The House of Lords in the Woolwich 1

litigation had acknowledged when striking down those Regulations that the transitional provisions subjected the interest paid in the gap period to double taxation, and this consideration was a fundamental part of the *ratio decidendi* of their decision (see paragraphs 29 and 30 above).

52. According to the applicant societies, it could only be concluded that the Government had misled Parliament as to the aim of the legislative scheme and had in effect procured the enactment of legislation which had the result of expropriating substantial amounts of money lawfully held in their reserves. They subsequently sought to legalise that expropriation by means of retrospective legislation which deprived the societies of their legal rights to recover those amounts.

53. The Government stressed that the sole intention behind section 40 of the Finance Act 1985 and the adoption of the 1986 Regulations was to ensure that in the transition from the prior to the actual year basis of assessment (see paragraphs 13 and 15 above) the interest paid by building societies to investors would be brought into account for tax purposes. Had the 1986 Regulations, as validated ultimately by section 53 of the 1991 Act (see paragraphs 33 and 34 above), not addressed the tax liability of the interest paid during the gap period in the way they did certain building societies like the applicant societies would have been left with considerable amounts of untaxed interest in their reserves. The interest paid in the gap period was taxed once and once only. The Government minister had correctly informed Parliament that the new arrangements would not produce additional revenue. The untaxed interest in the gap period would have been brought into account had the voluntary arrangements continued in force. The Regulations simply altered the timing of payment of tax on that interest by spreading the liability to pay it over successive fiscal years.

54. In the view of the Government, the applicant societies could not rely on the judgments given in the Woolwich 1 litigation to support their contention that the 1986 Regulations imposed double taxation. The Regulations had been declared void on purely technical grounds. Parliament had never been misled as to the effect which the 1986 Regulations would have on the gap period. Parliament had in fact legislated after extensive debates on the new arrangements in full knowledge of the concerns expressed by building societies at the relevant time about the effect of the Regulations.

55. Before the Court the Delegate of the Commission stated that it had been the clear intention of Parliament in enacting section 40 of the Finance Act 1985 and adopting the 1986 Regulations to ensure that building societies did not benefit from a windfall, but should remain liable to tax on interest paid to their investors in the gap period. Furthermore, there was no

support in the House of Lords ruling in the Woolwich 1 litigation for the argument that the applicant societies had been subjected to a double imposition other than in a technical sense.

56. The Court notes that the assertions of the applicant societies in regard to the intention of Parliament in 1985 and 1986 are central to their complaints concerning the retroactive removal of their rights to recover the monies which they paid to the Inland Revenue. It is fundamental to their arguments on those complaints that those monies were in reality unlawfully expropriated from their reserves under the guise of taxation.

57. Without prejudice to its subsequent consideration of the applicant societies' allegations that they had been unlawfully deprived of their legal claims to restitution of their monies in breach of Article 1 of Protocol No. 1, the Court is of the opinion that it should clarify at the outset whether or not the applicant societies are correct in their submissions that the legislative measures taken in 1985 and 1986 subjected the interest which they paid to their investors in the gap period to a double imposition contrary to the intention of Parliament.

58. It is to be noted in this respect that, had the voluntary arrangements (see paragraph 8 above) continued to apply as between the building societies and the Inland Revenue, the interest would inevitably have been brought into account for tax purposes. Accordingly, and by way of example, the Leeds would have had to pay to the Inland Revenue on or around 1 January 1987 tax on the interest earned by its investors between 1 October 1985 and 30 September 1986 in order to discharge the latter's liability to tax on that interest for the fiscal year 6 April 1986 to 5 April 1987. The interest paid in the gap period in issue would thus have been taxed, and subsequent gap periods would have been brought into account in future fiscal years in accordance with the same logic. The voluntary arrangements made no provision for interest to be omitted for tax-assessment purposes.

59. Since the interest earned by their investors in the gap period had been paid to them net of tax (see paragraph 10 above), the applicant societies had already deducted amounts representing tax on that interest. Those amounts were lodged in their reserves waiting to be brought into account. It is an inescapable conclusion that, had steps not been taken to bring those amounts into account in the move from the prior-period system (see paragraphs 13 and 14 above) to the actual-year system (see paragraphs 15 and 16 above), the applicant societies would have been left with considerable sums of money representing unpaid tax.

It cannot be maintained that the effect of the transitional arrangements in the 1986 Regulations was to subject those amounts of money to double taxation other than in a technical sense, since no tax had ever been paid on the interest paid in the gap period before the changeover to the new actual-year scheme of assessment. Admittedly, by deeming the interest to have been paid in a later accounting period (see paragraph 17 above) the effect of

the transitional regulations was to accelerate the payment of tax owed to the Inland Revenue in a way which may seem to be at variance with the measurement principle (see paragraph 7 above). However, this cannot serve to refute the conclusions that the volume of payments remained the same as between the old and the new system and that there was no increase in the revenue collected from the applicant societies.

60. Nor is the Court persuaded by the arguments of the applicant societies that the judgment of the House of Lords in the Woolwich 1 case (see paragraphs 29 and 30 above) provides support for their view that the effect of the transitional mechanism in the 1986 Regulations was to subject the interest paid to investors in the gap period to double taxation other than in a theoretical sense, having regard to the way in which the measurement principle was adjusted. As noted above (see paragraph 59), had the measurement principle not been modified the applicant societies would undoubtedly have each received a windfall, substantial in all cases but especially so in the case of the Leeds, which had the longest gap period. Neither is it convinced by their claim that Parliament was misled as to the effect of the transitional arrangements. It would appear that both section 40 of the Finance Act 1985 (see paragraph 15 above) and section 47 of the Finance Act 1986 (see paragraph 22 above) were fully discussed at the various legislative stages against the background of strong lobbying on the part of building societies to have the interest paid to investors in the gap period omitted from assessment. It cannot be said therefore that Parliament did not appreciate the impact of the 1986 Regulations, having regard to the opportunities which the opponents of the proposals had to question Government ministers and to clarify the precise implications of the scheme for building societies.

61. Having regard to the above conclusions, the Court will therefore consider the claims of the applicant societies that they were deprived of their legal rights to restitution of the monies paid to the Inland Revenue under the invalidated Regulations on the clear understanding that those monies were intended by Parliament to be charged to tax, had not been subjected to a double imposition and were not therefore wrongfully expropriated.

B. As to the deprivation of the applicant societies' legal claims

1. Whether there were possessions within the meaning of Article 1

62. The applicant societies contended that their legal claims to restitution of the assets which had been "unlawfully expropriated" by virtue

of the 1986 Regulations constituted, like those assets, "possessions" within the meaning of Article 1 of Protocol No. 1. As a result of the House of Lords ruling in the Woolwich 2 litigation (see paragraph 44 above) the applicant societies must be considered to have had enforceable common-law rights to recover their assets, which rights accrued as soon as the money had been paid over to the Inland Revenue pursuant to the invalidated Regulations. The Government had no defence to their claim for recovery, a point which they had conceded at the costs hearing in the wake of the stifled restitution proceedings brought by the Leeds and the National & Provincial (see paragraph 35 above). Having regard to the principles established by the Court in its Stran Greek Refineries and Stratis Andreadis v. Greece judgment of 9 December 1994 (Series A no. 301-B) and in its Pressos Compania Naviera S.A. and Others v. Belgium judgment of 20 November 1995 (Series A no. 332), they maintained that that right was sufficiently established and certain to constitute possessions and gave each of them a clear legitimate expectation that they would be treated similarly to the Woolwich on the basis of the law as it stood prior to the enactment of section 53 of the 1991 Act. The judicial review proceedings directed at the validity of the Treasury Orders (see paragraphs 38–40 above) and the second set of restitution proceedings (see paragraph 41 above) brought by all the applicant societies were an alternative route to the assertion of their enforceable rights to restitution of their monies. These rights were once again stifled under the impact of section 64 of the 1992 Act.

63. The Government disputed this conclusion and especially the reliance by the applicant societies on the case-law cited. None of the applicant societies' legal claims had ever given rise to a binding enforceable judgment. In fact the two sets of restitution proceedings had never proceeded beyond the issuing of writs (see paragraphs 31, 32 and 41 above) and the judicial review proceedings challenging the validity of the Treasury Orders (see paragraphs 38–40 above) were at an equally embryonic stage with the applicants having, at best, only an arguable chance of success. Furthermore, the first set of restitution proceedings brought by the Leeds and the National & Provincial (see paragraphs 31 and 32 above) and the second set of restitution proceedings brought by all three applicant societies (see paragraph 41 above) were in reality opportunistic legal moves having regard to the dates when the writs were issued and the Government's clear intentions at those times. In fact the second set of restitution proceedings, which were contingent on securing victory in the judicial review proceedings, were bound to fail since they were launched after the Government had officially announced their intention to validate retrospectively the Treasury Orders (see paragraph 42 above).

64. For the above reasons the Government requested the Court to find that Article 1 of Protocol No. 1 was not applicable since the applicant societies could not validly claim to have "possessions".

65. The Commission considered that the restitution proceedings initiated by the Leeds and the National & Provincial (see paragraphs 31 and 32 above) were "possessions" having regard to the scope of the decision of the House of Lords in the Woolwich 2 litigation. Had the Government not acted as they did and secured the passage of section 53 of the 1991 Act through Parliament (see paragraphs 33 and 34 above), there was nothing to suggest that the authorities would have had any sustainable defence to the restitution claim.

66. In the view of the Commission, it was less certain, however, whether the judicial review proceedings and the second set of restitution proceedings (see paragraphs 38–40 and paragraph 41 above) amounted to "possessions". Nevertheless, the Commission was prepared to assume that those claims were possessions, having regard to the background to the proceedings and to the fact that they were in effect alternative routes to the assertion of the restitution claims which had been extinguished by section 53 of the 1991 Act. Before the Court the Delegate of the Commission stated that the Commission had in fact assumed that the legal claims asserted by each of the applicant societies were possessions in order to bring into play the third sentence of Article 1 of Protocol No. 1 which preserves the right of a Contracting State to pass laws which it deems necessary to secure the payment of taxes.

67. The Court notes that the decision of the House of Lords in the Woolwich 2 litigation lies at the heart of the applicant societies' contention that the claims which they sought to assert in each of the three sets of legal proceedings amounted to "possessions" within the meaning of Article 1 of Protocol No. 1. In that landmark decision the House of Lords established that a plaintiff had a prima facie common-law right to repayment of sums paid to a public authority in the form of taxes pursuant to a demand which is found to be *ultra vires* (see paragraph 44 above). The Woolwich recovered the interest owing on sums paid to the Inland Revenue on the strength of the law on restitution as so clarified, having already been repaid towards the end of 1987 the monies which had been collected from it by the Inland Revenue under the Regulations which, by that stage, had been declared invalid by the High Court (see paragraph 26 above).

However, the Leeds and the National & Provincial had not themselves secured an enforceable final judgment in their favour at the time of instituting the first set of restitution proceedings and it may be questioned whether they could be considered in the circumstances to have had an acquired right to the recovery of their monies at that time (see, *mutatis mutandis*, the Stran Greek Refineries and Stratis Andreadis judgment cited above, p. 85, §§ 61–62). The strength of their contention on this aspect lies

essentially in the fact, firstly, that the Inland Revenue had repaid the Woolwich the principal sum (see paragraph 26 above) when it was discovered that Regulation 11 (4) of the 1986 Regulations was defective, entailing a risk that the transitional arrangements could not be saved despite the enactment of section 47 of the Finance Act 1986 (see paragraph 22 above), and, secondly, that the House of Lords in the Woolwich 1 case (see paragraph 29 above) ultimately found the 1986 Regulations including the transitional arrangements to be void in their entirety. It is significant in this regard that the Government conceded the merits of the cases brought by the Leeds and the National & Provincial (see paragraph 35 above), thereby indicating that in the absence of section 53 of the 1991 Act they would have lost the cases.

68. At the same time it must also be observed that the Leeds and the National & Provincial brought their restitution proceedings at a time when the law on restitution was not in fact favourable to the outcome of their cases. The House of Lords judgment in the Woolwich 2 case, which is central to their claim to have an established right amounting to possessions, was in fact delivered one year after the writs had been issued. Furthermore, while it may be the case that the authorities did not intimate to the applicant societies in the course of the Woolwich 1 litigation that they would seek to restore with retroactive effect the original intention of Parliament should that case go against the Inland Revenue, it is reasonable to question whether these two building societies could have had a "legitimate expectation" (see paragraph 62 above) that the Government would not have reacted as they did to the outcome of the litigation. As the Government have pointed out (see paragraph 63 above), the writs were issued after the decision had been taken to rectify with retrospective effect the inadvertent defects in the 1986 Regulations and in the days immediately preceding the official announcement by the Government of this course of action (see paragraphs 30–32 above).

69. While noting that the Leeds and the National & Provincial may be considered to have at best a precarious basis on which to assert a right amounting to "possessions", the Court is of the view that the claims asserted in the judicial review proceedings (see paragraphs 38–40 above) and the second set of restitution proceedings brought by all three applicant societies in May and June 1992 respectively (see paragraphs 39 and 40 above) could not be said to be sufficiently established or based on any "legitimate expectation" (see paragraph 62 above) that those claims would be determined on the basis of the law as it stood. By that stage Parliament had shown its continuing resolve to reassert its original intention to tax the

interest paid in the gap period by enacting section 53 of the 1991 Act; nor could they have any cast-iron guarantee of obtaining the declaration sought in the judicial review proceedings to enable them to recover their monies in the follow-up restitution proceedings.

70. While expressing no concluded view as to whether any of the claims asserted by the applicant societies could properly be considered to constitute possessions, the Court, like the Commission (see paragraph 66 above), is prepared to proceed on the working assumption that in the light of the Woolwich 2 ruling the applicant societies did have possessions in the form of vested rights to restitution which they sought to exercise in direct and indirect ways in the various legal proceedings instituted in 1991 and 1992. In so doing, it notes that the arguments which have been advanced in support of their contention that they had possessions are indissociably bound up with their complaints that they were unjustifiably deprived of those possessions. It will therefore treat Article 1 of Protocol No. 1 as applicable for the purposes of examining whether there was an interference with their legal claims and, if so, whether that interference was justified in the circumstances.

2. Whether there was an interference

71. The applicant societies asserted that the concrete effect of section 53 of the 1991 Act was to stifle the restitution proceedings instituted by the Leeds and the National & Provincial (see paragraph 35 above). The subsequent enactment of section 64 of the 1992 Act (see paragraphs 42 and 43 above) effectively removed any prospect of securing redress in the domestic courts against the "unlawful expropriation" of their assets. There was accordingly an interference with their possessions.

72. The Government did not deny that the retrospective effects of the impugned measures brought an end to the applicant societies' claims to recover the amounts which they had paid to the Inland Revenue.

73. The Commission concluded that the retrospective measures had the effect of interfering with the applicant societies' possessions on the hypothesis that the various claims did amount to such.

74. The Court notes that it is common ground that the retroactive measures operated in a way which constituted an interference with the enjoyment of the applicant societies' possessions. On the working assumption that the legal claims in issue amounted to possessions within the meaning of Article 1 of Protocol No. 1 (see paragraph 70 above), the Court sees no reason to reach a contrary conclusion. It will therefore assess whether or not that interference was justified.

3. Whether the interference was justified

75. The applicant societies reiterated that they were fairly and reasonably entitled to consider themselves in exactly the same position as the Woolwich with vested rights to recover the monies which had been expropriated from them under the 1986 Regulations (see paragraph 62 above). However, the Government intentionally procured the enactment of retrospective primary legislation in order to stifle the opportunity to assert those rights in a way which was repugnant to principles of legal certainty and legitimate expectation. The retrospective measures constituted a disproportionate and discriminatory interference with their rights which left them without any compensation. The measures were solely motivated by the intent of the authorities to retain the applicant societies' assets and could not be considered justified as being necessary to secure the payment of taxes within the meaning of the second paragraph of Article 1 of Protocol No. 1. The monies expropriated were not tax since all liability to pay tax on the interest earned by their investors in the gap period had been discharged (see paragraphs 51 and 52 above). In any event that provision only concerned procedural measures taken to enforce tax legislation and could not be invoked to justify substantive tax legislation such as the Finance Acts in issue in the instant case.

76. The Government argued that the ultimate aim of the impugned measures was, in line with the original intention of Parliament, to secure the payment of tax on the interest paid by building societies during the gap period and, in the case of section 64 of the 1992 Act, also to secure GBP 15 billion of revenue which had been collected from 1986 onwards from building societies, banks and other deposit institutions (see paragraph 42 above).

Having regard to a Contracting State's margin of appreciation in the tax field and to the public-interest considerations at stake, it could not be said that the decisions taken by Parliament to enact these measures with retrospective effect were manifestly without reasonable foundation or failed to strike a fair balance between the demands of the general interest of the community and the protection of the rights of the applicant societies. The latter were in fact seeking by means of opportunistic legal proceedings to exploit technical defects in the 1986 Regulations and to frustrate the original intention of Parliament. They clearly understood what that intention was and they could not have had any legitimate expectations following the Woolwich 1 litigation that Parliament would be content to leave the law as it then stood and allow them to retain a windfall.

77. The Commission found that the interference with the applicant societies' legal claims was justified and that there was no violation of Article 1 of Protocol No. 1. Parliament intended by section 47 of the 1986 Act to authorise the Inland Revenue to charge to tax the interest paid to investors in the gap period. The aim of section 53 of the 1991 Act (see paragraph 33 above) and section 64 of the 1992 Act (see paragraph 42 above) was to prevent building societies from frustrating that intention by exploiting technical defects in the drafting of the Regulations and benefiting from a windfall. In adopting retrospective measures to reaffirm that intention and to secure the payment of tax, the legislature did not upset the fair balance between the demands of the general interest of the community and the protection of the fundamental rights of the applicant societies.

(a) The applicable rule

78. The Court recalls that Article 1 of Protocol No. 1 guarantees in substance the right to property. It comprises three distinct rules. The first, which is expressed in the first sentence of the first paragraph and is of a general nature, lays down the principle of the peaceful enjoyment of possessions. The second, in the second sentence of the same paragraph, covers deprivation of possessions and makes it subject to certain conditions. The third, contained in the second paragraph, recognises that the Contracting States are entitled to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

However, the three rules are not "distinct" in the sense of being unconnected: the second and the third rules are concerned with particular interferences with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule (see, among many other authorities, the Gasus Dosier- und Fördertechnik GmbH v. the Netherlands judgment of 23 February 1995, Series A no. 306-B, pp. 46–47 § 55).

79. Having regard to the fact that the background to the alleged deprivation of the applicant societies' rights is constituted by the first unsuccessful steps taken by Parliament to ensure that interest paid in the gap period was charged to tax, it would appear to the Court to be the most natural approach to examine their complaints from the angle of a control of the use of property in the general interest "to secure the payment of tax", which falls within the rule in the second paragraph of Article 1. In so proceeding, it recalls that it has already found that the transitional arrangements contained in the 1986 Regulations did not, contrary to the assertions of the applicant societies, impose double taxation on the interest paid to their investors in the gap period or amount to a wrongful expropriation of their assets (see paragraph 61 above).

On that factual understanding, the efforts to secure a firm legal basis firstly, and unsuccessfully, in section 47 of the Finance Act 1986 (see paragraphs 22 and 30 above), and secondly in section 53 of the 1991 Act (see paragraphs 33–35 above) to give effect to Parliament's legitimate aim when adopting the defective Regulations (see paragraphs 15–18 above) could be considered equally to be measures to secure the payment of tax. It is to be recalled in this regard that irrespective of the move to the actual-year system the interest in issue would always have been liable to be brought into account for tax purposes (see paragraphs 58 and 59 above).

(b) Compliance with the conditions laid down in the second paragraph

80. According to the Court's well-established case-law (see, among many other authorities, the Gasus Dosier- und Fördertechnik GmbH judgment cited above, p. 49, § 62), an interference, including one resulting from a measure to secure the payment of taxes, must strike a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The concern to achieve this balance is reflected in the structure of Article 1 as a whole, including the second paragraph: there must therefore be a reasonable relationship of proportionality between the means employed and the aims pursued.

Furthermore, in determining whether this requirement has been met, it is recognised that a Contracting State, not least when framing and implementing policies in the area of taxation, enjoys a wide margin of appreciation and the Court will respect the legislature's assessment in such matters unless it is devoid of reasonable foundation (see the Gasus Dosier- und Fördertechnik GmbH judgment cited above, pp. 48–49, § 60).

81. Against that background, the Court notes that in enacting section 53 of the 1991 Act with retroactive effect Parliament was concerned to restore and reassert its original intention which had been stymied by the finding of the House of Lords in the Woolwich 1 litigation that the 1986 Regulations were *ultra vires* on technical grounds (see paragraphs 29 and 30 above). The decision to remedy the technical deficiencies of the Regulations with retroactive effect was taken before 7 March 1991, namely before the date when the Leeds and the National & Provincial issued their writs (see paragraphs 30 and 33 above) and without regard to the imminent launch of the first set of restitution proceedings. Although section 53 had the effect of extinguishing the restitution claims of those two applicant societies, it does not appear to the Court that the ultimate aim of the measure was without reasonable foundation having regard to the public-interest considerations which underpinned the proposal to legislate with retroactive effect and Parliament's endorsement of that proposal.

There is in fact an obvious and compelling public interest to ensure that private entities do not enjoy the benefit of a windfall in a changeover to a new tax-payment regime and do not deny the Exchequer revenue simply on account of inadvertent defects in the enabling tax legislation, the more so when such entities have followed the debates on the original proposal in Parliament and, while disagreeing with that proposal, have clearly understood that it was Parliament's firm intention to incorporate it in legislation.

Nor can the applicant societies maintain that the effect of the measure imposed an excessive and individual burden on them given that the interest they had paid to investors in the gap period would have been brought into account for tax purposes had the voluntary arrangements continued in force (see paragraph 58 above). They cannot assert that they had suffered prejudice other than in the sense that they were treated differently from the Woolwich. However, the substance of the latter allegation falls to be considered under their complaint under Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1 (see paragraph 84 below).

82. Furthermore, it is to be noted that the history of the enactment of section 64 of the 1992 Act must also be seen in terms of the same struggle between the legislature's efforts to safeguard the tax paid by the applicant societies and the latter's attempts to frustrate by all legal means possible those efforts and recover that tax. The challenge to the validity of the Treasury Orders was in reality an initiative on the part of all three applicant societies to recover indirectly what two of them had been denied under the effect of section 53 of the 1991 Act (see paragraph 35 above).

If the enactment of the latter provision can be considered to be justified on public-interest grounds (see paragraph 81 above), it must also be the case that the same public-interest justification can be lawfully asserted by the respondent State to thwart the challenge to the Treasury Orders. Indeed, on that occasion much more was at stake than the assertion of Parliament's right to secure tax on the interest paid by building societies over the course of the gap period since the vulnerability of the Treasury Orders to legal challenge placed at risk very substantial amounts of revenue collected from 1986 onwards from institutions other than building societies. The public-interest considerations in removing any uncertainty as to the lawfulness of the revenue collected must be seen as compelling and such as to outweigh the interests defended by the applicant societies in contesting the legality of the rate set by the Treasury Orders in order to try once again to circumvent Parliament's original intention.

83. The Court considers therefore that the actions taken by the respondent State did not upset the balance which must be struck between the protection of the applicant societies' rights to restitution and the public interest in securing the payment of taxes.

There has accordingly been no violation of Article 1 of Protocol No. 1.

II. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1 TAKEN IN CONJUNCTION WITH ARTICLE 14 OF THE CONVENTION

84. The applicant societies maintained that the impugned measures gave rise to a breach of Article 1 of Protocol No. 1 taken in conjunction with Article 14 of the Convention, having regard to their discriminatory effect. Article 14 of the Convention is worded as follows:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

85. The applicant societies contended that they were in a materially identical situation to that of the Woolwich as regards the application of the 1986 Regulations. Like the Woolwich they enjoyed the same rights to restitution of the monies which they had paid to the Inland Revenue pursuant to an unlawful demand. The Leeds in particular had closely associated itself with the Woolwich's decision to seek judicial review of the 1986 Regulations and all the applicant societies had at various stages made formal demands for repayment. They were not required to join the Woolwich's judicial review proceedings given that the outcome of the action would have been declaratory of the law applicable to all taxpayers. They were thus entitled to await the result of that litigation. On the strength of the House of Lords ruling in the Woolwich 1 case the Leeds and the National & Provincial issued writs to institute their own restitution proceedings against the authorities.

86. Furthermore, section 64 of the 1992 Act could not be said to be non-discriminatory as between the Woolwich and the applicant societies merely because it was of general application. This provision in fact favoured the Woolwich since the Woolwich had recovered all the monies owing to it.

87. The Commission, with whom the Government agreed, concluded that there had been no breach under this head. In contrast with the Woolwich, none of the applicants had instituted proceedings to challenge the validity of the 1986 Regulations. The Woolwich alone had borne the costs and incurred the risks of litigation. The applicant societies could not therefore be considered to have been in a relevantly similar situation to that

of the Woolwich. In any event there was a reasonable and objective justification for the difference in treatment, having regard to the public-interest considerations motivating the enactment of section 53 of the 1991 Act and the appropriateness of excluding the Woolwich from the retroactive effects of that measure given that that building society had secured a final court judgment in its favour.

As to section 64 of the 1992 Act, the Commission found that this provision applied across the board and could not be considered to be discriminatory in its effect. The Government supported this conclusion.

88. The Court reiterates that Article 14 of the Convention affords protection against discrimination in the enjoyment of the rights and freedoms safeguarded by the other substantive provisions of the Convention. However, not every difference in treatment will amount to a violation of this Article. Instead, it must be established that other persons in an analogous or relevantly similar situation enjoy preferential treatment, and that there is no reasonable or objective justification for this distinction. Furthermore, Contracting States enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law (for a recent authority, see the Stubbings and Others v. the United Kingdom judgment of 22 October 1996, *Reports of Judgments and Decisions* 1996-IV, p. 1507, § 72).

89. It is clear that the applicant societies were in an analogous if not identical situation with respect to the impact of the transitional mechanism in the 1986 Regulations on the monies held in their reserves. However, the Woolwich alone took an independent and bold stance by mounting a legal challenge to the validity of the Regulations (see paragraph 21 above). That building society was undeterred by the attempt of Parliament to stifle the litigation by enacting section 47 of the Finance Act 1986 (see paragraph 22 above).

Admittedly, the Woolwich's action was backed by the applicant societies and the Leeds in particular may be considered to have conspicuously manifested its solidarity with the Woolwich (see paragraph 20 above). However, the Court shares the view of the Commission that the Woolwich alone showed its readiness to bear the costs and risks of the litigation, taking complex and expensive proceedings against the Inland Revenue on two occasions as far as the House of Lords. By the time section 53 of the 1991 Act was enacted, the Leeds and the National & Provincial had not proceeded beyond the stage of issuing writs, whereas the Woolwich had secured a victory in the House of Lords (see paragraphs 29 and 30 above) and there were reasonable prospects that the House of Lords would uphold the decision of the Court of Appeal in its restitution proceedings allowing it interest on the sums paid (see paragraphs 36 and 37 above). It is also to be noted that the authorities had already repaid to the Woolwich the tax which

had been collected from it with interest from 31 July 1987 (see paragraph 26 above). In these circumstances, the Court does not accept that the applicant societies were in fact in a relevantly similar situation to that of the Woolwich.

90. The Court also considers that, even if it were possible to regard the applicant societies as having been in a relevantly similar situation to the Woolwich in view of their arguments on the *erga omnes* effect of the remedy sought by the Woolwich (see paragraph 85 above), there was nevertheless a reasonable and objective justification for the distinction made in section 53 of the 1991 Act (see paragraph 34 above). It was the aim of Parliament in enacting that provision to restore its original intention to secure the liability to tax of the interest paid to investors in the gap period and to make the Regulations immune from any further exploitation on technical grounds. The decision to do so retrospectively has been found by the Court to be justified in the public interest (see paragraph 81 above). To exclude the Woolwich from the retroactive effect of section 53 could be considered on reasonable and objective grounds to be justified given that by the time of enactment of that section the Woolwich had secured a final judgment in its favour from the House of Lords and it was understandable that Parliament did not wish to interfere with a judicial decision which brought to an end litigation which had lasted over three years.

91. As to the effect of section 64 of the 1992 Act (see paragraphs 33–35 above), the Court notes that the measure applied generally to building societies, banks and other deposit institutions. Admittedly the Woolwich was not concerned about the validity of the Treasury Orders since it had no interest in challenging them. However, it cannot be maintained that section 64 perpetuated any difference in treatment between the Woolwich and the applicant societies which resulted from section 53 of the 1991 Act given the Court's earlier conclusions on that complaint (see paragraphs 89 and 90 above).

92. Having regard to the above considerations, the Court concludes therefore that there has been no breach of Article 1 of Protocol No. 1 taken in conjunction with Article 14 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

93. The applicant societies further maintained that the measures taken by the respondent State deprived them of their right of access to a court for a determination of their civil rights to restitution of monies to which they were lawfully entitled. They alleged that there had been a breach of Article 6 § 1 of the Convention, which provides to the extent relevant:

"In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law …"

A. Applicability of Article 6 § 1

94. The applicant societies maintained that the subject matter of the three sets of legal proceedings which they had initiated (see paragraphs 31, 32 and 38–41 above) was pecuniary in nature and the outcome of the litigation in each instance was decisive for their private-law rights to restitution of the monies of which they had been unlawfully deprived by the respondent State. Should any doubts exist about the classification of the judicial review proceedings which each society set in motion between 10 July 1991 and 3 March 1992 (see paragraphs 38–40 above), the Court should find, like the Commission, that these proceedings were in fact an alternative route to the recovery of their monies. As such, the proceedings could not therefore be considered to be purely of a public-law nature.

95. The Government disputed the applicability of Article 6 § 1 of the Convention to the various proceedings instituted by the applicant societies. While the first set of restitution proceedings instituted by the Leeds and the National & Provincial (see paragraphs 31 and 32 above) may ostensibly have borne the hallmark of private-law proceedings, they nonetheless concerned a determination of rights and obligations which derived from tax legislation and which were therefore fiscal in nature. The judicial review proceedings instituted by the applicant societies (see paragraphs 38–40 above) were directed at obtaining a discretionary public-law remedy and were not concerned with securing restitution of the monies which they had paid pursuant to the 1986 Regulations. Furthermore, the second set of restitution proceedings brought by the applicant societies (see paragraph 41 above) depended on the outcome of the judicial review proceedings and for this reason could not be considered to be of a private-law nature.

For the above reasons, the Government maintained that the applicant societies could not rely on Article 6 § 1.

96. The Commission concluded that Article 6 § 1 was applicable. The two sets of restitution proceedings (see paragraphs 30, 31 and 41 above) were pecuniary in nature. The judicial review proceedings (see paragraphs 38–40 above) were closely linked to the second set of restitution proceedings (see paragraph 41 above) and formed part of a sequence of litigation which had its roots in the defective draftsmanship of section 40 of the Finance Act 1985 and the transitional provisions of the 1986 Regulations.

97. The Court considers that both sets of restitution proceedings (see paragraphs 30, 31 and 41 above) were private-law actions and were decisive for the determination of private-law rights to quantifiable sums of money. This conclusion is not affected by the fact that the rights asserted in those proceedings had their background in tax legislation and the obligation of the applicant societies to account for tax under that legislation (see, *mutatis mutandis*, the Editions Périscope v. France judgment of 26 March 1992, Series A no. 234-B, p. 66, § 40).

98. As to the judicial review proceedings (see paragraphs 38–40 above), it is to be noted that these were closely interrelated with the second set of restitution proceedings and were part of a calculated strategy to reassert the private-law claims which had been extinguished by section 53 of the 1991 Act. In these circumstances and irrespective of the public-law nature of that litigation, the judicial review proceedings must also be considered to have been decisive of private-law rights.

99. The Court concludes therefore that Article 6 § 1 of the Convention is applicable.

B. Compliance with Article 6 § 1

100. The applicant societies contended that the Government of the respondent State intentionally procured the enactment of retrospective legislation to thwart their access to a court to assert their vested rights to restitution of their assets. They argued that the legal victories secured by the Woolwich (see paragraphs 29 and 44 above) left the authorities with no defence to their claims. Indeed, the authorities had in fact conceded this by paying the costs incurred by the Leeds and the National & Provincial in bringing the first set of restitution proceedings (see paragraph 35 above). It was equally significant that the Government minister at the time of the passage through Parliament of the bill which eventually became the 1992 Act declared that section 64 thereof was designed to interfere with ongoing legal proceedings, namely the legal challenge to the validity of the Treasury Orders (see paragraph 42 above).

101. While accepting that limitations on the right of access to a court guaranteed by Article 6 § 1 may in certain well-defined circumstances be justified having regard to a Contracting State's margin of appreciation, the applicant societies stressed that any such margin cannot for the purposes of that provision be as broad as the one which may be invoked by a Contracting State under Article 1 of Protocol No. 1. With reference to the Court's own case-law governing the scope of limitations to the right of access to a court, they insisted that the retrospective measures did not pursue a legitimate aim given that the Government's overriding concern was to legalise the unlawful expropriation of their assets. The resulting

interference was also disproportionate. More importantly, the very essence of their right of access to a court had been impaired since the concrete result of section 53 of the 1991 Act and section 64 of the 1992 Act was to remove with retrospective effect the causes of action and render fruitless any attempt to secure redress before the courts.

102. The Government reasoned that the "possessions" of which the applicant societies claimed they had been deprived in breach of Article 1 of Protocol No. 1 were in reality their claims to restitution of the monies which they had been required to pay to the Inland Revenue. It must follow therefore that the lawful deprivation of the substance of their claims justified the removal of the procedural protection of those claims. For this reason, a finding by the Court that there had been no violation of Article 1 of Protocol No. 1 compelled a similar finding in respect of the applicant societies' complaints under Article 6.

103. The Government further maintained that there was no absolute rule which prohibited the intervention of the legislature in pending legal proceedings to which the State was a party. Whether or not retrospective legislation having this effect was lawful or not from the angle of Article 6 needed to be assessed in the light of factors such as the background to the litigation, the stage reached in the legal proceedings and the reasons which motivated legislative intervention.

Referring therefore to the arguments which they advanced both to dispute that the applicant societies' legal claims amounted to possessions and to justify the deprivation of the applicant societies' legal claims under Article 1 of Protocol No. 1 (see paragraphs 63 and 76 above), the Government requested the Court to find that the same justifications operated in defence of the alleged violation of Article 6.

104. The Commission concluded that there had been a violation of Article 6 § 1. While there may have been legitimate reasons for the introduction of section 53 of the 1991 Act and section 64 of the 1992 Act, by retrospectively validating the 1986 Regulations and the Treasury Orders which were the subject of pending litigation, the respondent State had intervened through the legislature in a manner which was decisive to ensure a favourable outcome of proceedings to which it itself was party. The effect of the measures was thus to deprive the applicant societies of their right to a determination of their civil rights and obligations following a fair hearing before a court.

105. The Court recalls that Article 6 § 1 of the Convention embodies the "right to a court", of which the right of access, that is, the right to institute proceedings before a court in civil matters, constitutes one aspect.

However, this right is not absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as

to the observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see the Stubbings and Others judgment cited above, p. 1502, § 50).

106. It is to be noted at the outset that the effect of section 53 of the 1991 Act was to deprive the Leeds and the National & Provincial of their chances of winning their restitution proceedings against the Inland Revenue (see paragraph 35 above). Section 64 of the 1992 Act effectively removed any hope which all three applicant societies may have had of restoring their chances of securing a favourable outcome against the Inland Revenue and recovering the tax they had paid. At no stage did the legislature intervene directly to bar the applicant societies' access to a court to seek a determination of the rights which they wished to assert. Admittedly, the end result of sections 53 and 64 was to condemn to failure any attempt by the applicant societies to proceed with their claims since Parliament, by means of primary legislation, had rendered both the 1986 Regulations and the Treasury Orders immune from judicial scrutiny. The applicant societies accordingly took the decision to discontinue the various proceedings which they had launched in the knowledge that they had no prospects of success.

107. Having regard to the above considerations, the Court must examine whether the action taken by the legislature on both occasions to deprive the applicant societies of their chances of winning litigation against the respondent State constituted an interference with their right of access to a court. In so doing, it will have regard to all the circumstances of the case and will subject to close scrutiny the reasons adduced by the respondent State for justifying any intervention which may have occurred in pending litigation as a result of the retrospective effects of section 53 of the 1991 Act and section 64 of the 1992 Act.

108. It is to be noted firstly that the applicant societies disputed from the very beginning their liability to pay tax on the interest they had paid to their investors in the gap period. The concerns of building societies were made known to Parliament during the passage of section 40 of the Finance Act 1985 (see paragraphs 15 and 16 above) and section 47 of the Finance Act 1986 (see paragraph 22 above). However, by enacting those measures Parliament clearly affirmed its intention to bring the interest paid in the gap period into account for tax purposes in the manner indicated in the 1986 Regulations.

109. The applicant societies subsequently became involved in a struggle with the Treasury through the courts in order to circumvent that intention, relying firstly on technical defects in the 1986 Regulations and secondly on alleged defects in the Treasury Orders. They followed closely the outcome of the Woolwich 1 litigation, and when the latter building society succeeded in having the 1986 Regulations invalidated on technical grounds the Leeds and the National & Provincial launched their own proceedings in the form of restitution actions (see paragraphs 31 and 32 above) in order to take advantage of the loophole exposed by the House of Lords in the Woolwich 1 case (see paragraphs 29 and 30 above). However, having regard to the clear aim of Parliament in adopting the impugned measures (see paragraph 108 above), these two applicant societies must reasonably be considered to have anticipated at the close of the Woolwich 1 litigation that the Treasury would seek Parliament's approval to cure the technical defects in the 1986 Regulations and would not be content on public-interest grounds to allow a substantial amount of already collected revenue to be lost on account of a technicality.

It is to be noted in this respect that the Director-General of the Building Societies Associations was not surprised by the Treasury's announcement that retrospective legislation would be introduced in the form of section 53 of the 1991 Act (see paragraph 35 above). It is also to be noted that the Leeds and the National & Provincial instituted their restitution proceedings after the authorities had formally decided to seek Parliament's approval for the retrospective validation of the 1986 Regulations and in the days immediately before the official announcement of that decision (see paragraphs 30–33 above). In these circumstances, those proceedings must be considered to have been an attempt to benefit from the vulnerability of the authorities' situation following the outcome of the Woolwich 1 litigation and to pre-empt the enactment of remedial legislation.

110. Furthermore, the decision of the authorities to legislate with retrospective effect to remedy the defect in the 1986 Regulations was taken without regard to pending legal proceedings and with the ultimate aim of restoring Parliament's original intention with respect to all building societies whose accounting periods ended in advance of the start of the fiscal year. That the extinction of the restitution proceedings was a significant consequence of the implementation of that aim cannot be denied. Nevertheless, it cannot be maintained that the Leeds and the National & Provincial were the particular targets of the authorities' decision.

111. While it is true that it was openly acknowledged by the authorities that the enactment of section 64 of the 1992 Act was intended to bring an end to the judicial review proceedings brought by all three applicant societies (see paragraph 42 above), those proceedings were in reality a next stage in the struggle with the Treasury and a deliberate strategy to frustrate the original intention of Parliament. This is borne out by the aim of the

applicant societies in bringing the contingent restitution proceedings to recover no more than they had paid to the Inland Revenue under the 1986 Regulations (see paragraph 41 above). Given the reaction of the authorities to the outcome of the Woolwich 1 litigation, the applicant societies could not safely rely on the Treasury remaining inactive in the face of a further challenge to Parliament's original intention, the more so since that challenge was directed at the validity of the Treasury Orders which formed the legal basis for the very substantial amounts of revenue collected from 1986 onwards, not just from building societies but also from banks and other deposit institutions (see paragraph 42 above).

112. As noted above (see paragraph 107) the Court is especially mindful of the dangers inherent in the use of retrospective legislation which has the effect of influencing the judicial determination of a dispute to which the State is a party, including where the effect is to make pending litigation unwinnable. Respect for the rule of law and the notion of a fair trial require that any reasons adduced to justify such measures be treated with the greatest possible degree of circumspection (see the Stran Greek Refineries and Stratis Andreadis judgment cited above, p. 82, § 49).

However, Article 6 § 1 cannot be interpreted as preventing any interference by the authorities with pending legal proceedings to which they are a party. It is to be noted that in the present case the interference caused by section 64 of the 1992 Act was of a much less drastic nature than the interference which led the Court to find a breach of Article 6 § 1 in the Stran Greek Refineries and Stratis Andreadis case (cited above). In that case the applicants and the respondent State had been engaged in litigation for a period of nine years and the applicants had an enforceable judgment against that State in their favour. The judicial review proceedings launched by the applicant societies had not even reached the stage of an *inter partes* hearing. Furthermore, in adopting section 64 of the 1992 Act with retrospective effect the authorities in the instant case had even more compelling public-interest motives to make the applicant societies' judicial review proceedings and the contingent restitution proceedings unwinnable than was the case with the enactment of section 53 of the 1991 Act. The challenge to the Treasury Orders created uncertainty over the substantial amounts of revenue collected from 1986 onwards (see paragraph 42 above).

It must also be observed that the applicant societies in their efforts to frustrate the intention of Parliament were at all times aware of the probability that Parliament would equally attempt to frustrate those efforts having regard to the decisive stance taken when enacting section 47 of the Finance Act 1986 and section 53 of the 1991 Act. They had

engaged the will of the authorities in the tax sector, an area where recourse to retrospective legislation is not confined to the United Kingdom, and must have appreciated that the public-interest considerations in placing the 1986 Regulations on a secure legal footing would not be abandoned easily.

113. For the above reasons, the Court concludes that the applicant societies cannot in the circumstances justifiably complain that they were denied the right of access to a court for a judicial determination of their rights. There has accordingly been no breach of Article 6 § 1 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 14

114. The applicant societies complained in addition that the impugned measures violated Article 6 § 1 of the Convention taken in conjunction with Article 14.

115. They reiterated that they were in a virtually identical situation to that of the Woolwich. Like the latter building society they possessed common-law rights to restitution of monies expropriated by the respondent State. The Woolwich had been allowed to recover in full following independent judicial determinations of its claims. Unlike the applicant societies, the Woolwich was excluded from the retrospective effects of section 53 of the 1991 Act. The Government minister responsible for the passage through Parliament of the 1992 Act had expressly acknowledged that there had been a disparity of treatment between the Woolwich and other building societies (see paragraph 42 above). That disparity was maintained in section 64 of the 1992 Act on account of the fact that the Woolwich had recovered everything owing to it and was not therefore concerned about the validity of the Treasury Orders.

116. The Government contended that the applicant societies were not in a relevantly similar position to the Woolwich and, further, that there existed a reasonable and objective justification for the difference in treatment. They relied on the reasoning used by the Commission to reach its finding that there had been no breach of Article 1 of Protocol No. 1 taken in conjunction with Article 14 of the Convention (see paragraph 87 above).

117. The Commission did not find it necessary to examine the applicant societies' complaints under this head, having regard to its conclusion under Article 6 § 1 of the Convention (see paragraph 104 above).

118. The Court observes that the complaints raised by the applicant societies under this head reflect the substance of their earlier complaints under Article 1 of Protocol No. 1 taken in conjunction with Article 14 (see paragraphs 84–86 above). It concluded in connection with those complaints that the Woolwich and the applicant societies were not in a relevantly similar situation and that in any event there was a reasonable and objective

justification for excluding the Woolwich from the retrospective effects of section 53 of the 1991 Act. Furthermore, it could not be validly contended that section 64 of the 1992 Act was discriminatory in its effect (see paragraphs 89–92 above).

119. The Court considers that the reasons which it has adduced in respect of the above finding equally support the conclusion that there has been no violation of Article 6 § 1 taken in conjunction with Article 14 of the Convention.

The Court finds therefore that the applicant societies were not victims of a violation under this head.

FOR THESE REASONS, THE COURT

1. *Holds* unanimously that there has been no violation of Article 1 of Protocol No. 1;
2. *Holds* by eight votes to one that there has been no violation of Article 1 of Protocol No. 1 taken in conjunction with Article 14 of the Convention;
3. *Holds* unanimously that there has been no violation of Article 6 § 1 of the Convention;
4. *Holds* by eight votes to one that there has been no violation of Article 6 § 1 of the Convention taken in conjunction with Article 14 of the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 23 October 1997.

Signed: ROLV RYSSDAL
President

Signed: HERBERT PETZOLD
Registrar

In accordance with Article 51 § 2 of the Convention and Rule 53 § 2 of Rules of Court A, the partly concurring, partly dissenting opinion of Mr Jambrek is annexed to this judgment.

Initialled: R. R.
Initialled: H. P.

PARTLY CONCURRING, PARTLY DISSENTING OPINION OF JUDGE JAMBREK

1. I voted for non-violation of Article 1 of Protocol No. 1 and for non-violation of Article 6 § 1 of the Convention. I disagree, however, with the majority as to whether there has been a violation of both provisions taken in conjunction with Article 14 of the Convention.

2. In respect of Article 1 of Protocol No. 1 taken in conjunction with Article 14, the applicants were in my opinion in a relevantly similar situation to that of the Woolwich. In this respect I do not find it decisive that they did not formally protest by instituting proceedings to challenge the validity of the Regulations. In my view the effect of the Woolwich 1 litigation was to declare the impugned Regulations invalid *erga omnes*. Other building societies were justified in believing that the ruling of the House of Lords would also apply to them. It is quite common to use a class action when many potential litigants are involved. The Woolwich may be considered to have taken a test case on behalf of other building societies. The other building societies identified themselves with the Woolwich and awaited the outcome of the litigation. This sort of procedure is therefore in line with the proper administration of justice. It is legitimate for one litigant to pave the way for others. The applicants made it clear, especially the Leeds, that they contested any obligation to pay the amounts required by the Regulations.

3. I therefore consider that there was no sufficient objective and reasonable justification for distinguishing between the Woolwich and the applicants in section 53 of the Finance Act 1991.

4. In respect of Article 6 of the Convention taken in conjunction with Article 14, I have serious reservations as to whether it is permissible for the State to intervene by legislating in order to determine the outcome of pending litigation which may thwart their policy objectives. The legislative power to intervene in such a manner to prevent the individual from obtaining justice should only be justified in exceptional cases. Like the Woolwich, the applicants would have won their cases if the law had not been amended. The applicant societies had good reasons to take proceedings in view of the outcome of the Woolwich litigation.

5. I consider therefore that the principle of the rule of law and the notion of a fair trial enshrined in Article 6 precluded in this case the interference by the legislator with the administration of justice in a way designed to influence the judicial determination of the dispute, given that this interference also gave rise to inequality of treatment of parties in a

relevantly similar situation, in breach of Article 14 of the Convention. The Woolwich was able to litigate (twice) the whole way to the House of Lords and to recover all the monies it had paid to the Inland Revenue. Even the Government minister during the parliamentary debates on section 64 of the Finance (No. 2) Act 1992 acknowledged that there had been undoubted disparity of treatment between the Woolwich and the other building societies.

6. In conclusion, I find that there was insufficient objective and reasonable justification for the discrimination suffered by the applicants in the enjoyment of their rights set forth in Article 6 of the Convention, given that the legal proceedings for restitution initiated by the applicants following the Woolwich 1 and 2 decisions were effectively stifled by the legislative action.

ANNEX 189

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

BRIDGESTONE LICENSING SERVICES, INC. AND BRIDGESTONE AMERICAS, INC.
Claimants

and

REPUBLIC OF PANAMA
Respondent

ICSID Case No. ARB/16/34

DECISION ON EXPEDITED OBJECTIONS

Members of the Tribunal
Lord Nicholas Phillips Baron of Worth Matravers, President of the Tribunal
Mr. Horacio A. Grigera Naón, Arbitrator
Mr. J. Christopher Thomas, QC, Arbitrator

Secretary of the Tribunal
Ms. Luisa Fernanda Torres

Date of dispatch to the Parties: 13 December 2017

Annex 189

REPRESENTATION OF THE PARTIES

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Representing the Respondent

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Vía España y Calle 52E
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Republic of Panama
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VIII. OBJECTIONS RELATING TO BOTH BSAM AND BSLS

A. Fifth Objection: The Tribunal Cannot Entertain Claims Based on Hypothetical Actions of Other States

(1) The Parties' Positions

a. The Respondent's Position

332. The Respondent contends that there is no jurisdictional basis for the claim for over US$10 million dollars (in excess of the US$ 5,431,000 million ordered by the Supreme Court judgment) for "*the 'loss' that supposedly 'has been and will be incurred*'" as a result of the Supreme Court decision.[475]

333. In particular, Panama takes issue with the Claimants' contentions that (i) the loss arises out of the fact that the Supreme Court decision may be followed by other countries in Latin America, or (ii) may lead to more trademark applications similar and confusingly similar to the Bridgestone mark in Panama and other Latin American countries.[476] Referring to Articles 10.17, 10.1 and 10.16 of the TPA, Panama argues that "[t]*he only claims that the Tribunal has jurisdiction to entertain are claims that Panama allegedly has breached the TPA, though 'measures' that* ***Panama*** *'has adopted or maintained*'", and therefore, the Tribunal "*cannot entertain claims based on the hypothetical actions of other States* […]*.*"[477]

334. According to the Respondent, this conclusion is supported by two principles of international law, namely, "*that each State is responsible for its* ***own*** *conduct and in respect of its* ***own*** *international obligations*" and that "*a tribunal cannot adjudicate any claim where 'the vital issue to be settled concerns the international responsibility of a third State*.'"[478] The Respondent points out that while Article 10.1.2 of the TPA states that the TPA Party's obligations apply to a state enterprise or other person that exercises

[475] Resp. Exp. Obj., ¶¶ 44-45. *See also*, *id.*, ¶ 51.

[476] Resp. Exp. Obj., ¶ 45.

[477] Resp. Exp. Obj., ¶ 48 (emphasis in original). *See also*, Resp. Reply Exp. Obj., ¶ 93.

[478] Resp. Exp. Obj., ¶ 49 (emphasis in original). *See also,* Resp. Reply Exp. Obj., ¶ 93.

governmental authority, it says nothing about extending that to the conduct of *other* States.[479]

335. For Panama, the issue is not a matter of causation, but rather of consent.[480] This is so, Panama explains, because consent is limited to claims for breaches of Articles 10.1 to Article 10.14 of the TPA, and those obligations only apply with respect to "*measures adopted or maintained by a* [TPA] *Party* […]." "*They do not apply in respect of (hypothetical) measures that other States (might) thereafter adopt in reaction thereto*."[481]

336. The Respondent explains that this objection does not need to address all of the four "*inter-related*" factors underlying the US$ 10 million claim, nor could it have given the nature of the objection. As Claimants argue that it is the "*combination*" of the various factors which led to the loss, a problem with two of those factors is enough to defeat the claim.[482]

337. However, Panama adds, "*if it ever came a time when the Tribunal needed to consider*" whether those other factors have any merit, it would find flaws: (i) they amount to the assertion that BSAM's non-payment of the judgement prevented it from reinvesting in sale, marketing and distribution of products; (ii) "*Claimants are requesting damages based on the hypothetical future conduct of private actors*"; and (iii) the Tribunal is being asked to accept that "*Bridgestone*" trademark policy efforts did not cause injury to competitors, but that trademark applications by competitors injure the Claimants.[483] The Respondent goes on to conclude that:

> "[F]or present purposes, those other factors do not matter. The issue here is that Claimants are asserting claims based on the conduct of other States, but the TPA does not impose any obligations on Panama in respect of their conduct, and international law in any event precludes the Tribunal from

[479] Resp. Reply Exp. Obj., ¶ 93.
[480] Resp. Reply Exp. Obj., ¶ 95.
[481] Resp. Reply Exp. Obj., ¶ 95.
[482] Resp. Reply Exp. Obj., ¶ 96.
[483] Resp. Reply Exp. Obj., ¶ 97.

evaluating such conduct without the consent of those other States. Claimants do not provide any real response on this issue."[484]

338. In the Post-Hearing Brief, Panama sums up the objection saying that the Claimants' attempt to seek compensation for "*hypothetical future injury that supposedly will result from hypothetical future action of States other than Panama*" is "*improper*" for two reasons:[485]

- *First*, consent to arbitration in the TPA is limited to claims arising out of measures already "*adopted or maintained*" and the resulting damage already incurred.[486] (The Respondent rejects the allegation that this aspect of the problem was not mentioned before the Hearing.[487])

- *Second,* Chapter 10 of the TPA does not apply to investments in other States or to measures by other States different from Panama.[488] Dismissing the allegation that the only measure at issue is the Supreme Court judgement from which the conduct of the other States flows causally, the Respondent argues that this type of reasoning would only work if the other State had committed an internationally wrongful-act,[489] which is an issue the Tribunal cannot evaluate.[490]

339. The Respondent emphasizes that it is not asking the Tribunal to make findings about the *quantum* of the alleged injury, but rather, to confirm that it lacks jurisdiction over "*(1) hypothetical future events or injury, (2) investments outside of Panama, or (3) the conduct of other States.*"[491] Once that is done, Panama argues, there is no remaining claim for damages by BSAM and the only remaining claim for BSLS is for the payment of the Supreme Court damages award (if it survives the other jurisdictional challenges).[492]

[484] Resp. Reply Exp. Obj., ¶ 98.
[485] Resp. PHB Exp. Obj., ¶¶ 41-43.
[486] Resp. PHB Exp. Obj., ¶ 42.
[487] Tr. Day 4, 578:12-22 (Ms. Gehring-Flores); Resp. PHB Exp. Obj., ¶ 42.
[488] Resp. PHB Exp. Obj., ¶ 43.
[489] Resp. PHB Exp. Obj., ¶ 43.
[490] Resp. PHB Exp. Obj., ¶ 44.
[491] Resp. PHB Exp. Obj., ¶ 45.
[492] Resp. PHB Exp. Obj., ¶ 45, nn. 194-195.

b. The Claimants' Position

340. The Claimants ask the Tribunal to dismiss this objection.[493] According to their last submission, the objection should be dismissed for either of the following alternative reasons: (i) it is not a matter of competence; (ii) it is intertwined with the merits, and all the necessary evidence is not before the Tribunal such that the Respondent has not discharged its burden of proof; or (iii) if the objection is a matter of competence and the Tribunal has sufficient evidence before it to decide it safely, then it should conclude that there is nothing for the Tribunal to decide as there is no claim for actions by other States.[494]

341. The Claimants argue that this objection fails as:

- It only impacts two of the four possible grounds for loss under this head of damage. And even though the four grounds are "*inter-related*" that does not mean that they are inextricably linked so that if one fails all do.[495]
- The loss claimed arises directly out of the decision of Panama's Supreme Court, and the TPA does not preclude a claim for loss suffered outside of Panama or the United States, as long as it meets the basic test for causation.[496]
- In reality, the objection relates to matters of causation, foreseeability and loss, and it cannot be determined under Article 10.20.5 of the TPA, because it is not a jurisdictional objection, and would require extensive evidence to be resolved.[497]

342. The Claimants observe, however, that "*it appears that this objection is not directed to the facts of causation and loss*" and for that reason they have not put in evidence of fact on the matter.[498] Under the Article 10.20.5 proceeding on preliminary objections, the Respondent is not allowed to argue that the Claimants cannot show causation, which is an issue that can only be dealt with a trial.[499]

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[493] Cl. Res. Exp. Obj., ¶ 179.
[494] Cl. PHB Exp. Obj., ¶ 3(a), 3(b), 3(c)(v).
[495] Cl. Res. Exp. Obj., ¶¶ 18, 174-175, 178; Cl. Rej. Exp. Obj., ¶ 73; Cl. PHB Exp. Obj., ¶ 61.
[496] Cl. Res. Exp. Obj., ¶¶ 18, 172. *See also*, Cl. Rej. Exp. Obj., ¶ 71.
[497] Cl. Res. Exp. Obj., ¶¶ 18, 173, 178. *See also,* Cl. Rej. Exp. Obj., ¶¶ 69, 72.
[498] Cl. Res. Exp. Obj., ¶ 178.
[499] Cl. Res. Exp. Obj., ¶ 178.

343. In addition, according to the Claimants, "*there is nothing for the Tribunal to decide at this point*", since the Claimants do not claim for measures adopted by other States, and agree that the Tribunal does not have jurisdiction to hear those claims.[500] The Claimants explain that they accept that if the measures of other States caused loss to the Claimants that would not be recoverable, but argue that this is a "*question of fact as to what has caused the loss and to what extent the measures result in loss*."[501]

344. Finally, the Claimants argue that the Respondent raised a new objection during the Hearing that did not appear in the written pleadings, namely, one concerning "*hypothetical future actions of private actors.*"[502] Because this objection was not raised within the 45-day time limit prescribed in Article 10.20.5 of the TPA, the Claimants argue, it is out of time and must be dismissed.[503]

(2) The Tribunal's Analysis

345. Dealing with the last point first, the Tribunal agrees that it is not open to Panama to pursue, outside the 45-day period, the general objection that the Claimants cannot advance a claim founded on the hypothetical future actions of private actors. Objection No. 5 is limited to the contention that the Claimants cannot advance a claim based on the hypothetical action *of other States.* Furthermore, the only timely grounds for this Objection were those set out at paragraph 334 *supra*, not that the alleged actions of other States were *hypothetical and future.*

346. This Objection arises out of the following passages in the Claimants' Request for Arbitration:

> "56. Second, the decision of the Panamanian Supreme Court may be followed in other Latin American countries as a matter of government policy. Many countries in Latin America have historically followed each other's lead in the implementation of protectionist trade policies in the area of intellectual property

[500] Cl. PHB Exp. Obj., ¶ 59.
[501] Cl. PHB Exp. Obj., ¶ 60.
[502] Cl. PHB Exp. Obj., ¶ 13. *See also*, Tr. Day 4, 634:22-636:7 (Mr. Williams).
[503] Cl. PHB Exp. Obj., ¶ 13.

> rights, and the decision of the Panamanian Supreme Court operates as a *de facto* protectionist device, allowing potentially confusingly similar marks to enter into the market because intellectual property rights holders are unwilling to risk significant, apparently arbitrary, penalties for their good faith use of the legal mechanisms intended to preserve those rights. […]
>
> 57. Third, the decision of the Panamanian Supreme Court establishes a precedent that is likely to be followed in other Latin American legal systems. Such concerns are warranted in light of the fact that it is not uncommon for ideas developed in the courts in one national legal system to be transferred to another. […]
>
> 58. Fourth, the decision of the Panamanian Supreme Court to impose damages for the good faith use of Panama's own trademark opposition proceedings is likely to result in more trademark applications that are similar and confusingly similar to the Bridgestone mark, both in Panama and elsewhere in Latin America. Muresa and L.V. International, through the so-called Luque Group, operate all over the Americas. There is therefore a significant risk that the Luque Group will seek to achieve the same result in those and other jurisdictions across the region. Other unrelated competitors are also likely to use this opportunity to follow the Luque Group's lead and try to enter the various tire markets in the region by filing and using confusingly similar trademarks.
>
> 59. Accordingly, the risk that similar decisions may be issued in other countries makes it much costlier for Bridgestone to invest not only in Panama, but in other countries in Latin America."[504]

347. In order to follow these averments it is necessary to consider what it is that the Claimants allege was objectionable about the decision of the Panamanian Supreme Court. The Claimants object that the decision was "*unjust and arbitrary.*"[505] The Tribunal understands this allegation to be fact specific. The Claimants do not suggest that Muresa was pursuing a new and unrecognized cause of action that the Panamanian courts should never have entertained. No complaint is made of the reasoning and approach of the two Panamanian lower courts. The complaint is that, in reversing the decision of the lower courts, the majority in the Panamanian Supreme Court perversely ignored the evidence, or lack of evidence, and the reasoning based upon it by the lower courts:

[504] Request for Arbitration, ¶¶ 56-59.

[505] Request for Arbitration, ¶ 3.

> "In its decision, the Supreme Court did not consider evidence submitted by Bridgestone nor the decision of the Eleventh Circuit Court and the First Superior Court, which found that Bridgestone had not acted recklessly in opposing the trademark, and that Muresa and TGLF had not suffered any harm caused by the trademark opposition action."[506]

348. What then is intended by the Claimants' allegation in paragraph 56 that "*the decision of the Panamanian Supreme Court may be followed in other Latin American countries as a matter of government policy*"? This appears to be suggesting administrative, not judicial, activity for paragraph 57 deals with the latter. The Tribunal reads this as suggesting that by some form of executive action the governments of other Latin American countries may penalize the owners of trademarks that take legitimate action to protect those trademarks.

349. And what is suggested by paragraph 57? What is the *precedent* alleged to have been set by the Panamanian Supreme Court; is it the perverse disregard of evidence? It seems to the Tribunal that both paragraph 56 and paragraph 57 envisage that other Latin American countries may, in one way or another, be influenced by the example of the Panama Supreme Court to act – if the allegations are to be accepted – in abuse of recognized intellectual property rights.

350. As the Tribunal reads paragraph 58, the scenario there painted in relation to countries outside Panama is premised on the likelihood that the governments and the courts of these countries will copy the abuse of intellectual property rights shown by the Supreme Court of Panama. This is evident from paragraph 59. The Claimants have made it clear that they do not seek to impose on Panama liability for the *direct* consequences of actions by other States. What, however, they are seeking to do is to impose liability for the indirect consequences of those actions, namely the challenges to the Claimants' intellectual property rights that the predicted actions by other States will encourage.

351. The contention made by Panama in its Expedited Objections is that this head of claim requires the Tribunal to evaluate the likelihood of States other than Panama committing

[506] Request for Arbitration, ¶ 42.

intentionally wrongful acts, and that this is something that the Tribunal has no jurisdiction to do under established principles of international law.[507]

352. Panama submits that it would be contrary to international law for the Tribunal to rule on the likelihood of sovereign States committing wrongs when those States are not subject to the jurisdiction of the Tribunal. Panama relies on the decision of the International Court of Justice in the *Monetary Gold Case.*[508] That case concerned a dispute between the United Kingdom and Italy as to whether Italy had a prior claim to gold owned by Albania that Albania wished to be paid to the United Kingdom. This depended upon whether or not Italy had a claim against Albania to be paid the gold that took priority over that of the United Kingdom. Although the United Kingdom and Italy had agreed to the jurisdiction of the International Court of Justice, Albania had not. In these circumstances the Court ruled that it had no jurisdiction to decide the issue as:

> "[…] To adjudicate upon the international responsibility of Albania without her consent would run counter to a well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent."[509]

353. The Tribunal does not consider that this decision is precisely in point. The *Monetary Gold* case involved rival claims to be paid by Albania gold owned by Albania and thus Albania was directly concerned with the result. In the present case, a finding as to the likely conduct of Latin American countries other than Panama would not purport to affect their legal rights or amount to an assertion of jurisdiction over them. Nonetheless, the Tribunal considers that it would be an extraordinary interpretation of the ICSID Convention and the TPA that would bring within the jurisdiction of ICSID a dispute as to whether or not sovereign States not party to the TPA are likely to act in abuse of established intellectual property rights and, if they are, whether the respondent host State

[507] Resp. Exp. Obj., ¶¶ 48-51.

[508] **RLA-029**, *Case of the Monetary Gold Removed from Rome in 1943*, ICJ, Judgment on Preliminary Objections (15 June 1954) [hereinafter, "*Monetary Gold*"].

[509] **RLA-029**, *Monetary Gold*, p. 17.

is liable for the consequences. Neither the United States, nor Panama could possibly have envisaged such a claim arising under the TPA, and for good reason.

354. In the opinion of the Tribunal, a dispute as to whether States other than Panama are likely to copy Panama's alleged abuse of the Claimants' intellectual property rights to the detriment of the Claimants is both speculative and remote from each of the Claimants' investments. That part of the overall dispute cannot possibly be said to *"aris*e *directly out of*" either Claimant's investment. Thus, so far as BSAM is concerned, this Objection succeeds not by reason of the grounds relied on in support of it but by reason of the grounds advanced in support of Objection No. 2.

355. What is the position of BSLS? Objection No. 2 was only made against BSAM. Is it open to the Tribunal to uphold Objection No. 5 against BSLS not on the grounds advanced in support of that Objection but on the grounds advanced against BSAM in Objection No. 2? The Tribunal does not consider that it is. Accordingly, so far as BSLS is concerned Objection No. 5 must be dismissed. But the Tribunal will add this. BSLS will no doubt consider carefully whether to pursue a claim in relation to events outside Panama in circumstances where the Tribunal has ruled that it has no jurisdiction to entertain an identical claim by BSAM.

IX. COSTS

A. The Parties' Positions

356. Panama has requested that the Claimants be held "*jointly and severally*" liable for all the costs of the arbitration.[510] Contrary to the Claimants' allegations at the Hearing, the Respondent argues that it is inapposite that some objections relate to one of the Claimants and not the others: the Claimants decided to bring the case jointly, have tried to argue it blurring the lines between the Claimants, and should not be permitted to draw a line now,

[510] Resp. PHB Exp. Obj., ¶ 47; Resp. Exp. Obj., ¶ 55(b); Resp. Reply Exp. Obj., ¶ 99; Tr. Day 4, 643:12-644:6 (Mr. Deveboise).

ANNEX 190

PL 96–72, SEPTEMBER 29, 1979, 93 Stat 503

UNITED STATES PUBLIC LAWS

96th Congress - First Session

Convening January 15, 1979

DATA SUPPLIED BY THE U.S. DEPARTMENT OF JUSTICE. (SEE SCOPE)

Additions and Deletions are not identified in this document.

PL 96–72 (S 737)

SEPTEMBER 29, 1979

An Act to provide authority to regulate exports, to improve the efficiency of export regulation, and to minimize interference with the ability to engage in commerce.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

Section 1. This act // 50 USC app. 2401 // may be cited as the “Export Administration Act of 1979”.

FINDINGS

Sec. 2. // 50 USC app. 2401. // The Congress makes the following findings:

(1) The ability of United States citizens to engage in international commerce is a fundamental concern of United States policy.

(2) Exports contribute significantly to the economic well-being of the United States and the stability of the world economy by increasing employment and production in the United States, and by strengthening the trade balance and the value of the United States dollar, thereby reducing inflation. The restriction of exports from the United States can have serious adverse effects on the balance of payments and on domestic employment, particularly when restrictions applied by the United States are more extensive than those imposed by other countries.

(3) It is important for the national interest of the United States that both the private sector and the Federal Government place a high priority on exports, which would strengthen the Nation’s economy.

(4) The availability of certain materials at home and abroad varies so that the quantity and composition of United States exports and their distribution among importing countries may affect the welfare of the domestic economy and may have an important bearing upon fulfillment of the foreign policy of the United States.

(5) Exports of goods or technology without regard to whether they make a significant contribution to the military potential of individual countries or combinations of countries may adversely affect the national security of the United States.

(6) Uncertainty of export control policy can curtail the efforts of American business to the detriment of the overall attempt to improve the trade balance of the United States.

(7) Unreasonable restrictions on access to world supplies can cause worldwide political and economic instability, interfere with free international trade, and retard the growth and development of nations.

(8) It is important that the administration of export controls imposed for national security purposes give special emphasis to the need to control exports of technology (and goods which contribute significantly to the transfer of such technology) which could make a significant contribution to the military potential of any country or combination of countries which would be detrimental to the national security of the United States.

(9) Minimization of restrictions on exports of agricultural commodities and products is of critical importance to the maintenance of a sound agricultural sector, to achievement of a positive balance of payments, to reducing the level of

Federal expenditures for agricultural support programs, and to United States cooperation in efforts to eliminate malnutrition and world hunger.

DECLARATION OF POLICY

Sec. 3. // 50 USC app. 2402. // The Congress makes the following declarations:

(1) It is the policy of the United States to minimize uncertainties in export control policy and to encourage trade with all countries with which the United States has diplomatic or trading relations, except those countries with which such trade has been determined by the President to be against the national interest.

(2) It is the policy of the United States to use export controls only after full consideration of the impact on the economy of the United States and only to the extent necessary—,

(A) to restrict the export of goods and technology which would make a significant contribution to the military potential of any other country or combination of countries which would prove detrimental to the national security of the United States;

(B) to restrict the export of goods and technology where necessary to further significantly the foreign policy of the United States or to fulfill its declared international obligations; and

(C) to restrict the export of goods where necessary to protect the domestic economy from the excessive drain of scarce materials and to reduce the serious inflationary impact of foreign demand.

(3) It is the policy of the United States (A) to apply any necessary controls to the maximum extent possible in cooperation with all nations, and (B) to encourage observance of a uniform export control policy by all nations with which the United States has defense treaty commitments.

(4) It is the policy of the United States to use its economic resources and trade potential to further the sound growth and stability of its economy as well as to further its national security and foreign policy objectives.

(5) It is the policy of the United States—,

(A) to oppose restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries friendly to the United States or against any United States person;

(B) to encourage and, in specified cases, require United States persons engaged in the export of goods or technology or other information to refuse to take actions, including furnishing information or entering into or implementing agreements, which have the effect of furthering or supporting the restrictive trade practices or boycotts fostered or imposed by any foreign country against a countr friendly to the United States or against any United States person; and

(C) to foster international cooperation and the development of international rules and institutions to assure reasonable access to world supplies.

(6) It is the policy of the United States that the desirability of subjecting, or continuing to subject, particular goods or technology or other information to United States export controls should be subjected to review by and consultation with representatives of appropriate United States Goverment agencies and private industry.

(7) It is the poicy of the United States to use export controls, including license fees, to secure the removal by foreign countries of restrictions on access to supplies where such restrictions have or may have a serious domestic inflationary impact, have caused or may cause a serious domestic shortage, or have been imposed for purposes of influencing the foreign policy of the United States. In effecting this policy, the President shall make every reasonable effort to secure the removal or reduction of such restrictions, policies, or actions through international cooperation and agreement before resorting to the imposition of controls on exports from the United States. No action taken in fulfillment of the policy set forth in this paragraph shall apply to the export of medicine or medical supplies.

(8) It is the policy of the United States to use export controls to encourage other countries to take immediate steps to prevent the use of their territories or resources to aid, encourage, or give sanctuary to those persons involved in directing, supporting, or participating in acts of international terrorism. To achieve this objective, the President shall make every reasonable effort to secure the removal or reduction of such assistance to international terrorists through international cooperation and agreement before resorting to the imposition of export controls.

(9) It is the policy of the United States to cooperate with other countries with which the United States has defense treaty commitments in restricting the export of goods and technology which would make a significant contribution to the military potential of any country or combination of countries which would prove detrimental to the security of the United States and of those countries with which the United States has defense treaty commitments.

(10) It is the policy of the United States that export trade by United States citizens be given a high priority and not be controlled except when such controls (A) are necessary to further fundamental national security, foreign policy, or short supply objectives, (B) will clearly further such objectives, and (C) are administered consistent with basic standards of due process.

(11) It is the policy of the United States to minimize restrictions on the export of agricultural commodities and products.

GENERAL PROVISIONS

Sec. 4. // 50 USC app. 2403. // (a) Types of Licensee.—Under such conditions as may be imposed by the Secretary which are consistent with the provisions of this Act, the Secretary may require any of the following types of export licenses:

(1) A validated license, authorizing a specific export, issued pursuant to an application by the exporter.

(2) A qualified general license, authorizing multiple exports, issued pursuant to an application by the exporter.

(3) A general license, authorizing exports, without application by the exporter.

(4) Such other licenses as may assist in the effective and efficient implementation of this Act.

(b) Commodity Control List.—The Secretary shall establish and maintain a list (hereinafter in this Act referred to as the "commodity control list") consisting of any goods or technology subject to export controls under this Act.

(c) Foreign Availability.—In accordance with the provisions of this Act, the President shall not impose export controls for foreign policy or national security purposes on the export from the United States of goods or technology which he determines are available without restriction from sources outside the United States in significant quantities and comparable in quality to those produced in the United States, unless the President determines that adequate evidence has been presented to him demonstrating that the absence of such controls would prove detrimental to the foreign policy or national security of the United States.

(d) Right of Export.—No authority or permission to export may be required under this Act, or under regulations issued under this Act, except to carry out the policies set forth in section 3 of this Act.

(e) Delegation of Authority.—The President may delegate the power, authority, and discretion conferred upon him by this Act to such departments, agencies, or officials of the Government as he may consider appropriate, except that no authority under this Act may be delegated to, or exercised by, any official of any department or agency the head of which is not appointed by the President, by and with the advice and consent of the Senate. The President may not delegate or transfer his power, authority, and discretion to overrule or modify any recommendation or decision made by the Secretary, the Secretary of Defense, or the Secretary of State pursuant to the provisions of this Act.

(f) Notification of the Public; Consultation With Business.—The Secretary shall keep the public fully apprised of changes in export control policy and procedures instituted in conformity with this Act with a view to encouraging trade. The Secretary shall meet regularly with representatives of the business sector in order to obtain their views on export control policy and the foreign availability of goods and technology.

NATIONAL SECURITY CONTROLS

Sec. 5. // 50 USC app. 2404. // (a) Authority.—(1) In order to carry out the policy set forth in section 3(2)(A) of this Act, the President may, in accordance with the provisions of this section, prohibit or curtail the export of any goods or technology subject to the jurisdiction of the United States or exported by any person subject to the jurisdiction of the United States. The authority contained in this subsection shall be exercised by the Secretary, in consultation with the Secretary of Defense, and such other departments and agencies as the Secretary considers appropriate, and shall be implemented by means of export licenses described in section 4(a) of this Act.

(2)(A) Whenever the Secretary makes any revision with respect to any goods or technology, or with respect to the countries or destinations, affected by export controls imposed under this section, the Secretary shall publish in the Federal Register a notice of such revision and shall specify in such notice that the revision relates to controls imposed under the authority contained in this section.

(B) Whenever the Secretary denies any export license under this section, the Secretary shall specify in the notice to the applicant of the denial of such license that the license was denied under the authority contained in this section. The Secretary shall also include in such notice what, if any, modifications in or restrictions on the goods or technology for which the license was sought would allow such export to be compatible with controls imposed under this section, or the Secretary shall indicate in such notice which officers and employees of the Department of Commerce who are familiar with the application will be made reasonably available to the applicant for consultation with regard to such modifications or restriction, if appropriate.

(3) In issuing regulations to carry out this section, particular attention shall be given to the difficulty of devising effective safeguards to prevent a country that poses a threat to the security of the United States from diverting critical technologies to military use, the difficulty of devising effective safeguards to protect critical goods, and the need to take effective measures to prevent the reexport of critical technologies from other countries to countries that pose a threat to the security of the United States. Such regulations shall not be based upon the assumption that such effective safeguards can be devised.

(b) Policy Toward Individual Countries.—In administering export controls for national security purposes under this section, United States policy toward individual countries shall not be determined exclusively on the basis of a country's Communist or non-Communist status but shall take into account such factors as the country's present and potential relationship to the * United States, its present and potential relationship to countries friendly or hostile to the United States, its ability and

willingness to control retransfers of United States exports in accordance with United States policy, and such other factors as the President considers appropriate. The President shall review not less frequently than every three years in the case of controls maintained cooperatively with other nations, and annually in the case of all other controls, United States policy toward individual countries to determine whether such policy is appropriate in light of the factors specified in the preceding sentence.

(c) Control List.—(1) The Secretary shall establish and maintain, as part of the commodity control list, a list of all goods and technology subject to export controls under this section. Such goods and technology shall be clearly indentified as being subject to controls under this section.

(2) The Secretary of Defense and other appropriate departments and agencies shall identify goods and technology for inclusion on the list referred to in paragraph (1). Those items which the Secretary and the Secretary of Defense concur shall be subject to export controls under this section shall comprise such list. If the Secretary and the Secretary of Defense are unable to concur on such items, the matter shall be referred to the President for resolution.

(3) The Secretary shall issue regulations providing for review of the list established pursuant to this subsection not less frequently than every 3 years in the case of controls maintained cooperatively with other countries, and annually in the case of all other controls, in order to carry out the policy set forth in section 3(2)(A) and the provisions of this section, and for the prompt issuance of such revisions of the list as may be necessary. Such regulations shall provide interested Government agencies and other affected or potentially affected parties with an opportunity, during such review, to submit written data, views, or arguments, with or without oral presentation. Such regulations shall further provide that, as part of such review, an assessment be made of the availability from sources outside the United States, or any of its territories or possessions, of goods and technology comparable to those controlled under this section. The Secretary and any agency rendering advise with respect to export controls shall keep adequate records of all decisions made with respect to revision of the list of controlled goods and technology, including the factual and analytical basis for the decision, and, in the case of the Secretary, any dissenting recommendations received from any agency.

(d) Militarily Critical Technologies.—(1) The Secretary, in consultation with the Secretary of Defense, shall review and revise the list established pursuant to subsection (c), as prescribed in paragraph (3) of such subsection, for the purpose of insuring that export controls imposed under this section cover and (to the maximum extent consistent with the purposes of this Act) are limited to militarily critical goods and technologies and the mechanisms through which such goods and technologies may be effectively transferred.

(2) The Secretary of Defense shall bear primary responsibility for developing a list of militarily critical technologies. In developing such list, primary emphasis shall be given to—,

(A) arrays of design and manufacturing know-how,

(B) keystone manufacturing, inspection, and test equipment, and

(C) goods accompanied by sophisticated operation, application, or maintenance know-how,

which are not possessed by countries to which exports are controlled under this section and which, if exported, would permit a significant advance in a military system of any such country.

(3) The list referred to in paragraph (2) shall be sufficiently specific to guide the determinations of any official exercising export licensing responsibilities under this Act.

(4) The initial version of the list referred to in paragraph (2) shall be completed and published in an appropriate form in the Federal Register not later than October 1, 1980.

(5) The list of militarily critical technologies developed primarily by the Secretary of Defense pursuant to paragraph (2) shall become a part of the commodity control list, subject to the provisions of subsection (c) of this section.

(6) The Secretary of Defense shall report annually to the Congress on actions taken to carry out this subsection.

(e) Export Licenses.—(1) The Congress finds that the effectiveness and efficiency of the process of making export licensing determinations under this section is severely hampered by the large volume of validated export license applications required to be submitted under this Act. Accordingly, it is the intent of Congress in this subsection to encourage the use of a qualified general license in lieu of a validated license.

(2) To the maximum extent practicable, consistent with the national security of the United States, the Secretary shall require a validated license under this section for the export of goods or technology only if—,

(A) the export of such goods or technology is restricted pursuant to a multilateral agreement, formal or informal, to which the United States is a party and, under the terms of such multilateral agreement, such export requires the specific approval of the parties to such multilateral agreement;

(B) with respect to such goods or technology, other nations do not possess capabilities comparable to those possessed by the United States; or

(C) the United States is seeking the agreement of other suppliers to apply comparable controls to such goods or technology

and, in the judgment of the Secretary, United States export controls on such goods or technology, by means of such license, are necessary pending the conclusion of such agreement.
(3) To the maximum extent practicable, consistent with the national security of the United States, the Secretary shall require a qualified general license, in lieu of a validated license, under this section for the export of goods or technology if the export of such goods or technology is restricted pursuant to a multilateral agreement, formal or informal, to which the United States is a party, but such export does not require the sepcific approval of the parties to such multilateral agreement.
(4) Not later than July 1, 1980, the Secretary shall establish procedures for the approval of goods and technology that may be exported pursuant to a qualified general license.
(f) Foreign Availability.—(1) The Secretary, in consultation with appropriate Government agencies and with appropriate technical advisory committees established pursuant to subsection (h) of this section, shall review, on a continuing basis, the availability, to countries to which exports are controlled under this section, from sources outside the United States, including countries which participate with the United States in multilateral export controls, of any goods or technology the export of which requires a validated license under this section. In any case in which the Secretary determines, in accordance with procedures and criteria which the Secretary shall by regulation establish, that any such goods or technology are available in fact to such destinations from such sources in sufficient quantity and of sufficient quality so that the requirement of a validated license for the export of such goods or technology is or would be ineffective in achieving the purpose set forth in subsection (a) of this section, the Secretary may not, after the determination is made, require a validated license for the export of such goods or technology during the period of such foreign availability, unless the President determines that the absence of export controls under this section would prove detrimental to the national security to the United States. In any case in which the President determines that export controls under this section must be maintained notwithstanding foreign availability, the Secretary shall publish that determination together with a concise statement of its basis, and the estimated economic impct of the decision.
(2) The Secretary shall approve any application for a validated license which is required under this section for the export of any goods or technology to a particular country and which meets all other requirements for such an application, if the Secretary determines that such goods or technology will, if the license is denied, be available in fact to such country from sources outside the United States, including countries which participate with the United States in multilateral export controls, in sufficient quantity and of sufficient quality so that denial of the license would be ineffective in achieving the purpose set forth in subsection (a) of this section, subject to the exception set forth in paragraph (1) of this subsection. In any case in which the Secretary makes a determination of foreign availability under this paragraph with respect to any goods or technology, the Secretary shall determine whether a determination of foreign availability under paragraph (1) with respect to such goods or technology is warranted.
(3) With respect to export controls imposed under this section, any determination of foreign availability which is the basis of a decision to grant a license for, or to remove a control on, the export of a good or technology, shall be made in writing and shall be supported by reliable evidence, including scientific or physical examination, expert opinion based upon adequate factual information, or intelligence information. In assessing foreign availability with respect to license applications, uncorroborated representations by applicants shall not be deemed sufficient evidence of foreign availability.
(4) In any case in which, in accordance with this subsection, export controls are imposed under this section notwithstanding foreign availability, the President shall take steps to initiate negotiations with the governments of the appropriate foreign countries for the purpose of eliminating such availability. Whenever the President has reason to believe goods or technology subject to export control for national security purposes by the United States may become available from other countries to countries to which exports are controlled under this section and that such availability can be prevented or eliminated by means of negotiations with such other countries, the President shall promptly initiate negotiations with the governments of such other countries to prevent such foreign availability.
(5) In order to further carry out the policies set forth in this Act, the Secretary shall establish, within the Office of Export Administration of the Department of Commerce, a capability to monitor and gather information with respect to the foreign availability of any goods or technology subject to export controls under this Act.
(6) Each department or agency of the United States with responsibilities with respect to export controls, including intelligence agencies, shall, consistent with the protection of intelligence sources and methods, furnish information to the Office of Export Administration concerning foreign availability of goods and technology subject to export controls under this Act, and such Office, upon request or where appropriate, shall furnish to such departments and agencies the information it gathers and receives concerning foreign availability.
(g) Indexing.—In order to ensure that requirements for validated licenses and qualified general licenses are periodically removed as goods or technology subject to such requirements become obsolete with respect to the national security of the United States, regulations issued by the Secretary may, where appropriate, provide for annual increases in the performance

levels of goods or technology subject to any such licensing requirement. Any such goods or technology which no longer meet the performance levels established by the latest such increase shall be removed from the list established pursuant to subsection (c) of this section unless, under such exceptions and under such procedures as the Secretary shall prescribe, any other department or agency of the United States objects to such removal and the Secretary determines, on the basis of such objection, that the goods or technology shall not be removed from the list. The Secretary shall also consider, where appropriate, removing site visitation requirements for goods and technology which are removed from the list unless objections described in this subsection are raised.

(h) Technical Advisory Committees.—(1) Upon written request by representatives of a substantial segment of any industry which produces any goods or technology subject to export controls under this section or being considered for such controls because of their significance to the national security of the United States, the Secretary shall appoint a technical advisory committee for any such goods or technology which the Secretary determines are difficult to evaluate because of questions concerning technical matters, worldwide availability, and actual utilization of production and technology, or licensing procedures. Each such committee shall consist of representatives of United States industry and Government, including the Departments of Commerce, Defense, and State and, in the discretion of the Secretary, other Government departments and agencies. No person serving on any such committee who is a representative of industry shall serve on such committee for more than four consecutive years.

(2) Technical advisory committees established under paragraph (1) shall advise and assist the Secretary, the Secretary of Defense, and any other department, agency, or official of the Government of the United States to which the President delegates authority under this Act, with respect to actions designed to carry out the policy set forth in section 3(2)(A) of this Act. Such committees, where they have expertise in such matters, shall be consulted with respect to questions involving (A) technical matters, (B) worldwide availability and actual utilization of production technology, (C) licensing procedures which affect the level of export controls applicable to any goods or technology, and (D) exports subject to multilateral controls in which the United States participates, including proposed revisions of any such multilateral controls. Nothing in this subsection shall prevent the Secretary or the Secretary of Defense from consulting, at any time, with any person representing industry or the general public, regardless of whether such person is a member of a technical advisory committee. Members of the public shall be given a reasonable opportunity, pursuant to regulations prescribed by the Secretary, to present evidence to such committees.

(3) Upon request of any member of any such committee, the Secretary may, if the Secretary determines it appropriate, reimburse such member for travel, subsistence, and other necessary expenses incurred by such member in connection with the duties of such member.

(4) Each such committee shall elect a chairman, and shall meet at least every three months at the call of the chairman, unless the chairman determines, in consultation with the other members of the committee, that such a meeting is not necessary to achieve the purposes of this subsection. Each such committee shall be terminated after a period of 2 years, unless extended by the Secretary for additional periods of 2 years. The Secretary shall consult each such committee with respect to such termination or extension of that committee.

(5) To facilitate the work of the technical advisory committees, the Secretary, in conjunction with other departments and agencies participating in the administration of this Act, shall disclose to each such committee adequate information, consistent with national security, pertaining to the reasons for the export controls which are in effect or contemplated for the goods or technology with respect to which that committee furnishes advice.

(6) Whenever a technical advisory committee certifies to the Secretary that goods or technology with respect to which such committee was appointed have become available in fact, to countries to which exports are controlled under this section, from sources outside the United States, including countries which participate with the United States in multilateral export controls, in sufficient quantity and of sufficient quality so that requiring a validated license for the export of such goods or technology would be ineffective in achieving the purpose set forth in subsection (a) of this section, and provides adequate documentation for such certification, in accordance with the procedures established pursuant to subsection (f)(1) of this section, the Secretary shall investigate such availability, and if such availability is verified, the Secretary shall remove the requirement of a validated license for the export of the goods or technology, unless the President determines that the absence of export controls under this section would prove detrimental to the national security of the United States. In any case in which the President determines that export controls under this section must be maintained notwithstanding foreign availability, the Secretary shall publish that determination together with a concise statement of its basis and the estimated economic impact of the decision.

(i) Multilateral Export Controls.—The President shall enter into negotiations with the governments participating in the group known as the Coordinating Committee (hereinafter in this subsection referred to as the "Committee") with a view toward accomplishing the following objectives:

(1) Agreement to publish the list of items controlled for export by agreement of the Committee, together with all notes, understandings, and other aspects of such agreement of the Committee, and all changes thereto.
(2) Agreement to hold periodic meetings with high-level representatives of such governments, for the purpose of discussing export control policy issues and issuing policy guidance to the Committee.
(3) Agreement to reduce the scope f the export controls imposed by agreement of the Committee to a level acceptable to and enforceable by all governments participating in the Committee.
(4) Agreement on more effective procedures for enforcing the export controls agreed to pursuant to paragraph (3).
(j) Commercial Agreements With Certain Countries.—(1) Any United States firm, enterprise, or other nongovernmental entity which, for commercial purposes, enters into any agreement with any agency of the government of a country to which exports are restricted for national security purposes, which agreement cites an intergovernmental agreement (to which the United States and such country are parties) calling for the encouragement of technical cooperation and is intended to result in the export from the United States to the other party of unpublished technical data of United States origin, shall report the agreement with such agency to the Secretary.
(2) The provisions of paragraph (1) shall not apply to colleges, universities, or other educational institutions.
(k) Negotiations With Other Countries.—The Secretary of State, in consultation with the Secretary of Defense, the Secretary of Commerce, and the heads of other appropriate departments and agencies, shall be responsible for conducting negotiations with other countries regarding their cooperation in restricting the export of goods and technology in order to carry out the policy set forth in section 3(9) of this Act, as authorized by subsection (a) of this section, including negotiations with respect to which goods and technology should be subject to multilaterally agreed export restrictions and what conditions should apply for exceptions from those restrictions.
(1) Diversion to Military Use of Controlled Goods or Technology.—(1) Whenever there is reliable evidence that goods or technology, which were exported subject to national security controls under this section to a country to which exports are controlled for national security purposes, have been diverted to significant military use in violation of the conditions of an export license, the Secretary for as long as that diversion to significant military use continues—,
(A) shall deny all further exports to the party responsible for that diversion of any goods or technology subject to national security controls under this section which contribute to that particular military use, regardless of whether such goods or technology are available to that country from sources outside the United States; and
(B) may take such additional steps under this Act with respect to the party referred to in subparagraph (A) as are feasible to deter the further military use of the previously exported goods or technology.
(2) As used in this subsection, the terms “diversion to significant military use” and “significant military use” means the use of United States goods or technology to design or produce any item on the United States Munitions List.

FOREIGN POLICY CONTROLS

Sec. 6. // 50 USC app. 2405. // (a) Authority.—(1) In order to carry out the policy set forth in paragraph (2)(B), (7), or (8) of section 3 of this Act, the President may prohibit or curtail the exportation of any goods, technology, or other information subject to the jurisdiction of the United States or exported by any person subject to the jurisdiction of the United States, to the extent necessary to further significantly the foreign policy of the United States or to fulfill its declared international obligations. The authority granted by this subsection shall be exercised by the Secretary, in consultation with the Secretary of State and such other departments and agencies as the Secretary considers appropriate, and shall be implemented by means of export licenses issued by the Secretary.
(2) Export controls maintained for foreign policy purposes shall expire on December 31, 1979, or one year after imposition, whichever is later, unless extended by the President in accordance with subsections (b) and (e). Any such extension and any subsequent extension shall not be for a period of more than one year.
(3) Whenever the Secretary denies any export license under this subsection, the Secretary shall specify in the notice to the applicant of the denial of such license that the license was denied under the authority contained in this subsection, and the reasons for such denial, with reference to the criteria set forth in subsection (b) of this section. The Secretary shall also include in such notice what, if any, modifications in or restrictions on the goods or technology for which the license was sought would allow such export to be compatible with controls implemented under this section, or the Secretary shall indicate in such notice which officers and employees of the Department of Commerce who are familiar with the application will be made reasonably available to the applicant for consultation with regard to such modifications or restrictions, if appropriate.
(4) In accordance with the provisions of section 10 of this Act, the Secretary of State shall have the right to review any export license application under this section which the Secretary of State requests to review.
(b) Criteria.—When imposing, expanding, or extending export controls under this section, the President shall consider—,
(1) the probability that such controls will achieve the intended foreign policy purpose, in light of other factors, including the

availability from other countries of the goods or technology proposed for such controls;
(2) the compatibility of the proposed controls with the foreign policy objectives of the United States, including the effort to counter international terrorism, and with overall United States policy toward the country which is the proposed target of the controls;
(3) the reaction of other countries to the imposition or expansion of such export controls by the United States;
(4) the likely effects of the proposed controls on the export performance of the United States, on the competitive position of the United States in the international economy, on the international reputation of the United States as a supplier of goods and technology, and on individual United States companies and their employees and communities, including the effects of the controls on existing contracts;
(5) the ability of the United States to enforce the proposed controls effectively; and
(6) the foreign policy consequences of not imposing controls.
(c) Consulatation With Industry.—The Secretary, before imposing export controls under this section, shall consult with such affected United States industries as the Secretary considers appropriate, with respect to the criteria set forth in paragraphs (1) and (4) of subsection (b) and such other matters as the Secretary considers appropriate.
(d) Alternative Means.—Before resorting to the imposition of export controls under this section, the President shall determine that reasonable efforts have been made to achieve the purposes of the controls through negotiations or other alternative means.
(e) Notification To Congress.—The President in every possible instance shall consult with the Congress before imposing any export control under this section. Except as provided in section 7(g)(3) of this Act, whenever the President imposes, expands, or extends export controls under this section, the President shall immediately notify the Congress of such action and shall submit with such notification a report specifying—,
(1) the conclusions of the President with respect to each of the criteria set forth in subsection (b); and
(2) the nature and results of any alternative means attempted under subsection (d), or the reasons for imposing, extending, or expanding the control without attempting any such alternative means.

Such report shall also indicate how such controls will further significantly the foreign policy of the United States or will further its declared international obligations. To the extent necessary to further the effectiveness of such export control, portions of such report may be submitted on a classified basis, and shall be subject to the provisions of section 12(c) of this Act.
(f) Exclusion for Medicine and Medical Supplies.—This section does not authorize export controls on medicine or medical supplies. It is the intent of Congress that the President not impose export controls under this section on any goods or technology if he determines that the principal effect of the export of such goods or technology would be to help meet basic human needs. This subsection shall not be construed to prohibit the President from imposing restrictions on the export of medicine or medical supplies, under the International Emergency Economic Powers Act. // 50 USC 1701 // This subsection shall not apply to any export control on medicine or medical supplies which is in effect on the effective date of this Act.
(g) Foreign Availability.—In applying export controls under this section, the President shall take all feasible steps to initiate and conclude negotiations with appropriate foreign governments for the purpose of securing the cooperation of such foreign governments in controlling the export to countries and consignees to which the United States export controls apply of any goods or technology comparable to goods or technology controlled under this section.
(h) International Obligations.—The provisions of subsections (b), (c), (d), (f), and (g) shall not apply in any case in which the President exercises the authority contained in this section to impose export controls, or to approve or deny export license applications, in order to fulfill obligations of the United States pursuant to treaties to which the United States is a party or pursuant to other international agreements.
(i) Countries Supporting International Terrorism.—The Secretary and the Secretary of State shall notify the Committee on Foreign Affairs of the House of Representatives and the Committee on Banking, Housing, and Urban Affairs of the Senate before any license is approved for the export of goods or technology valued at more than $7,000,000 to any country concerning which the Secretary of State has made the following determinations:
(1) Such country has repeatedly provided support for acts of international terrorism.
(2) Such exports would make a significant contribution to the military potential of such country, including its military logistics capability, or would enhance the ability of such country to support acts of international terrorism.
(j) Crime Control Instruments.—(1) Crime control and detection instruments and equipment shall be approved for export by the Secretary only pursuant to a validated export license.
(2) The provisions of this subsection shall not apply with respect to exports to countries which are members of the North Atlantic Treaty Organization or to Japan, Australia, or New Zealand, or to such other countries as the President shall designate consistent with the purposes of this subsection and section 502 B of the Foreign Assistance Act of 1961. // 22

USC 2304. //
(k) Control List.—The Secretary shall establish and maintain, as part of the commodity control list, a list of any goods or technology subject to export controls under this section, and the countries to which such controls apply. Such goods or technology shall be clearly identified as subject to controls under this section. Such list shall consist of goods and technology identified by the Secretary of State, with the concurrence of the Secretary. If the Secretary and the Secretary of State are unable to agree on the list, the matter shall be referred to the President. Such list shall be reviewed not less frequently than every three years in the case of controls maintained cooperatively with other countries, and annually in the case of all other controls, for the purpose of making such revisions as are necessary in order to carry out this section. During the course of such review, an assessment shall be made periodically of the availability from sources outside the United States, or any of its territories or possessions, of goods and technology comparable to those controlled for export from the United States under this section.

SHORT SUPPLY CONTROLS

Sec. 7. // 50 USC app. 2406. // (a) Authority.—(1) In order to carry out the policy set forth in section 3(2)(C) of this Act, the President may prohibit or curtail the export of any goods subject to the jurisdiction of the United States or exported by any person subject to the jurisdiction of the United States. In curtailing exports to carry out the policy set forth in section 3(2)(C) of this Act, the President shall allocate a portion of export licenses on the basis of factors other than a prior history of exportation. Such factors shall include the extent to which a country engages in equitable trade practices with respect to United States goods and treats the United States equitably in times of short supply.
(2) Upon imposing quantitative restrictions on exports of any goods to carry out the policy set forth in section 3(2)(C) of this Act, the Secretary shall include in a notice published in the Federal Register with respect to such restrictions an invitation to all interested parties to submit written comments within 15 days from the date of publication on the impact of such restrictions and the method of licensing used to implement them.
(3) In imposing export controls under this section, the President's authority shall include, but not be limited to, the imposition of export license fees.
(b) Monitoring.—(1) In order to carry out the policy set forth in section 3(2)(C) of this Act, the Secretary shall monitor exports, and contracts for exports, of any good (other than a commodity which is subject to the reporting requirements of section 812 of the Agricultural Act of 1970) // 7 USC 612c–3. // when the volume of such exports in relation to domestic supply contributes, or may contribute, to an increase in domestic prices or a domestic shortage, and such price increase or shortage has, or may have, a serious adverse impact on the economy or any sector thereof. Any such monitoring shall commerce at a time adequate to assure that the monitoring will result in a data base sufficient to enable policies to be developed, in accordance with section 3(2)(C) of this Act, to mitigate a short supply situation or serious inflationary price rise or, if export controls are needed, to permit imposition of such controls in a timely manner. Information which the Secretary requires to be furnished in effecting such monitoring shall be confidential, except as provided in paragraph (2) of this subsection.
(2) The results of such monitoring shall, to the extent practicable, be aggregated and included in weekly reports setting forth, with respect to each item monitored, actual and anticipated exports, the destination by country, and the domestic and worldwide price, supply, and demand. Such reports may be made monthly if the Secretary determines that there is insufficient information to justify weekly reports.
(3) The Secretary shall consult with the Secretary of Energy to determine whether monitoring or export controls under this section are warranted with respect to exports of facilities, machinery, or equipment normally and principally used, or intended to be used, in the production, conversion, or transportation of fuels and energy (except nuclear energy), including, but not limited to, drilling rigs, platforms, and equipment; petroleum refineries, natural gas processing, liquefaction, and gasification plants; facilities for production of synthetic natural gas or synthetic crude oil; oil and gas pipelines, pumping stations, and associated equipment; and vessels for transporting oil, gas, coal, and other fuels.
(c) Petitions for Monitoring or Controls.—(1)(A) Any entity, including a trade association, firm, or certified or recognized union or group of workers, which is representative of an industry or a substantial segment of an industry which processes metallic materials capable of being recycled with respect to which an increase in domestic prices or a domestic shortage, either of which results from increased exports, has or may have a significant adverse effect on the national economy or any sector thereof, may transmit a written petition to the Secretary requesting the monitoring of exports, or the imposition of export controls, or both, with respect to such material, in order to carry out the policy set forth in section 3(2)(C) of this Act.
(B) Each petition shall be in such form as the Secretary shall prescribe and shall contain information in support of the action requested. The petition shall include any information reasonably available to the petitioner indicating (i) that there has been a significant increase, in relation to a specific period of time, in exports of such material in relation to domestic supply, and (ii) that there has been a significant increase in the price of such material or a domestic shortage of such material under

circumstances indicating the price increase or domestic shortage may be related to exports.
(2) Within 15 days after receipt of any petition described in paragraph (1), the Secretary shall publish a notice in the Federal Register. The notice shall (A) include the name of the material which is the subject of the petition, (B) include the Schedule B number of the material as set forth in the Statistical Classification of Domestic and Foreign Commodities Exported from the United States, (C) indicate whether the petitioner is requesting that controls or monitoring, or both, be imposed with respect to the exportation of such material, and (D) provide that interested persons shall have a period of 30 days commencing with the date of publication of such notice to submit to the Secretary written data, views, or arguments, with or without opportunity for oral presentation, with respect to the matter involved. At the request of the petitioner or any other entity described in paragraph (1)(A) with respect to the material which is the subject of the petition, or at the request of any entity representative of producers or exporters of such material, the Secretary shall conduct public hearings with respect to the subject of the petition, in which case the 30–day period may be extended to 45 days.
(3) Within 45 days after the end of the 30- or 45–day period described in paragraph (2), as the case may be, the Secretary shall—,
(A) determine whether to impose monitoring or controls, or both, on the export of such material, in order to carry out the policy set forth in section 3(2)(C) of this Act; and
(B) publish in the Federal Register a detailed statement of the reasons for such determination.
(4) Within 15 days after making a determination under paragraph (3) to impose monitoring or controls on the export of a material, the Secretary shall publish in the Federal Register proposed regulations with respect to such monitoring or controls. Within 30 days following the publication of such proposed regulations, and after considering any public comments thereon, the Secretary shall publish and implement final regulations with respect to such monitoring or controls.
(5) For purposes of publishing notices in the Federal Register and scheduling public hearings pursuant to this subsection, the Secretary may consolidate petitions, and responses thereto, which involve the same or related materials.
(6) If a petition with respect to a particular material or group of materials has been considered in accordance with all the procedures prescribed in this subsection, the Secretary may determine, in the absence of significantly changed circumstances, that any other petition with respect to the same material or group of materials which is filed within 6 months after consideration of the prior petition has been completed does not merit complete consideration under this subsection.
(7) The procedures and time limits set forth in this subsection with respect to a petition filed under this subsection shall take precedence over any review undertaken at the initiative of the Secretary with respect to the same subject as that of the petition.
(8) The Secretary may impose monitoring or controls on a temporary basis after a petition is filed under paragraph (1)(A) but before the Secretary makes a determination under paragraph (3) if the Secretary considers such action to be necessary to carry out the policy set forth in section 3(2)(C) of this Act.
(9) The authority under this subsection shall not be construed to affect the authority of the Secretary under any other provision of this Act.
(10) Nothing contained in this subsection shall be construed to preclude submission on a confidential basis to the Secretary of information relevant to a decision to impose or remove monitoring or controls under the authority of this Act, or to preclude consideration of such information by the Secretary in reaching decisions required under this subsection. The provisions of this paragraph shall not be construed to affect the applicability of section 552(b) of title 5, United State Code.
(d) Domestically Produced Crude Oil.—(1) Notwithstanding any other provision of this Act and notwithstanding subsection (u) of section 28 of the Mineral Leasing Act of 1920 (30 U.S.C. 185), no domestically produced crude oil transported by pipeline over right-of-way granted pursuant to section 203 of the Trans–Alaska Pipeline Authorization Act (43 U.S.C. 1652) (except any such crude oil which (A) is exported to an adjacent foreign country to be refined and consumed therein in exchange for the same quantity of crude oil being exported from that country to the United States; such exchange must result through convenience or increased efficiency of transportation in lower prices for consumers of petroleum products in the United States as described in paragraph (2)(A)(ii) of this subsection, or (B) is temporarily exported for convenience or increased efficiency of transportation across parts of an adjacent foreign country and reenters the United States) may be exported from the United States, or any of its territories and possessions, unless the requirements of paragraph (2) of this subsection are met.
(2) Crude oil subject to the prohibition contained in paragraph (1) may be exported only if—,
(A) the President makes and publishes express findings that exports of such crude oil, including exchanges—,
(i) will not diminish the total quantity or quality of petroleum refined within, stored within, or legally committed to be transported to and sold within the United States;
(ii) will, within 3 months following the initiations of such exports or exchanges, result in (I) acquisition costs to the refiners which purchase the imported crude oil being lower than the acquisition costs such refiners would have to pay for the

domestically produced oil in the absence of such an export or exchange, and (II) not less than 75 percent of such savings in costs being reflected in wholesale and retail prices of products refined from such imported crude oil;
(iii) will be made only pursuant to contracts which may be terminated if the crude oil supplies of the United States are interrupted, threatened, or diminished;
(iv) are clearly necessary to protect the national interest; and
(v) are in accordance with the provisions of this Act; and
(B) the President reports such findings to the Congress and the Congress, within 60 days thereafter, agrees to a concurrent resolution approving such exports on the basis of the findings.
(3) Notwithstanding any other provision of this section or any other provision of law, including subsection (u) of section 28 of the Mineral Leasing Act of 1920, // 30 USC 185. // the President may export oil to any country pursuant to a bilateral international oil supply agreement entered into by the United States with such nation before June 25, 1979, or to any country pursuant to the International Emergency Oil Sharing Plan of the International Energy Agency.
(e) Refined Petroleum Products.—(1) No refined petroleum product may be exported except pursuant to an export license specifically authorizing such export. Not later than 5 days after an application for a license to export any refined petroleum product or residual fuel oil is received, the Secretary shall notify the Congress of such application, together with the name of the exporter, the destination of the proposed export, and the amount and price of the proposed export. Such notification shall be made to the chairman of the Committee on Foreign Affairs of the House of Representatives and the chairman of the Committee on Banking, Housing, and Urban Affairs of the Senate.
(2) The Secretary may not grant such license during the 30–day period beginning on the date on which notification to the Congress under paragraph (1) is received, unless the President certifies in writing to the Speaker of the House of Representatives and the President pro tempore of the Senate that the proposed export is vital to the national interest and that a delay in issuing the license would adversely affect that interest.
(3) This subsection shall not apply to (A) any export license application for exports to a country with respect to which historical export quotas established by the Secretary on the basis of past trading relationships apply, or (B) any license application for exports to a country if exports under the license would not result in more than 250,000 barrels of refined petroleum products being exported from the United States to such country in any fiscal year.
(4) For purposes of this subsection, “refined petroleum product” means gasoline, kerosene, distillates, propane or butane gas, diesel fuel, and residual fuel oil refined within the United States or entered for consumption within the United States.
(5) The Secretary may extend any time period prescribed in section 10 of this Act to the extent necessary to take into account delays in action by the Secretary on a license application on account of the provisions of this subsection.
(f) Certain Petroleum Products.—Petroleum products refined in United States Foreign Trade Zones, or in the United States Territory of Guam, from foreign crude oil shall be excluded from any quantitative restrictions imposed under this section except that, if the Secretary finds that a product is in short supply, the Secretary may issue such regulations as may be necessary to limit exports.
(g) Agricultural Commodities.—(1) The authority conferred by this section shall not be exercised with respect to any agricultural commodity, including fats and oils or animal hides or skins, without the approval of the Secretary of Agriculture. The Secretary of Agriculture shall not approve the exercise of such authority with respect to any such commodity during any period for which the supply of such commodity is determined by the Secretary of Agriculture to be in excess of the requirements of the domestic economy except to the extent the President determines that such exercise of authority is required to carry out the policies set forth in subparagraph (A) or (B) of paragraph (2) of section 3 of this Act. the Secretary of Agriculture shall, by exercising the authorities which the Secretary of Agriculture has under other applicable provisions of law, collect data with respect to export sales of animal hides and skins.
(2) Upon approval of the Secretary, in consultation with the Secretary of Agriculture, agricultural commodities purchased by or for use in a foreign country may remain in the United States for export at a later date free from any quantitative limitations on export which may be imposed to carry out the policy set forth in section 3(2)(C) of this Act subsequent to such approval. The Secretary may not grant such aproval unless the Secretary receives adequate assurance and, in conjunction with the Secretary of Agriculture, finds (A) that such commodities will eventually be exported, (B) that neither the sale nor export thereof will result in an excessive drain of scarce materials and have a serious domestic inflationary impact, (C) that storage of such commodities in the United States will not unduly limit the space available for storage of domestically owned commodities, and (D) that the purpose of such storage is to establish a reserve of such commodities for later use, not including resale to or use by another country. The Secretary may issue such regulations as may be necessary to implement this paragraph.
(3) If the authority conferred by this section or section 6 is exercised to prohibit or curtail the export of any agricultural commodity in order to carry out the policies set forth in subparagraph (B) or (C) of paragraph (2) of section 3 of this Act,

the President shall immediately report such prohibition or curtailment to the Congress, setting forth the reasons therefor in detail. If the Congress, within 30 days after the date of its receipt of such report, adopts a concurrent resolution disapproving such prohibition or curtailment, then such prohibition or curtailment shall cease to be effective with the adoption of such resolution. In the computation of such 30–day period, there shall be excluded the days on which either House is not in session because of an adjournment of more than 3 days to a day certain or because of an adjournment of the Congress sine die.

(h) Barter Agreements.—(1) The exportation pursuant to a barter agreement of any goods which may lawfully be exported from the United States, for any goods which may lawfully be imported into the United States, may be exempted, in accordance with paragraph (2) of this subsection, from any quantitative limitation on exports (other than any reporting requirement) imposed to carry out the policy set forth in section 3(2)(C) of this Act.

(2) The Secretary shall grant an exemption under paragraph (1) if the Secretary finds, after consultation with the appropriate department or agency of the United States, that—,

(A) for the period during which the barter agreement is to be performed—,

(i) the average annual quantity of the goods to be exported pursuant to the barter agreement will not be required to satisfy the average amount of such goods estimated to be required annually by the domestic economy and will be surplus thereto; and

(ii) the average annual quantity of the goods to be imported will be less than the average amount of such goods estimated to be required annually to supplement domestic production; and

(B) the parties to such barter agreement have demonstrated adequately that they intend, and have the capacity, to perform such barter agreement.

(3) For purposes of this subsection, the term “barter agreement” means any agreement which is made for the exchange, without monetary consideration, of any goods produced in the United States for any goods produced outside of the United States

(4) This subsection shall apply only with respect to barter agreements entered into after the effective date of this Act.

(i) Unprocessed Red Cedar.—(1) The Secretary shall require a validated license, under the authority contained in subsection (a) of this section, for the export of unprocessed western red cedar (Thuja plicata) logs, harvested from State or Federal lands. The Secretary shall impose quantitative restrictions upon the export of unprocessed western red cedar logs during the 3–year period beginning on the effective date of this Act as follows:

(A) Not more than thirty million board feet scribner of such logs may be exported during the first year of such 3–year period.

(B) Not more than fifteen million board feet scribner of such logs may be exported during the second year of such period.

(C) Not more than five million board feet scribner of such logs may be exported during the third year of such period.

After the end of such 3–year period, no unprocessed western red cedar logs may be exported from the United States.

(2) The Secretary shall allocate export licenses to exporters pursuant to this subsection on the basis of a prior history of exportation by such exporters and such other factors as the Secretary considers necessary and appropriate to minimize any hardship to the producers of western red cedar and to further the foreign policy of the United States.

(3) Unprocessed western red cedar logs shall not be considered to be an agricultural commodity for purposes of subsection (g) of this section.

(4) As used in this subsection, the term “unporcessed western red cedar” means red cedar timber which has not been processed into—,

(A) lumber without wane;

(B) chips, pulp, and pulp products;

(C) veneer and plywood;

(D) poles, posts, or pilings cut or treated with preservative for use as such and not intended to be further processed; or

(E) shakes and shingles.

(j) Export of Horses.—(1) Notwithstanding any other provision of this Act, no horse may be exported by sea from the United States, or any of its territories and possessions, unless such horse is part of a consignment of horses with respect to which a waiver has been granted under paragraph (2) of this subsection.

(2) The Secretary, in consultation with the Secretary of Agriculture, may issue regulations providing for the granting of waivers permitting the export by sea of a specified consignment of horses, if the Secretary, in consultation with the Secretary of Agriculture, determines that no horse in that consignment is being exported for purposes of slaughter.

FOREIGN BOYCOTTS

Sec. 8. // 50 USC app. 2047. // (a) Prohibitions and Exceptions.—(1) For the purpose of implementing the policies set forth

in subparagraph (A) or (B) of paragraph (5) of section 3 of this Act, the President shall issue regulations prohibiting any United States person, with respect to his activities in the interstate or foreign commerce of the United States, from taking or knowingly agreeing to take any of the following actions with intent to comply with, further, or support any boycott fostered or imposed by a foreign country against a country which is friendly to the United States and which is not itself the object of any form of boycott pursuant to United States law or regulation:

(A) Refusing, or requiring any other person to refuse, to do business with or in the boycotted country, with any business concern organized under the laws of the boycotted country, with any national or resident of the boycotted country, or with any other person, pursuant to an agreement with, a requirement of, or a request from or on behalf of the boycotting country. The mere absence of a business relationship with or in the boycotted country with any business concern organized under the laws of the boycotted country, with any national or resident of the boycotted country, or with any other person, does not indicate the existence of the intent required to establish a violation of regulations issued to carry out this subparagraph.

(B) Refusing, or requiring any other person to refuse, to employ or otherwise discriminating against any United States person on the basis of race, religion, sex, or national origin of that person or of any owner, officer, director, or employee of such person.

(C) Furnishing information with respect to the race, religion, sex, or national origin of any United States person or of any owner, officer, director, or employee of such person.

(D) Furnishing information about whether any person has, has had, or proposes to have any business relationship (including a relationship by way of sale, purchase, legal or commercial representation, shipping or other transport, insurance, investment, or supply) with or in the boycotted country, with any business concern organized under the laws of the boycotted country, with any national or resident of the boycotted country, or with any other person which is known or believed to be restricted from having any business relationship with or in the boycotting country. Nothing in this paragraph shall prohibit the furnishing of normal business information in a commercial context as defined by the Secretary.

(E) Furnishing information about whether any person is a member of, has made contributions to, or is otherwise associated with or involved in the activities of any charitable or fraternal organization which supports the boycotted country.

(F) Paying, honoring, confirming, or otherwise implementing a letter of credit which contains any condition or requirement compliance with which is prohibited by regulations issued pursuant to this paragraph, and no United States person shall, as a result of the application of this paragraph, be obligated to pay or otherwise honor or implement such letter of credit.

(2) Regulations issued pursuant to paragraph (1) shall provide exceptions for—,

(A) complying or agreeing to comply with requirements (i) prohibiting the import of goods or services from the boycotted country or goods produced or services provided by any business concern organized under the laws of the boycotted country or by nationals or residents of the boycotted country, or (ii) prohibiting the shipment of goods to the boycotting country on a carrier of the boycotted country, or by a route other than that prescribed by the boycotting country or the recipient of the shipment;

(B) complying or agreeing to comply with import and shipping document requirements with respect to the country of origin, the name of the carrier and route of shipment, the name of the supplier of the shipment or the name of the provider of other services, except that no information knowingly furnished or conveyed in response to such requirements may be stated in negative, blacklisting, or similar exclusionary terms, other than with respect to carriers or route of shipment as may be permitted by such regulations in order to comply with precautionary requirements protecting against war risks and confiscation;

(C) complying or agreeing to comply in the normal course of business with the unilateral and specific selection by a boycotting country, or national or resident thereof, of carriers, insurers, suppliers of services to be performed within the boycotting country or specific goods which, in the normal course of business, are identifiable by source when imported into the boycotting country;

(D) complying or agreeing to comply with export requirements of the boycotting country relating to shipments or transshipments of exports to the boycotted country, to any business concern of or organized under the laws of the boycotted country, or to any national or resident of the boycotted country;

(E) compliance by an individual or agreement by an individual to comply with the immigration or passport requirements of any country with respect to such individual or any member of such individual's family or with requests for information regarding requirements of employment of such individual within the boycotting country; and

(F) compliance by a United States person resident in a foreign country or agreement by such person to comply with the laws of that country with respect to his activities exclusively therein, and such regulations may contain exceptions for such resident complying with the laws or regulations of that foreign country governing imports into such country of trademarked, trade named, or similarly specifically identifiable products, or components of products for his own use, including the performance of contractual services within that country, as may be defined by such regulations.

(3) Regulations issued pursuant to paragraphs (2)(C) and (2)(F) shall not provide exceptions from paragraphs (1)(B) and (1)(C).
(4) Nothing in this subsection may be construed to supersede or limit the operation of the antitrust or civil rights laws of the United States.
(5) This section shall apply to any transaction or activity undertaken, by or through a United States person or any other person, with intent to evade the provisions of this section as implemented by the regulations issued pursuant to this subsection, and such regulations shall expressly provide that the exceptions set forth in paragraph (2) shall not permit activities or agreements (expressed or implied by a course of conduct, including a pattern of responses) otherwise prohibited, which are not within the intent of such exceptions.
(b) Foreign Policy Controls.—(1) In addition to the regulations issued pursuant to subsection (a) of this section, regulations issued under section 6 of this Act shall implement the policies set forth in section 3(5).
(2) Such regulations shall require that any United States person receiving a request for the furnishing of information, the entering into or implementing of agreements, or tthe taking of any other action referred to in section 3(5) shall report that fact to the Secretary, together with such other information concerning such request as the Secretary may require for such action as the Secretary considers appropriate for carrying out the policies of that section. Such person shall also report to the Secretary whether such person intends to comply and whether such person has complied with such request. Any report filed pursuant to this paragraph shall be made available promptly for public inspection and copying, except that information regarding the quantity, description, and value of any goods or technology to which such report relates may be kept confidential if the Secretary determines that disclosure thereof would place the United States person involved at a competitive disadvantage. The Secretary shall periodically transmit summaries of the information contained in such reports to the Secretary of State for such action as the Secretary of State, in consultation with the Secretary, considers appropriate for carrying out the policies set forth in section 3(5) of this Act.
(c) Preemption.—The provisions of this section and the regulations issued pursuant thereto shall preempt any law, rule, or regulation of any of the several States or the District of Columbia, or any of the territories or possessions of the United States, or of any governmental subdivision thereof, which law, rule, or regulation pertains to participation in, compliance with, implementation of, or the furnishing of information regarding restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries.

PROCEDURES FOR HARDSHIP RELIEF FROM EXPORT CONTROLS

Sec. 9 // 50 USC app. 2408. // (a) Filing of Petitions.—Any person who, in such person's domestic manufacturing process or other domestic business operation, utilizes a product produced abroad in whole or in part from a good historically obtained from the United States but which has been made subject to export controls, or any person who historically has exported such a good, may transmit a petition of hardship to the Secretary requesting an exemption from such controls in order to alleviate any unique hardship resulting from the imposition of such controls. A petition under this section shall be in such form as the Secretary shall prescribe and shall contain information demonstrating the need for the relief requested.
(b) Decision of the Secretary.—Not later than 30 days after receipt of any petition under subsection (a), the Secretary shall transmit a written decision to the petitioner granting or denying the requested relief. Such decision shall contain a statement setting forth the Secretary's basis for the grant or denial. Any exemption granted may be subject to such conditions as the Secretary considers appropriate.
(c) Factors To Be Considered.—For purposes of this section, the Secretary's decision with respect to the grant or denial of relief from unique hardship resulting directly or indirectly from the imposition of export controls shall reflect the Secretary's consideration of factors such as the following:
(1) Whether denial would cause a unique hardship to the petitioner which can be alleviated only by granting an exception to the applicable regulations. In determining whether relief shall be granted, the Secretary shall take into account—,
(A) ownership of material for which there is no practicable domestic market by virtue of the location or nature of the material;
(B) potential serious financial loss of the applicant if not granted an exception;
(C) inability to obtain, except through import, an item essential for domestic use which is produced abroad from the good under control;
(D) the extent to which denial would conflict, to the particular detriment of the applicant, with other national policies including those reflected in any international agreement to which the United States is a party;
(E) possible adverse effects on the economy (including unemployment) in any locality or region of the United States; and
(F) other relevant factors, including the applicant's lack of an exporting history during any base period that may be established with respect to export quotas for the particular good..
(2) The effect a finding in favor of the applicant would have on attainment of the basic objectives of the short supply control

program.

In all cases, the desire to sell at higher prices and thereby obtain greater profits shall not be considered as evidence of a unique hardship, nor will circumstances where the hardship is due to imprudent acts or failure to act on the part of the petitioner.

PROCEDURES FOR PROCESSING EXPORT LICENSE APPLICATIONS

Sec. 10. // 50 USC app. 2409. // (a) Primary Responsibility of the Secretary.—(1) All export license applications required under this Act shall be submitted by the applicant to the Secretary. All determinations with respect to any such application shall be made by the Secretary, subject to the procedures provided in this section.

(2) It is the intent of the Congress that a determination with respect to any export license application be made to the maximum extent possible by the Secretary without referral of such application to any other department or agency of the Government.

(3) To the extent necessary, the Secretary shall seek information and recommendations from the Government departments and agencies concerned with aspects of United States domestic and foreign policies and operations having an important bearing on exports. Such departments and agencies shall cooperate fully in rendering such information and recommendations.

(b) Initial Screening.—Within 10 days after the date on which any export license application is submitted pursuant to subsection (a)(1), the Secretary shall—,

(1) send the applicant an acknowledgment of the receipt of the application and the date of the receipt;

(2) submit to the applicant a written description of the procedures required by this section, the responsibilities of the Secretary and of other departments and agencies with respect to the application, and the rights of the applicant;

(3) return the application without action if the application is improperly completed or if additional information is required, with sufficient information to permit the application to be properly resubmitted, in which case if such application is resubmitted, it shall be treated as a new application for the purpose of calculating the time periods prescribed in this section;

(4) determine whether it is necessary to refer the application to any other department or agency and, if such referral is determined to be necessary, inform the applicant of any such department or agency to which the application will be referred; and

(5) determine whether it is necessary to submit the application to a multilateral review process, pursuant to a multilateral agreement, formal or informal, to which the United States is a party and, if so, inform the applicant of this requirement.

(c) Action on Certain Applications.—In each case in which the Secretary determines that it is not necessary to refer an application to any other department or agency for its information and recommendations, a license shall be formally issued or denied within 90 days after a properly completed application has been submitted pursuant to this section.

(d) Referral to Other Departments and Agencies.—In each case in which the Secretary determines that it is necessary to refer an application to any other department or agency for its information and recommendations, the Secretary shall, within 30 days after the submission of a properly completed application—,

(1) refer the application, together with all necessary analysis and recommendations of the Department of Commerce, concurrently to all such departments or agencies; and

(2) if the applicant so requests, provide the applicant with an opportunity to review for accuracy any documentation to be referred to any such department or agency with respect to such application for the purpose of describing the export in question in order to determine whether such documentation accurately describes the proposed export.

(e) Action by Other Departments and Agencies.—(1) Any department or agency to which an application is referred pursuant to subsection (d) shall submit to the Secretary, within 30 days after its receipt of the application, the information or recommendations requested with respect to such application. Except as provided in paragraph (2), any such department or agency which does not submit its recommendations within the time period prescribed in the preceding sentence shall be deemed by the Secretary to have no objection to the approval of such application.

(2) If the head of any such department or agency notifies the Secretary before the expiration of the time period provided in paragraph (1) for submission of its recommendations that more time is required for review by such department or agency, such department or agency shall have an additional 30–day period to submit its recommendations to the Secretary. If such department or agency does not submit its recommendations within the time period prescribed by the preceding sentence, it shall be deemed by the Secretary to have no objection to the approval of such application.

(f) Action by the Secretary.—(1) Within 90 days after receipt of the recommendations of other departments and agencies with respect to a license application, as provided in subsection (e), the Secretary shall formally issue or deny the license. In deciding whether to issue or deny a license, the Secretary shall take into account any recommendation of a department or agency with respect to the application in question. In cases where the Secretary receives conflicting recommendations, the

Secretary shall, within the 90–day period provided for in this subsection, take such action as may be necessary to resolve such conflicting recommendations.

(2) In cases where the Secretary receives questions or negative considerations or recommendations from any other department or agency with respect to an application, the Secretary shall, to the maximum extent consistent with the national security and foreign policy of the United States, inform the applicant of the specific questions raised and any such negative considerations or recommendations, and shall accord the applicant an opportunity, before the final determination with respect to the application is made, to respond in writing to such questions, considerations, or recommendations.

(3) In cases where the Secretary has determined that an application should be denied, the applicant shall be informed in writing, within 5 days after such determination is made, of the determination, of the statutory basis for denial, the policies set forth in section 3 of the Act which would be furthered by denial, and, to the extent consistent with the national security and foreign policy of the United States, the specific considerations which led to the denial, and of the availability of appeal procedures. In the event decisions on license applications are deferred inconsistent with the provisions of this section, the applicant shall be so informed in writing within 5 days after such deferral.

(4) If the Secretary determines that a particular application or set of applications is of exceptional importance and complexity, and that additional time is required for negotiations to modify the application or applications, the Secretary may extend any time period prescribed in this section. The Secretary shall notify the Congress and the applicant of such extension and the reasons therefor.

(g) Special Procedures for Secretary of Defense.—(1) Notwithstanding any other provision of this section, the Secretary of Defense is authorized to review any proposed export of any goods or technology to any country to which exports are controlled for national security purposes and, whenever the Secretary of Defense determines that the export of such goods or technology will make a significant contribution, which would prove detrimental to the national security of the United States, to the military potential of any such country, to recommend to the President that such export be disapproved.

(2) Notwithstanding any other provision of law, the Secretary of Defense shall determine, in consultation with the Secretary, and confirm in writing the types and categories of transactions which should be reviewed by the Secretary of Defense in order to make a determination referred to in paragraph (1). Whenever a license or other authority is requested for the export to any country to which exports are controlled for national security purposes of goods or technology within any such type or category, the Secretary shall notify the Secretary of Defense of such request, and the Secretary may not issue any license or other authority pursuant to such request before the expiration of the period within which the President may disapprove such export. The Secretary of Defense shall carefully consider any notification submitted by the Secretary pursuant to this paragraph and, not later than 30 days after notification of the request, shall—,

(A) recommend to the President that he disapprove any request for the export of the goods or technology involved to the particular country if the Secretary of Defense determines that the export of such goods or technology will make a significant contribution, which would prove detrimental to the national security of the United States, to the military potential of such country or any other country;

(B) notify the Secretary that he would recommend approval subject to specified conditions; or

(C) recommend to the Secretary that the export of goods or technology be approved.

If the President notifies the Secretary, within 30 days after receiving a recommendation from the Secretary of Defense, that he disapproves such export, no license or other authority may be issued for the export of such goods or technology to such country.

(3) The Secretary shall approve or disapprove a license application, and issue or deny a license, in accordance with the provisions of this subsection, and, to the extent applicable, in accordance with the time periods and procedures otherwise set forth in this section.

(4) Whenever the President exercises his authority under this subsection to modify or overrule a recommendation made by the Secretary of Defense or exercises his authority to modify or overrule any recommendation made by the Secretary of Defense under subsection (c) or (d) of section 5 of this Act with respect to the list of goods and technologies controlled for national security purposes, the President shall promptly transmit to the Congress a statement indicating his decision, together with the recommendation of the Secretary of Defense.

(h) Multilateral Controls.—In any case in which an application, which has been finally approved under subsection (c), (f), or (g) of this section, is required to be submitted to a multilateral review process, pursuant to a multilateral agreement, formal or informal, to which the United States is a party, the license shall not be issued as prescribed in such subsections, but the Secretary shall notify the applicant of the approval of the application (and the date of such approval) by the Secretary subject to such multilateral review. The license shall be issued upon approval of the application under such multilateral review. If such multilateral review has not resulted in a determination with respect to the application within 60 days after such date, the Secretary's approval of the license shall be final and the license shall be issued, unless the Secretary

determines that issuance of the license would prove detrimental to the national security of the United States. At the time at which the Secretary makes such a determination, the Secretary shall notify the applicant of the determination and shall notify the Congress of the determination, the reasons for the determination, the reasons for which the multilateral review could not be concluded within such 60–day period, and the actions planned or being taken by the United States Government to secure conclusion of the multilateral review. At the end of every 60–day period after such notification to Congress, the Secretary shall advise the applicant and the Congress of the status of the application, and shall report to the Congress in detail on the reasons for the further delay and any further actions being taken by the United States Government to secure conclusion of the multilateral review. In addition, at the time at which the Secretary issues or denies the license upon conclusion of the multilateral review, the Secretary shall notify the Congress of such issuance or denial and of the total time required for the multilateral review.

(i) Record.—The Secretary and any department or agency to which any application is referred under this section shall keep accurate records with respect to all applications considered by the Secretary or by any such department or agency, including, in the case of the Secretary, any dissenting recommendations received from any such department or agency.

(j) Appeal and Court Action.—(1) The Secretary shall establish appropriate procedures for any applicant to appeal to the Secretary the denial of an export license application of the applicant.

(2) In any case in which any action prescribed in this section is not taken on a license application within the time periods established by this section (except in the case of a time period extended under subsection (f)(4) of which the applicant is notified), the applicant may file a petition with the Secretary requesting compliance with the requirements of this section. When such petition is filed, the Secretary shall take immediate steps to correct the situation giving rise to the petition and shall immediately notify the applicant of such steps.

(3) If, within 30 days after a petition is filed under paragraph (2), the processing of the application has not been brought into conformity with the requirements of this section, or the application has been brought into conformity with such requirements but the Secretary has not so notified the applicant, the applicant may bring an action in an appropriate United States district court for a restraining order, a temporary or permanent injunction, or other appropriate relief, to require compliance with the requirements of this section. The United States district courts shall have jurisdiction to provide such relief, as appropriate.

VIOLATIONS

Sec. 11. // 50 USC app. 2410. // (a) In General.—Except as provided in subsection (b) of this section, whoever knowingly violates any provision of this Act or any regulation, order, or license issued thereunder shall be fined not more than five times the value of the exports involved or $50,000, whichever is greater, or imprisoned not more than 5 years, or both.

(b) Willful Violations.—(1) Whoever willfully exports anything contrary to any provision of this Act or any regulation, order, or license issued thereunder, with knowledge that such exports will be used for the benefit of any country to which exports are restricted for national security or foreign policy purposes, shall be fined not more than five times the value of the exports involved or $100,000, whichever is greater, or imprisoned not more than 10 years, or both.

(2) Any person who is issued a validated license under this Act for the export of any good or technology to a controlled country and who, with knowledge that such a good or technology is being used by such controlled country for military or intelligence gathering purposes contrary to the conditions under which the license was issued, willfully fails to report such use to the Secretary of Defense, shall be fined not more than five times the value of the exports involved or $100,000, whichever is greater, or imprisoned for not more than 5 years, or both. For purposes of this paragraph, "controlled country" means any country described in section 620(f) of the Foreign Assistance Act of 1961. // 22 USC 2370. //

(c) Civil Penalties; Administrative Sanctions.—(1) The head of any department or agency exercising any functions under this Act, or any officer or employee of such department or agency specifically designated by the head thereof, may impose a civil penalty not to exceed $10,000 for each violation of this Act or any regulation, order, or license issued under this Act, either in addition to or in lieu of any other liability or penalty which may be imposed.

(2)(A) The authority under this Act to suspend or revoke the authority of any United States person to export goods or technology may be used with respect to any violation of the regulations issued pursuant to section 8(a) of this Act.

(B) Any administrative sanction (including any civil penalty or any suspension or revocation of authority to export) imposed under this Act for a violation of the regulations issued pursuant to section 8(a) of this Act may be imposed only after notice and opportunity for an agency hearing on the record in accordance with sections 554 through 557 of title 5, United States Code.

(C) Any charging letter or other document initiating administrative proceedings for the imposition of sanctions for violations of the regulations issued pursuant to section 8(a) of this Act shall be made available for public inspection and copying.

(d) Payment of Penalties.—The payment of any penalty imposed pursuant to subsection (c) may be made a condition, for a period not exceeding one year after the imposition of such penalty, to the granting, restoration, or continuing validity of any export license, permission, or privilege granted or to be granted to the person upon whom such penalty is imposed. In

addition, the payment of any penalty imposed under subsection (c) may be deferred or suspended in whole or in part for a period of time no longer than any probation period (which may exceed one year) that may be imposed upon such person. Such a deferral or suspension shall not operate as a bar to the collection of the penalty in the event that the conditions of the suspension, deferral, or probation are not fulfilled.

(e) Refunds.—Any amount paid in satisfaction of any penalty imposed pursuant to subsection (c) shall be covered into the Treasury as a miscellaneous receipt. The head of the department or agency concerned may, in his discretion, refund any such penalty, within 2 years after payment, on the ground of a material error of fact of law in the imposition of the penalty. Notwithstanding section 1346(a) of title 28, United States Code, no action for the refund of any such penalty may be maintained in any court.

(f) Actions for Recovery of Penalties.—In the event of the failure of any person to pay a penalty imposed pursuant to subsection (c), a civil action for the recovery thereof may, in the discretion of the head of the department or agency concerned, be brought in the name of the United States. In any such action, the court shall determine de novo all issues necessary to the establishment of liability. Except as provided in this subsection and in subsection (d), no such liability shall be asserted, claimed, or recovered upon by the United States in any way unless it has previously been reduced to judgment.

(g) Other Authorities.—Nothing in subsection (c), (d), or (f) limits—,

(1) the availability of other administrative or judicial remedies with respect to violations of this Act, or any regulation, order, or license issued under this Act;

(2) the authority to compromise and settle administrative proceedings brought with respect to violations of this Act, or any regulation, order, or license issued under this Act; or

(3) the authority to compromise, remit or mitigate seizures and forfeitures pursuant to section 1(b) of title VI of the Act of June 15, 1917 (22 U.S.C. 401(b)).

ENFORCEMENT

Sec. 12. // 50 USC app. 2411. // (a) General Authority.—To the extent necessary or appropriate to the enforcement of this Act or to the imposition of any penalty, forfeiture, or liability arising under the Export Control Act of 1949 // 50 USC app. 2021 // or the Export Administration Act of 1969, the head of any department or agency exercising any function thereunder (and officers or employees of such department or agency specifically designated by the head thereof) may make such investigations and obtain such information from, require such reports or the keeping of such records by, make such inspection of the books, records, and other writings, premises, or property of, and take the sworn testimony of, any person. In addition, such officers or employees may administer oaths or affirmations, and may by subpena require any person to appear and testify or to appear and produce books, records, and other writings, or both, and in the case of contumacy by, or refusal to obey a subpena issued to, any such person, the district court of the United States for any district in which such person is found or resides or transacts business, upon application, and after notice to any such person and hearing, shall have jurisdiction to issue an order requiring such person to appear and give testimony or to appear and produce books, records, and other writings, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(b) Immunity.—No person shall be excused from complying with any requirements under this section because of his privilege against self–incrimination, but the immunity provisions of section 6002 of title 18, United States Code, shall apply with respect to any individual who specifically claims such privilege.

(c) Confidentiality.—(1) Except as otherwise provided by the third sentence of section 8(b)(2) and by section 11(c)(2)(C) of this Act, information obtained under this Act on or before June 30, 1980, which is deemed confidential, including Shippers' Export Declarations, or with reference to which a request for confidential treatment is made by the person furnishing such information, shall be exempt from disclosure under section 552 of title 5, United States Code, and such information shall not be published or disclosed unless the Secretary determines that the withholding thereof is contrary to the national interest. Information obtained under this Act after June 30, 1980, may be withheld only to the extent permitted y statute, except that information obtained for the purpose of consideration of, or concerning, license applications under this Act shall be withheld from public disclosure unless the release of such information is determined by the Secretary to be in the national interest. Enactment of this subsection shall not affect any judicial proceeding commenced under section 552 of title 5, United States Code, to obtain access to boycott reports submitted prior to October 31, 1976, which was pending on May 15, 1979; but such proceeding shall be continued as if this Act had not been enacted.

(2) Nothing in this Act shall be construed as authorizing the withholding of information from the Congress, and all information obtained at any time under this Act or previous Acts regarding the control of exports, including any report or license application required under this Act, shall be made available upon request to any committee or subcommittee of Congress of appropriate jurisdiction. No such committee or subcommittee shall disclose any information obtained under this Act or previous Acts regarding the control of exports which is submitted on a confidential basis unless the full committee

determines that the withholding thereof is contrary to the national interest.
(d) Reporting Requirements.—In the administration of this Act, reporting requirements shall be so designed as to reduce the cost of reporting, recordkeeping, and export documentation required under this Act to the extent feasible consistent with effective enforcement and compilation of useful trade statistics. Reporting, recordkeeping, and export documentation requirements shall be periodically reviewed and revised in the light of developments in the field of information technology.
(e) Simplification of Regulations.—The Secretary, in consultation with appropriate United States Government departments and agencies and with appropriate technical advisory committees established under section 5(h), shall review the regulations issued under this Act and the commodity control list in order to determine how compliance with the provisions of this Act can be facilitated by simplifying such regulations, by simplifying or clarifying such list, or by any other means.

EXEMPTION FROM CERTAIN PROVISIONS RELATING TO ADMINISTRATIVE PROCEDURE AND JUDICIAL REVIEW

Sec. 13. // 50 USC app. 2412. // (a) Exemption.—Except as provided in section 11(c)(2), the functions exercised under this Act are excluded from the operation of sections 551, 553 through 559, and 701 through 706 of title 5, United States Code.
(b) Public Participation.—It is the intent of the Congress that, to the extent practicable, all regulations imposing controls on exports under this Act be issued in proposed form with meaningful opportunity for public comment before taking effect. In cases where a regulation imposing controls under this Act is issued with immediate effect, it is the intent of the Congress that meaningful opportunity for public comment also be provided and that the regulation be reissued in final form after public comments have been fully considered.

ANNUAL REPORT

Sec. 14. // 50 USC app. 2413. // (a) Contents.—Not later than December 31 of each year, the Secretary shall submit to the Congress a report on the administration of this Act during the preceding fiscal year. All agencies shall cooperate fully with the Secretary in providing information for such report. Such report shall include detailed information with respect to—,
(1) the implementation of the policies set forth in section 3;
(2) general licensing activities under sections 5, 6, and 7, and any changes in the exercise of the authorities contained in sections 5(a), 6(a), and 7(a);
(3) the results of the review of United States policy toward individual countries pursuant to section 5(b);
(4) the results, in as much detail as may be included consistent with the national security and the need to maintain the confidentiality of proprietary information, of the actions, including reviews and revisions of export controls maintained for national security purposes, required by section 5(c)(3);
(5) actions taken to carry out section 5(d);
(6) changes in categories of items under export control referred to in section 5(e);
(7) determinations of foreign availability made under section 5(f), the criteria used to make such determinations, the removal of any export controls under such section, and any evidence demonstrating a need to impose export controls for national security purposes notwithstanding foreign availability;
(8) actions taken in compliance with section 5(f)(5);
(9) the operation of the indexing system under section 5(g);
(10) consultations with the technical advisory committees established pursuant to section 5(h), the use made of the advice rendered by such committees, and the contributions of such committees toward implementing the policies set forth in this Act;
(11) the effectiveness of export controls imposed under section 6 in furthering the foreign policy of the United States;
(12) export controls and monitoring under section 7;
(13) the information contained in the reports required by section 7(b)(2), together with an analysis of—,
(A) the impact on the economy and world trade of shortages or increased prices for commodities subject to monitoring under this Act or section 812 of the Agricultural Act of 1970;

// 7 USC 612c–3. //

(B) the worldwide supply of such commodities; and
(C) actions being taken by other countries in response to such shortages or increased prices;
(14) actions taken by the President and the Secretary to carry out the antiboycott policies set forth in section 3(5) of this Act;
(15) organizational and procedural changes undertaken in furtherance of the policies set forth in this Act, including changes to increase the efficiency of the export licensing process and to fulfill the requirements of section 10, including an analysis of the time required to process license applications, the number and disposition of export license applications taking more than 90 days to process, and an accounting of appeals received, court orders issued, and actions taken pursuant thereto under

subsection (j) of such section;
(16) delegations of authority by the President as provided in section 4(e) of this Act;
(17) efforts to keep the business sector of the Nation informed with respect to policies and procedures adopted under this Act;
(18) any reviews undertaken in furtherance of the policies of this Act, including the results of the review required by section 12(d), and any action taken, on the basis of the review required by section 12(e), to simplify regulations issued under this Act;
(19) violations under section 11 and enforcement activities under section 12; and
(20) the issuance of regulations under the authority of this Act, including an explanation of each case in which regulations were not issued in accordance with the first sentence of section 13(b).
(b) Report on Certain Export Controls.—To the extent that the President determines that the policies set forth in section 3 of this Act require the control of the export of goods and technology other than those subject to multilateral controls, or require more stringent controls than the multilateral controls, the President shall include in each annual report the reasons for the need to impose, or to continue to impose, such controls and the estimated domestic economic impact on the various industries affected by such controls.
(c) Report on Negotiations.—The President shall include in each annual report a detailed report on the progress of the negotiations required by section 5(i), until such negotiations are concluded.

REGULATORY AUTHORITY

Sec. 15. // 50 USC app. 2414. // The President and the Secretary may issue such regulations as are necessary to carry out the provisions of this Act. Any such regulations issued to carry out the provisions of section 5(a), 6(a), 7(a), or 8(b) may apply to the financing, transporting, or other servicing of exports and the participation therein by any person.

DEFINITIONS

Sec. 16. // 50 USC app. 2415. // As used in this Act—,
(1) the term "person" includes the singular and the plural and any individual, partnership, corporation, or other form of association, including any government or agency thereof;
(2) the term "United States person" means any United States resident or national (other than an individual resident outside the United States and employed by other than a United States person), any domestic concern (including any permanent domestic establishment of any foreign concern) and any foreign subsidiary or affiliate (including any permanent foreign establishment) of any domestic concern which is controlled in fact by such domestic concern, as determined under regulations of the President;
(3) the term "good" means any article, material, supply or manufactured product, including inspection and test equipment, and excluding technical data;
(4) the term "technology" means the information and know-how that can be used to design, produce, manufacture, utilize, or reconstruct goods, including computer software and technical data, but not the goods themselves; and
(5) the term "Secretary" means the Secretary of Commerce.

EFFECT ON OTHER ACTS

Sec. 17. // 50 USC app. 2416. // (a) In General.—Nothing contained in this Act shall be construed to modify, repeal, supersede, or otherwise affect the provisions of any other laws authorizing control over exports of any commodity.
(b) Coordination of Controls.—The authority granted to the President under this Act shall be exercised in such manner as to achieve effective coordination with the authority exercised under section 38 of the Arms Export Control Act (22 U.S.C. 2778).
(c) Civil Aircraft Equipment.—Notwithstanding any other provision of law, any product (1) which is standard equipment, certified by the Federal Aviation Administration, in civil aircraft and is an integral part of such aircraft, and (2) which is to be exported to a country other than a controlled country, shall be subject to export controls exclusively under this Act. Any such product shall not be subject to controls under section 38(b)(2) of the Arms Export Control Act. For purposes of this subsection, the term "controlled country" means any country described in section 620(f) of the Foreign Assistance Act of 1961. // 22 USC 2370. //
(d) Nonproliferation Controls.—(1) Nothing in section 5 or 6 of this Act shall be construed to supersede the procedures published by the President pursuant to section 309(c) of the Nuclear Non–Proliferation Act of 1978.
(2) With respect to any export license application which, under the procedures published by the President pursuant to section 309(c) of the Nuclear Non–Proliferation Act of 1978, // 92 Stat. 141. 42 USC 2139. // is referred to the Subgroup on Nuclear Export Coordination or other interagency group, the provisions of section 10 of this Act shall apply with respect to

such license application only to the extent that they are consistent with such published procedures, except that if the processing of any such application under such procedures is not completed within 180 days after the receipt of the application by the Secretary, the applicant shall have the rights of appeal and court action provided in section 10(j) of this Act.

(e) Termination of Other Authority.—On October 1, 1979, the Mutual Defense Assistance Control Act of 1951 (22 U.S.C. 1611—1613d), is superseded.

AUTHORIZATION OF APPROPRIATIONS

Sec. 18. // 50 USC app. 2417. // (a) Requirement of Authorizing Legislation.—Notwithstanding any other provision of law, no appropriation shall be made under any law to the Department of Commerce for expenses to carry out the purposes of this Act unless previously and specifically authorized by law.

(b) Authorization.—There are authorized to be appropriated to the Department of Commerce to carry out the purposes of this Act—,

(1) $8,000,000 for each of the fiscal years 1980 and 1981, of which $1,250,000 shall be available for each such fiscal year only for purposes of carrying out foreign availability assessments pursuant to section 5(f)(5), and

(2) such additional amounts, for each such fiscal year, as may be necessary for increases in salary, pay, retirement, other employee benefits authorized by law, and other nondiscretionary costs.

EFFECTIVE DATE

Sec. 19. // 50 USC app. 2418. // (a) Effective Date.—This Act shall take effect upon the expiration of the Export Administration Act of 1969. // 50 USC app. 2401. //

(b) Issuance of Regulations.—(1) Regulations implementing the provisions of section 10 of this Act // 50 USC app. 2409 // shall be issued and take effect not later than July 1, 1980.

(2) Regulations implementing the provisions of section 7(c) of this Act // 50 USC app. 2406 // shall be issued and take effect not later than January 1, 1980.

TERMINATION DATE

Sec. 20. // 50 USC app. 2419. // The authority granted by this Act terminates on September 30, 1983, or upon any prior date which the President by proclamation may designate.

SAVINGS PROVISIONS

Sec. 21. // 50 USC app. 2420. // (a) In General.—All delegations, rules, regulations, orders, determinations, licenses, or other forms of administrative action which have been made, issued, conducted, or allowed to become effective under the Export Control Act of 1949 // 50 USC app. 2021 // or the Export Administration Act of 1969 and which are in effect at the time this Act takes effect shall continue in effect according to their terms until modified, superseded, set aside, or revoked under this Act.

(b) Administrative Proceedings.—This Act shall not apply to any administrative proceedings commenced or any application for a license made, under the Export Administration Act of 1969, which is pending at the time this Act takes effect.

TECHNICAL AMENDMENTS

Sec. 22. (a) Section 38(e) of the Arms Export Control Act (22 U.S.C. 2788(E)) is amended by striking out “sections 6(c), (d), (e), and (f) and 7(a) and (c) of the Export Administration Act of 1969” and inserting in lieu thereof “subsections (c), (d), (e), and (f) of section 11 of the Export Administration Act of 1979, and by subsections (a) and (c) of section 12 of such Act”.

(b)(1) Section 103(c) of the Energy Policy and Conservation Act (42 U.S.C. 6212(c)) is amended—,

(A) by striking out “1969” and inserting in lieu thereof “1979”; and

(B) by striking out “(A)” and inserting in lieu thereof “(C)”.

(2) Section 254(e)(3) of such Act (42 U.S.C. 6274(e)(3)) is amended by striking out “section 7 of the Export Administration Act of 1969” and inserting in lieu thereof “section 12 of the Export Administration Act of 1979”.

(c) Section 993(c)(2)(D) of the Internal Revenue Code of 1954 (26 U. S.C. 993(c)(2)(D)) is amended—,

(1) by striking out “4(b) of the Export Administration Act of 1969 (50 U.S.C. App. 2403(b))” and inserting in lieu thereof “7(a) of the Export Administration Act of 1979”; and

(2) by striking out “(A)” and inserting in lieu thereof “(C)”.

INTERNATIONAL INVESTMENT SURVEY ACT AUTHORIZATIONS

Sec. 23. (a) Section 9 of the International Investment Survey Act of 1976 (22 U.S.C. 3108) is amended to read as follows:

"AUTHORIZATIONS

" Sec. 9. To carry out this Act, there are authorized to be appropriated $4,400,000 for the fiscal year ending September 30, 1980, and $4,500,000 for the fiscal year ending September 30, 1981.".

(b) The amendment made by subsection (a) // 22 USC 3108 // shall take effect on October 1, 1979.

MISCELLANEOUS

Sec. 24. Section 402 of the Agricultural Trade Development and Assistance Act of 1954 // 7 USC 1732. // is amended by inserting "or beer" in the second sentence immediately after "wine".

Approved September 29, 1979.

LEGISLATIVE HISTORY:

HOUSE REPORTS: No. 96—200 accompanying H.R. 4034 (Comm. on Foreign Affairs) and No. 96—482 (Comm. of Conference).

SENATE REPORT No. 96—169 (Comm. on Banking, Housing, and Urban Affairs).

CONGRESSIONAL RECORD, Vol. 125 (1979):

July 18, 20, 21, considered and passed Senate.

May 31, July 23, Sept. 11, 18, 21, 25, H.R. 4034 considered and passed House; passage vacated and S. 737, amended, passed in lieu.

Sept. 27, Senate agreed to conference report.

Sept. 28, House agreed to conference report.

PL 96–72, 1979 S 737

ANNEX 191

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

IN THE PROCEEDING BETWEEN

METALPAR S.A. AND BUEN AIRE S.A.
(Claimants)

and

THE ARGENTINE REPUBLIC
(Respondent)

AWARD ON THE MERITS

ICSID CASE NO. ARB/03/5

Members of the Tribunal:

Rodrigo Oreamuno Blanco, President
Duncan H. Cameron, Arbitrator
Jean Paul Chabaneix, Arbitrator

Secretary of the Tribunal: Natalí Sequeira

Representing the Claimants:
Roberto Mayorga and Joaquín Morales
Etcheberry Rodríguez, Abogados
Santiago, Chile
Jaime Paredes
Chairman Metalpar S.A., Santiago, Chile
Sergio Meli
Abogado-Fiscal del Grupo de Empresas Metalpar, Santiago, Chile
Jorge Postiglione
Estudio Brons & Salas
Buenos Aires, Argentina
Gonzalo Varela
Manager Metalpar Argentina

Representing the Respondent:
Osvaldo César Guglielmino
Procurador del Tesoro de la Nación Argentina
Gustavo Scrinzi
Subprocurador del Tesoro de la Nación Argentina
Gabriel Bottini
Jorge Barraguirre
Fabián Markaida
Ignacio Pérez Cortés
Cintia Yaryura
María Victoria Vitali
Ariel Martins
Verónica Lavista
Patricio Arnedo Barriero and
María Julieta Fontán
Procuración del Tesoro de la Nación Argentina
Ignacio Torterola
Embassy of the Argentine Republic

Date: June 6, 2008

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The Tribunal, composed as described above, after consideration of the written and oral presentations by the parties, and after having deliberated, issues the following award:

I. PROCEEDING

1. On February 3, 2003, the International Centre for Settlement of Investment Disputes ("ICSID" or the "Centre") received from **Metalpar S.A.** and **Buen Aire S.A.**, (the "Claimants"), two companies incorporated in Chile, a Request for Arbitration against the Argentine Republic ("Argentina" or the "Respondent") under the Convention on the Settlement for Investment Disputes between States and Nationals of Other States (the "Convention"). The request was based on the alleged adverse effects that a series of economic measures adopted by Argentine authorities in late 2001 and early 2002 would have had on the investments made by Claimants in a company manufacturing bus bodies for public transportation vehicles in Argentina.

2. In their request for arbitration, Claimants invoked the provisions of the 1991 bilateral investment treaty between Argentina and Chile for the Promotion and Reciprocal Protection of Investments, in force as from January 1, 1995 (hereinafter, the "BIT" or the "APPI").

3. On February 5, 2003, in accordance with Rule 5 of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (the "Institution Rules"), the Centre acknowledged receipt of the request for arbitration and sent copies thereof to the Argentine Republic and to the Argentine Embassy in Washington, D.C.

4. On April 7, 2003, the Acting Secretary-General of the Centre registered the request pursuant to Article 36(3) of the ICSID Convention. On the same date, the Acting Secretary-General, in accordance with Institution Rule 7, notified the parties of the registration of the request and invited them to proceed to constitute an Arbitral Tribunal as soon as possible.

5. On July 14, 2003, the parties agreed on the number of arbitrators that would form the Arbitral Tribunal and on the method to appoint them. Under such agreement each

party would appoint one arbitrator by July 16, 2004, at the latest, and the President of the Tribunal would be appointed by the Secretary-General of ICSID. The agreement also provided that, should Respondent fail to appoint an arbitrator within the agreed term, Claimants would be entitled to request the application of the mechanism provided for in Article 37(2)(b) of the ICSID Convention (each of the parties appoints an arbitrator and they reach an agreement on the third arbitrator, who acts as President of the Tribunal).

6. None of the parties appointed an arbitrator within the term agreed upon. Consequently, by letter dated July 23, 2003, Claimants requested that ICSID constitute the Arbitral Tribunal as set forth in Article 37(2)(b) of the Convention. By that same letter, Claimants appointed Mr. Duncan H. Cameron, a national of the United States of America, as arbitrator in the instant case.

7. After 90 (ninety) days had elapsed as from the notification of the registration without the Tribunal having been constituted, on August 11, 2003, Claimants requested the appointment of the other two arbitrators and the designation of the President of the Arbitral Tribunal, as provided for in the mechanism set forth in Article 38 of the ICSID Convention and Rule 4 of the ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules).

8. On August 20, 2003, Argentina appointed Jean Paul Chabaneix, a Peruvian national, as arbitrator.

9. After consultation with the parties, the Chairman of the Administrative Council of ICSID appointed Mr. Rodrigo Oreamuno Blanco, a national of Costa Rica, as President of the Arbitral Tribunal.

10. On September 23, 2003, in accordance with Arbitration Rule 6(1), the parties were notified that all the arbitrators had accepted their appointments and that therefore the Tribunal was deemed to have been constituted on that date. On the same date, pursuant to Regulation 25 of the ICSID Administrative and Financial Regulations, the parties were informed that Mr. Gonzalo Flores, Senior Counsel of ICSID, would serve as Secretary of the Arbitral Tribunal.

11. The first session of the Tribunal with the parties was held on November 13, 2003, at the seat of the Centre in Washington, D.C. Claimants were represented by Messrs. Roberto Mayorga, Joaquín Morales, Jorge Postiglione, and Sergio Meli. Mr. Jaime Paredes also appeared on behalf of Claimants. Argentina was represented by Ms. Cintia Yaryura and by Mr. Jorge Barraguirre, both of them from the *Procuración del Tesoro de la Nación Argentina*. At the beginning of the session, Mr. Barraguirre, on behalf of the Argentina, requested that the Tribunal decide briefly and immediately on the validity of the registration of Claimants' request for arbitration. After giving the floor to Claimants and deliberating, the Tribunal advised the parties that it was not procedurally possible to accept such petition on that occasion and noted that Argentina would have the opportunity to file any objections it might have during the proceedings. Subsequently, the President of the Tribunal invited the parties to continue with the session. Mr. Barraguirre indicated that, based on express instructions from Argentine authorities, he could not accept the Tribunal's decision. Immediately afterwards, the Argentine delegation left the session.

12. The President of the Tribunal regretted Argentina's decision and expressed the Tribunal's wish that Respondent reconsider its position and participate in the proceedings actively. He then invited those present to continue reviewing the agenda.

13. During the continuation of the first session, several procedural matters were determined, which were reflected in minutes signed by the President and the Secretary of the Tribunal. In addition, the following schedule was set for the written procedures: Claimants would file a memorial on the merits within one hundred and thirty-five days (135) from the date of the first session, and Respondent would file a counter-memorial within one hundred and thirty-five says (135) days from its receipt of Claimants' memorial; the Tribunal would then decide whether it was convenient for the parties to file reply and rejoinder memorials.

14. Claimants submitted their Memorial on the Merits (referred to as "Memorial" in the proceedings) with the related accompanying documentation on March 30, 2004.

15. On May 17, 2004, Argentina filed a Memorial on Objections to the Centre's Jurisdiction and the Competence of the Arbitral Tribunal.

16. By letter of May 21, 2004, the Tribunal confirmed the suspension of the proceedings on the merits in accordance with Arbitration Rule 41(3) and the parties were requested to file their proposals on a schedule regarding the issue of jurisdiction.

17. On June 15, 2004, the Tribunal, having reviewed the parties' submissions on the issue, established the following procedural schedule for filing the briefs on jurisdiction: Claimants would file their Counter-Memorial on Jurisdiction within forty-five (45) days as from that date; Respondent would file a Reply on Jurisdiction within the subsequent forty-five (45) days as from the receipt of Claimants' Counter-Memorial, and Claimants would file a Rejoinder on Jurisdiction within the subsequent forty-five days (45) as from the receipt of Respondent's Reply. The Tribunal would subsequently fix, in consultation with the parties, an appropriate date to hold a hearing on jurisdiction.

18. In conformity with the schedule set by the Tribunal, Claimants filed their Counter-Memorial on Jurisdiction, with accompanying documentation, on July 28, 2004. Argentina filed its Reply on Jurisdiction on September 21, 2004, and Claimants filed their Rejoinder on Jurisdiction on November 8, 2004.

19. By letter dated December 13, 2004, the Tribunal forwarded to the parties proposals for dates to hold the hearing on jurisdiction, which was set, with the agreement of the parties, for March 17 and 18, 2005. As a result of a technical failure of the airplane which transported the Argentine delegation to Washington, D.C. the hearing was held, with the agreement of the parties, only on Friday March 18, 2005, at the Centre's headquarters. Claimants were represented by Messrs. Roberto Mayorga and Joaquín Morales from the law firm Etcheberry/Rodríguez Abogados in Santiago de Chile, Mr. Jorge Postiglione from the law firm Brons & Salas in Buenos Aires, and Messrs. Jaime Paredes, Sergio Meli and Gonzalo Varela from Metalpar S.A. Respondent was represented by Ms. Cintia Yaryura and Mr. Ignacio Torterola from the *Procuración del Tesoro de la Nación Argentina* (Argentina's Treasury Attorney General's Office), Mr. Osvaldo Siseles, Legal Under-Secretary of the Ministry of Economy and Production of Argentina, and Mr. Marcelo Massoni from the Argentine Embassy in Washington, D.C. During the hearing, Messrs. Mayorga, Meli, Morales, Postiglione and Varela addressed the Tribunal on behalf of Claimants; Ms. Yaryura and Mr. Torterola did so on behalf of

Argentina. The Tribunal posed questions to the representatives of the parties, in accordance with Arbitration Rule 32(3).

20. On April 27, 2006, the Arbitral Tribunal issued its decision on the jurisdiction of the Centre and its competence in which, as provided for in Arbitration Rule 41, it unanimously rejected the objection on jurisdiction filed by Argentina and declared its competence to hear and resolve the instant case.

21. On May 2, 2006, the Centre advised the Tribunal and the parties that, as a result of an internal reorganization of the Centre, Ms. Gabriela Álvarez Ávila, Senior Counsel of ICSID, would substitute Mr. Gonzalo Flores as Secretary of the Arbitral Tribunal.

22. On May 5, 2006, the Tribunal issued Procedural Order No. 1 in which it stated that Argentina had to file its Counter-Memorial on the merits within eighty-five days (85) as from the date of such order, that is to say, by July 31, 2006 at the latest. The Tribunal stated that it would subsequently decide on the need or convenience that the parties file Reply and Rejoinder memorials and that it would set a date for a hearing on the merits in due course.

23. On June 20, 2006, Argentina asked the Tribunal to request Claimants to deliver additional accounting, financial, corporate and other documentation related to the contracts entered into with the customers of Metalpar Argentina S.A. and Inversiones Loma Hermosa S.A., in order to complete the information provided by them in their Memorial. Claimants opposed this request and Argentina insisted on it. After analyzing the parties' positions, on July 13, 2006, the Tribunal ordered Claimants to submit the documents requested. On August 14, 2006, the Secretariat advised Argentina and the Tribunal that it had received nine volumes of documents submitted by Claimants in connection with this piece of evidence.

24. On August 8, 2006, the Tribunal issued Procedural Order No. 2, regarding items 7-8 of the minutes of the First Session and the Argentine Republic's request of July 14, 2006, that the time limit for filing substantive briefs be deemed to have been met upon receipt by the Centre via email of the briefs and declarations of witnesses and experts.

Once Claimants' observations were received, the Tribunal decided by such Order that the time limit for filing substantive briefs would be subsequently deemed to have been met: a) upon receipt by the Centre via international courier or email in pdf format of the substantive briefs, the statements of witnesses and experts and all the accompanying documentation; b) if one of the parties decided to meet the time limit via email, it would have to send the other party a copy of the email forwarding the documentation and on the same day send the Centre via a first-rate international courier service the original and six copies of the substantive brief and its exhibits.

25. At the request of Argentina, on August 29, 2006, the Tribunal granted an extension until September 13, 2006, to file the Counter-Memorial. On that latter date, the Centre acknowledged receipt of the Counter-Memorial filed by Respondent.

26. On October 2, 2006, the President of the Tribunal, in conformity with the minutes of the first session and Procedural Order No. 1, invited the parties to make their observations regarding the convenience of filing Reply and Rejoinder memorials and, should they chose to do so, he asked them to make their observations on the term deemed necessary for such purpose.

27. Taking into consideration both parties' observations, on October 23, 2006, the Tribunal granted a term of 75 days for each party to file its submission, as per the following schedule: a) Claimants had to file their Reply within seventy-five (75) days subsequent to the receipt of the communication from the Tribunal, that is to say, at the latest on January 8, 2007; b) Argentina had to file its Rejoinder within the seventy-five (75) days subsequent to the receipt of Claimants' Reply. The Tribunal informed the parties that, in the light of the fact that the terms granted were quite long, it excluded the possibility of granting future extensions, unless circumstances occurred making such concession indispensable.

28. On January 4, 2007, Claimants submitted a copy of the Reply memorial to the Centre via email. On January 8, 2007, Claimants submitted a copy of Exhibit 2 to the Reply memorial to the Centre via email. An electronic copy of these documents was

forwarded to Argentina on those same dates. On January 15, 2007, the Centre sent a hard copy of those documents to Argentina.

29. Through a communication of January 30, 2007, the Tribunal, having consulted with the parties, set September 10 through 17, 2007, as the dates for the hearing on the merits and it provided for the possibility of extending it for two further days should it be necessary.

30. Argentina sent an electronic copy of its Rejoinder to the Centre on March 30, 2007. On April 6, 2007, the Centre sent to Claimants by international courier a copy of that Rejoinder and the accompanying documentation, received by the Centre on the previous day.

31. On April 4, 2007, the Tribunal took note of Claimants' position as to the fact that Argentina should have filed its Rejoinder on March 24, 2007 (75 days as from January 8, 2007). In addition, the Tribunal noted that Argentina had forwarded to the Centre an electronic copy of its Rejoinder on March 30, 2007 (74 days as from January 15, 2007). The Tribunal considered that, despite the fact that there was disagreement between the parties as to how terms were calculated, even if it accepted Claimants' position in this regard, Argentina's delay in filing its Rejoinder memorial did not seriously undermine Claimants' rights, especially considering the long period between the date of the last filing and the hearing on the merits which, as resolved, had to begin on September 10, 2007.

32. On July 12, 2007, the Tribunal issued Procedural Order No. 3, whereby it decided several issues related to the organization of the hearing on the merits, including the time schedule, the distribution of time between the parties, the method for witness and expert examination, the order in which witnesses and experts would appear, the preparation of the documents to be used by the Tribunal and the parties during the hearing, the filing of post-hearing briefs, the Tribunal's questions and other administrative issues.

33. On August 21, 2007, the Arbitral Tribunal referred to the request filed by Claimants on August 6, 2007, related to the appearance of Professor Hernán Salinas as an

expert at the hearing on the merits. The Tribunal reminded Claimants that the minutes of the first session held on November 13, 2003, contained the following agreement:

> "18. Documentary Evidence
> Notwithstanding the power of the Tribunal to request the parties to submit additional evidence at any stage of the proceeding, it was decided that each filing would include all the supporting documentation and the statements of witnesses and experts, signed by them, that the parties may wish to submit. It was set forth that, exceptionally, the parties may request the Tribunal's authorization to file additional supporting documents after filing their briefs."

34. Consequently, the Tribunal dismissed Claimants' request that Professor Hernán Salinas appear during the hearing since it considered that the request had been filed late and considering that: a) Claimants received Respondent's Rejoinder memorial in early April 2007 and, as from such date, at no time did they request any authorization from the Tribunal to file any additional documentation nor did they state the exceptional reasons justifying a request of such a nature; b) it is the Tribunal's duty to guarantee that both parties have the same opportunity to defend their positions and that is why clear rules were established from the early stages of the procedure.

35. On August 24, 2007, the Senior Counsel of ICSID informed the Tribunal and the parties that, as a result of an internal reorganization of the Centre, Ms. Natalí Sequeira Navarro, Counsel of ICSID, would substitute Ms. Gabriela Álvarez Ávila as Secretary of the Arbitral Tribunal.

36. On August 28, 2007, Claimants advised the Tribunal that they would "abstain from calling the witnesses and experts that they had previously announced."

37. On August 29, 2007, Argentina stated as follows:

> "[…] this Office believes that the current distribution of examinations of witnesses and experts is too concentrated, which could be detrimental to the adequate examination thereof. We therefore suggest that Dr. Pérez Rovira's and Dr. De Riz's examinations be postponed to the morning of the third day and morning of the fourth day, respectively, […]."

38. On August 31, 2007, Claimants referred to the request made by Argentina as follows: "This party believes the method proposed to be inadequate as it damages and disrupts the logical order that has been followed in the process."

39. On September 3, 2007, the Tribunal reminded the parties that the method for examining witnesses at the hearing (direct examination, cross-examination, and redirect examination) had been established in items II and III of Order No. 3, in conformity with the normal practice in this type of procedures and that such method had been confirmed by Respondent in its communication dated July 30, 2007, and by Claimants in their letter dated July 31, 2007.

40. As to the appearance of witnesses and experts, in that communication, the Tribunal confirmed that, when one of the parties to an arbitral proceeding files expert reports or written statements as evidence, it is obliged to present, if that is requested by the other party or the Tribunal, its witnesses or experts so that they may be examined at the hearing summoned for such purpose.

41. The Tribunal explained in its communication that, in the light of the fact that Respondent had communicated within the appropriate term the names of the witnesses and experts offered by Claimants that it wished to examine, it was Claimants' responsibility to present these persons at the hearing. If something precluded them from appearing at the hearing, Claimants should have given notice to the Tribunal sufficiently in advance (item III(11) and (12) of Procedural Order No. 3).

42. In the same communication the Tribunal reminded the parties that paragraph II(5) of Procedural Order No. 3 stated that if one of the parties decided not to present witnesses or experts that it had previously offered for examination, the Tribunal would be entitled to make such inferences as it deemed necessary and even deny any probative value to the statements of such witnesses or experts.

43. Based on the above, the Tribunal invited both parties to confirm, no later than September 5, 2007, the names of the witnesses and experts that would appear at the hearing scheduled to begin on September 10, 2007.

44. Through the communication of September 4, 2007, Claimants explained that the witnesses and experts whose statements they offered during the proceedings and who were summoned to appear at the hearing by Argentina "have stated their impossibility to be present at the hearing" and that "Metalpar requested that they appear but, as stated, they excused themselves and neither this party nor the Tribunal are in a position to compel them to do so."

45. By communication of September 4, 2007, Respondent confirmed the attendance of all the witnesses and experts it had proposed.

46. On September 7, 2007, the Tribunal referred to the answers received by the parties and noted that, in its letter dated August 31, 2007, Claimants advised the Tribunal that Messrs. Miguel Virgós and Carlos Pérez Rovira would not be able to travel to Washington, D.C. during the dates set for the hearing but, as to the other witnesses and experts, they stated that "if Respondent was especially interested in cross-examining any of the witnesses, it was such party that should have taken the necessary measures to make sure they appeared at the hearing."

47. In such communication, the Tribunal repeated what it had stated in its letter of September 3, 2007, in the sense that the generalized practice in this type of arbitration procedure before ICSID is that the party providing as evidence the written statement of a witness or the report of an expert must make sure that they are available so that the other party and the Tribunal may examine them.

48. The Tribunal also stated that the parties had had enough time to prepare the organizational aspects and the logistical details necessary to submit their arguments and evidence at the hearing on the merits, the dates of which had been communicated to them well in advance.

49. The Tribunal also considered that, in the event of disagreement between the parties on any issue related to the organization of the hearing, it was the parties' obligation to advise the Tribunal of such disagreement as soon as possible, for it to take the measures it

deems appropriate, as provided for in Procedural Order No. 3, and the ICSID Convention and Arbitration Rules.

50. In particular, the Tribunal called the attention of the parties to Arbitration Rule 34(3) which provides that the parties shall cooperate with the Tribunal in producing evidence and that the Tribunal shall take note of the failure of a party to comply with its obligations and of any reasons given for such failure.

51. Finally, the Tribunal confirmed that Arbitration Rule 34(1) grants the Tribunal the power to decide on the admissibility of any evidence adduced and on its probative value whenever deemed appropriate by the Tribunal.

52. Owing to a delay in the arrival of the flight of Claimants' representatives, the hearing on the merits, which was held at the Centre's headquarters, started on Tuesday, September 11, 2007, and it lasted through Friday, September 14, 2007.

53. The hearing was attended by the following people on behalf of Claimants: Messrs. Roberto Mayorga and Joaquín Morales from the law firm Etcheberry/Rodríguez Abogados in Santiago de Chile; Jorge Postiglione from the law firm Brons & Salas in Buenos Aires; Jaime Paredes, Chairman of Metalpar S.A.; Sergio Meli, legal counsel for Metalpar S.A.; Gonzalo Varela, Manager of Metalpar S.A.; Hernán Salinas, attorney-at-law; Pablo Grillo, attorney-at-law; Juan Fontaine, economist; and Hernán Buchi, economist.

54. The following people attended the hearing representing Respondent: Mr. Gustavo Adolfo Scrinzi, *Subprocurador del Tesoro de la Nación Argentina* (Deputy Treasury Attorney General); Messrs. Gabriel Bottini, Fabián Markaida, Ariel Martins, Ignacio Pérez Cortés, Jorge Barraguirre and Patricio Arnedo Barreiro, and Mses. Cintia E. Yaryura, Verónica Lavista, María Julieta Fontán and María Victoria Vitali, all of them from the *Procuración del Tesoro de la Nación de la República Argentina* (Argentina's Treasury Attorney General's Office); and Mr. Ignacio Torterola, from the Argentine Embassy in Washington, D.C.

55. At different times during the hearing, the following people were present or gave testimony at the request of Argentina:

Experts:
Dr. Augusto César Belluscio
Dr. Liliana de Riz
Dr. Roberto Frenkel
Dr. Mario Damill
Lic. Daniel Marx
Lic. José Echagüe

Witness:
Dr. Eduardo Ratti

56. As announced, Claimants failed to provide the experts and witnesses they had offered and Argentina had requested to examine.

57. On September 28, 2007, both parties filed their written replies to questions posed by the Tribunal at the hearing.

58. The Tribunal has thoroughly discussed and considered the content of the memorials on the merits filed by the parties, the evidence provided and the oral statements made by them at the hearing on the merits.

59. On February 13, 2008, the Tribunal communicated the closure of the proceeding to the parties, in accordance with ICSID Arbitration Rule 28.

II. BACKGROUND

60. In its Memorial and Counter-Memorial on Jurisdiction, **Metalpar S.A.** and **Buen Aire S.A.** described the following background of the instant case:

a. **Metalpar S.A.** (formerly named Comercial Metalpar S.A.) is a Chilean company engaged mainly in manufacturing bus bodies.

b. **Buen Aire S.A.** is also a Chilean company which is engaged in investing and technical advisory services.

c. In May 1997, **Metalpar S.A.** and Mercobús S.A., a Chilean company formerly named Inversiones Mercobús S.A., owned 11,880 and 120 shares respectively out of a total number of 12,000, which formed the capital stock of an Argentine company called Inversiones Loma Hermosa S.A.

d. On May 9, 1997, Inversiones Loma Hermosa S.A. acquired the Argentine company Bus Carrocería S.A., which was in default and on the brink of bankruptcy.

e. On October 1, 1997, the shareholders of Bus Carrocería S.A. agreed to change the company's name to Metalpar Argentina S.A. This change was registered with the *Inspección General de Justicia* (Argentine regulatory agency of companies) (Exhibit 4 of the Memorial).

f. On December 10, 1998, the shareholders increased the capital stock of Inversiones Loma Hermosa, which was distributed as follows: **Metalpar S.A.**, 1,999,880 shares and Mercobus S.A., 120 shares.

g. On July 13, 2000, **Metalpar S.A.** transferred such 1,999,880 shares to Inversiones Metalpar S.A., a Chilean company set up in June 2000. Therefore, as from such date, the capital stock of Inversiones Loma Hermosa S.A. was held as follows: Inversiones Metalpar S.A., 1,999,880 shares and Mercobus S.A., 120 shares.

h. On November 16, 2001, Inversiones Metalpar S.A. transferred 1,999,760 shares to Mercobús S.A. and kept 120; consequently, the capital stock of Inversiones Loma Hermosa S.A. was held as follows: Inversiones Metalpar S.A., 120 shares of stock and Mercobus S.A., 1,999,880 shares.

i. On October 11, 2002, Mercobús S.A. transferred its 1,999,880 shares to Buen Aire, S.A.; thus, the shares of Inversiones Loma Hermosa S.A. were held as follows: Inversiones Metalpar S.A., 120 shares and Buen Aire, S.A., 1,999,880 shares.

61. On February 3, 2003, on which date Claimants requested ICSID to register this arbitration, the shares of the companies mentioned in this proceeding were held as follows:

a) METALPAR S.A (Chilean):

Jaime Paredes Gaete:	416,286 shares
Mario Paredes Gaete:	416,286 shares
Carlos Paredes Gaete:	416,286 shares
Inversiones Yelcho S.A.:	22,895,714 shares
Inversiones Río Baker S.A.:	69,936,000 shares
Constructora Marga Marga S.A.:	22,749,428 shares
Total:	116,560,000 shares

(Exhibit A.13 of Claimants' Counter-Memorial on Jurisdiction).

b) BUEN AIRE S.A. (Chilean):

Jaime Paredes Gaete:	416,286 shares
Mario Paredes Gaete:	416,286 shares
Carlos Paredes Gaete:	416,286 shares
Inversiones Yelcho S.A.:	22,895,714 shares
Inversiones Río Baker S.A.:	69,936,000 shares
Constructora Marga Marga S.A.:	22,749,428 shares
Total:	116,560,000 shares

(Exhibit A.13 of Claimants' Counter-Memorial on Jurisdiction).

c) INVERSIONES METALPAR S.A. (Chilean):

Metalpar S.A.:	111,832,696 shares
Jaime Paredes Gaete:	50,050 shares
Mario Paredes Gaete:	42,350 shares
Carlos Paredes Gaete:	30,800 shares
Total:	111,955,896 shares

(Exhibit A.5 of Claimants' Counter-Memorial on Jurisdiction).

d) INVERSIONES LOMA HERMOSA S.A. (Argentine):

Inversiones Metalpar S.A.:	120 shares
Buen Aire S.A.:	1,999,880 shares
Total:	2,000,000 shares

In addition, **Metalpar S.A.** had made "irrevocable contributions" to Inversiones Loma Hermosa S.A. in the amount of USD 28,873,000.00.

(Exhibit A of Claimants' Counter-Memorial on Jurisdiction; Exhibit 1 of the Memorial).

e) METALPAR ARGENTINA S.A. (Argentine):

Inversiones Loma Hermosa S.A.:	1,988,000 shares
Jaime Paredes Gaete:	12,000 shares

In addition, Inversiones Loma Hermosa S.A. had made "irrevocable contributions" to Metalpar Argentina S.A. in the amount of USD 30,022,426.00.

(Exhibit A.8 of Claimants' Counter-Memorial on Jurisdiction; Exhibit 1 of the Memorial).

62. The Claim submitted involves several provisions of the Argentine legal system which, for better understanding, are listed below:

a. **Law No. 24,522:** Bankruptcy and Insolvency Law.
b. **Law No. 23,298:** Convertibility Law of March 28, 1991.
c. **Presidential Decree No. 1570/2001:** Decree of December 1, 2001, which contains the rules that govern the entities subject to the Superintendency of Financial and Foreign Exchange Entities of the Central Bank of the Argentine Republic. Such rules establish temporary limitations on cash withdrawals and transfers abroad and ban the export of foreign currency bills and coins.
d. **Law No. 25,561:** Public Emergency and Foreign Exchange System Reform Law, called "**Pesification Law,"** of January 6, 2002.
e. **Presidential Decree No. 71/2002:** Decree of January 20, 2002, which contains the provisions regulating the foreign exchange system as established by Law No. 25,561.
f. **Presidential Decree No. 214/2002:** Decree of February 3, 2002, on Reorganization of the Financial System, regulating Law 25,561.

g. **Communication A 3471** of the Central Bank of Argentina (BCRA) of February 8, 2002, which implemented Presidential Decree No. 260/2002 and eliminated what Presidential Decree No. 71/2002 established.

h. **Presidential Decree No. 260/2002:** Decree of February 8, 2002, which eliminated the official foreign exchange market.

i. **Presidential Decree No. 320/2002:** Decree of February 15, 2002, on Reorganization of the Financial System, amending Presidential Decree No. 214/2002.

j. **Presidential Decree No. 410/2002:** Decree of February 8, 2002, on Reorganization of the Financial System, which excluded several types of operations from the pesification system.

k. **Presidential Decree No. 704/2002:** Decree of May 2, 2002, which widened the exclusions established in Presidential Decree No. 214/2002.

l. **Presidential Decree No. 905/2002:** Decree of June 1, 2002, instructing the Ministry of Economy to redress the damages suffered by financial institutions as a consequence of the pesification.

m. **Presidential Decree No. 53/2003:** Decree of January 10, 2003, amending Presidential Decree No. 410/2002.

n. **Law No. 25,820:** of December 4, 2003, amending Law No. 25,561.

III. POSITIONS OF THE PARTIES IN CONNECTION WITH THE MERITS

63. Claimants stated that their investments in Argentina amounted to over USD 30,000,000 (thirty million US dollars), which was sent by **Metalpar S.A.** to Inversiones Loma Hermosa S.A. and then transferred by the latter to Metalpar Argentina S.A. as irrevocable contributions to capital. (Exhibit 1 of the Memorial and Exhibit B of the Counter-Memorial on Jurisdiction).

64. They also expressed that, as of December 2001, Argentina started a process of change of the financial and foreign exchange system in the country that affected their investments.

65. In short, they argued that Presidential Decree No. 1570/2001 "openly breaches" the APPI, which guarantees free transfers of funds, and that Law No. 25,561, called "Pesification Law," which established that the obligations contracted in US dollars were bound to be converted into Argentine pesos and empowered the Executive Branch to set up the system that would determine the Argentine peso-foreign currency peg, also violates the APPI.

66. According to Claimants, because of the changes established "[…] debtors were authorized to pay their obligations in Argentine pesos at the new market value, which meant a loss in value of over 300% of the Argentine peso against the US dollar" (Memorial, paragraph 49).

67. They also stated that Metalpar Argentina S.A. entered into several contracts with different legal and natural persons in the amount of USD 18,000,000.00, by means of which, as a bus body manufacturer, it provided those persons with financing for the purchase of such bus bodies. Those contracts were secured with pledges over the vehicles it sold and, in some cases, with further collateral; credits were agreed upon in US dollars, based on articles 617 and 619 of the Civil Code, as in force at the time the contracts were signed. Claimants argued that "[…] the pesification [...] amounts to expropriation or to a measure similar in its effects on the credits in foreign currency, which is illegal and overtly violates the rules of the APPI in this regard" (Memorial, paragraph 52).

68. In the Claimants' view, the situation described above also violates the APPI provisions that establish that investors shall be accorded fair and equitable treatment and constitutes an indirect expropriation.

69. According to Argentina, the measures challenged by Claimants are authorized by the BIT, Argentine law and general international law (Counter-Memorial, paragraph 1).

70. In addition, Argentina stated that: "It is not possible to argue the existence of an expropriation of METALPAR's investment. METALPAR's investment in Argentina currently, measured in US dollars, is worth a lot more […]" (Counter-Memorial, paragraph 5).

71. In Argentina's opinion, the measures were adopted on the basis of the principles of reasonability, good faith and proportionality (Counter-Memorial, paragraph 8).

72. In Argentina's view, the Claimants' argument on the alleged expropriation derives from a conceptual error, because it does not specify what their investment in Argentina is (Rejoinder, paragraph 6).

73. Argentina added that the need for and reasonableness of the measures adopted have been ratified by international case law (Rejoinder, paragraph 7), and the state of necessity has also been acknowledged by general international law (Rejoinder, paragraph 8).

74. The parties not only disagree on the general aspects of the claim filed by **Metalpar S.A.** and **Buen Aire S.A.** They are also in disagreement on the specific aspects of that claim, as analyzed in the following paragraphs.

1. Claimants' investment

75. In their Reply, Claimants stated the following:

> "Metalpar does not base its claim on the fact that its investment has been expropriated by Argentina. SPECIFICALLY, WHAT HAS BEEN EXPROPRIATED ARE THE RIGHTS AND CREDITS THAT METALPAR HAD AGAINST ITS CLIENTS, WHICH IT HAS BEEN UNABLE TO EXERCISE FULLY, BECAUSE THE ARGENTINE AUTHORITIES HAVE PREVENTED IT FROM DOING SO THROUGH THE FINANCIAL MEASURES ENFORCED TO THAT EFFECT" (Reply, paragraph 225).

76. In connection with their investments, Claimants stated the following: "For us […] the issue is not […] about the value of the investments but about the expropriation of credits, a contractual breach" (transcript of the hearing on the merits, September 14, 2007, page 714).

77. According to Argentina, **Metalpar S.A.** and **Buen Aire S.A.**'s investment "[…] are indirect shareholdings in local companies […] any assessment or consideration of the measures has to be made taking into account the effect of the measures on those

investments and not on Metalpar Argentina's contracts" (transcript of the hearing on the merits, September 11, 2007, page 211).

78. Argentina added that Claimants confuses what their investment is, since such investment is not Metalpar Argentina's credits but rather Claimants' shareholding, which "is worth much more than what it would have been worth had the measures not been adopted" (transcript of the hearing on the merits, September 11, 2007, page 240).

2. Discrimination

79. In Claimants' opinion, "[…] compensations provided for the financial sector, in accordance with Law No. 25,561, Law No. 25,789 and Presidential Decree No. 905/2002, breach Article 2(3) of the APPI, which prohibits discriminatory or arbitrary acts against the foreign investor […]" (Memorial, paragraph 169).

80. In that same memorial, Claimants stated that "The Argentine State has disregarded the rights expressly recognized to Metalpar Argentina in the Argentine Constitution, and has treated those affected by the 'pesification' unequally" (Memorial, paragraph 217). In order to support their statements, they cited the report signed by Dr. Pablo Richards, enclosed with the Memorial as Exhibit 6.

81. According to Claimants, Argentina discriminated against **Metalpar S.A.** and **Buen Aire S.A.** since "[…] it established and acknowledged exceptional situations to which it did not apply obligatory 'pesification'" (Memorial, paragraph 360). This argument is based on the fact that Presidential Decree No. 71/2002 made an exception with regards to the pesification, by providing that if a member of the financial sector "[…] holds pledge credits provided for the purchase of vehicles in an amount that exceeds at origin (in other words, at the time the obligation was executed) the amount of USD 100,000, the debtors' obligations are not affected by 'pesification', thus maintaining 'what was originally agreed to'" (Memorial, paragraph 361).

82. Moreover, Claimants declared that "Argentina also acted unfairly and inequitably when it adopted legal measures that affect Claimants' investments but that did not affect

the financial system, that type of action is arbitrarily discriminatory" (Reply, paragraph 281).

83. As for the alleged discrimination, Argentina stated that "It cannot be validly stated, as Claimants argue, that the measure is discriminatory because other subjects received a different treatment from that granted to METALPAR. It is illogical and illegitimate to compare categories of subjects that are regulated by different *rules* and that have different *characteristics*" (Counter-Memorial, paragraph 655).

84. Later on Argentina held that "[…] not discriminating does not entail treating everyone absolutely the same. Rather, in order to treat *everyone the same*, the affected people should be carefully listed into *different categories* based on the *relevant similarities* among them" (Counter-Memorial, paragraph 664). It repeated this argument in its Rejoinder in the following words: "[…] the measures did not discriminate between subjects of the same category. The effects of the measures were suffered by the immense majority of the players that held obligations outside the financial system. There was no discrimination in the sense of inequality within a **same category of equals**" (paragraph 289).

85. Respondent also based its arguments on the award of May 12, 2005, in the case of CMS against the Argentine Republic (ICSID case No. ARB/01/8), in which the Tribunal stated that "[…] discrimination exist[s] only in similarly situated groups or categories of people" (Rejoinder, paragraph 447).

86. Argentina also stated that "[…] it is worth highlighting that (sic) the financial institutions were also affected by the measures since asymmetric pesification was imposed on them (deposits had to be returned at USD1= ARS1.40 + CER (benchmark stabilization coefficient) whereas loans were pesified at USD1= ARS1), and for this special impact they were partially compensated" (Rejoinder, paragraph 453).

87. For all these reasons, Argentina rejected the arguments presented by Claimants and stated that "the Argentine government did not adopt more favourable measures for financial institutions" (Counter-Memorial, paragraph 686).

3. Expropriation

88. For Claimants "[…] the measures adopted by the Argentine State, in connection with Metalpar Argentina S.A., as the company receiving investments from Metalpar S.A. and Buen Aire S.A., and with respect to them as foreign investors, are disproportionate and constitute an 'indirect expropriation'" (Memorial, paragraph 288).

89. In the same memorial they outlined the concept of indirect expropriation, which in their view means that the measures taken by the State do not either physically or legally seize the holder's right or asset, but that "[…] they significantly reduce the bundle of powers that ownership implies, or they considerably undermine its economic value" (Memorial, paragraph 256). In addition, they asserted that: "It could be said that since the 'pesification' of credits derived from a general act of an authority, the confiscation would become 'indirect' in nature" (Memorial, paragraph 190).

90. When referring to indirect expropriation, Claimants explained the tests that, from the standpoint of scholar's opinions and case law, make it possible to identify this type of expropriation: the sole effect doctrine and the balancing test (Memorial, paragraphs 266-294).

91. On the basis of the balancing test, Claimants stated that they "[…] **disproportionately** have suffered the 'expropriatory' effects of the Argentine devaluation measures without enjoying the potential benefits they could cause" (Memorial, paragraph 292).

92. In connection with the protection afforded by the **APPI** they stated the following: "Article 4 of the Argentina-Chile APPI grants full legal protection and security to Metalpar S.A. and Buen Aire S.A.'s investments in the Argentine territory. In accordance with the Treaty, such investments cannot be expropriated, nationalized, or subject to other measures the effects of which are equivalent to expropriation or nationalization, except by law, for a public purpose or the common good, and upon payment of prior compensation" (Memorial, paragraph 254).

93. Claimants referred in their Memorial to the well-known principle according to which no expropriation may take place without payment of the appropriate compensation and they asserted that the "[…] expropriation clause is currently considered a general Public International Law rule" (Memorial, paragraph 238). They added that: "It is equitable for the State that expropriates for the common good to compensate the party that suffers the individual costs of this common good" (paragraph 246).

94. Pesification, in Claimants' opinion, "[…] disabled the mechanisms contractually provided for in the case of pesification and prevented METALPAR from collecting the dollars due, receiving instead Argentine pesos at a third of the promised value for the dollar. This reduction in the value, obviously '… *has caused a change in the substance of the affected right which renders this reduction invalid under the Argentine Constitution*'" (Reply, paragraph 30).

95. Moreover, they alleged that the measures adopted by Argentina "[…] were permanent in nature and have had 'permanent effects' on the contracts signed by Metalpar, since it was never allowed to demand full compliance with them […]" (Reply, paragraph 254).

96. Argentina denied that it had violated Claimants' property rights (Counter-Memorial, paragraph 224). In connection with the doctrine explained by Claimants, called the sole effect doctrine, Argentina declared that "[…] there has been no expropriation under that doctrine. An investment that is worth a lot more than what it would have been worth had the measures not been adopted was clearly positively affected by such measures" (Counter-Memorial, paragraph 225).

97. Based on the report prepared by Marx, Echagüe and Molina, Argentina also stated that the measures "[…] rather than compensate negative effects with positive ones, were widely beneficial for METALPAR's investment" (Counter-Memorial, paragraph 234).

98. In Argentina's opinion, in this case it is impossible to speak of an expropriation since the investment "[…] is worth substantially more in US dollars than what it would

have been worth if the measures had not been adopted" (Counter-Memorial, paragraph 185).

99. It also explained that Claimants' position is based on an "[…] alleged expropriation of some of Metalpar Argentina's contractual rights and not of METALPAR's investment" (meaning **Metalpar S.A.** and **Buen Aire S.A.**), (Counter-Memorial, paragraph 192).

100. Argentina quoted what Claimants declared in paragraph 225 of their Memorial, ("Metalpar does not base its claim on the fact that its investment has been expropriated by Argentina"), and concludes that "[…] Argentina can only request the rejection of the expropriatory claim *in limine* on the grounds of what Claimants themselves have declared" (Rejoinder, paragraphs 171 and 172).

4. Interference

101. According to Claimants, Argentina interfered in their exercise of property rights: "[…] the measures adopted by Argentina, interfered with or 'neutralized' Metalpar's ownership and use of rights and credits, which prevented it from 'running the daily operations of its business and investments;' in other words, it affected 'the control over its investments and business' since it could not demand the compliance with the validly executed contracts. These contracts are the essence of the activities related to its investments since it uses them to legally carry out its trade or business transactions" (Reply, paragraph 253).

102. Based on the award of August 30, 2000, of Metalclad against the United Mexican States (ICSID Case No. ARB(AF)/97/1), Claimants commented that an expropriatory action also includes the under-cover or incidental interference by the State with the use of property by its owners as it causes the effect of depriving the owners of all or some reasonably expected economic benefits, without it being necessary that there is an obvious economic benefit for the State (Reply, paragraph 239).

103. Claimants also outlined other arguments related to the alleged State intervention: "[…] had the Argentine State not interfered in Metalpar Argentina's relationship with its

clients (by establishing the 'pesification' of the credits in foreign currency), METALPAR and BUEN AIRE would have maintained their investments today in the currency of origin […]" (Memorial, paragraph 149). They argue that this intervention became apparent in the pesification of the credits, and the abandonment of the convertibility regime which pegged the US dollar to the Argentine peso, through Law No. 25,561 modifying Law No. 23,928.

104. Claimants concluded that: "[…] the effects of Law No. 25,561 did not hinder the enforcement of the credits guaranteed with pledges in the currency that had been originally agreed upon. Nonetheless, first through the provisions made in article 11 of Law No. 25,561 and then through articles 1 and 8 of Presidential Decree No. 214/2002, Argentina interferes in the relationships between individuals and affects the rights that are part of Metalpar Argentina's equity as established by the Argentine Constitution and METALPAR and BUEN AIRE's investments, under the protection of the APPI" (Memorial, paragraph 152).

105. In Argentina's view "[…] it is impossible to affirm that METALPAR's rights—referring to Claimants'—have 'become so useless that they should be considered expropriated', or that 'the benefits of the property of the foreign investor has been effectively neutralized', since METALPAR's investment is worth substantially more than what it would have been worth if the measures had not been adopted […]" (Counter-Memorial, paragraph 221).

106. Respondent also expressed:

> "The Argentine Republic did not cause the Investor to lose control of its investment.
>
> The Argentine Republic did not run nor currently runs the daily operations of the companies in which METALPAR has made its investment.
>
> The Argentine Republic has not detained nor currently detains any executive or employee of the companies in which METALPAR has made its investment […]

> The Argentine Republic has not interfered nor currently interferes with the management or the activities of the shareholders.
>
> The Argentine Republic did not prevent nor currently prevents the companies in which METALPAR has made its Investment from paying dividends to their shareholders.
>
> The Argentine Republic has not interfered nor currently interferes with the appointment of directors and managers. […]" (Counter Memorial, paragraph 224).

5. Prohibition from transferring funds abroad

107. Claimants stated that Argentina breached Article 5 of the APPI, which refers to the freedom to transfer investment-related payments. They explained that, through a letter of "[…] May 8, 2003, which is Exhibit 8 of this Memorial, Metalpar Argentina S.A., as the company receiving Metalpar S.A. and Buen Aire S.A.'s investments, asked BankBoston of Buenos Aires to transfer USD 200,000, which corresponded to a distribution of dividends that the investors had (sic) the right to transfer abroad in accordance with the abovementioned Article 5" (Memorial, paragraph 369). They also asked BankBoston to "[…] advise us on the procedure to be followed in order to perform such an operation" (Exhibit 8 of the Memorial). They added that, in a telephone conversation, the abovementioned bank indicated that they should "[…] refer to the legislation in force [*meaning the Presidential Decree No. 1570/2001, as Claimants pointed out later*], which banned those transfers" (Memorial, paragraph 370).

108. Claimants concluded "[…] that Argentina breached the guarantee to transfer funds granted in the Argentina-Chile APPI and, what is more, it discriminated against foreign investors in establishing exceptions to the transfer ban like payments of expenses incurred abroad through credit cards" (Memorial, paragraph 372).

109. In relation to this issue, Argentina explained that it always permitted international transfers and, only in the most difficult moment of the crisis, it required the prior approval of the Central Bank for those transfers (Counter-Memorial, paragraph 9). The problem, according to Argentina, is that, "[…] neither of the Claimants ever requested BCRA authorization to carry out a transfer" (Counter Memorial, paragraphs 707 and 716).

110. Argentina believes that, although it is true that Article 5 of the APPI indicates that States must guarantee individuals or companies of the other Contracting Party free transfer of investment-related payments, "[…] this does not prevent each State party from establishing certain procedures for such transfers " (Counter-Memorial, paragraph 721). It added that "[…] in this particular case, the delays in the transfers are exclusively due to Claimants' non-compliance with the required formalities'" (Counter-Memorial, paragraph 744). Further, Argentina argued that the regulations related to this issue (Presidential Decree No. 1570 and several Communications issued by the Central Bank) "[…] do not discriminate between transfers in pesos and transfers in dollars" (Counter-Memorial, paragraph 753).

111. Finally, in relation to this issue, Respondent explained that the requirement of prior authorization became gradually more flexible and, after certain time, some transfers could even be made without having to comply with the authorization of the Central Bank (Counter-Memorial, paragraph 766).

6. Fair and equitable treatment

112. For Claimants, the fair and equitable treatment clause set forth in article 2.1 of the APPI, "[…] operates as a general guarantee clause addressed to foreign investors that their investments in that State will be given treatment that is compatible with those expectations and that that guarantee is independent of the national law of the Host State" (Memorial, paragraph 313).

113. Based on the proceedings in the arbitrations of Técnicas Medioambientales Tecmed S.A. against the United Mexican States (ICSID Case No ARB(AF)/00/2, award of May 29, 2003) and Mondev International Ltd. against the United States of America (ICSID Case No. ARB(AF)/99/2, award of October 11, 2002), Claimants stated that the breach of the fair and equitable treatment principle does not require that the State act in bad faith (Memorial, paragraph 315 and 316).

114. As regards Argentina's acts, Claimants said that "Argentina's legislative action was not coherent, it was ambiguous, unpredictable and lacking in transparency, which

prevented investors from being able to plan their activities" (Memorial, paragraph 320). Moreover, they stated that "[…] Argentina arbitrarily and illegally issued regulations that changed the legal framework on the basis of which claimants had decided to invest […]" (paragraph 322). According to Claimants as of December, 2001, Argentina started issuing legal provisions of different levels in a disorderly and contradictory manner (Memorial, paragraph 350).

115. After stating that the APPI "[…] does not define what should be understood as 'fair and equitable'" (Memorial, paragraph 331), Claimants declared that there were two thesis to approach this issue: the non-autonomy principle or "minimum standard of treatment" observance principle. For this thesis, fair and equitable treatment is reflected in "minimum standard of treatment" recognized in customary International Law. "In precise terms, 'fair and equitable treatment' represents the obligation to give the 'minimum standard of treatment' as established by customary International Law," (Memorial, paragraph 332). The second thesis the autonomous standard of protection, or plain meaning approach, is based "[…] on the conventional nature of the fair and equitable treatment clause and the rules of interpretation of the Vienna Convention […]" (Memorial, paragraph 335). Claimants concluded that arbitral case law has tended to interpret fair and equitable treatment clauses extensively (Memorial, paragraph 346).

116. Claimants declared that "[…] Argentina, by signing the APPI with Chile, took on the obligation towards Chilean investments and investors to respect the rights acquired in connection with such investments and the rational and legitimate expectations of the investors. Argentina did not respect its duty and, therefore, the treatment given to Metalpar S.A. and Buen Aire S.A.'s investments was neither fair nor equitable" (Memorial, paragraph 359).

117. For Argentina, fair and equitable treatment is "[…] **the international minimum standard of treatment, this understood as a standard meaning reasonableness and proportionality,**" (Counter-Memorial, paragraph 473). It is its opinion that international practice and organizations consider that "[…] the standard of fair and equitable treatment a) 'does not include an obligation to afford any additional treatment beyond the requirements of the minimum standard under international customary law concerning the

treatment of foreigners'; b) it is related to concepts such as denial of justice or discrimination; c) based on the States' understanding, it is not related to the stability of the legal and business framework, or the investors' expectations" (Counter-Memorial, paragraph 485).

118. Based on the award issued on June 25, 2001, in the arbitration proceedings between Alex Genin, Eastern Credit Limited Inc., and A.A. Baltoil against the Republic of Estonia (ICSID Case No. ARB/99/2), Argentina pointed out, amongst other criteria, that for the principle of fair and equitable treatment "[…] to be violated by the State requires acts showing a willful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith" (Counter-Memorial, paragraph 551).

119. On the grounds of what we have just explained, Argentina denied that during "the emergency" it stopped respecting the fair and equitable treatment principle (Counter-Memorial, paragraph 499).

120. Argentina concluded that the allegedly violating measures were in fact proportional to the situation and that an equilibrium between all the economic agents in society was sought. "The measures were not inconsistent as, not only did they consider the society as a whole, but they also were successful in readjusting circumstances to the prevailing economic situation." (Counter-Memorial, paragraph 609).

121. According to Argentina, Claimants referred to incompatible concepts in relation to fair and equitable treatment. "If fair and equitable treatment is a 'minimum standard of protection,' then it cannot be, at the same time, a stabilization clause as Claimants intend" (Rejoinder, paragraph 354).

122. Argentina also referred to the award of October 27, 2006, issued in the arbitration proceeding Champion Trading Company and Ameritrade International Inc. against the Arab Republic of Egypt, (ICSID Case No. ARB/02/9), which stated that "[…] according to recent case law, the fair and equitable standard must be assessed in light of all the facts and circumstances of the case, including the behaviour of the Claimants" (Rejoinder, paragraph 424). Based on what was resolved in that case, Argentina emphasized the need

to analyze the circumstances when assessing whether an investor was provided with fair and equitable treatment.

123. In Argentina's opinion: "METALPAR cannot argue that it had any legitimate expectation that, in the face of the most serious economic, social and institutional collapse in the history of the country, its investment would not be affected at all and that the legal framework governing the contractual relationships between private persons would not be readjusted." (Rejoinder, paragraph 392).

7. Compensation

124. In their Memorial, Claimants requested consequential damages for the decrease in value in dollars of the credit rights of Metalpar Argentina S.A., according to a financial report as of December 31, 2003, that they presented as Annex 7, in the amount of USD 8,055,933 (paragraph 407). They requested that upon issuance of the award a new calculation be prepared adjusted as of such date (paragraph 402). They also requested a total amount of USD 1,405,010 as actual damages with respect to the court and out-of-court costs as of January 6, 2002 (paragraph 410). With respect to lost profits, which is mentioned as opportunity cost in the abovementioned report with the cut-off date as of December 31, 2003, they requested the amount of USD 281,773 (paragraph 414); they reduced the amount in USD 174,947 for the liabilities settled by Metalpar Argentina S.A. in 2002 in Argentine pesos readjusted by CER, which—in their opinion—was a "benefit" for that company (paragraph 416). After such reduction, they requested a total amount of USD 9,567,769 for consequential damages and lost profits (paragraph 418). For moral damages, they requested the payment of damages for USD 3,000,000 (paragraph 423) and as "loss of chance," a total amount of USD 2,870,330.81 (paragraph 432). They also requested the amount of USD 2,500,000 for other damages related to economic, financial and legal advisory services that Claimants "[…] had to resort to in order to face the company's situation in Argentina and in Chile […]" (paragraph 434).

125. To conclude, Claimants requested that Argentina be ordered to pay USD 17,938,099 plus "[…] compound interest from the date of the decision until the actual payment thereof" (Memorial, paragraph 437 b).

126. They also requested "In the alternative, to order the Argentine Republic to compensate claimants for the damages caused, in the amount deemed appropriate by the tribunal" (Memorial, paragraph 437).

127. In the hearing on the merits, Claimants stated as follows: "In order to reduce the effect of pesification or to try to reduce the effect of damages for the benefit of the Argentine Government and then require a lower compensation, Metalpar accepted payments from debtors even if they were 1-to-1 without CER, […] thus, Metalpar was able to collect a significant amount from debtors" (transcript of the hearing on the merits, September 11, 2007, page 34).

128. Argentina expressed its disagreement with the compensation requested by Claimants, based mainly on the fact that—in its opinion—the measures that it took "[…] far from impairing METALPAR's investment, have benefited it strongly […]" (Counter-Memorial, paragraph 876). "[…] the measures amply benefited Metalpar Argentina as they allowed its debtors not only to settle their payables but also to improve their economic-financial situation as a result of the recovery in the demand of passenger transportation, a circumstance that meant a rise in the acquisition of new vehicles" (Rejoinder, paragraph 534).

129. Also, in its opinion, Metalpar should not have "[…] referred to the provisions contained in the contracts signed by Metalpar Argentina, in order to calculate the amount of compensation for alleged damages due to the breach of the BIT by Argentina" (Counter-Memorial, paragraph 879). It added that Claimants did not consider the economic crisis that Argentina went through either, which generated effects in the business of Metalpar Argentina, even before the application of the emergency measures adopted by such country. It stated that "[…] in fact, in the letter to the shareholders [*Memoria*] included in the 2001 financial statements, the company itself acknowledged that '[t]he billing of the fiscal year under analysis [2001] decreased in absolute values by 34.55% due to the macroeconomic situation previously mentioned…'" (paragraph 881).

130. According to Argentina, there is no causal relationship between its behaviour and the damages alleged by Claimants (Counter-Memorial, paragraph 884) and furthermore,

the headings of moral damages, loss of chance and other damages have no technical grounds supporting their quantification (Rejoinder, paragraph 545).

131. Argentina asserted that—as acknowledged by Claimants—the method used to estimate compensation is an accounting method, not a financial method and, further, there is an error in the assessment of the alleged damages (Rejoinder, paragraphs 549-552). Argentina challenged many of the aspects of the report submitted by Claimants as Exhibit 7 of the Memorial ("Financial Report, Metalpar, Effects of Pesification as of December 31, 2003"), since it was prepared by an accountant and the amounts disclosed derive from Metalpar's Management. "The report lacks independence […]" (transcript of the hearing on the merits, September 11, 2007, page 196). At the hearing, Argentina also explained the technical errors that it found in such report.

132. In the opinion of Argentina, the damages for moral damages are not admissible because Claimants are judicial persons and according to Argentine law they cannot "[…] experience spiritual suffering" (transcript of the hearing on the merits, September 11, 2007, page 207).

133. To conclude, Argentina argued that Claimants did not suffer any damage as a result of the measures adopted by such State and it is "[…] obvious that the valuation of the shareholding in Metalpar Argentina is currently much higher than that that could be assessed in 2001" (Rejoinder, paragraph 577).

8. State of necessity

134. Argentina argued, as a circumstance precluding responsibility, the state of necessity. In its opinion:

> "[…] the collapse that affected and continues to affect it constitutes a state of necessity that exempts it from international responsibility as:
>
> - The Government has not contributed to the occurrence of such state of necessity.

- The measures adopted were the only means of safeguarding that essential interest from the grave peril of social dissolution and political anarchy.

- No essential interest of the State or States with respect to which the obligation exists has been seriously impaired; neither has an interest of the community as a whole nor the compliance with a *ius cogens* obligation been affected.

- No unequal treatment has been given to foreign investors as compared to their Argentine counterparts, or to investors with respect to the other investors engaged in the same activity.

- The international obligation invoked (the BIT) does not rule out the possibility of invoking a state of necessity" (Counter-Memorial, paragraph 854).

135. According to Argentina, the crisis that it suffered is related to countless external factors in which it had null or insignificant involvement (Counter-Memorial, paragraph 859; Rejoinder, paragraph 497).

136. Argentina also stated, based on the case of Sea-Land Service, Inc. against Iran, Award No. 135-33-1 of 20 June 1984 issued by the Iran-United Status Tribunal, that in a crisis situation government authorities may use "[…] a wide range of powers without incurring in international responsibility" (Counter-Memorial, paragraph 864).

137. According to Argentina, during the crisis, there was a certain risk of disintegration of the State itself (Rejoinder, paragraph 491). The measures that it adopted in view of this risk represented the only way of safeguarding an essential interest from a grave and imminent peril (Rejoinder, paragraph 517). Argentina also added that "[…] there is no doubt that the disastrous state which the country was in gives rise to the state of necessity, which is a clear cause of justification under both Argentine law and international law» (Rejoinder, paragraph 280).

138. According to Claimants, the emergency or necessity law—based on local case law—is limited and subject to the verification of certain circumstances established by the case law of the Argentine Supreme Court (Reply, paragraph 23). According to the Supreme Court, the measure adopted by a State shall be constitutional if it temporarily

restricts the performance of the contract or decision, keeping the substance thereof unharmed and integral (Reply, quotation in footnote number 5, page 13).

139. In Claimants' opinion, "[…] it is admissible that the need to provide for common welfare imply the limitation of certain individual rights; but in such case, that deprivation should be compensated" (Reply, paragraph 31).

140. Another argument posed by Claimants as regards this issue is that the emergency in Argentina "[…] did not come out of nowhere, and it was not a natural disaster, it was the result of its own mismanagement" (Reply, paragraph 47).

141. Claimants emphasized that they do not question the power of Argentina to issue the measures (Reply, paragraph 54) and that they are not intending to obtain a declaration of unlawfulness as regards pesification or devaluation (Reply, paragraph 56); neither do they question the sovereign power of Argentina to devalue its currency, "[…] Argentina had sufficient *imperium*—through public order laws—to modify the conventions agreed to freely between parties to the contracts" (Reply, paragraph 57). According to Claimants, pesification was not necessary or mandatory (Reply, paragraph 98); it was a measure that was deemed convenient and they do not question the power to issue it (Reply, paragraph 101). They concluded that, although they have no doubts as to Argentina's sovereign power to issue the measures challenged, such Government should compensate them for the losses that they suffered.

142. Claimants asserted that Argentina "[…] did not have nor has any right to require a 'patriotic contribution' from a foreign investor, and that the decrease, reduction or partial deprivation of their property (the investment instrumented through the contracts) must be compensated" (Reply, paragraph 115).

143. According to Claimants' opinion, the state of necessity is an exceptional excuse and it should only be used under strict conditions (transcript of the hearing on the merits, September 11, 2007, pages 82 and 86). It cannot be alleged "[…] if the responsible State has contributed deliberately or negligently to the occurrence of such state of necessity"

(page 96). "The state of necessity does not exclude the Government's obligation to provide compensation for the effectively caused loss" (page 102).

9. Obligation to mitigate damages

144. Argentina stated that the Argentine legal system expressly established a method to amend situations of inequality that could arise from the application of pesification, and it added that "METALPAR acknowledges that neither Claimants in this arbitration nor Metalpar Argentina made use of the mechanism described" (Counter-Memorial, paragraph 17).

145. According to the Argentine Republic, "Metalpar Argentina, a company controlled by METALPAR, should have made a reasonable and '*bona fide* effort' before local authorities to amend the alleged inequalities resulting from the pesification of contracts" (Counter-Memorial, paragraph 18). It clarified that this does not imply or equal the requirement to exhaust internal remedies, but rather "[…] it refers to the mere fact that, in the absence of a reasonable effort by the investor for the amendment of the measures challenged, the likelihood that there is a breach of the BIT becomes at least doubtful" (Counter-Memorial, paragraph 19).

146. Claimants expressed their disagreement with Argentina and asserted that they could not be required to initiate local legal actions because that would have implied a duplication of claims, which is inadmissible from the international point of view, and it would have prevented them from resorting to an ICSID tribunal (Reply, paragraphs 143, 153 and 154). In addition, initiating the proceedings would have signified incurring in a self-contradictory attitude in challenging the legality of the system and, at the same time, making claims within such system (Reply, paragraph 144). They also considered that the claim would not have even "produced results" because, as of December 27, 2006, there were over 50,000 proceedings pending at the Argentine Supreme Court with respect to the constitutionality of pesification (Reply, paragraph 145). Also, in their opinion, requiring them to "go through" the complicated legal proceedings "[…] also implied an expropriatory measure" (Reply, paragraph 146).

147. In a communication of September 28, 2007, in response to several questions posed by the Tribunal in the hearing on the merits, Claimants stated that "Metalpar received the payments made by their customers 'towards the final amount due', as established by Law No. 25,561, and proposed to their debtors a renegotiation of the loan" (page 7). They added that: "As established by Law No. 25,642, CER could only be applied as from October 1, 2002. That is why, we repeat, Metalpar used such date—and not any other date—to calculate CER, and not because of foreign exchange speculation. Consequently, Metalpar could only start claiming the payment of CER from its debtors as of October 1, 2002 […] Furthermore, Metalpar refinanced the loans of some of its customers" (page 7).

10. Conclusions and requests

148. In the hearing on the merits, Claimants concluded that "[…] pesification breaches the legal framework and the Agreement for the Promotion and Reciprocal Protection of Investments (APPI) that it took into account upon making the investment since it implied substantive modifications to what Metalpar had considered upon carrying out the investment" (transcript of the hearing on the merits, September 11, 2007, page 36). They added that "Argentina breached its obligation to provide full protection and legal security within its territory to the investments made by Metalpar and Buen Aire and caused them to be subject to measures tantamount to expropriation" (transcript of the hearing on the merits, September 11, 2007, page 49).

149. In their Memorial, Claimants requested that the Tribunal issue the award as follows:

> "a) Establish that the Argentine Republic has breached its obligations under the Bilateral Investment Treaty previously mentioned, which was signed between Chile and Argentina, international law and the Argentine Constitution itself;
>
> b) Condemn the Argentine Republic to pay to claimants Metalpar S.A. and Buen Aire S.A. a compensation of **USD 17,938,099**, readjusted and updated as previously requested, plus all additional court expenses deriving from this litigation for claimants, as well as compound interest from the date of issuance of the decision until actual payment.

> c) In the alternative, order the Argentine Republic to compensate claimants for the damages caused, in the amount deemed appropriate by the tribunal" (paragraph 437).

150. In their Reply, Claimants repeated the requests indicated in the previous paragraph (XXV Request for Relief).

151. In its Counter-Memorial, Argentina requested that the Tribunal declare "[…] a) that this Counter-Memorial be deemed filed in due time and manner; b) that METALPAR's claim against the Argentine Republic be dismissed in full, plus court costs" (Counter-Memorial, paragraph 909).

152. In its Rejoinder, Argentina requested that the Tribunal declare "a) That the Rejoinder be deemed filed in due time and manner; b) That the evidence offered and submitted be considered; c) That METALPAR's claim be dismissed in due time; e) That court costs be imposed on Claimants" (Rejoinder, paragraph 593).

IV. DIFFICULTIES WITH EVIDENCE

153. As previously explained, for reasons unknown to the Tribunal, Claimants did not present the witnesses and experts proposed by the parties in the hearing scheduled and held precisely with the object that the Tribunal and each of the parties examine them. Claimants proceeded in this way despite the fact that the Tribunal had indicated to them, pursuant to Rule 34(3) of ICSID Arbitration Rules, that they were required to present those witnesses and experts, so that they may be examined by Argentina and the Tribunal as explained in paragraphs 36, 37, 38, 39, 40, 41, 42, 44, 46, 50 and 51 above. Consequently, the Tribunal is unable to base its decision on the facts and conclusions that those witnesses and experts would have allegedly proved, as stated by Claimants. To proceed differently would imply causing a serious procedural inequality for Respondent, who expressly requested the presentation of those persons in order to examine them. The Tribunal also values the fact that the Argentine Republic did bring its witnesses and experts to the hearing, and Claimants had full possibilities of interrogating them on that occasion.

154. Neither will the Tribunal be able to base its decision on the documents submitted in the hearing by Dr. Juan Andrés Fontaine and Dr. Hernán Salinas, when they examined some of the experts presented by Argentina, although the Tribunal reserves its right to use their statements made at the hearing to clarify events. Accepting the inclusion of the opinions and reports issued by experts in the proceedings through the examination of the counterparty's expert witnesses would imply placing the counterparty in an obvious situation of procedural inequality, as those opinions and reports could not be examined and those who prepared them could not be interrogated.

155. Claimants justified their procedural attitude with respect to evidence through their alleged conviction—which was repeated by their legal counsel expressly—that the only remaining issues were matters of law (and that there was no controversy as to the matters of fact). Notwithstanding the reasons that led Claimants not to present their witnesses and experts to be examined by Argentina at the hearing, the truth is that they imposed serious probative limitations on the Tribunal that it cannot surpass without breaching the procedural equilibrium that should exist between the parties. In any case, as the issue discussed in this case is whether Claimants' investment was affected, the Tribunal considers that this fact should be proven and, therefore, it is not possible to treat the controversy as if the only remaining issues were matters of law (and that there was no controversy as to matters of fact).

156. Despite the objections made by Claimants, the Tribunal has no reason to doubt the truthfulness of the assertions made by the witness offered by Argentina or the conclusions reached by its experts. Their examination by Claimants' representatives and the members of the Tribunal might have shown some weaknesses in certain cases, but nothing that could disqualify them.

157. With respect to the evidence offered by Argentina, Claimants stated that they "[…] challenge the documentation, reports and statements filed by Argentina, both in form and substance. With respect to form, because they were not filed pursuant to procedural regulations, i.e. they did not form part of Argentina's Counter-Memorial […]" (Reply, paragraph 321).

158. The Tribunal based on Rule 24 of the ICSID Arbitration Rules and point 18 of the Minutes of the Tribunal's First Session held on November 23, 2003, in which—among other issues—the procedure for documentary evidence was analyzed, does not share Claimants' criterion. Argentina offered its evidence in a timely manner, as exhibits to its briefs, just as Claimants did with theirs.

V. ANALYSIS OF THE MERITS OF THE CASE

159. Below the Tribunal will analyze and reach conclusions regarding the positions of the parties with respect to the issues discussed in these proceedings, as mentioned in section III above.

1. Discrimination

160. Claimants alleged, in brief, that Argentina, through Law No. 25,561, Law No. 25,789, and Presidential Decree No. 905/2002, had discriminated against them (Memorial, paragraphs 169 and 360). Argentina denied the existence of such discrimination against Claimants and in favor of the financial sector and, on the contrary, asserted that the entities of such sector had received a more burdensome treatment.

161. The Tribunal considers that a State's power to create its legal system—through its competent authorities—allows it to establish different rules to govern different subjects. If Claimants neither were nor are financial institutions, they cannot argue that the Argentine Government should have treated them as such.

162. Treating different categories of subjects differently is not unequal treatment. The principle of equality only applies between equal subjects, not between unequal subjects. This was acknowledged by the Tribunal in the case CMS Gas Transmission Company against the Argentine Republic, which stated as follows: "The Respondent's argument

about discrimination existing only in similarly situated groups or categories of people is correct […]."[1]

163. Likewise, the Sempra Energy International against the Argentine Republic case may be quoted:

> "The Tribunal reaches a similar conclusion in respect of the alleged discrimination. There are quite naturally important differences between the various affected sectors, so it is not surprising that different solutions might have been or are being sought for each. It could not be said, however, that any such sector has been particularly singled out either to have applied to it measures harsher than in respect of others, or conversely to be provided with a more beneficial remedy to the detriment of another."[2]

164. In conclusion, the Tribunal does not find in this case that Argentina discriminated against Claimants through the rules cited by them because, as they belong to a group that is different from the financial sector, to which the rules granted different treatment as regards pesification, they cannot argue that they were treated in a discriminatory manner.

2. Expropriation

165. In the Memorial, **Metalpar S.A.** and **Buen Aire S.A.** argued that the APPI provides for protection and legal security to its investments and that they cannot be expropriated (paragraph 254). They also explained what is understood as indirect expropriation and argued that the acts performed by Argentina constituted an indirect expropriation.

166. Subsequently, they repeatedly explained their position as follows: "Metalpar does not base its claim on the fact that its investment has been expropriated by Argentina. SPECIFICALLY, WHAT HAS BEEN EXPROPRIATED ARE THE RIGHTS AND CREDITS METALPAR HAD AGAINST ITS CLIENTS, WHICH IT HAS NOT BEEN ABLE TO EXERCISE FULLY BECAUSE THE ARGENTINE AUTHORITY HAS

[1] CMS Gas Transmission Company v. Argentine Republic (ICSID Case No. ARB/01/8), Award of May 12, 2005, paragraph 293.
[2] Sempra Energy International v. Argentine Republic (ICSID Case No. ARB/02/16), Award of September 28, 2007, paragraph 319.

PREVENTED IT FROM DOING SO BY MEANS OF THE FINANCIAL MEASURES ISSUED TO THAT EFFECT" (Reply, paragraph 225).

167. Similarly, they stated at the hearing that: "In our opinion, the issue here is not the valuation of the investments, but an expropriation of credits, a contractual breach" (transcript of the hearing on the merits, September 14, 2007, page 714).

168. The BIT sets forth as follows:

> "Article 4. Expropriation, nationalization and extraordinary situations.
>
> 1. The investments made by nationals or companies of one of the Contracting Parties shall enjoy full protection and legal security within the territory of the other Contracting Party.
>
> 2. The investments made by nationals or companies of one of the Contracting Parties shall not be, within the territory of the other Contracting Party, expropriated, nationalized or placed under the sphere of measures whose effects are tantamount to an expropriation or nationalization, except in the event of a law based on public use or common welfare, and, in those cases, they shall be previously compensated […]."

169. As already stated, Argentina, aside from asserting that Claimants' investments were not expropriated, repeated on different occasions Claimants' alleged contradictions on this issue, as they mistook their investments for the contracts signed by its subsidiary, Metalpar Argentina S.A.

170. During the proceedings, Claimants repeated their position and asserted that what had been expropriated were the loan agreements signed between Metalpar Argentina S.A. and its customers, and they expressly stated that their Claim is not based "[…] on the fact that their Investment was expropriated by Argentina" (Reply, paragraph 225).

171. According to Claimants, the loan agreements that they signed with their debtors were financed with their investments and, therefore, they should be under the BIT's protection. In the opinion of Argentina, the investments and the loan agreements are different things, and only the former are protected by the investment treaty.

172. In another ICSID arbitration, the tribunal correctly stated that:

> "In considering the severity of the economic impact, the analysis focuses on whether the economic impact unleashed by the measure adopted by the host State was sufficiently severe as to generate the need for compensation due to expropriation. In many arbitral decisions, the compensation has been denied when it has not affected all or almost all the investment's economic value. Interference with the investment's ability to carry on its business is not satisfied where the investment continues to operate, even if profits are diminished. The impact must be substantial in order that compensation may be claimed for the expropriation."[3]

173. This Tribunal agrees with what was expressed in the previous paragraph and considers that in this proceeding Claimants were unable to prove that the actions taken by the Argentine Government had a "sufficiently severe" effect on their investments "to generate the need for compensation due to expropriation." Furthermore, in this case, the Tribunal has not had any evidence showing that the intervention in the loan agreements alleged by Claimants produced any negative effects on their investment in Argentina.

174. In addition to the above, based on the evidence presented by Argentina, the Tribunal considers that Claimants were never prevented from managing their investment and they always had control over it through their subsidiary, Metalpar Argentina S.A. What is more, such company continued performing its business activities, negotiating with the customers that had already signed the contracts and with future customers. Metalpar Argentina S.A. improved its production and sales in the Argentine market, as acknowledged by its Chairman, Mr. Jaime Paredes, who is also one of the main shareholders of Claimants (transcript of the hearing on the merits, September 14, 2007, page 932). Therefore, there is no evidence of direct or indirect expropriation of Claimants' investments.

3. Interference

175. For the same reasons given showing that Claimants' investments were not expropriated, the Tribunal concludes that it is also not possible to affirm that there was

[3] LG&E Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic (ICSID Case No. ARB/02/1), Decision on Liability of October 3, 2006, paragraph 191.

any significant interference by Argentina with respect to Claimants' investments that may have prevented the latter or Metalpar Argentina S.A. from carrying out their business activities as they deemed most appropriate.

4. Prohibition on transferring funds abroad

176. According to Claimants, Argentina breached the guarantee of transfer of funds included in the **BIT** and thus discriminated against them as compared to other foreign investors (Memorial, paragraph 372). According to Argentina, there was no such violation since, even during the worst part of the crisis, investors were always able to make transfers, although for a period of time authorization from the Central Bank was required (Counter-Memorial, paragraphs 9, 707, 715 and 716).

177. To solve this issue, it is necessary to review the regulations quoted by Claimants, i.e. Presidential Decree No. 1570/2001, which, in the relevant part, establishes:

> "*Article 2 – The following transactions are hereby prohibited:*
>
> *[…] b) Transfers abroad, except for those related to foreign trade transactions, to the payment of expenses or withdrawals made abroad through credit or debit cards issued within the country, or to the settlement of financial transactions or for other concepts, in this last case, subject to the authorization of the Central Bank of Argentina*" (Memorial, paragraph 371).

178. Claimants intended to prove the only case in which they were allegedly unable to transfer funds abroad through a letter dated May 8, 2003 that was attached as Exhibit No. 9 to the Memorial. In that letter, Metalpar Argentina S.A. requested BankBoston to provide advice as to how to transfer USD 200,000.00 to its shareholders; the bank responded that current legislation prohibited such remittances.

179. The Tribunal concludes that Claimants, who knew the regulations on this matter well, as indicated in the file, did not comply with the established procedure, which consisted of requesting authorization from the Central Bank, not BankBoston, and that Argentina did not breach article 5(b) of the BIT, which guarantees the transfer of funds abroad. Should it be concluded that the events were the result of incorrect advice provided

by BankBoston to Claimants, the consequences of that error could not be charged to Argentina either.

5. Fair and equitable treatment

180. The Tribunal considers that, contrary to what Claimants stated, the treatment that Argentina accorded to their investments did not breach the fair and equitable treatment standard established in the BIT.

181. As explained in paragraphs 160 through 164, Argentina did not discriminate against Claimants. Nor did it deny them access to justice. As previously stated, the measures taken by Argentina to avert the crisis included judicial and extra-judicial mechanisms to mitigate the effects thereof. Claimants, through their own decision, and not because the Argentine authorities prevented them from doing so, did not use any of those mechanisms.

182. With respect to the issue of the expectations alleged by Claimants, the Tribunal observed that they were basically based on the award issued on May 29, 2003 in the arbitration Tecmed against the United Mexican States (ICSID Case No. ARB/00/2); however, it considers that it is required to analyze what was resolved in other cases in order to achieve greater conceptual accuracy. The following paragraphs are included for such purpose.

183. In the PSEG Global Inc. and Kenya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi against the Republic of Turkey case, the Tribunal stated as follows:

> "Because the role of fair and equitable treatment changes from case to case, it is sometimes not as precise as would be desirable […] Recent awards have applied this standard to the assessment of rights affected by inconsistent State action, arbitrary modification of the regulatory framework or endless normative changes to the detriment of the investor's business and the need to secure a predictable and stable legal environment. This includes most significantly the issue of legitimate expectations which, as the Tribunal in *Tecmed* concluded, requires a treatment that does not "detract from the basic expectations on the basis of which the foreign investor decided to make the investment" […]. Although the Claimants, as noted above, provide a long list of legitimate

> expectations that in their view have not been met, the Tribunal is not persuaded that all such complaints relate to legitimate expectations. **Legitimate expectations by definition require a promise of the administration on which the Claimants rely to assert a right that needs to be observed"**[4] (emphasis added).

184. In the award of LG&E Corp., LG&E Capital Corp. and LG&E International Inc. against the Argentine Republic, the Tribunal concluded that:

> "Thus, this Tribunal, having considered, as previously stated, the sources of international law, understands that the fair and equitable standard consists of the host State's consistent and transparent behavior, free of ambiguity that involves the obligation to grant and maintain a stable and predictable legal framework necessary to fulfill the justified expectations of the foreign investor."[5]

185. After analyzing the abovementioned awards, the conclusions of which, in essence, this Tribunal shares as they properly reflect the concept of "fair and equitable treatment," it is necessary to point out the following: the tribunals in the cases PSEG Global Inc. Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi against Republic of Turkey (ICSID Case No. ARB/02/5, award of January 19, 2007), Técnicas Medioambientales Tecmed S.A. against United Mexican States (ICSID Case No. ARB(AF)/00/2, award of May 29, 2003), ADC Affiliate Limited and ADC & ADMC Management Limited against Republic of Hungary (ICSID Case No. ARB/03/6, award of October 2, 2006), Azurix Corp. against Argentine Republic (ICSID Case No. ARB/01/12, award of July 14, 2006), Siemens A. G. against Argentine Republic (ICSID Case No. ARB/02/8, award of February 6, 2007), LG&E Corp., LG&E Capital Corp. and LG&E International Inc. against Argentine Republic (ICSID Case No. ARB/02/1, award of July 25, 2007), and Enron Corporation, Ponderosa Assets L.P. against Argentine Republic (ICSID Case No. ARB/01/3, award of May 22, 2007), amongst others, asserted that investors' expectations were related to fair and equitable treatment. However, in all of them, the conflict arose out of a state of facts different to the one under analysis in this case: in some of them, the relevant governments had invited the foreign investors to participate in a bidding process that was awarded to each of those investors and ended with the signing of a contract. In

[4] PSEG Global Inc. and Kenya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey (ICSID Case No. ARB/02/5), Award of January 19, 2007, paragraphs 239-241.
[5] LG&E Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic (ICSID Case No. ARB/02/1), Decision on Liability of October 3, 2006, paragraph 131.

other cases, there were other types of contractual relations which created legitimate expectations; in all of them, the Government refused to renew or to comply with the contract, license or permit.

186. In this specific case, there was no bid, license, permit or contract of any kind between Argentina and Claimants, and the Tribunal considers that there were no legitimate expectations entertained by Claimants that were breached by Argentina.

187. In the hearing it was shown that both Claimants had business experience in Argentina as well as in Chile (transcript of the hearing on the merits, September 11, 2007, page 159) and that they knew that the automobile industry in Argentina was in bad conditions since 1997, as affirmed by Mr. Jaime Paredes, one of the main shareholders of Claimants (transcript of the hearing on the merits, September 14, 2007, page 927). Therefore, the Tribunal considers that it is unlikely that Claimants legitimately expected that their investments would not be subject to the ups and downs of the country in which they were made or that the crisis that could already be foreseen would not make it necessary to issue legal measures to cope with it. Since in this case there is no arbitrary governmental conduct nor is there a contractual situation of any kind leading Claimants to entertain legitimate expectations that were violated by such conduct, the Tribunal concludes that Argentina did not violate the provision that requires it to afford fair and equitable treatment to Claimants' investments.

188. Based on what has been disclosed in the previous pages, the Tribunal concludes that it was not proven during this proceeding that **Metalpar S.A.**'s and **Buen Aire S.A.**'s investments in the Argentine Republic received discriminatory treatment or treatment violating the provision requiring fair and equitable treatment from the Argentine Government. Neither has it been proven to the Tribunal that these investments were expropriated by that Government in a direct or indirect manner, that that Government interfered considerably in how the investments were handled by Claimants, nor that they were arbitrarily denied the possibility of making transfers abroad. That would be sufficient to dismiss the claim filed by Claimants. However, as already mentioned and as will be shown further ahead, this case, additionally, has the singular feature that there is no evidence in the case file showing that the investments of Claimants were adversely

affected, which is why their claims should be denied. The Tribunal also considers it convenient to analyze other aspects of this dispute that make it different from other similar disputes. The following paragraphs are devoted to this end.

6. The circumstances under which Claimants made their investment

189. As from 1998, a crisis began to shape in Argentina, which exploded violently in late 2001. The extent of this situation is undeniable and was thoroughly proven in the case. The severity of the phenomenon was described by Dr. Liliana De Riz, expert witness offered by Argentina, who in her report and in her subsequent oral statement expressed as follows:

> "In 1998, the economy began a period of recession and the social imbalance worsened until it turned into a social crisis that, simultaneously, reflected a crisis in the legitimacy of the governing authorities and a crisis of the State, which was incapable of maintaining order" (Report, page, 1).
>
> "After the abandonment of the convertibility regime, which was determined by the market, chaos and economic depression continued to reign. With a paralyzed banking system and no clear prospects of possible international financial aid, GDP contracted by 16% in the first half of 2002" (Report, page 6).

190. At the hearing, Dr. De Riz added: "There is no doubt that the unprecedented nature of this Argentine crisis, the new aspect of it, was that it consisted, simultaneously, of a collapse of the economy, a crisis of the Argentine Government, a crisis of the political system of representation and a social crisis" (transcript of the hearing on the merits, September 12, 2007, page 445).

191. When referring to the crisis, she said, on that same occasion:

> "What did this translate into? As I said into the sudden increase in poverty, pushing half the population under the poverty line and a quarter of the population under the indigence line, which translates into the rapid spreading towards the periphery, to the marginal sectors of society, to those who do not receive a formal income, because the economic chain is broken. And in a context of sudden impoverishment—as I have said—there is an implosion, this social outburst that brings new social characters into the Argentine scene. This is what the *cacerolazos*

> (people protesting through banging on pots and pans), the *piqueteros* (picketers) are, they had already begun to protest but they grew in significance" (transcript of the hearing on the merits, September 12, 2007, page 448 and 449).

192. The extremely grave situation experienced in Argentina during that time was not only shown by expert testimony. It was also reported by some of the most important newspapers around the world. As an example, the following headlines are transcribed below:

"*Argentina a la deriva*" (Argentina adrift), ABC (Spain), December 21, 2001; "*Argentina se hunde sin ayuda*" (Argentina sinks without help), El Nuevo Herald (Miami), December 21, 2001; "*Frágil, el equilibrio político, económico y social en Argentina: un mal paso desataría la furia*" (Fragile, the political, economic and social balance in Argentina: a wrong step would unleash fury), Jornada (Mexico), January 20, 2002; "*El 70% de los niños argentinos vive en la pobreza*" (Seventy percent of Argentine children live in poverty), La Nación, August 21, 2002 (exhibits A RA 44, 50, 45 and 36, respectively, submitted by Argentina).

193. Several international financial institutions, such as the International Monetary Fund, also expressed their concern over the severity of the crisis Argentina was going through. Similarly, figures without any connection to either of the parties pointed out how alarming the situation was. As an example, the following interview may be quoted:

> "The U.S. Assistant Secretary of State for Latin American Affairs, Otto Reich, said that the severity of the economic crisis which Argentina is going through 'more than doubles' the Great Depression the United States went through in the early thirties. At that time, there was a serious financial crack which brought serious consequences for that country's economy.
>
> Reich also indicated in an interview published yesterday by the Italian newspaper Corriere Della Sera that 'the financial system in Argentina exists but must be rebuilt'. Furthermore, the U.S. official pointed out that due to the magnitude of the crisis, he is following 'the negotiation between the Argentine Government and the International Monetary Fund (IMF) very attentively'" (Clarín.com, July 10, 2003, quoted by Argentina in its Counter-Memorial, footnote on page 54).

194. The Argentine Supreme Court of Justice itself recently recalled this chaotic situation:

> "[…] the questions at issue make it necessary to recall that the political, social and economic events that gave rise to one of the most serious crises in the contemporary history of Argentina are public and well-known events acknowledged by the Court upon ruling in Fallos […] once the situation of serious economic, social and political distress that represents a maximum danger for the country has been accepted, the State's duty to put in place exceptional rules is imperative; i.e. a set of extraordinary remedies to ensure the self-defense of the community and the reestablishment of the social normality that the political system provided by the Constitution requires […]."[6]

195. There were many external factors that contributed to the chaotic situation Argentina experienced in late 2001 and early 2002. Among them, those frequently mentioned are the problems suffered by Mexico in 1995, Russia as from 1998, the southeast Asian countries and, especially, Brazil in 1998 (Report by expert Carlos Pérez Rovira, filed by Claimants, page 5, and report by Roberto Frenkel and Mario Damill, filed by Argentina, page 33).

196. Although, in the words of the witnesses, the crisis in late 2001 and early 2002 is incomparable to any other in Argentina's past, it is true that this country has suffered serious political and economic setbacks throughout its history. Without having to go back farther in history, it is sufficient to recall the difficult situations experienced by Argentina during the second part of the 20th century to know that, although extremely serious, the crisis of the early 21st century is not without precedent in Argentina.

197. As regards the causes of the crisis and the appropriateness of the measures taken by Argentina, the Tribunal cannot determine whether, as Claimants alleged, those measures contributed to the crisis. It is possible that some of them were not the best measures, but undoubtedly, they were aimed at overcoming the devastating situation Argentina was going through. Therefore, the Tribunal will base itself on the objective fact that, in a relatively short period, Argentina went from utter chaos in the social, economic and political fields to a situation of stability as is currently the case.

[6] Rinaldi, Francisco A. et al versus Guzmán Toledo et al. Mortgage foreclosure, Argentine Supreme Court of Justice, March 15, 2007, Resolution 320 XLII.

198. Leaders of different countries must make decisions of a very different nature on a daily basis. Except in very obvious situations, it is extremely difficult to determine at the time such decisions are made, and even some time afterwards, whether said decisions were the best they could have been. In this case, to try to abstractly determine whether the actions carried out by Argentina during the crisis were optimal is a difficult or impossible task, especially if economic consequences are intended to be derived from the conclusion reached.

199. Resolving whether the actions taken by the Argentine Republic during the emergency were correct and taken in a timely manner and, consequently, whether they were key to Argentina overcoming the crisis, or whether, quite the opposite, they contributed to the creation of the crisis or, at least, made it more serious; or to evaluate the way in which international financial institutions and the global economic system conducted themselves, are discussions that go beyond this Tribunal's sphere of action. Even today, discussions continue on whether the financial aid received by Argentina was timely or tardy, sufficient or insignificant and some hold that no matter what governments and international institutions would have done, only Argentina could take the measures—some of these measures being almost heroic—that were necessary to start to overcome the situation that was weighing down its people. As regards the suggestions (or impositions, according to some) made by the international financial organizations, the discussion covers not only issues on their appropriateness, rather, it also includes other aspects such as the debate on whether, even if they were in fact correct, they were incorrectly or insufficiently applied by the governments of that country.

200. This Tribunal is fully aware that it was not appointed to make a historical and economic analysis of the social, economic and political problems Argentina has experienced. Neither is such a task of interest for the purpose of fulfilling the mission that was entrusted to the Tribunal, which is to settle the dispute between the parties. The undersigning arbitrators understand that the analysis of the causes of the crisis suffered by Argentina, which reached the height of its severity in late 2001 and during 2002, exceeds their field of action, as does the analysis of the appropriateness and timeliness of the measures that Argentine authorities brought into effect. Therefore, this Tribunal will neither take sides with those making the governing leaders responsible for the crisis

suffered by Argentina, nor with those considering that their course of action was optimum. To attempt to do so, as was expected in this proceeding, would constitute a mistaken decision and might lead the Tribunal to make assertions the evidence of which would be doubtful or impossible and whose consequences would be impossible to prove.

201. The representatives of **Metalpar S.A.** and **Buen Aire S.A.**, Chilean companies founded and based in this neighbouring country of Argentina, were not unaware of the political and economic problems undergone by Argentina in the past. They themselves expressed it on several occasions, one of such statements having been made in paragraph 139 of their Memorial. They were aware of the fact that in the near past Argentina had suffered serious instability issues and, possibly, with a little diligence, they would have been able to discover in 1996 and the following years, when they were making their investments in Argentina (in 1997 they purchased Bus Carrocería and in 1998 they made significant capital contributions in companies owned by them), that a new crisis was shaping although, of course, it would have been impossible to foresee the gravity of the events that were to come.

202. It is therefore valid to suppose that Claimants, with representatives who have ample international experience, living in a neighbouring country and with strong relations with that country, were aware of Argentina's reality. This supposition became certain for the members of this Tribunal during the hearing held in September 2007, when Claimants themselves, and persons related to them, in their eagerness to show that Argentina had contributed to the crisis that triggered the conflict that will be resolved in this proceeding, showed that they had a good understanding of the economic, social and political commotions that had been frequent in Argentina. They did this also in several submissions throughout the proceeding.

203. As mentioned previously, long discussions have been held between economists on the reasons for the crisis and with a view to defining whether the measures taken by Argentina were the correct ones and whether they were implemented in a timely fashion. There are several experts, on whose opinions Claimants have based themselves, which state that Argentina contributed to the outbreak of the crisis. However, there is also another group of knowledgeable persons on the subject, expert Carlos Pérez Rovira

among them, introduced by **Metalpar** (page 5 of his report cited by Argentina on page 14 of the Rejoinder), which hold that the crisis resulted from external factors such as those mentioned in paragraph 195 above.

204. In the world of finance, it is frequently held that "the greater the return, the greater the risk." Although this aphorism is normally applied to financial transactions between private parties, such aphorism cannot be ignored when trying to decide which country to invest in; that is why there is such a thing as a "country risk" rating. It cannot be denied that there are countries in the world that enjoy greater stability than others. Claimants' representatives, businesspersons with international experience who are knowledgeable of Argentina's situation, were aware, as already stated, of the problems Argentina had suffered on several prior occasions. However, they decided to invest in that country where, although there was a greater risk due to the instability problems Argentina had experienced in the past, there was also the possibility of obtaining greater returns.

205. In one of his interventions in the hearing on the merits held in September 2007, Dr. Hernán Salinas, who appeared as part of Claimants' legal advisors, referred to the CMS against Argentina case (ICSID, ARB 01/8) and said:

> "[…] in this regard, the Arbitral Tribunal cited concludes that after examining the circumstances of the controversy—I quote—'The crisis was not of the making of one particular administration and found its roots in the earlier crisis of the 1980s and evolving governmental policies of the 1990s that reached a zenith in 2002 and thereafter. Therefore, the Tribunal observes that government policies and their shortcomings significantly contributed to the crisis and the emergency and while—it continues—exogenous factors did fuel additional difficulties they do not exempt the Respondent for its responsibility in the matter.' End quote" (transcript of the hearing on the merits, September 11, 2007, page 97).
>
> Mr. Salinas added:
>
> "As Argentina herself has pointed out, the Argentine crisis was not the [sic] an isolated crisis. There were numerous economies that suffered the external shocks, the effects of volatility or movements of funds and the so-called contagion effects" (transcript of the hearing on the merits, September 11, 2007, page 99).

206. Claimants also stated that: "[…] during Argentina's democratic governments there was never a period lasting longer than 7 years without an 'emergency' justifying the subjugation of constitutional rights […] As established by the ICSID Tribunal in 'LG&E Energy Corp. vs. Argentine Republic', there have been '…emergency periods in Argentina longer than the non-emergency periods…'" (Reply, paragraph 26). Further ahead, they expressed as follows: "That is why—in light of the ups and downs of the economy—Metalpar Argentina included in the Agreements the clauses that established the price in US dollars and, moreover, which expressly maintained that currency for payment, waiving the theory of unpredictability, if the convertibility regime established by Law No. 23,928 were to be altered" (Reply, paragraph 28).

207. When Claimants invested in Argentina, they knew that the Convertibility Law No. 23,298, published on March 28, 1991, was in effect, and that, in the event of certain external events impacting on Argentina, the factual situation upholding what was provided in that law could become unreal and a new crisis would lash such nation. In spite of this, Claimants' representatives decided to invest large sums of money in Argentina. The Tribunal is not clear on whether, in addition to weighing the aforementioned risks, Claimants had the possibility of foreseeing that the Argentine Government could, in such circumstances, intervene with the contractual relations with its customers, forcing them to change these relations the way it was done. However, as already stated, such analysis is pointless considering that it has not been shown that Claimants' investment in the Argentine Republic was affected.

7. State of Necessity

208. Self-preservation is one of the fundamental duties of the government of a country. If the government disappears, chaos and great hardship for that country's population ensue. In this specific case, as already stated above, the Tribunal is convinced of the severity of the crisis suffered by Argentina in late 2001 and early 2002. As already mentioned, back then there were discussions, which persist to this day, on whether the measures taken at that time by Argentina's governing leaders were appropriate and whether they were taken in a timely manner. The Tribunal also expressed, in previous

paragraphs, that the determination of this matter exceeds its sphere of action and, moreover, is unnecessary to resolve the dispute existing between the parties.

209. During this proceeding, the representatives of Argentina confirmed that the measures taken by the Government during the months in which the crisis was at its peak and subsequently, were absolutely essential to overcome the situation the country was going through. They also added that, as regards Claimants, these measures had a beneficial effect and contributed, in a definite manner, to their financial recovery. Claimants, on the other hand, consider that Argentina contributed to causing the crisis and, although they acknowledge Argentina's sovereign right to take the measures it deems necessary to solve the crisis, they state that as these actions adversely affected them, Argentina should compensate them.

210. The parties disagree on what circumstances are necessary to be able to refer to a "state of necessity," on the duration of the ruling imposing it and on the consequences of the actions taken by a government in such circumstances. To defend their points of view in relation to this matter, they presented extensive written and oral arguments.

211. For the purposes of this proceeding, as explained below, it is not necessary to clarify this matter due to the fact that, as will be shown further ahead, Claimants did not prove that their investments in the Argentine Republic were adversely affected by the actions taken by the Argentine Government, which would make it pointless to decide whether the measures taken by Argentina and challenged by Claimants, were executed due to there being a "state of necessity," which would extinguish the liability that could be attributed to Respondent.

212. This conclusion clearly distinguishes this matter from others filed against the Argentine Republic. To exemplify, we mention the arbitrations of LG&E (ICSID case ARB/02/1) and Enron Corporation (ICSID case ARB 01/3), which also discussed the existence of a "state of necessity" in Argentina and its consequences. Both cases mentioned are clearly different to this case because in them the existence of damages to the investments was shown.

213. The analysis of the *state of necessity* issue, as a circumstance precluding responsibility, is required in cases in which a government is shown to conduct itself in a manner that infringes the right of a person, whether natural or judicial, to have its investment in that country respected. If, in addition to the existence of this detrimental conduct to the investments it is proven that, as a result thereof damage was caused, and moreover, the amount thereof can be proven, the definition of whether there is a state of necessity precluding the government from responsibility, is unavoidable. None of this occurs in this case and, therefore, going into this analysis would be completely futile.

8. Obligation to mitigate the alleged damage

214. Argentina stated that Claimants should have carried out a reasonable effort with their debtors and before local authorities to remedy the supposed inequalities resulting from the pesification (Counter-Memorial, paragraph 18). Claimants disagreed with such statement and to support their position they provided several arguments.

215. Claimants basically argued that bringing any proceeding before Argentine courts would have eliminated the possibility of accessing an arbitration proceeding before an ICSID tribunal. They added that proceeding in this manner would have entailed, moreover, a contradictory stance as, if they had done so, they would have been turning to a system they were questioning. They concluded that such a proceeding would have required an enormous effort on their part and would have had a futile outcome given the backlog of cases pending before the Argentine Supreme Court of Justice in which there are more than "[…] 50,00 proceedings pending a decision on whether the pesification is constitutional" (Reply, paragraph 145). Argentina contradicted each of these arguments.

216. In other circumstances, it may be of importance to analyze whether Metalpar Argentina S.A. should have attempted, through negotiations or, otherwise, through the court system, the actions provided by the measures to counteract inequitable situations. Evidently, if they had done so there would not have been an identity of parties, purpose and causes of action between those hypothetical legal actions and this arbitration; therefore, a legal action filed by Metalpar Argentina S.A. in this regard would not have jeopardized Claimants' possibility of beginning arbitration proceedings through ICSID.

217. Given the conclusions that will be presented below, the Tribunal considers that to resolve this dispute there is no need to go into the discussion on whether Claimants should have acted before Argentine courts to attack the measures taken by the Argentine Government or to mitigate the damages they allegedly suffered. For these same reasons, the Tribunal is also not interested in judging on the duration of the proceedings filed or on the discussion of whether Claimant's actions brought before those courts would have jeopardized their possibility of resorting to ICSID or would have required an effort from them that was out of proportion.

9. Claimants' Investment

218. According to the Tribunal, the evidence in the case determines doubtlessly that the Argentine Republic's current situation is much better, regardless from which perspective the situation is looked at, than what it was some six years ago. The arbitrators also find it evident that the effects of the recovery began to be felt a very short time after Argentine authorities took, during the crisis, the actions that were referred to above.

219. The Tribunal will not enter into the analysis of whether the development of the international economic context contributed to Argentina's economic recovery. It is very possible that this was the case. However, the Tribunal finds it evident (and it lacks evidence to reach a conclusion to the contrary) that the actions taken by the Argentine Government in late 2001 and early 2002 had a beneficial effect and made it possible to overcome the chaos the country experienced in those days.

220. The effects of the actions taken by the governmental authorities (or these effects and the changes of other circumstances that also took place), benefited the Argentine society in general, the automobile industry in particular and, according to Argentina's experts, the investments made by **Metalpar S.A.** and **Buen Aire S.A.** (report by Marx and Echagüe and Molina, page 7).

221. At the hearing on the merits Argentina submitted several graphs to support its statement that "[…] Metalpar's investment is worth much more in a scenario, the real scenario in which the measures were taken, than in an assumed scenario in which the

measures would not have been taken […]" (transcript of the hearing on the merits, September 11, 2007, page 208 and 209).

222. Through the evidence submitted, the Tribunal is shown that the bus bodies sold by Metalpar Argentina S.A. from 1998 through 2005 were as follows:

Year	**Amount**
1998:	75
1999:	17
2000:	56
2001:	107
2002:	98
2003:	147
2004:	431
2005:	1,048

(Report by Daniel Marx, José Echagüe and Federico Molina, August 29, 2006, page 8)

223. As Argentina showed in the hearing on the merits held September 11, Metalpar Argentina S.A. had the following sales, in thousands of US dollars since 1998 through 2005:

Year	**Sales in USD**
1998:	$9,713,000
1999:	$13,713,000
2000:	$12,062,000
2001:	$7,895,000
2002:	$4,626,000
2003:	$2,806,000
2004:	$9,157,000

2005: $20,754,000

(Report by Daniel Marx, José Echagüe and Federico Molina, August 29, 2006, page 8)

224. As far as this Tribunal knows, the only investments made by **Metalpar S.A.** and **Buen Aire S.A.** in the Argentine Republic were the purchase of shares of the Argentine company named Loma Hermosa S.A. and its capitalization. This company, in its turn, was the sole shareholder of all the capital stock of the company that, after having changed its name, was named Metalpar Argentina S.A. and received most of Claimants' investments. Part of these investments were used by Metalpar Argentina S.A., subsidiary of Claimants', to give financing to the persons purchasing the vehicles it manufactures; the transactions were generally documented using contracts with a pledge executed in relation to the vehicles. The Tribunal supposes (because, as indicated, it was not proven) that Metalpar Argentina S.A.'s credits with its customers may have been temporarily affected by the actions taken by Argentina but, in effect, it has no evidence that Claimants' investments would have been adversely affected.

225. In fact, regardless of the vicissitudes that could have been suffered by the loans that Metalpar Argentina S.A. granted the buyers of the vehicles it manufactured, the Tribunal was unable to find one single piece of evidence showing that, in the end, Claimants' investments would have been adversely affected as a result of the measures taken by Argentina to avert the crisis. On the contrary, the evidence received during the proceeding (report dated August 29, 2006, written by Marx, Echagüe and Molina, page 7, and the financial statements of Metalpar Argentina S.A., among others) show that Metalpar Argentina S.A.'s financial situation improved significantly after 2004; the Tribunal attributes this improvement to the combination of several factors, as will be explained further ahead.

226. Claimants stated that "Metalpar recovered not as a result of the 'Measures' in itself (sic), but rather due to the increase in turnover and production registered between 2004 and 2005 (2 years after implementing the 'Measures'), which is explained: (i) through the need to supply a market with a very significant delay in renewing the passenger vehicle sector, infringing renovation laws and not abiding by the aging of the vehicles currently in circulation due specifically to the 'Measures' that harshly punished the Argentine

economy as a whole and in particular passenger public transport companies, and (ii) due to the fact that Metalpar Argentina S.A. is in an advantageous competitive position as its main competitor is undergoing a bankruptcy situation" (Reply, paragraph 302).

227. It is very possible that the improvement in Metalpar Argentina S.A.'s situation is not only due to the measures taken by Argentina, but that in this improvement there was an influence of the change in external and internal circumstances such as those mentioned in the paragraph above and, of course, the actions taken by Metalpar Argentina S.A. However, the objective fact which has been sufficiently proven is that the recent results of the business of such company are much better than what it obtained in 2001, before Argentine authorities took the measures that are being questioned by Claimants.

228. To speculate about what would have happened if Argentina had not taken any action or if it had imposed different measures would, as has already been said, be a futile exercise that would lead to purely hypothetical conclusions, which would be impossible to prove. What in actual fact took place, and on which the Tribunal has no doubt whatsoever, is that the putting in order of public finances, the subsidies that Argentina granted to transport companies and the recovery of stability, in general, constituted a beneficial environment for Metalpar Argentina S.A. to make the business decisions that would enable it to make a speedy recovery.

229. In addition to those already mentioned, it is evident that other factors, which made Metalpar Argentina S.A.'s success possible, must be taken into consideration, such as the proven business ability of its representatives and the disappearance of its main competitors.

230. In effect, as acknowledged by Mr. Paredes, Chairman and one of the main shareholders of Claimants (transcript of the hearing on the merits, September 14, 2007, pages 932-934), its Manager, Mr. Gonzalo Varela (transcript of the hearing on the merits, September 14, 2007, pages 753-754) and their legal counsel, Messrs. Mayorga and Postiglione, due to a series of factors, from which they exclude the measures taken by the Argentine Republic, as from 2004 Metalpar Argentina S.A. has enjoyed, and shall continue to enjoy, as stated by Mr. Paredes (the Tribunal deems him to do so with full

knowledge of the facts) in the closing argument, spectacular success, as explained in the following paragraphs.

231. Judging Metalpar Argentina S.A.'s business operation in Argentina by almost any parameter, it is highly successful. After selling 56 bus bodies in 2000, it jumped to 431 in 2004 and 1,048 in 2005. Further, Mr. Paredes declared that in 2007 they would be manufacturing 2400 bus bodies (transcript of the hearing on the merits, September 14, 2007, page 932).

232. The increases in sales affected Metalpar Argentina S.A. in such a way that it is currently one of the main bus body sellers in Argentina. This is remarkable if it is taken into consideration that in 2001 there were 28 companies engaged in this business and today there are only 5 left (statement by Mr. Jaime Paredes, transcript of the hearing on the merits, September 14, 2007, page 932). As mentioned repeatedly, it is obvious that this success cannot be attributed exclusively to the measures taken by Argentine authorities but it is evident that the Tribunal, in light of this scenario, cannot come to a contradictory conclusion and rule that these measures had a ruinous effect on Claimants' investments, the alleged ruin of which led to this proceeding.

233. When comparing sales and earnings of Metalpar Argentina S.A. in 2001 with those of recent years, the Tribunal must inevitably come to the conclusion that the situation of this company has not deteriorated, but quite the opposite, has notably improved in the past five years and, furthermore, according to its representatives, shall continue to do better and better. It is impossible to determine which factors had an influence in this drastic improvement in Metalpar Argentina S.A.'s situation, related directly to the investments of Claimants. It is just as impossible to determine the degree to which each of those factors contributed to the final outcome and guess what would have happened had Argentina not taken any action at all or had Argentina imposed different measures. In any case, that determination is of no interest for the purpose of resolving this dispute as, for the numerous reasons which have been set forth in the preceding paragraphs, the Tribunal must reject, as to all its aspects, the Claim filed by **Metalpar S.A.** and **Buen Aire S.A.**

234. **Legal costs**: The Tribunal is not unaware of the fact that, for external or internal reasons, or a combination of both, due to the fault or not of its governments, it is in fact true that the Argentine Republic experienced a catastrophic situation in late 2001 and during the early months of 2002, which to some extent altered all commercial relations in existence at the time in its territory. To avert this crisis, it was necessary for authorities of Argentina to take a series of emergency measures that, although in the long run had a beneficial effect on Claimants, also constituted a factor disruptive to the business relationships which their subsidiary had with their customers and to the contracts executed with them. The Tribunal has affirmed that such measures did not adversely affect Claimants' investments; however, it cannot be denied that they distorted Metalpar Argentina S.A.'s business activities in which Claimants had, indirectly, invested. Out of fear of what had taken place, and the impossibility of being able to foresee in early 2003 the consequences that could derive from such measures, Claimants' were driven to initiate these arbitration proceedings in February 2003. Argentina's defense brought to light the weak points of Claimants' case; their conduct in the proceedings as regards evidence contributed to weakening their claim. However, there is no doubt that Argentina cannot consider itself to have played no part in the alteration suffered by the legal relations existing between Metalpar Argentina S.A. or its debtors and the commotion its actions caused Claimants. Due to these considerations, the Tribunal considers it fair that each party cover the costs they incurred in relation to this arbitration proceeding.

VI. FINAL DECISION

235. Due to the reasons mentioned above, the Arbitration Tribunal unanimously resolves:

1. To dismiss the Claim filed by **Metalpar S.A.** and **Buen Aire S.A.** against the Argentine Republic in its entirety.

2. Each party shall bear the costs which it has incurred in relation to this arbitration proceeding.

[signature]

Duncan H. Cameron
Arbitrator

Date: May 15, 2008

[signature]

Jean Paul Chabaneix
Arbitrator

Date: May 9, 2008

[signature]

Rodrigo Oreamuno B.
President

Date: May 6, 2008

ANNEX 192

Date of dispatch to the parties: May 22, 2007

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

WASHINGTON, D.C.

IN THE PROCEEDINGS BETWEEN

ENRON CORPORATION
PONDEROSA ASSETS, L.P

(CLAIMANTS)

AND

ARGENTINE REPUBLIC

(RESPONDENT)

ICSID Case No. ARB/01/3

AWARD

Members of the Tribunal:

Professor Francisco Orrego-Vicuña, President
Professor Albert Jan van den Berg, Arbitrator
Mr. Pierre-Yves Tschanz, Arbitrator

Secretary of the Tribunal:
Ms. Claudia Frutos-Peterson

Representing the Claimants

Mr. R. Doak Bishop
King & Spalding
Washington, D.C.
United States of America

and

Mr. Guido Santiago Tawil
M&M Bomchil
Buenos Aires
Argentina

Representing the Respondent

H.E. Osvaldo César Guglielmino
Procurador del Tesoro de la Nación
Procuración del Tesoro de la Nación
Buenos Aires
Argentina

Liability under Argentine law

231. The inescapable conclusion for the Tribunal to reach is that in considering the claims purely from the point of view of the Argentine legislation as one of the laws applicable to the dispute, the obligations which the Argentine Republic had and the commitments it undertook under the License were not observed. This is particularly significant in view that the License is expressly subject to Argentine law in some key respects, without prejudice to the effect that these legal arrangements have under the Treaty and international law. Liability is thus the consequence of such breach and there is no legal excuse under the Argentine legislation which could justify the non-compliance, as the very conditions set out by this legislation and the decisions of courts have not been met.

232. Yet, the Tribunal bears in mind that a major crisis indeed there was. While these unfortunate events do not in themselves amount to a legal excuse, neither would it be reasonable for the Claimants to believe they are not affected by some of the effects. The economic balance of the license was clearly affected by the crisis situation, and just as it is not reasonable for the licensees to bear the entire burden of such changed reality neither would it be reasonable for them to believe that nothing happened in Argentina since the License was approved. This is something the Tribunal will duly take into account in considering the compensation that follows such finding of liability and how the crisis period influences its determination.

The Treaty as the applicable law

233. The Tribunal must now examine the question of whether the breach of the License and its regulatory regime, in addition to its assessment under Argentine legislation, amounts to a breach of the Treaty guarantees.

1. The claim of expropriation

234. The principal claim made in this arbitration is that the measures adopted since early 2000, and particularly those following in 2002 under the Emergency Law, have expropriated the Claimants' investments, both directly and indirectly, in a manner contrary to the protection granted under Article IV of the Treaty. The Claimants argue that their investment comprises the equity in TGS, the capital contributed to this effect, the rights under the Technical Assistance Agreement and the specific rights related to the tariff regime of the License. The deprivation, the Claimants maintain, has been permanent, not merely ephemeral, and no prompt, adequate and effective compensation has been paid. In the Claimants' view, compensation must be paid irrespective of the purpose of the measures[41].

235. The Claimants assert that the Respondent has directly expropriated the rights to tariff adjustment and calculation they have under the License, as well as the right to be free from a tariff freeze, as all of it was expressly derogated by the Emergency Law. A transfer of revenues is also alleged to have taken place as a result. The Claimants also invoke in support of their argument on expropriation an OPIC "Memorandum of Determinations" of August 2, 2005, which concludes that expropriation in violation of international law has taken place with regard to this investment.

[41] *Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica* (ICSID Case No. ARB/96/1), Award of February 17, 2000, available at <http://www.worldbank.org/icsid/cases/santaelena_award.pdf>, paras. 71-72.

236. Simultaneously, the Claimants maintain, the measures in question are "tantamount to expropriation", thus constituting an indirect or creeping expropriation unfolding in time and resulting in a cumulative substantial destruction of the value of the investment. This kind of measures includes various forms of regulatory action unreasonably interfering with the investor's property rights, the Claimants explain, just as the measures involve conduct inconsistent with legitimate expectation and with the assurances offered to induce the investment or the capacity for rational decision-making in the business.

237. The Respondent argues at the outset that the same measures complained of cannot give rise simultaneously to a claim of direct and indirect expropriation and that the wrong justification of the claim must lead to its rejection[42]. It is also argued as a preliminary point that in the Tribunal's Decision on Jurisdiction only equity participation was held to be an investment qualifying for protection, not other kinds of peripheral rights that the Claimants now untimely invoke in their argument on the merits[43].

238. The Respondent opposes the claim arguing that there has been no transfer of property rights to the benefit of the Government or the consumers and without redistribution there is no expropriation[44]; in these circumstances, if compensation for expropriation were paid there would be unjust enrichment of the service providers. The Respondent also asserts that temporary measures, particularly emergency measures, do not qualify as expropriation as they do not entail permanent deprivation of earnings or corporate rights and no such effects can be shown in the present dispute; that substantial deprivation of fundamental property rights must be established and that no such deprivation has taken place or been proven in this case; that losses must be significant, while the Claimants

[42] *Generation Ukraine Inc. v. Ukraine* (ICSID Case No. ARB/00/9), Award of September 16, 2003, 44 *ILM* 404 (2005), paras. 20, 22.

[43] Remarks of Jorge Alberto Barraguirre, Hearing Transcript, Vol. 1, November 28, 2005, pp. 121-124.

[44] *Ronald S. Lauder v. The Czech Republic*, UNCITRAL Arbitration Proceeding, Final Award of September 3, 2001, available at <http://ita.law.uvic.ca/documents/LauderAward.pdf>, para. 203.

continue to benefit from earnings or the sale of shares; that the value of the investment would have been further reduced had the measures not been adopted; and that a mere contract violation cannot be turned into a Treaty claim.

239. The Respondent also argues that the purpose of the measures is relevant to make a determination on an expropriation claim, particularly if such measures are adopted under the police power of the State and are proportional to the requirements of public interest. Moreover, the Respondent maintains, the Treaty does not protect legitimate expectations but only specific rights and in this case none of the measures questioned can be equated to those considered in other cases as being inconsistent with the guarantees offered to induce the investor or amounts to the destruction of the capacity for rational decision-making.

240. The Tribunal is again grateful to counsel for the parties for having undertaken a thorough explanation of their views on the issue of expropriation, invoking in support of their respective views a wealth of decisions, opinions of writers and other authorities that allow understanding the parties' arguments in all their meaning and differences.

241. The first question the Tribunal must address is that of the protected investment. The Respondent argues that the Tribunal in the jurisdictional stage held that the dispute was one related to investment in equity and that nothing else can now be considered in the merits This, however, has to be understood in the context of a determination about whether minority shareholders had a right to claim independently, as the Respondent itself recalls. In that context, the issue was whether an investment in equity so allows. The Tribunal must also recall that the reference paragraph 30 of the Decision on Jurisdiction made to a definition of investment is related to the very broad definition of the Treaty as reproduced in paragraph 29 of that Decision. Accordingly that broad definition is the one governing this discussion.

242. The equity investment was the vehicle through which a complex business relationship was developed and which can be affected in other of its elements by the measures

questioned. This is the case, for example, of the measures affecting the tariff regime envisaged in the License, which is the key factor determining the success or failure of the investment in the equity of TGS.

243. This discussion, in any event, turns out to be rather academic as the Tribunal is persuaded by the merit of the Respondent's argument on direct expropriation. In fact, the Tribunal does not believe there can be a direct form of expropriation if at least some essential component of property rights has not been transferred to a different beneficiary, in particular the State. In this case it can be argued that economic benefits might have been transferred to an extent from industry to consumer or from industry to another industrial sector, but this does not amount to affecting a legal element of the property held, such as the title to property.

244. The question of indirect or creeping expropriation is more complex to assess. The Tribunal has no doubt about the fact that indirect or creeping expropriation can arise from many kinds of measures and these have to be assessed in their cumulative effects. Yet, in this case, the Tribunal is not convinced that this has happened.

245. The list of measures considered in the *Pope & Talbot* case as tantamount to expropriation, which the Respondent has invoked among other authorities, is in the Tribunal's view representative of the legal standard required to make a finding of indirect expropriation. Substantial deprivation results in that light from depriving the investor of the control of the investment, managing the day-to-day operations of the company, arrest and detention of company officials or employees, supervision of the work of officials, interfering in the administration, impeding the distribution of dividends, interfering in the appointment of officials and managers, or depriving the company of its property or control in total or in part[45].

[45] *Pope & Talbot Inc. v. Canada*, NAFTA (UNCITRAL) Arbitration Proceeding, Interim Award of June 26, 2000, para. 100.

246. Nothing of the sort has happened in the case of TGS or CIESA or any of the related companies, so much so that the Claimants' interests in these companies have been freely sold and included in complex transactions, some involving foreign companies too, as evidenced by the 2005 and 2006 agreements already described. The Tribunal must accordingly conclude that the Government of Argentina in adopting the measures complained of has not breached the standard of protection established in Article IV(1) of the Treaty.

247. The Tribunal must also point out that although the OPIC "Memorandum of Determinations" referred to above reaches a different conclusion on this matter, it responds to a different kind of procedure and context that cannot influence or be taken into account in this arbitration.

248. The question of devaluation has also been discussed by the parties in the context of its influence on a finding of expropriation, particularly in light of the meaning each attaches to the *Himpurna* case.[46] However, as the Tribunal has explained above, this is not a dispute about devaluation, nor has so been claimed, but about allegedly breached rights under a regulatory framework and the License. This discussion thus does not alter the Tribunal's determination about expropriation.

249. The Tribunal's conclusion does not mean that the measures discussed are free from legal consequences under other Treaty standards, as will be seen below, or free from liability for compensation arising from the damage they may have caused.

250. The Respondent's argument about the inappropriateness of claiming simultaneously a direct and an indirect expropriation, as the Claimants have done, is also persuasive. In fact, if a given measure qualifies as a form of direct expropriation it cannot at the same time qualify as an indirect expropriation, as their nature and extent are different. The

[46] *Himpurna California Energy Ltd. v. Republic of Indonesia*, UNCITRAL Arbitration Proceeding.

converse is also true. This is not to conclude, like in *Generation Ukraine*, that the claim has to be rejected because the measures complained of were not described with precision and coherently, as here they have been competently substantiated.

2. The claim concerning the standard of fair and equitable treatment

251. The Claimants have argued that in addition to expropriation the Respondent has breached the standard of fair and equitable treatment established under Article II(2)(a) of the Treaty on various counts: failing to act in good faith, abusing its rights, repudiating assurances given, altering regulatory approvals and conditions, and failure to provide a stable and predictable legal environment.

252. Originating in the obligation of good faith under international law, the Claimants explain, this particular standard has gradually acquired a specific meaning in light of decisions and treaties, including a treatment compatible with expectations of foreign investors,[47] the observance of arrangements on which the investor has relied to make the investment[48]and the maintenance of a stable legal and business framework.[49]

253. The Respondent's argument on this matter is based on the premise that fair and equitable treatment is a standard not different from the customary international law minimum standard and that it is not for tribunals to set out its meaning or even less to legislate on the matter. The Respondent asserts that this view is confirmed by the NAFTA Free Trade

[47] *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States* (ICSID Case No. ARB(AF)/00/2), Award of May 29, 2003, 43 *ILM* 133 (2004), para. 115.

[48] *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL Arbitration Proceeding, Partial Award of September 13, 2001, available at <http://www.investmentclaims.com/decisions/CME-Czech-PartialAward-13Sept2001.pdf>, para. 611.

[49] *Occidental Exploration and Production Company (OEPC) v. Republic of Ecuador*, London Court of International Arbitration Administered Case No. UN 3467, Final Award of July 1, 2004, available at <http://www.asil.org/ilib/OEPC-Ecuador.pdf >, para. 183.

Commission[50] and the Chile-US Free Trade Agreement, in clarifying that fair and equitable treatment does not entail any treatment additional to or beyond that required by customary law,[51] as well as by a number of NAFTA and ICSID decisions and the opinions of learned writers.

254. In the Respondent's view what has been criticized by recent decisions is a kind of conduct that evidences inconsistency in State action,[52] radical and arbitrary modification of the regulatory framework[53] or endless normative changes to the detriment of the investor's business.[54] None of that, the argument follows, is present in the instant case where the measures adopted were eminently reasonable in light of the economic crisis described and the changes in the economic conditions of the country.

255. In particular, the Respondent maintains that devaluation was the result of market decisions and that the constant decisions of courts in other crises has reaffirmed the constitutionality of measures of this kind, most notably in the context of the United States' great depression. The *Thunderbird v. Mexico* decision has also been invoked by the Respondent in support of its view that the standard of fair and equitable treatment does not include the protection of legitimate expectation and it is not different from the international minimum standard[55].

256. The Tribunal notes that the Respondent is right in arguing that fair and equitable treatment is a standard none too clear and precise. This is because international law is not too clear and precise either on the treatment due to foreign citizens, traders and investors

[50] FTC decision, NAFTA Free Trade Commission, Interpretation of NAFTA Article 1105(1), July 21, 2001, available at < http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpr-en.asp>.

[51] Chile-United States Free Trade Agreement of June 6, 2003, available at <http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/asset_upload_file1_4004.pdf>, Article 10.4.2.

[52] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile* (ICSID Case No. ARB/01/7), Award of May 25, 2004, available at <http://www.asil.org/ilib/MTDvChile.pdf>, para. 164.

[53] *Tecmed*, para. 154.

[54] *OEPC*, pars. 184-186.

[55] Respondent's Post-Hearing Brief, p. 13.

or with respect to the fact that the pertinent standards have gradually evolved over the centuries. Customary international law, treaties of friendship, commerce and navigation, and more recently bilateral investment treaties, have all contributed to this development[56].

257. The evolution that has taken place is for the most part the outcome of a case by case determination by courts and tribunals, as evidenced among many other investment treaty and NAFTA decisions by the *TECMED*, the *OEPC* and the *Pope & Talbot* cases[57]. This explains that, like with the international minimum standard, there is a fragmentary and gradual development. Such development however partly hinges on the gradual formulation – both in cases and legal writings – of 'general principles of law' (as understood under Article 38(1)(c) of the ICJ Statute) able to guide and 'discipline'[58] the evaluation of state conduct under investment treaty standards.

258. It might well be that in some circumstances where the international minimum standard is sufficiently elaborate and clear, fair and equitable treatment might be equated with it. But in other more vague circumstances, the fair and equitable standard may be more precise than its customary international law forefathers. This is why the Tribunal concludes that the fair and equitable standard, at least in the context of the Treaty applicable to this case, can also require a treatment additional to, or beyond that of, customary law. The very fact that recent FTC interpretations or investment treaties have purported to change the meaning or extent of the standard only confirms that those specific instruments aside, the standard is or might be a broader one.

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[56] Stephen Vasciannie, *The Fair and Equitable Treatment Standard in International Investment Law and Practice*, BYIL, Vol. 70, 1999, para. 100.

[57] *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States* (ICSID Case No. ARB(AF)/00/2), Award of May 29, 2003; *Occidental Exploration and Production Company (OEPC) v. Republic of Ecuador*, London Court of International Arbitration Administered Case No. UN 3467, Final Award of July 1, 2004; *Pope & Talbot Inc. v. Canada*, NAFTA (UNCITRAL) Arbitration Proceeding, Interim Award of June 26, 2000.

[58] *ADF Group Inc. v. United States of America* (ICSID Case No. ARB(AF)/00/1), Award of January 9, 2003, 18 *ICSID Rev.—FILJ* 195 (2003); 6 *ICSID Rep.* 470 (2004), para. 124.

259. The Tribunal is bound to interpret Article II(2)(a) of the Treaty "*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 the object and purpose*" as required by Article 31 of the Vienna Convention. The Tribunal gives weight to the text of the Treaty's Preamble, which links the standard to the goal of legal stability: '*fair and equitable treatment of investment is desirable in order to maintain a stable framework for the investment and maximum effective use of economic resources.*'

260. Thus, the Tribunal concludes that a key element of fair and equitable treatment is the requirement of a '*stable framework for the investment*', which has been prescribed by a number of decisions[59]. Indeed, this interpretation has been considered '*an emerging standard of fair and equitable treatment in international law*'[60].

261. This Tribunal notes, however, that the stabilization requirement does not mean the freezing of the legal system or the disappearance of the regulatory power of the State. As noted by the tribunal in *CMS*:

> It is not a question of whether the legal framework might need to be frozen as it can always evolve and be adapted to changing circumstances, but neither is it a question of whether the 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[61].

262. The protection of the '*expectations that were taken into account by the foreign investor to make the investment*'[62] has likewise been identified as a facet of the standard. The *Tecmed*

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[59] *OEPC*, paras. 190-191; *CMS*, paras. 274-276; *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic* (ICSID Case No. ARB/02/1), Decision on Liability of October 3, 2006, available at <http://www.worldbank.org/icsid/cases/pdf/ARB021_LGE-Decision-on-Liability-en.pdf>, para. 124.

[60] *LG&E*, para. 125.

[61] *CMS*, para. 277.

[62] *Tecmed*, para. 154.

approach has been consistently adopted by subsequent decisions[63]. *Tecmed* described such expectations as '*basic*'[64], while in the context of NAFTA, tribunals have qualified them as '*reasonable and justifiable*'[65]. What seems to be essential, however, is that these expectations derived from the conditions that were offered by the State to the investor at the time of the investment[66] and that such conditions were relied upon by the investor when deciding to invest[67].

263. The Tribunal observes that, as acknowledged by previous arbitral tribunals, the principle of good faith is not an essential element of the standard of fair and equitable treatment and therefore violation of the standard would not require the existence of bad faith[68].

264. The measures in question in this case have beyond any doubt substantially changed the legal and business framework under which the investment was decided and implemented. Argentina in the early 1990s constructed a regulatory framework for the gas sector containing specific guarantees to attract foreign capital to an economy historically unstable and volatile. As part of this regulatory framework, Argentina guaranteed that tariffs would be calculated in US dollars, converted into pesos for billing purposes, adjusted semi-annually in accordance with the US PPI and sufficient to cover costs and a reasonable rate of return. It further guaranteed that tariffs would not be subject to freezing or price controls without compensation. Foreign investors were specifically targeted to

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[63] *MTD*, para. 114.; *OEPC*, para. 185; *Eureko B.V. v. Poland*, *Ad Hoc* Proceeding, Partial Award of August 19, 2005, available at <http://www.investmentclaims.com/decisions/Eureko-Poland-LiabilityAward.pdf>, para. 235; *LG&E*, para. 127.

[64] *Tecmed*, para. 154.

[65] *International Thunderbird Gaming Corporation v. United Mexican States*, NAFTA (UNCITRAL) Arbitration Proceeding, Award of January 26, 2006, available at <http://www.iisd.org/pdf/2006/itn_award.pdf>, para. 147.

[66] *Southern Pacific Properties (Middle East) Limited (SPP)* v. Arab Republic of Egypt (ICSID Case No. ARB/84/3), Award of May 20, 1992, 32 *ILM* 1470 (1993), para. 82; *LG&E*, para. 130.

[67] *SPP*, para. 82; *CME*, para. 611; *Tecmed*, para. 154; *Thunderbird*, para. 147; *LG&E*, para. 127.

[68] *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2), Award of October 11, 2002, 42 *ILM* 85 (2003), para. 116; *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3), Award of June 26, 2003, 42 *ILM* 811 (2003), para. 32; *OEPC*, para. 186; *Tecmed*, para 153; *Waste Management, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/98/2), Award of June 2, 2000, 40 *ILM* 56 (2001), para. 93; *CMS*, para. 280; *LG&E*, para. 129.

invest in the privatization of public utilities in the gas sector. Substantial foreign investment was undertaken on the strength of such guarantees, including the investment made by Enron in TGS.

265. The Tribunal observes that it was in reliance upon the conditions established by the Respondent in the regulatory framework for the gas sector that Enron embarked on its investment in TGS. Given the scope of Argentina's privatization process, its international marketing, and the statutory enshrinement of the tariff regime, Enron had reasonable grounds to rely on such conditions.

266. A decade later, however, the guarantees of the tariff regime that had seduced so many foreign investors, were dismantled. Where there was certainty and stability for investors, doubt and ambiguity are the order of the day. The long-term business outlook enabled by the tariff regime, has been transformed into a day-to-day discussion about what comes next. Tariffs have been frozen for almost five years. The recomposition of the tariff regime is subject to a protracted renegotiation process imposed on the public utilities that has failed to provide a final and definitive framework for the operation of business in the energy sector.

267. The Respondent might be right in distinguishing this case from the factual scenarios that recent decisions have faced, but this does not mean that Argentina's acts are consistent with the meaning of the protection under the Treaty. It is clear that the 'stable legal framework' that induced the investment is no longer in place and that a definitive framework has not been made available for almost five years.

268. Even assuming that the Respondent was guided by the best of intentions, which the Tribunal has no reason to doubt, there is here an objective breach of the fair and equitable treatment due under the Treaty. The Tribunal thus holds that the standard established in Article II(2)(a) of the Treaty has not been observed and that to the extent that it results in a detriment to the Claimants' rights it will give rise to compensation.

3. The claim concerning the breach of the umbrella clause

269. The Claimants have also brought to this Tribunal a claim for an alleged breach of the obligations the Respondent entered into with regard to the investment, in light of the "umbrella clause" of Article II(2)(c) of the Treaty. This aspect of the claim is built on the premise that the protection envisaged is an expression of the obligation to observe the principle *pacta sunt servanda*. The Claimants cite in this context the view of Judge Higgins to the effect that such principle and acquired rights "emphasize the protection that the private party has been given against either a later change of mind by the State or against the exercise of the State's regulatory powers"[69].

270. The Claimants argue that the clause applies to obligations arising from a contract or from broader undertakings contained in the State's own law and that the Respondent's measures breached every commitment made in the Gas Law, the Gas Decree and the License, with particular reference to the tariff regime and the commitment not to amend the License without TGS's consent.

271. The Respondent opposes this claim arguing that it did not undertake any specific obligation with regard to the investment or Enron in the Treaty, the investment legislation or the legislation regulating the License. In addition, it alleges that under customary law, violations of contracts cannot be equated with a treaty breach and thus do not engage the international responsibility of the State[70], and that, as held in *SGS v. Pakistan*, contract

[69] Rosalyn Higgins, *The Taking of Property by the State: Recent Developments in International Law*, 176 Recueil des Cours 267, 347 (1982), as cited in Claimants' Memorial, para. 316.

[70] *Noble Ventures, Inc. v. Romania* (ICSID Case No. ARB/01/11), Award of October 12, 2005, available at <http://www.investmentclaims.com/decisions/Noble-Ventures-Final-Award.pdf>, para. 53.

claims do not qualify as BIT claims[71]. Moreover, the Respondent maintains the Tribunal in *SGS v. Philippines*, while disagreeing with some aspects of the *Pakistan* decision, still held that the umbrella clause only comprises obligations undertaken with respect to a specific investment and thus the clause does not extend to ordinary contractual breaches that must be taken to the contract forum.

272. In any event, it is also asserted that because the commitments were made in respect of TGS they cannot be invoked by the Claimants and the License does not qualify as an investment agreement. The Respondent relies upon the *Noble Ventures v. Romania* decision insofar as it would limit the application of the umbrella clause to investment contracts. Claimants oppose such an interpretation because that decision, in their view, referred to contracts made with regard to an investment[72].

273. The Tribunal recalls that the text of Article II(2)(c) reads "*[e]ach party shall observe any obligation it may have entered into with regard to investments*", a text which should be interpreted "*in good faith in accordance with the ordinary meaning to be given to the terms of the treaty"* as indicated by Article 31(1) of the Vienna Convention.

274. Under its ordinary meaning the phrase 'any obligation' refers to obligations regardless of their nature. Tribunals interpreting this expression have found it to cover both contractual obligations such as payment[73] as well as obligations assumed through law or regulation[74]. 'Obligations' covered by the 'umbrella clause' are nevertheless limited by their object: '*with regard to investments*'.

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[71] *Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13), Decision of the Tribunal on Objections to Jurisdiction of August 6, 2003, available at http://www.investmentclaims.com/decisions/SGS-Pakistan-Jurisdiction-6Aug2003.pdf.

[72] Claimants' Post-Hearing Brief, para. 17.

[73] *Fedax N.V. v. Republic of Venezuela* (ICSID Case No. ARB/96/3), Award of March 9, 1998, 37 *ILM* 1391 (1998), para. 29; *Société Générale de Surveillance S.A. v. Republic of the Philippines* (ICSID Case No. ARB/02/6), Decision of the Tribunal on Objections to Jurisdiction of January 29, 2004; 8 *ICSID Rep.* 518, paras. 127-128.

[74] *SGS v. Islamic Republic of Pakistan* para. 166; *LG&E*, para. 175.

275. Through the Gas Law and its implementing legislation, the Respondent assumed '*obligations with regard to investments'*: tariffs calculated in US dollars converted to pesos for billing purposes, linked to the US PPI and sufficient to provide a reasonable rate of return were intended to establish a tariff regime that assured the influx of capital into the newly privatized companies such as TGS and ensured the value of such investment. The dismantling of these guarantees would suffice to establish a violation of the obligations entered into by the Respondent with regard to the Claimants' investment.

276. In addition, the prohibition of price controls without indemnification and the prohibition of License amendments without consent, although contained in the License were also approved by decree[75] and formed part of the implementing legislation that established the tariff regime. The obliteration of these commitments likewise entails a violation of obligations entered into by the Respondent with regard to the Claimants' investment.

277. The Tribunal concludes accordingly that the breach of the obligations noted undertaken both under contract and law and regulation in respect of the investment have resulted in the breach of the protection provided under the umbrella clause of Article II(2)(c).

4. The claim about arbitrariness and discrimination

278. The Claimants assert that there has also been a breach of Article II(2)(b) of the Treaty because the measures adopted are both arbitrary and discriminatory. The claim of arbitrariness is based on the argument that such measures destroyed the rights and reasonable expectations of the Claimants, lacked proportionality and were in violation of the law. The claim of discrimination relies on the view that the measures fell

[75] Obligations undertaken in the License were initially approved by Decree 2255/92 (Model License) and later specifically ratified with regard to TGS by Decree 2458/92.

disproportionately on the largely foreign-owned gas sector. A long list of specific measures is given by the Claimants in respect of each of these aspects.

279. The Respondent opposes this claim asserting that the measures were consistent with the law and aimed at continuing the operational income and earnings of the companies, while at the same time being proportionate to the purpose sought, reasonable and, in any event, lacking in any intention to breach the rule of law or affect judicial propriety, as required by numerous judicial and arbitral decisions.

280. Neither is there discrimination, the Respondent maintains, because the regulated gas sector is very different from other sectors operating in a competitive market, such as banking, and the entities involved are far from being in a similar or even comparable situation, thus not being discriminated if treated differently in light of each individual or sector requirement. Least of all is there any capricious, irrational or absurd differential treatment of the Claimants, who are not even among those who have suffered the most severe consequences of the measures adopted.

281. After examining the detailed arguments of the parties and their supporting authorities and decisions, the Tribunal is not persuaded by the Claimants' view that there is here arbitrariness or discrimination. The measures adopted might have been good or bad, a matter which is not for the Tribunal to judge, and as concluded they were not consistent with the domestic and the Treaty legal framework, but they were not arbitrary in that they were what the Government believed and understood was the best response to the unfolding crisis. Irrespective of the question of intention, a finding of arbitrariness requires that some important measure of impropriety is manifest, and this is not found in a process which although far from desirable is nonetheless not entirely surprising in the context it took place.

282. The Tribunal reaches a similar conclusion in respect of discrimination. There are quite naturally important differences between the various sectors that have been affected, so it

is not surprising either that different solutions might have been or are being sought for each, but it could not be said that any such sector has been singled out, in particular either to apply to it measures harsher than in respect of others, or conversely to provide a more beneficial remedy to one sector to the detriment of another. The Tribunal does not find that there has been any capricious, irrational or absurd differentiation in the treatment accorded to the Claimants as compared to other entities or sectors.

283. The Tribunal accordingly concludes that the Respondent has not breached the protection provided under Article II(2)(b) of the Treaty.

5. The claim about failure to give full protection and security

284. Lastly, the Claimants argue that there has been a failure to give full protection and security to the Claimants' investment, as required under Article II(2)(a) of the Treaty. The Claimants rely to this effect on the broader interpretation of this requirement made particularly in *CME*, where the standard was related not just to physical security but also to the legal protection of the investment.

285. The Respondent believes differently, arguing first that the standard only relates to physical protection and security, as evidenced in *AAPL* and *AMT* where installations were destroyed, and asserting next that *CME* does not mean that the interpretation it made of the standard is the accepted definition under international law, so much so that it was at the same time contradicted by the opposite conclusion in *Lauder*.

286. There is no doubt that historically this particular standard has been developed in the context of physical protection and security of the company's officials, employees or facilities. The Tribunal cannot exclude as a matter of principle that there might be cases where a broader interpretation could be justified, but then it becomes difficult to

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ANNEX 193

462 F.Supp.2d 457
United States District Court,
S.D. New York.

Janet Ray WEININGER, Plaintiff,
v.
Fidel CASTRO, et al., Defendants.

No. 05 Civ. 7214(VM).
|
Nov. 17, 2006.

Synopsis
Background: In consolidated actions in which garnishee bank petitioned for interpleader relief against judgment creditors and other parties whom it alleged could have an interest in accounts containing funds blocked by the United States pursuant to the Cuban Assets Control Regulations (CACR), judgment creditors, who obtained Florida state court default judgments against Republic of Cuba and certain Cuban officials, filed motions for partial summary judgment seeking an order directing turnover of certain funds held by garnishees bank and law firm. Bank cross-moved for discharge in interpleader, as well as discharge.

Holdings: The District Court, Marrero, J., held that:

court would not, on its own motion, reopen Florida state court default judgments to consider jurisdictional competence of courts which rendered the underlying judgments;

Terrorism Risk Insurance Act (TRIA) provided an exception to immunity from execution over Cuban government funds in United States, and hence conferred subject matter jurisdiction over garnishment action under Foreign Sovereign Immunities Act (FSIA) where judgment creditors each had a judgment against a terrorist party for a claim for which the terrorist party was not immune;

TRIA allowed for execution of assets of jurisdictionally separate agencies or instrumentalities of Cuba, which were blocked by the United States pursuant to the Cuban Assets Control Regulations (CACR), to satisfy judgments against Cuba; and

bank was entitled to interpleader relief where it faced a reasonable fear of double liability or conflicting claims to funds in various bank accounts.

Motions granted.

West Codenotes

Recognized as Repealed by Implication
28 U.S.C.A. § 1611

Attorneys and Law Firms

***461** James Wilson Perkins, Greenberg Traurig, LLP, New York City, for Janet Ray Weininger.

Bryan T. West, Joseph A. DeMaria, Tew Cardenas LLP, Miami, FL, for Dorothy Anderson McCarthy.

James Loran Kerr, Karen E. Wagner, Davis Polk & Wardwell, New York City, for JP Morgan Chase Bank.

Robert Lee Muse, Muse & Associates, Washington, D.C., for The Cuban Electric Company.

DECISION AND ORDER

MARRERO, District Judge.

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***462** Plaintiffs Janet Ray Weininger ("Weininger") and Dorothy Anderson McCarthy ("McCarthy") (collectively, "Plaintiffs") each filed motions for partial summary judgment for turnover orders pursuant to Federal Rules of Civil Procedure 13 and 69 and New York Civil Practice Law and Rules ("CPLR") § 5225(b). Defendant JPMorgan Chase Bank, N.A. ("JPM Chase") opposed Plaintiffs' motions for summary judgment and cross-moved for discharge in interpleader, as well as discharge pursuant to CPLR §§ 5209 and 5239. [1] Adverse claimant-respondents AT & T Corp. ("AT & T") and Cuban American Telephone and Telegraph Company ("CATT"), a wholly-owned subsidiary of AT & T, opposed JPM Chase's cross-motion for discharge in interpleader to the extent that such motion requested discharge of funds that AT & T and CATT claimed were the sole property of AT & T and/or CATT. The Court has reviewed the submissions from Plaintiffs, JPM Chase, AT & T and CATT, the amicus curiae submission from the Cuban Electric Company ("CEC"), and a letter dated January 6, 2006 from the U.S. Department of Justice, expressing the position of the United States in this matter. [2]

Plaintiffs seek an order directing turnover of certain funds held by garnishees JPM Chase and Rabinowitz, Boudin, Standard, Krinsky & Lieberman, P.C., ("Rabinowitz Boudin") (collectively, "Garnishees"). Specifically, Plaintiffs seek turnover of funds in the following accounts: (i) AT & T Long Lines (Account No. G00875) (hereinafter the "AT & T Long Lines Account") (of which CATT claims ownership of $6,332,843.49, which ***463** amount (and interest thereon) has been voluntarily exempted by Petitioners from the scope of the requested order); (ii) Rabinowitz Boudin Republic of Cuba (Account No. 092–6371190) (hereinafter the "Rabinowitz Boudin Account"); and (iii) Empresa de Telecomunicaciones de Cuba (Account No. 395–507995) (hereinafter the "EMTELCUBA Account") (collectively the "Accounts"). [3] The funds sought were blocked by the United States pursuant to the Cuban Assets Control Regulations ("CACR"), 31 C.F.R. Part 515, as authorized by Trading with the Enemy Act, 50 U.S.C.App. §§ 1–44, as sanctions against Cuba in response to the expropriation of Americans' property in Cuba.

None of the judgment debtors has appeared at any stage of these proceedings. Additionally, Rabinowitz Boudin has not appeared in this action.

I. *BACKGROUND* [4]

A. *THE WEININGER JUDGMENT*

Weininger, invoking amendments to the Foreign Sovereign Immunities Act ("FSIA") that removed the immunity of foreign countries from suits in United States courts for certain state-sponsored wrongful conduct, *see* 28 U.S.C. § 1605(a)(7), obtained a default judgment in Florida state court against the Republic of Cuba, Fidel Castro, Raul Castro, and the Army of the Republic of Cuba. Weininger's Florida action was grounded on the death of her father, Thomas Willard Ray, who was killed by Cuban soldiers during events surrounding the Bay of Pigs invasion by Cuban exiles and their supporters in 1961. Weininger's default judgment was rendered by the Circuit Court for the Eleventh Judicial Circuit in and for Miami–Dade County (the "Florida Circuit Court") on June 15, 2005. *See Weininger v. Castro,* No. 03–22920 CA 20 (Fla. Cir. Ct., 11th Cir., Miami–Dade Cty., June 15, 2005) ("Weininger Judgment") (attached as Ex. B to Perkins Decl.). The amount of compensatory damages awarded by Weininger's judgment is $23,939.301.95, including interest through December 27, 2005.

***464** Weininger commenced the instant litigation in state court by seeking summary judgment in lieu of complaint to domesticate the Florida state court judgment. On August 1, 2005, Weininger obtained an attachment order in New York State Supreme Court, New York County, directing the Sheriff of the City of New York to levy upon property held at JPM Chase as Garnishee in which the judgment debtors have an interest, naming specifically the three accounts mentioned above. On or about August 4, 2005, the sheriff levied upon JPM Chase, and in response, on August 11, 2005, JPM Chase served its garnishment statement pursuant to CPLR § 6219. In that statement, JPM Chase indicated that none of the accounts on its books had been opened in the name of any of the judgment debtors, but that the three specified accounts represented deposit debts owed to

"agencies or instrumentalities" of the Republic of Cuba, and that the Republic of Cuba "may have an indirect or contingent interest" in the accounts. (Letter from JPM Chase to Sheriff, dated Aug. 11, 2005 ("JPM Chase Garnishee Statement"), attached as Ex. A to Perkins Decl.) JPM Chase further indicated that all such accounts were blocked pursuant to the Cuba Assets Control Regulations, 31 C.F.R. Part 515.

JPM Chase removed the action to federal court on August 12, 2005, and on September 8, 2005 filed a third-party petition for interpleader relief against Weininger, McCarthy, and various other parties whom JPM Chase alleged may have an interest in the accounts. In particular, JPM Chase named (1) Rabinowitz Boudin in its capacity as alleged fiduciary in respect of the blocked Rabinowitz Boudin Account; (2) Banco Nacional de Cuba ("Banco Nacional"); (3) Empresa Cubana Exportadora de Alimentos y Productos Varios ("CUBAEXPORT"); (4) Empresa de Telecomunicaciones Internacionales de Cuba ("EMTELCUBA"); (5) Empresa de Radiocomunication y Difusion de Cuba ("RADIOCUBA"); (6) Empresa de Telecomunicaciones de Cuba SA ("ETECSA") (7) AT & T; and (8) CATT.[5] JPM Chase served a summons, notice of petition and third-party petition on each of these adverse claimants. AT & T and CATT were served pursuant to agreement with counsel. (*See* Kerr Suppl. Decl. ¶¶ 19, 36.) Rabinowitz Boudin was served by hand on October 5, 2005. (*See* Kerr Suppl. Decl. ¶¶ 17, 34.) After being served with JPM Chase's interpleader petition, Rabinowitz Boudin twice requested additional time to respond, first until October 31, 2005, then until November 4, 2005, and the parties so stipulated. (*See* Kerr Suppl. Decl. ¶¶ 18, 35.) To date, no response has been made by Rabinowitz Boudin to JPM Chase's petition.

JPM Chase served the alleged agencies and instrumentalities of Cuba, or entities sited only in Cuba (such as ETECSA), pursuant to § 1608(b)(3)(B) of the FSIA by causing the summons, notice of petition, and third-party petition, in English and Spanish, to be sent by the Clerk of Court by registered mail, return receipt requested, for delivery by the United States Postal Service. (*See* Kerr Suppl. Decl. ¶¶ 7–11, 26–29.) JPM Chase indicates that it supplemented this service, at least with respect to Banco Nacional, ETECSA, and RADIOCUBA, by DHL Worldwide Express through the Clerk of Court. (*See* Kerr Suppl. Decl. ¶¶ 13–16, 30–33, Exs. ***465** A(6), A(7), A(8), B(5), B(6), B(7), attached to same.) JPM Chase also served these papers on the defendants in the underlying Weininger and McCarthy actions—*i.e.,* the Republic of Cuba, Fidel Castro, Raul Castro, and the Army of the Republic of Cuba—by causing the summons, notice of petition, and third-party petition in English and Spanish to be sent by the Clerk of Court by registered mail, return receipt requested, for delivery by the United States Postal Service. (*See* Kerr Suppl Decl. ¶¶ 7, 12, 25, 29, Exs. A(4), A(5), B(3), B(4)). From the Supplemental Declaration alone it is unclear whether JPM Chase also served these judgment debtors by DHL: the exhibits indicate that JPM Chase requested that the Clerk of Court effect DHL service upon the defendants in the underlying action, and that DHL service was made upon "Ministerio de Relaciones Exteriores, Attention: Felipe Perez Rogue, Ministro," but it is unclear which of the named judgment debtors or other agencies and instrumentalities this service may refer to. (*See* Kerr Suppl. Decl. ¶¶ 13–16, 30–33, Exs. A(6), A(7), A(8), B(5), B(6), B(7), attached to same.) However, the Court notes that JPM Chase has attempted to effect service of all papers in this litigation upon these judgment debtors by addressing these judgment debtors at such address.

Weininger commenced a proceeding in this Court on November 2, 2005 against JPM Chase seeking turnover of the funds pursuant to the order of attachment. Weininger does not indicate that she served the judgment debtors with these papers pursuant to the FSIA, but instead provided notice according to CPLR § 5225(b) by serving copies by DHL. (*See* Perkins Decl. ¶ 12.) By Order dated December 13, 2005, this Court consolidated Weininger's attachment proceeding that had been removed to this court, Chase's third-party petition, Weininger's turnover proceeding, and McCarthy's petition described below. By consent of the parties, Weininger's turnover petition was deemed, pursuant to Federal Rules of Civil Procedure 13 and 18, to have been filed as a counterclaim to JPM Chase's third-party petition for interpleader relief.

In addition, by Order dated December 13, 2005, this Court granted Weininger's motion for summary judgment in lieu of complaint domesticating the Florida state court judgment in New York, ordering that Weininger's Florida judgment, "including all of the findings of fact and conclusions of law therein, ... is entitled to full faith and credit in New York" and directing the Clerk of Court to enter judgment as provided in the Florida judgment. (Docket No. 71.) On December 27, 2005, this Court entered a writ of execution with respect to Weininger's judgment.

On January 9, 2006, Weininger also filed a cross-claim against Rabinowitz Boudin for turnover of the funds in the Rabinowitz Boudin Account at JPM Chase. (*See* Perkins Decl. ¶ 17.) Weininger served Rabinowitz Boudin by hand and mailed copies to the judgment debtors by DHL. (*See id.* ¶ 18.) [6]

***466** Weininger now moves for a turnover order directing the Garnishees to relinquish funds from the Accounts. In response, JPM Chase cross-moved for interpleader relief. JPM Chase served its cross-motion for interpleader relief by DHL Air Mail upon ETECSA, EMTELCUBA, CUBAEXPORT, the Army of the Republic of Cuba, the Republic of Cuba, Raul Castro, Fidel Castro, RADIOCUBA, Banco Nacional. It served the same upon Rabinowitz Boudin by Express Mail. (*See* Kerr Suppl. Decl. ¶¶ 39–40; Exs. C(1), C(2).)

B. *THE MCCARTHY JUDGMENT*

McCarthy's judgment is based on a claim against the Republic of Cuba arising from the execution of her husband, Howard F. Anderson ("Anderson"), by a Cuban firing squad shortly after his conviction by a "Revolutionary Tribunal" for allegedly acting as a liaison for an anti-communist group and conspiring to smuggle weapons to anti-Castro forces in Cuba. *See McCarthy v. Republic of Cuba,* No. 01–26628 CA 04 (Fla. Cir. Ct., 11th Cir., Miami–Dade Cty., April 17, 2003) ("McCarthy Judgment") (attached as Ex. A to DeMaria Decl.). The Florida Circuit Court issued a final order authorizing entry of default judgment against the Republic of Cuba on April 17, 2003, and awarded compensatory damages to Anderson's estate and family in the aggregate amount of $67 million. *See id.* at 12–17.

McCarthy subsequently brought an action on the judgment in the United States District Court for the Southern District of Florida. On February 2, 2005, that court entered a final default judgment against the Republic of Cuba. (*See* DeMaria Decl., Ex. B., at 4–5.) On May 22, 2005, McCarthy registered that federal judgment with this Court pursuant to 28 U.S.C. § 1963. (*See* DeMaria Decl. ¶ 5; Ex. F.) On August 22, 2005, the judge sitting in Part I in this Court granted an order authorizing issuance of a writ of execution for McCarthy to levy upon the Republic of Cuba's property in this district for the purposes of satisfying the registered judgment.

On September 2, 2005, the United States Marshal served Rabinowitz Boudin and JPM Chase with a writ of execution levying upon the EMTELCUBA, AT & T Long Lines, and Rabinowitz Boudin Accounts. [7]

Separately, McCarthy sought to enforce the federal registered judgment in the New York Supreme Court. On August 24, 2005, that court held that the FSIA did not preclude enforcement of the Florida state and federal court judgments and granted McCarthy's motion to execute upon the judgment against the Republic of Cuba. *See McCarthy v. Republic of Cuba,* 9 Misc.3d 750, 800 N.Y.S.2d 906, 909 (Sup.Ct.N.Y.Co.2005).

As indicated above, JPM Chase's third-party petition was filed against McCarthy, among others. In response to JPM Chase's third-party petition, on November 14, 2005 McCarthy filed a counter-petition for turnover, asserted against both JPM Chase and Rabinowitz Boudin in their capacity as garnishees, seeking turnover of funds in those accounts. McCarthy served Rabinowitz Boudin by hand. (*See* ***467** Docket No. 104, Ex. 3 (Affidavit of Service).) In addition, McCarthy served her turnover petition in accordance in accordance with the FSIA upon the Republic of Cuba, as well as the various Cuban entities identified by Chase in its papers (including Banco Nacional, EMTELCUBA, RADIOCUBA, ETECSA, and CUBAEXPORT), by serving copies in both English and Spanish by DHL through the Clerk of Court. (*See* R.56.1 Statement ¶ 40; DeMaria Aff. ¶ 9; Docket No. 104.). As indicated, these actions were consolidated before this Court. McCarthy now moves for turnover of assets in those accounts.

C. *JPM CHASE'S CROSS–MOTION FOR RELIEF IN THE NATURE OF INTERPLEADER*

JPM Chase asserts that as a result of the Plaintiffs' actions to execute against the Accounts, it is exposed to "inconsistent legal obligations and to the risk of double or multiple liability." (Mem. of Law in Response to Motion for Partial Summary Judgment on Claims for Turnover and in Support of Cross–Motion for Relief in the Nature of Interpleader, dated Mar. 10, 2006 ("JPM Chase Mem."), at 2.) JPM Chase commenced third-party proceedings in order to bring all adverse claimants to the blocked deposits before the Court and to obtain a discharge in interpleader and as a garnishee under CPLR §§ 5209 and 5239.

JPM Chase seeks an order from the Court that will (a) determine whether JPM Chase is to be required to comply

with the turnover order sought by Plaintiffs; (b) incorporate findings intended to protect any turnover order from collateral attack, and (c) discharge JPM Chase from any further liability to any present or future adverse claimants-respondents, with respect to the accounts subject to turnover. JPM Chase also seeks reimbursement for its expenses in seeking interpleader relief.

II. *STANDARD OF REVIEW*

To prevail on a motion for summary judgment, the moving party must demonstrate that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The Court ascertains which facts are material by considering the substantive law of the action, for only those "facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Even if a dispute over material facts exists, summary judgment may be granted unless the dispute is "genuine," *i.e.,* "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Id.* at 249, 106 S.Ct. 2505. In determining whether genuine issues of material fact exist, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255, 106 S.Ct. 2505 (*citing Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 158–59, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970)).

III. *DISCUSSION*

The property in the United States of a foreign state and its agencies and instrumentalities is generally immune from execution under the FSIA unless a specific exception applies pursuant to the FSIA. *See* 28 U.S.C. § 1609; *FG Hemisphere Assocs., LLC v. Republique du Congo,* 455 F.3d 575, 584 (5th Cir.2006); *Letelier v. Republic of Chile,* 748 F.2d 790, 793 (2d Cir.1984). Conversely, federal courts lack subject matter jurisdiction over enforcement proceedings against the property of a foreign state unless a statutory exception ***468** to immunity applies. *See Verlinden B.V. v. Central Bank of Nigeria,* 461 U.S. 480, 489, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983); *FG Hemisphere,* 455 F.3d at 584; *Letelier,* 748 F.2d at 793. [8] Plaintiffs seek to execute judgments against property in the United States of the Republic of Cuba ("Cuba") and certain alleged agencies and instrumentalities of Cuba. Accordingly, the Court must determine whether any statutory exception to immunity from execution applies to permit execution in this proceeding.

As set forth below, the Court concludes that Section 201(a) of the Terrorism Risk Insurance Act of 2002, Pub.L. No. 107–297, 116 Stat. 2322, ("TRIA") provides an exception to immunity from execution over the funds in question.

Before reaching the question of TRIA's applicability to the Weininger and McCarthy judgments, the Court will first examine the question raised by JPM Chase and CEC regarding whether the Weininger and McCarthy judgments are entitled to enforcement by this Court. CEC argues that the judgments are unenforceable because the Florida state courts that rendered the judgments purportedly lacked subject matter and personal jurisdiction under the FSIA, while JPM Chase suggests that the judgments may be unenforceable on such ground. As discussed below, the Court is not persuaded that the judgments are unenforceable on account of the alleged jurisdictional deficiencies of the Florida state courts.

The Court first makes several preliminary observations.

It is beyond question that this Court must satisfy itself that it has jurisdiction to rule on any question it needs to decide that resolves the merits of a dispute. This unremarkable and fundamental principle is reflected in countless precedents as well as in the special status accorded subject matter jurisdiction in the Federal Rules of Civil Procedure, which allow the subject matter jurisdiction of a court to be raised at any time, even by the court on its own initiative. *See* Fed.R.Civ.P. 12(h)(3). What makes this case unique is the question of the extent to which such inquiry into the Court's own subject matter jurisdiction should encompass probing further back in the jurisdictional chain to examine the authority of a prior court, the judgment of which this Court is called upon to authorize execution, especially where, preceding the matter before this Court, other courts took intermediate actions that recognized or assumed the validity of the underlying judgments without review of the subject matter jurisdiction of the court which rendered the judgments.

To be sure, attacks on a prior court's jurisdiction, both subject matter and personal, are routinely made and obligate the later court to consider the challenge. Such an inquiry generally arises after a default judgment is rendered, when the party who won the judgment seeks to enforce it. The party who defaulted in the first proceeding will then collaterally

attack the judgment, arguing that the rendering court lacked jurisdiction, and thus that he or she should not be bound. Here, however, the question is posed without any collateral attack by the parties against ***469** whom the judgment is sought to be enforced. Instead, the jurisdictional question is raised by a third party serving as amicus curiae, as well as by a garnishee seeking not to void the judgment but merely to obtain interpleader relief.

In the absence of any collateral attack, what governs this Court's obligation defining how far back in the decisional line it need go in ascertaining the propriety of the jurisdictional issues now before it and its own authority to rule? Stated differently, what duty does this Court have on its own motion to reexamine the jurisdictional competence, and resultant factual and legal determinations, of courts preceding it in the decisional order that also were under similar obligation to confirm their authority as a predicate to rendering a judgment on the merits, and how deeply into the record of these extensive proceedings need this Court probe?

In this case, there have already been two levels of review. First, the Florida state courts determined their jurisdiction. Nor was such determination implicit or cursory, as might have been the case in the entry of a routine default judgment. Instead, because § 1608(e) of the FSIA bars entry of default against a foreign state unless the claimant establishes a claim or right to relief "by evidence satisfactory to the court," 28 U.S.C. § 1608(e), the Florida courts whose judgments are at issue here held hearings, took evidence, satisfied themselves of their jurisdiction and expressly so ruled.

Then, in the McCarthy case, a Florida federal district court held that the state court judgment was entitled to full faith and credit. Those same judgment debtors were served and failed to appear, and the federal court made an implicit determination of jurisdiction—both its own and the state court's—and found the judgment entitled to be enforced. In the Weininger case, this Court granted summary judgment in lieu of complaint recognizing the Florida judgment, finding it entitled to full faith and credit, and thus implicitly recognizing both its own and the Florida state court's jurisdiction after service upon the judgment debtors who again failed to appear.

Even now, in these enforcement proceedings, neither the judgment debtors nor the other entities which JPM Chase has impleaded and whose alleged assets are at risk of loss, have appeared, despite notice, to contest the validity of the judgments or that such judgments should be enforced against them. Under these circumstances, the policies and principles underlying res judicata doctrine would make it manifestly inequitable for this Court to reopen the judgments so as to permit a challenge to the underlying adjudication at the request of parties not affected by the judgments, and in particular at the behest of a party who appears as amicus here by the grace of the Court.

A. *ENFORCEABILITY OF THE WEININGER AND MCCARTHY JUDGMENTS*

JPM Chase and CEC assert that the Weininger and McCarthy judgments are unenforceable against the judgment debtors because the Florida state courts that rendered judgment erred in determining that FSIA § 1605(a)(7) (" § 1605(a)(7)") provided jurisdiction over the judgment debtors. The FSIA provides the sole basis for obtaining jurisdiction over a foreign state or an agency or instrumentality of a foreign state. *See Saudi Arabia v. Nelson,* 507 U.S. 349, 355, 113 S.Ct. 1471, 123 L.Ed.2d 47 (1993); *Argentine Republic v. Amerada Hess Shipping Corp.,* 488 U.S. 428, 434, 109 S.Ct. 683, 102 L.Ed.2d 818 (1989); *Verlinden,* 461 U.S. at 488–89, 103 S.Ct. 1962. ***470** Unless one of the exceptions to immunity from jurisdiction set forth in the FSIA applies, a foreign state and its agencies and instrumentalities are immune from the subject matter jurisdiction of federal and state courts. *See Saudi Arabia,* 507 U.S. at 355, 113 S.Ct. 1471; *Verlinden,* 461 U.S. at 488–89, 103 S.Ct. 1962; *Zappia Middle East Constr. Co. v. Emirate of Abu Dhabi,* 215 F.3d 247, 250–51 (2d Cir.2000). Pursuant to the FSIA, a court acquires personal jurisdiction over a foreign state or instrumentality of a foreign state where the court has subject matter jurisdiction pursuant to the FSIA and where service has been made on the foreign state or instrumentality as specified by FSIA § 1608. *See* 28 U.S.C. § 1330(b).

JPM Chase and CEC argue that the Florida state courts erroneously determined that the FSIA provided subject matter jurisdiction over the judgment debtors in the state court proceedings. As noted above, the Florida state courts held, after requisite fact-finding proceedings, that jurisdiction over the named defendants in the Weininger and McCarthy state court actions arose under § 1605(a)(7). That provision states that a foreign state is not immune from the jurisdiction of state and federal courts in the United States where "money damages are sought against a foreign state for personal injury or death that was caused by an act of torture [or] extrajudicial killing." 28 U.S.C. § 1605(a)(7). However, that section further provides that a court "shall decline to hear a claim under this paragraph ... if the foreign state was not 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) at the time the act occurred, unless later so designated as a result of such act." 28 U.S.C. § 1605(a)(7)(A). JPM Chase and CEC question the state courts' finding of jurisdiction pursuant to that section, noting that Cuba was not designated as a state sponsor of terrorism under those statutes at the time of the incidents giving rise to the Weininger and McCarthy judgments, and contending that although Cuba was later so designated, such designation was not "as a result of" the incidents giving rise to the judgments. In response, Plaintiffs argue first that the full faith and credit doctrine bars the Court from re-examining the issue of the jurisdiction of the prior courts at this stage in the proceeding. Plaintiffs also contend that the Florida state court judgments are no longer assailable because subsequent courts, *e.g.,* the United States District Court for the Southern District of Florida, the New York Supreme Court, as well as this Court, have already acknowledged the validity of the state court judgments. Each of these arguments is addressed below.

1. *The Full Faith and Credit Doctrine*

Plaintiffs argue that the judgments sought to be enforced in this proceeding must be recognized as valid pursuant to the requirements of full faith and credit. According to that doctrine, codified in the Full Faith and Credit Act, "the judicial proceedings of any court of any such State. shall have the same full faith and credit in every court within the United States ... as they have by law or usage in the courts of such State ... from which they are taken." 28 U.S.C. § 1738. Under this statute, a federal court that is asked to recognize a state court judgment is obligated to give the same preclusive effect to that judgment as would the courts of the rendering state. *See Migra v. Warren City Sch. Dist.,* 465 U.S. 75, 81, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984); *Kremer v. Chemical Constr. Corp.,* 456 U.S. 461, 482, 102 S.Ct. 1883, 72 L.Ed.2d 262 (1982); ***471** *Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident Health Ins. Guar. Ass'n,* 455 U.S. 691, 704 & n. 9, 102 S.Ct. 1357, 71 L.Ed.2d 558 (1982); *Stone v. Williams,* 970 F.2d 1043, 1053–54 (2d Cir.1992). [9]

Ordinarily, in assessing whether to enforce a state court judgment, a federal court must engage in a two-step inquiry. *See McCloud v. Lawrence Gallery, Ltd.,* No. 90 Civ. 30, 1991 WL 136027, at *4 (S.D.N.Y. July 12, 1991). First, pursuant to the full faith and credit doctrine, the court is obliged to enforce the judgment only to the extent that the courts of the rendering state would be similarly bound. *See id.* "Hence, if the state courts would entertain a collateral attack on the judgment, so may the federal courts." *Id.* at *4; *see Johnson v. Muelberger,* 340 U.S. 581, 587, 71 S.Ct. 474, 95 L.Ed. 552 (1951) (holding that a collateral attack is barred "where the party attacking would not be permitted to make a collateral attack in the courts of the granting state").

The second step arises from the recognition that these full faith and credit principles are subject to "some basic limitations"—"[c]hief among these limitations is the caveat, consistently recognized by this Court, that 'a judgment of a court in one State is conclusive upon the merits in a court in another State only if the court in the first State had power to pass on the merits—had jurisdiction, that is, to render the judgment.' " *Underwriters,* 455 U.S. at 704, 102 S.Ct. 1357 (*quoting Durfee v. Duke,* 375 U.S. 106, 110, 84 S.Ct. 242, 11 L.Ed.2d 186 (1963)). Thus, because neither federal nor state courts may enforce a "constitutionally infirm judgment," *see Kremer,* 456 U.S. at 482–83, 102 S.Ct. 1883, "before a court is bound by the judgment rendered in another State, it may inquire into the jurisdictional basis of the foreign court's decree. If that court did not have jurisdiction over the subject matter or the relevant parties, full faith and credit need not be given." *Underwriters,* 455 U.S. at 705, 102 S.Ct. 1357; *McCloud,* 1991 WL 136027, at *5. *See Conopco, Inc. v. Roll Int'l,* 231 F.3d 82, 90 n. 7 (2d Cir.2000) (describing two-part analysis required under Full Faith and Credit Act as "(1) whether, under federal law, the judgment is entitled to full faith and credit; and (2) what preclusive effect would the judgment be given under the law of the rendering state"); *American Steel Bldg. Co. v. Davidson & Richardson Constr. Co.,* 847 F.2d 1519, 1521 (11th Cir.1988) ("The full faith and credit statute thus requires a two-tiered analysis: first, we must consider whether the original court had jurisdiction, thus entitling the judgment to full faith and credit; and second, we must determine how much credit the judgment is entitled to receive."). [10]

With regard to the first step in the inquiry, a federal court is required to examine the state court's res judicata law to determine whether a collateral attack would be permitted. Where such an attack would be permitted under state law, the federal court must permit such an attack in an enforcement proceeding. *See Johnson,* 340 U.S. at 587, 71 S.Ct. 474; ***472** *McCloud,* 1991 WL 136027, at *4–5. However, this analysis is not entirely applicable here, where no judgment debtor has made a collateral attack. While the judgment debtors had numerous opportunities

to challenge the state court judgments, either directly, by appealing the judgments, or collaterally, through a motion to vacate for lack of jurisdiction, a suit for declaratory relief, or in the numerous subsequent proceedings to domesticate and federalize the judgments in New York and Florida or in this proceeding seeking execution, the judgment debtors have failed to interpose any collateral attack. The judgment debtors' failure to collaterally attack the judgments works as a "double default" and renders the first step of the court's full faith and credit inquiry, that of whether a collateral attack would be permissible under state court law, unnecessary. In the absence of a collateral attack, a Florida state court would be bound to enforce the judgments, except to the extent that such court were to find them constitutionally infirm, as discussed below.

The second step in a federal court's inquiry into the enforceability of a foreign court's judgment is whether there is a constitutional infirmity with the foreign court judgment. *See Kremer,* 456 U.S. at 482, 102 S.Ct. 1883 ("The State must ... satisfy the applicable requirements of the Due Process Clause. A State may not grant preclusive effect in its own courts to a constitutionally infirm judgment, and other state and federal courts are not required to accord full faith and credit to such a judgment."); *Underwriters,* 455 U.S. at 705, 102 S.Ct. 1357; *McCloud,* 1991 WL 136027, at *5. Accordingly, a federal court may examine whether the rendering court lacked jurisdiction over the judgment sought to be enforced. *See Underwriters,* 455 U.S. at 705, 102 S.Ct. 1357.

Nonetheless, "principles of preclusion apply equally to jurisdictional matters." *Stone,* 970 F.2d at 1057. "It has long been the rule that principles of res judicata apply to jurisdictional determinations—both subject matter and personal." *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee,* 456 U.S. 694, 702 n. 9, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982); *see also Underwriters,* 455 U.S. at 706, 102 S.Ct. 1357. Thus, " 'a judgment is entitled to full faith and credit—even as to questions of jurisdiction—when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment.' " *Underwriters,* 455 U.S. at 706, 102 S.Ct. 1357 (*quoting Durfee,* 375 U.S. at 111, 84 S.Ct. 242); *see American Steel,* 847 F.2d at 1521; *McCloud,* 1991 WL 136027, at *5. The same preclusive effect occurs where a party had an opportunity to litigate jurisdiction but chose not to do so: "A party that has had an opportunity to litigate the question of subject-matter jurisdiction may not ... reopen that question in a collateral attack upon an adverse judgment." *Ins. Corp.,* 456 U.S. at 702 n. 9, 102 S.Ct. 2099; *see United States v. Bigford,* 365 F.3d 859, 865 (10th Cir.2004) ("[A]s long as a party had an opportunity to litigate the jurisdictional issue, it is not subject to collateral attack."); *Corbett v. MacDonald Moving Servs., Inc.,* 124 F.3d 82, 88–89 (2d Cir.1997); *A.L.T. Corp. v. Small Bus. Admin.,* 801 F.2d 1451, 1460 n. 17 (5th Cir.1986); *Nemaizer v. Baker,* 793 F.2d 58, 65 (2d Cir.1986) ("[I]f the parties *could* have challenged the court's power to hear a case, then res judicata principles serve to bar them from later challenging it collaterally.") (emphasis in original).

However, where a judgment is rendered by default, it is not always clear whether such an opportunity to contest any jurisdictional deficiency actually existed. Certainly ***473** as to personal jurisdiction, default judgments do not foreclose collateral attacks. *See Ins. Corp.,* 456 U.S. at 706, 102 S.Ct. 2099 ("A defendant is always free to ignore the judicial proceedings, risk a default judgment, and then challenge that judgment on jurisdictional grounds in a collateral proceeding."); *Transaero, Inc. v. La Fuerza Aerea Boliviana,* 162 F.3d 724, 730 (2d Cir.1998) ("A court entering a default judgment may assume that it has jurisdiction over the defendant when the defendant does not appear in court to contest the judgment, but that assumption does not preclude the defendant from later contesting jurisdiction in the enforcing court. Thus, any determination by the [district court] that service was proper and that it had personal jurisdiction under the FSIA when it entered the initial default judgment in 1989 cannot be deemed final and preclusive on these questions.") (citations omitted); *see also Bigford,* 365 F.3d at 865 (observing that there is no opportunity to litigate a personal jurisdiction issue in a default proceeding); *American Steel,* 847 F.2d at 1521 ("[W]here the defendant does not appear, and judgment is by default, the state court judgment does not preclude the federal court from reviewing the jurisdictional issues."). *But cf. ALT Corp.,* 801 F.2d at 1460 n. 17 (stating, on appeal of a default judgment, that the state court "[a]rguably ... fully and fairly considered the issue of personal jurisdiction when it recited ALT's compliance with Texas service of process requirements," but declining to give preclusive effect to subject matter jurisdiction where the record did not indicate that the state court even considered questions of subject matter jurisdiction); *McCloud,* 1991 WL 136027, at *12 n. 8 (suggesting that the res judicata effect of a default judgment on a jurisdictional question appears to be an unsettled question). [11]

However, each of the preceding cases involved a collateral attack by the judgment debtor, or presumptive party to the underlying action, who had sufficient standing to pursue an

appeal or collateral attack on the underlying judgment. Here, there is no collateral attack by the judgment debtors. No judgment debtor has appeared to argue that it did not have an opportunity to contest the rendering court's subject matter jurisdiction or personal jurisdiction and that the judgments are void on that basis. While CEC objects to this Court's enforcement of the judgment, it does not have standing to bring a collateral attack upon the judgment.[12] A garnishee such as JPM Chase may have standing to either directly or collaterally attack a judgment. *See FG Hemisphere,* 455 F.3d at 584 (allowing sovereign immunity of foreign state to be directly raised by garnishee on appeal); *Thompson v. Liberty Mut. Ins. Co. of Boston,* 390 F.2d 24, 26 (10th Cir.1968) ("The garnishee may properly show that the judgment sued upon is not valid for jurisdictional reasons."). Yet, JPM Chase has not collaterally ***474** attacked the underlying judgments here, and it concedes that it does not oppose the relief requested by Plaintiffs. (*See* Kerr Decl. ¶ 5 ("TRIA may provide to plaintiffs the execution they seek. JPM Chase does not oppose that relief.")).[13] Instead, displaying the better part of somewhat Falstaffian valor, JPM Chase merely invites the Court to undertake that inquiry of the Court's own accord. Even the United States, which had been a party to this suit, is monitoring the case, and has expressed its views through a letter to the Court, has not expressed the position that Plaintiffs' state court judgments should not be enforced. *Compare Roeder v. Islamic Republic of Iran,* 195 F.Supp.2d 140, 159–60 (D.D.C.2002) (vacating a default judgment against Iran in response to Rule 60(b)(4) motion by intervenor United States, who argued that rendering court lacked subject matter jurisdiction because Iran had not been designated a state sponsor of terrorism as a result of the acts in question).

The parties have not pointed to any authority *requiring* this Court to sua sponte engage in an analysis of the subject matter jurisdiction of the rendering court in the absence of a collateral attack by the party against whom the judgment is to be enforced or another party in interest such as the United States, and the Court declines to do so. *See Underwriters,* 455 U.S. at 705, 102 S.Ct. 1357 ("[B]efore a court is bound by the judgment rendered in another State, it *may* inquire into the jurisdictional basis of the foreign court's decree.") (emphasis added); *cf. McLearn v. Cowen & Co.,* 660 F.2d 845, 849 (2d Cir.1981) (noting that the court "may" on its own motion set aside a void judgment). At this late stage of these complex and lengthy proceedings, the judgment debtors have had ample opportunity to contest the jurisdictional issues but chose not to do so. Similarly, numerous state and federal courts that encountered the same questions raised here either asserted jurisdiction or exercised discretion not to reopen those settled matters. Under these circumstances, insofar as the choice now before this Court offers sufficient latitude for the exercise of discretion, it would be acutely inequitable for this Court to assume the task of such a renewed jurisdictional inquiry on its own initiative.

Nor would enforcement of these judgments under these circumstances be so clearly wrong that it would comprise a violation of some constitutional principle. In this regard, it bears repeating that the Florida state courts did not simply enter default but instead were obligated to comply with with FSIA § 1608(e), which requires that "[n]o judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court." 28 U.S.C. § 1608(e). Accordingly, the state courts conducted a hearing and took evidence before finding that subject matter jurisdiction existed. (*See* Pls. Reply Mem. at 21 n. 15 (discussing evidence placed before the Florida state courts, including expert submissions); McCarthy Judgment at 5–7; Weininger Judgment at 4, 5–7.)

While those hearings may have entailed the submissions of only one side, in the ***475** absence of a collateral attack contesting the sufficiency of the evidence presented to establish jurisdiction, it is not appropriate at this stage for this Court on its own motion to review those findings. Moreover, the Florida state court examined its jurisdiction as required by FSIA § 1608(e) and found an arguable basis for jurisdiction that is entitled to presumptive validity, absent a sufficiently compelling challenge by the judgment debtors or other party with enough standing to intervene on their behalf. Even if some colorable ground to charge error on the part of the state court were to be introduced at this point, under the circumstances prevailing here, this Court discerns no basis to support a finding that the state courts' judgments represent such a plain usurpation of power to warrant this Court taking it upon itself to reexamine the state courts' findings and defeat the compelling interest in repose for matters settled after extensive litigation. This course holds true particularly in a case in which the record demonstrates that the defendant was given notice and afforded multiple opportunities to contest the courts' exercise of jurisdiction and elected not to do so. *See Cantor Fitzgerald, L.P., v. Peaslee,* 88 F.3d 152, 155 n. 2 (2d Cir.1996) ("[A] judgment rendered by a court assuming subject-matter jurisdiction and sustained on direct appeal is

entitled to preclusive effect as long as the District Court did not 'plainly usurp jurisdiction' over the action."); *Nemaizer,* 793 F.2d at 65 (in context of Rule 60(b)(4) motion, "[s]ince a court has power to determine its own jurisdiction and, in fact, is required to exercise that power sua sponte, it does not plainly usurp jurisdiction when it merely commits an error in the exercise of that power. Rather, a court will be deemed to have plainly usurped jurisdiction only when there is a 'total want of jurisdiction' and no arguable basis on which it could have rested a finding that it had jurisdiction."); 18A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 4428 at 15–16 (2d ed. 2002) ("So long as the court that entered judgment can assert personal jurisdiction over the defendant, it may fairly claim the right to determine its own subject-matter jurisdiction. This claim should be honored unless the lack of jurisdiction is so clear that a second court can act to protect the defendant against the imposition of any burden by a manifestly powerless tribunal and to defeat a judgment that offers no plausible basis for repose.").

CEC also asserts that the state courts erred in determining that the courts had personal jurisdiction over the judgment debtors pursuant to the FSIA. Under the FSIA, personal jurisdiction is achieved where the court has subject matter jurisdiction pursuant to the FSIA and service has been made on the foreign state under FSIA § 1608. *See* 28 U.S.C. § 1330(b); *Verlinden,* 461 U.S. at 485 n. 5, 103 S.Ct. 1962 (" § 1330(b) provides personal jurisdiction wherever subject matter jurisdiction exists under subjection (a) and service of process has been made under § 1608 of the Act."). CEC's challenge is based entirely on the first prong of FSIA personal jurisdiction—the finding of subject matter jurisdiction. As explained above, insofar as this Court possesses discretion to do so under the circumstances governing this case, it chooses not to reopen consideration of subject matter jurisdiction.

Finally, the Court concludes that enforcement of the judgments is not precluded by any other constitutional infirmity. A federal court may not enforce a judgment that is constitutionally defective because it was entered in violation of the defendant's due process rights. ***476** *See Kremer,* 456 U.S. at 482–83, 102 S.Ct. 1883. This rule permits the enforcing court to decline enforcement not only on the basis of lack of jurisdiction, as discussed above, but also "if the procedures utilized in the original forum were in other respects so deficient as to reflect an absence of due process." *McCloud,* 1991 WL 136027, at *17 (*citing Fehlhaber v. Fehlhaber,* 681 F.2d 1015, 1027–29 (Fifth Cir. Unit B 1982)).

The Court concludes that the due process rights of the judgment debtors were not violated in the Florida Circuit Court.

There is no dispute that the judgment debtors were served in the state court proceedings in accordance with the requirements of the FSIA. Accordingly, reopening the state courts' determinations would not be appropriate here. Reexamination would entail, in an essentially ex parte proceeding here, a reconsideration of the factual record before the state courts and a new determination as to whether the evidence before those courts supported the courts' conclusion. "The insufficiency of evidence in support of a claim is not, in itself, a basis for a collateral due process attack on a judgment." *McCloud,* 1991 WL 136027, at *17. "Were it otherwise, the enforcing court would inevitably be required to reexamine the merits of the original controversy, which is plainly not proper in an enforcement proceeding." *Id. (citing Ultracashmere House, Ltd. v. Madison's of Columbus, Inc.,* 534 F.Supp. 542, 544 n. 5 (S.D.N.Y.1982)). "This principle is even more pertinent in a case where the defendant has defaulted in the original proceeding." *Id. See Boddie v. Connecticut,* 401 U.S. 371, 378, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971) (holding that due process does not require a hearing where defendant defaults, but merely notice and opportunity to be heard). Here, where there is no collateral attack by the judgment debtors, it is especially inappropriate for the Court to reexamine the record from the original controversy. Furthermore, as discussed below, the judgments have been adopted by numerous subsequent courts, making reopening of the issue at this juncture even more inappropriate.

CEC argues that this Court has an obligation to raise sua sponte and decide the issue of subject matter jurisdiction. While this Court must consider whether it has subject matter jurisdiction in connection with the proceeding immediately before it, that is a separate issue from the question of whether the state courts that rendered the underlying judgments had subject matter jurisdiction that should now be assessed anew. As explained below, the Court concludes that TRIA Section 201(a) provides subject matter jurisdiction in this proceeding.

2. *Recognition by Other Courts*

There have been intervening court decisions recognizing the validity of Plaintiffs' judgments. As to Weininger's, this Court has already recognized that such judgment, as well as "all of the findings of fact and conclusions of law therein," are entitled to full faith and credit. (Order, dated Dec. 13, 2005 (Docket No. 71).) As to McCarthy's state judgment, a federal

district court in Florida has already recognized that judgment and entered a default against the judgment debtors in respect of it. Moreover, a state court in New York has recognized it as well, after concluding that the FSIA did not preclude enforcement of the Florida judgment. [14] No evidence ***477** of constitutional infirmity in the records of the proceedings in the courts that authorized these judgments has been called to this Court's attention. Accordingly, a variant of the "last in time" rule provides further reason for this Court to decline to re-open the matter of the validity of the Florida state court judgments. *See* 18A Wright, Miller & Cooper, *Federal Practice & Procedure* § 4428 at 34 (2d ed. 2002) ("[T]he 'last in time' rule applies as well to determinations of the consequences of jurisdictional failure as to other matters. There can be little question that a ruling by a second court that a prior judgment cannot be attacked for lack of jurisdiction is binding. So too, a final ruling by a second court that a prior judgment can be ignored for lack of jurisdiction is binding even though it disregards all sound principle.") (*citing Treinies v. Sunshine Mining Co.,* 308 U.S. 66, 78, 60 S.Ct. 44, 84 L.Ed. 85 (1939)).

B. *TRIA SECTION 201(a)*

As set forth below, the Court concludes that: (1) this Court has subject matter jurisdiction over the enforcement action before it pursuant to TRIA § 201(a); (2) TRIA § 201(a) permits execution against funds held by or owed to the Republic of Cuba; (3) TRIA § 201(a) permits execution against funds held by or owed to those entities that are agencies and instrumentalities of a foreign state as defined by the FSIA; and (4) Banco Nacional is not exempt from TRIA § 201(a) as a result of its status as a central bank.

1. *Subject Matter Jurisdiction*

The FSIA is the exclusive source of subject matter jurisdiction over all civil actions against foreign states or their agencies and instrumentalities. *See Saudi Arabia,* 507 U.S. at 355, 113 S.Ct. 1471; *Argentine Republic,* 488 U.S. at 434, 109 S.Ct. 683; *Robinson v. Government of Malaysia,* 269 F.3d 133, 138 (2d Cir.2001); *Zappia,* 215 F.3d at 250–51. "[S]ubject-matter jurisdiction in any such action depends on the existence of one of the specified exceptions to foreign sovereign immunity." *Verlinden,* 461 U.S. at 493, 103 S.Ct. 1962. Accordingly, " '[a]t the threshold of every district court action against a foreign state, the court must satisfy itself that one of the exceptions [to immunity] applies [because its] subject matter jurisdiction ... depends on that application.' " *FG Hemisphere,* 455 F.3d at 584 (*quoting Republic of Austria v. Altmann,* 541 U.S. 677, 691, 124 S.Ct. 2240, 159 L.Ed.2d 1 (2004)); *see Verlinden,* 461 U.S. at 493–94, 103 S.Ct. 1962; *Robinson,* 269 F.3d at 139; *Nysa–Ila Pension Trust Fund ex rel. Bowers v. Garuda Indonesia,* 7 F.3d 35, 39 (2d Cir.1993) ("Before a federal court may apply ... any ... rule of law in a case involving a foreign state or instrumentality of that state, it must, as a threshold matter, find an exception to the FSIA's grant of sovereign immunity."). Even if a party fails to enter an appearance and assert its claim of immunity, a court must determine whether immunity is available pursuant to the FSIA. *See Verlinden,* 461 U.S. at 493 n. 20, 103 S.Ct. 1962 ("[S]ubject matter jurisdiction turns on the existence of an exception to foreign sovereign immunity. Accordingly, even if the foreign state does not enter an appearance to assert an immunity defense, a District Court still must determine that immunity is unavailable under ***478** the Act.") (citation omitted); *Brewer v. Socialist People's Republic of Iraq,* 890 F.2d 97, 101 (8th Cir.1989).

Under § 1604 of FSIA, a foreign state is immune from the jurisdiction of federal or state courts unless one of the statutory exceptions to immunity found in §§ 1605–07 applies. *See* 28 U.S.C. § 1604; *Verlinden,* 461 U.S. at 488, 103 S.Ct. 1962; *Shapiro v. Republic of Bolivia,* 930 F.2d 1013, 1017 (2d Cir.1991). In the context of an enforcement proceeding, § 1609 renders the property in the United States of a foreign state immune from execution or attachment, including garnishment, unless §§ 1610–11 provide otherwise. *See* 28 U.S.C. § 1609 ("[T]he property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter."); [15] *FG Hemisphere,* 455 F.3d at 584; *Alejandre v. Telefonica Larga Distancia de Puerto Rico, Inc.,* 183 F.3d 1277, 1283 (11th Cir.1999); *Letelier,* 748 F.2d at 793 ("[U]nder § 1609 foreign states are immune from execution upon judgments obtained against them, unless an exception set forth in §§ 1610 or 1611 of the FSIA applies."). Accordingly, to exercise subject matter jurisdiction in this action, this Court must find that a statutory exception to immunity exists under the FSIA. As set forth below, the Court finds that TRIA § 201(a) provides an exception to immunity in this garnishment action, and hence confers subject matter jurisdiction over this enforcement action. *See FG Hemisphere,* 455 F.3d at 595 ("A finding that an exception to executional immunity applies is a finding that the court has jurisdiction over the garnishment action."). [16] Alternatively, as set forth below, at least with respect to the ***479** judgment debtors, this Court has subject matter jurisdiction through ancillary jurisdiction to enforce a judgment.

2. *TRIA § 201(a)*

In November 2002, Congress enacted TRIA. Section 201(a) of TRIA provides:

> Notwithstanding any other provision of law, and except as provided in subsection (b),[17] 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 (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.

TRIA § 201(a), codified at 28 U.S.C. § 1610 note.

Thus, TRIA allows for execution on the blocked assets of a terrorist party, or its agency or instrumentality, to satisfy a judgment against the terrorist party, provided that the following requirements are met:

(1) a person has obtained a judgment against a terrorist party;

(2) the judgment is either

(a) for a claim based on an act of terrorism, or

(b) for a claim for which a terrorist party is not immune under § 1605(a)(7);

(3) the assets are "blocked assets" within the meaning of TRIA; and

(4) execution is sought only to the extent of any compensatory damages.

In addition, as indicated, and important to this case, by its terms § 201 provides that the blocked assets that may be executed upon are those of either the "terrorist party" or "any agency or instrumentality of that terrorist party," even though the judgment itself need be only against the terrorist party. The Court will examine each of these elements in turn.

a. A Judgment Against a Terrorist Party

TRIA defines "terrorist party" to mean

> a terrorist, a terrorist organization (as defined in section 212(a)(3)(B)(vi) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(B)(vi))), 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), codified at 28 U.S.C. § 1610 note.

In 1982, Cuba was designated by the State Department as a state sponsor of terrorism under Section 6(j) of the Export Administration Act of 1979, 50 U.S.C.App. § 2405(j). *See* Clarification for Foreign Policy Export Controls, 47 Fed.Reg. 16,623 (Apr. 19, 1982). It therefore falls within TRIA's definition of "terrorist party." *See* § 201(d)(4). Therefore, Plaintiffs have each obtained a judgment against a terrorist party, a prerequisite to execution under TRIA.

b. A Claim Based on an Act of Terrorism or a Claim for Which the Terrorist Party Is Not Immune under § 1605(a)(7)

As indicated, to execute under TRIA, Plaintiffs must have a judgment against a ***480** terrorist party either for (a) a claim based on an act of terrorism, *or* (b) a claim for which a terrorist party is not immune under § 1605(a)(7). In Part III.A above, this Court concluded that the Florida state courts already determined that Cuba was not immune from judgment under § 1605(a)(7), and that this Court would decline to re-open those proceedings in the absence of any collateral attack by any party against whom the judgments are sought to be

enforced. Thus, Plaintiffs each have a judgment against a terrorist party for a claim for which the terrorist party is not immune under § 1605(a)(7).

In light of this conclusion, the Court need not decide whether Plaintiffs also have a judgment for "a claim based on an act of terrorism" within the meaning of TRIA.[18] "Act of terrorism" is defined by reference to other statutes, and Plaintiffs suggest that they also have judgments based on an act of terrorism as defined in those statutes. However, if a foreign sovereign was immune from judgment under § 1605(a)(7), reading "a claim based on an act of terrorism" to include those foreign sovereigns would defeat that very immunity and create a whole new category of jurisdiction over otherwise immune sovereigns. This Court has before it no indication that this application reflects Congress's intent in passing TRIA, an execution statute. It is possible that such language was designed to refer to terrorist acts by non-state actors, and not to state sponsors of terrorism such as Cuba. Alternatively, the reference to "claims based upon an act of terrorism" may, as JPM Chase suggests, be meant to authorize execution where the jurisdictional basis for the judgment to be enforced is a subsection of 28 U.S.C. § 1605(a) other than § 1605(a)(7). However, in light of this Court's determination that each Plaintiff here has obtained a judgment against a terrorist party for a claim for which the terrorist party is not immune under § 1605(a)(7), the Court does not address the issue any further.

c. Blocked Assets

TRIA defines a "blocked asset" as "any asset seized or frozen by the United States under section 5(b) of the Trading With the Enemy Act (50 U.S.C.App. 5(b)) or under sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701; 1702)," excluding diplomatic and consular property and property related to certain transactions licensed by the government. TRIA § 201(d)(2), codified at 28 U.S.C. § 1610 note. There is no dispute here that the accounts at issue fall within this definition. JPM Chase points out that the assets in question are blocked pursuant to the Cuban Assets Control Regulations, 31 C.F.R. Part 515. These regulations are authorized by § 5(b) of the Trading with the Enemy Act, 50 U.S.C.A.App. 5(b). *See DeCuellar v. Brady,* 881 F.2d 1561, 1562–63 (11th Cir.1989) (explaining source of authority for Cuban Assets control Regulations); *American Airways Charters, Inc. v. Regan,* 746 F.2d 865, 867 n. 1 (D.C.Cir.1984) (same).

d. Compensatory Damages

Here, Weininger was awarded by the Florida Circuit Court $23,939,301.95 (including interest) in compensatory damages. Similarly, that court awarded McCarthy $67,000,000.00 (including interest) ***481** in compensatory damages. Each plaintiff seeks enforcement only as to these compensatory damages. Accordingly, this requirement of TRIA is satisfied.

e. Execution Upon the Assets of an Agency or Instrumentality of a Terrorist Party

Plaintiffs seek to execute on accounts that contain assets that the record suggests belong not to the named judgment debtors (the Republic of Cuba, Fidel Castro, Raul Castro, and the Army of the Republic of Cuba), but to other entities, including EMTELCUBA, Banco Nacional, and CUBAEXPORT. Plaintiffs contend that these entities are agencies or instrumentalities of Cuba, and that TRIA therefore allows execution on these assets to satisfy the judgments rendered against Cuba itself. Plaintiffs' contention raises several issues. First is whether the entities at issue are agencies or instrumentalities of Cuba. Second is whether the FSIA imposes any jurisdictional barrier over executing upon the assets of such agencies or instrumentalities to satisfy a judgment that was rendered against another entity. The third issue, as pointed out by JPM Chase, is whether the Supreme Court's decision in *First National City Bank v. Banco Para El Comercio Exterior de Cuba,* 462 U.S. 611, 103 S.Ct. 2591, 77 L.Ed.2d 46 (1983) ("*Bancec* "), nonetheless prohibits execution upon these assets absent a showing by Plaintiffs that these alleged agencies and instrumentalities are not juridically separate from Cuba for purposes of both liability and immunity. As set forth below, this Court finds that the language and legislative history of TRIA demonstrate that Plaintiffs need not overcome the *Bancec* presumption in order to execute upon the assets of the agencies and instrumentalities of Cuba here.

(i) *Placing TRIA in Context in the FSIA*

As indicated above, the FSIA is the exclusive source of subject matter jurisdiction over all civil actions against foreign states or their agencies and instrumentalities. *See Saudi Arabia,* 507 U.S. at 355, 113 S.Ct. 1471; *Argentine Republic,* 488 U.S. at 434, 109 S.Ct. 683; *Verlinden,* 461 U.S. at 488, 103 S.Ct. 1962.[19] In addition, § 1609 renders the property in the United States of a foreign state, including its agencies and instrumentalities, immune from execution

or attachment, including garnishment, unless §§ 1610–11 provide otherwise. *See* 28 U.S.C. § 1609; *FG Hemisphere,* 455 F.3d at 584; *Alejandre,* 183 F.3d at 1283; *Letelier,* 748 F.2d at 793.

Thus, the FSIA preserves a common law distinction between two different aspects of foreign sovereign immunity: jurisdictional immunity from actions brought in United States courts and immunity from attachment or execution of the foreign sovereign's property. *See Connecticut Bank of Commerce v. Republic of Congo,* 309 F.3d 240, 252 (5th Cir.2002) (observing that under FSIA, immunity from execution is narrower than jurisdictional immunity); 15 James W. Moore, *Moore's Federal Practice* § 104.12[1][f] (3d ed.2005); *see also Brewer,* 890 F.2d at 100 ("Foreign states are further protected from execution of judgments by 28 U.S.C. § 1609.... Therefore, even the victorious plaintiff ***482** may only pursue particular property of a foreign state."); *Letelier,* 748 F.2d at 798–99 (observing that in some circumstances under the FSIA, "a right without a remedy does exist").

Moreover, the FSIA defines a foreign state to include not only the foreign state itself, but also its political subdivisions and its agencies and instrumentalities. *See* § 28 U.S.C. 1603(a) ("A 'foreign state,' except as used in section 1608 of this title [relating to service of process], includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in [§ 1603(b)]."). Therefore, such agencies and instrumentalities also enjoy immunity from suit and execution unless an exception applies. *See Alejandre,* 183 F.3d at 1283; *Letelier,* 748 F.2d at 793. Plaintiffs contend that the entities whose assets are at issue are agencies and instrumentalities of Cuba—indeed, they insist on this, in order to bring the assets of these entities within the scope of TRIA. Assuming for the moment that such entities are indeed agencies and instrumentalities of Cuba as defined in § 1603(b), their assets would be immune from execution absent an exception to immunity as found in §§ 1610–11. *See S & S Machinery Co. v. Masinexportimport,* 706 F.2d 411, 415–16 (2d Cir.1983) ("Having held that the district court correctly concluded that the Romanian Bank and Masin are agencies or instrumentalities of the Romanian state, it follows that they are entitled to protection as 'foreign state[s]' within the meaning of § 1603(a) of the Act. Among the protections accorded to foreign states by the Act is the immunity from attachment provided in § 1609.").

Sections 1610(a) and 1610(b) provide a list of several exceptions to the immunity from attachment and execution provided by § 1609. For example, § 1610(a)(1) allows for execution on property used for commercial activity where the foreign state has expressly or impliedly waived its immunity from attachment. *See* 28 U.S.C. § 1610(a)(1). Similarly, § 1610(a)(7) allows for execution on property used for commercial activity where "the judgment relates to a claim for which the foreign state is not immune under section 1605(a)(7), regardless of whether the property is or was involved with the act upon which the claim is based." 28 U.S.C. § 1610(a)(7). Section 1610(b) provides several additional exceptions to immunity allowing for execution of an agency or instrumentality's property where the agency or instrumentality is engaged in commercial activity in the United States. *See* 28 U.S.C. § 1610(b); *see also Ministry of Defense & Support for the Armed Forces of the Islamic Republic of Iran v. Elahi,* 546 U.S. 450, 126 S.Ct. 1193, 163 L.Ed.2d 1047 (2006); *Connecticut Bank of Commerce,* 309 F.3d at 252–53; *Letelier,* 748 F.2d at 798–99. Section 1611, which the Court addresses below, places certain restrictions on the execution of property of a foreign central bank.

While at first glance § 1610(a)(7) may appear to apply to the situation at hand, Plaintiffs do not seek to execute under this statutory subsection, presumably because there is insufficient evidence that the property at issue here is property used for commercial activity; instead, it consists of blocked assets. Nor have Plaintiffs sought to execute under § 1610(b), presumably because the alleged agencies and instrumentalities here are not engaged in commercial activity in the United States. Instead, Plaintiffs seek an exception to immunity from attachment through TRIA. Such an approach is not without precedent. *See, e.g., Rubin v. Islamic Republic of Iran,* 456 F.Supp.2d 228, 234 (D.Mass.2006) ("The property's immunity under FSIA [§ 1610(a)(7)] notwithstanding, the plaintiffs may still be able to obtain the ***483** antiquities pursuant to § 201 of the Terrorism Risk Insurance Act of 2002.").

The legislative history of § 201 of TRIA provides persuasive guidance in the resolution of the issue before the Court. TRIA § 201 was passed in order to "deal comprehensively with the problem of enforcement of judgments rendered on behalf of victims of terrorism in any court of competent jurisdiction by enabling them to satisfy such judgments through the attachment of blocked assets of terrorist parties. It is the intent of the Conferees that Section 201 establish that such judgments are to be enforced." H.R. Conf. Rep. 107–779, at 27 (2002), *reprinted in* 2002 U.S.C.C.A.N. 1430, at 1434–35; *see Hill v. Republic of Iraq,* No. 99 Civ. 03346, 2003

WL 21057173, at *2 (D.D.C. Mar. 11, 2003) (discussing enactment of TRIA). As noted by the Second Circuit, the plain meaning of the phrase that blocked assets "shall be subject to execution or attachment in aid of execution" "is to give terrorist victims who actually receive favorable judgments a right to execute against assets that would otherwise be blocked." *Smith ex rel. Estate of Smith v. Fed. Reserve Bank of New York,* 346 F.3d 264, 271 (2d Cir.2003).

On its face, TRIA would appear to provide the exception to immunity from attachment that Plaintiffs seek. *Bancec*, however, complicates this analysis.

(ii) *The Effect of TRIA upon Bancec*

In *Bancec*, the Supreme Court held that government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such, so that an agency or instrumentality of a foreign state could not automatically be liable for the debts of its associated foreign state. *See* 462 U.S. at 626–27, 103 S.Ct. 2591. [20]

The rationale for this principle is that

> [t]he language and history of the FSIA clearly establish that the Act was not intended to affect the substantive law determining the liability of a foreign state or instrumentality, or the attribution of liability among instrumentalities of a foreign state.

Id. at 620, 103 S.Ct. 2591. Instead, FSIA expressly provided that liability of a foreign state is determined " 'in the same manner and to the same extent as a private individual under like circumstances.' " *Id. (quoting* 28 U.S.C. § 1606). [21] Thus, the Court looked to substantive law to determine whether Bancec could be liable for the acts of its government. Examining ***484** international and federal common law, [22] it concluded that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." *Id.* at 626–27, 103 S.Ct. 2591.

However, although there existed a "presumption that a foreign government's determination that its instrumentality is to be accorded separate legal status," *id.* at 628, 103 S.Ct. 2591, such presumption could be overcome in certain circumstances. *Id.* First, where a corporate entity "is so extensively controlled by its owner that a relationship of principal and agent is created," one could be held liable for the actions of the other. *Id.* at 629, 103 S.Ct. 2591. Second, the doctrine of corporate entity would not be regarded " 'when to do so would work fraud or injustice.' " *Id. (quoting Taylor v. Standard Gas Co.,* 306 U.S. 307, 322, 306 U.S. 618, 59 S.Ct. 543, 83 L.Ed. 669 (1939)). [23]

Under *Bancec*, before Plaintiffs here could recover on their judgments against Cuba by executing upon the assets of Cuba's agencies or instrumentalities, they would need to overcome the presumption that the alleged agencies and instrumentalities here should be treated as entities juridically separate from Cuba. Post-*Bancec*, several circuits, including the Second Circuit, have followed this analysis. *See, e.g., Flatow v. Islamic Republic of Iran,* 308 F.3d 1065, 1069–73, 1073 (9th Cir.2002) (finding that plaintiff could not overcome presumption that Iranian bank was juridically separate from Iran, and thus could not execute on assets of Iranian bank to satisfy judgment against Iran); *Alejandre,* 183 F.3d at 1284–89 (finding that plaintiffs did not overcome presumption that ETECSA, a Cuban telecommunications company, was juridically separate from Cuba, and thus could not execute on ETECSA's assets to satisfy judgment against Cuba); *Walter Fuller Aircraft Sales, Inc. v. Republic of Philippines,* 965 F.2d 1375, 1381 (5th Cir.1992) ("Section 1603 defines the universe of entities entitled to statutory sovereign immunity. This is completely different from the question whether a foreign state and its agency or instrumentality are alter egos for purposes of substantive liability."); *Letelier,* 748 F.2d at 794–95 (finding that plaintiffs could not execute against assets of Chile's wholly-owned airline to satisfy judgment against Chile, because plaintiffs did not overcome presumption that airline was juridically separate from Chile); *see also Bayer & Willis Inc. v. Republic of Gambia,* 283 F.Supp.2d 1, 4 (D.D.C.2003) ("[A]n entity's status as an agency or instrumentality of a foreign sovereign is insufficient, without more, to establish that the entity is liable for the debts of the foreign state."); *Pravin Banker Assocs., Ltd. v. Banco Popular del Peru,* 9 F.Supp.2d 300, 307 (S.D.N.Y.1998) (holding that plaintiff could not attach property of Peruvian-owned corporation, an instrumentality of Peru, to collect on a ***485** debt owed by Peru when plaintiff did not overcome presumption that the corporation was separate juridical entity).

Plaintiffs contend that TRIA obviates this *Bancec* analysis. By Plaintiffs' account, TRIA's plain language eliminates any impediment to execution against the blocked assets of a terrorist party's agency or instrumentality to satisfy a judgment rendered against the terrorist party. Plaintiffs also contend that this interpretation is supported by TRIA's legislative history.

The Court agrees with Plaintiffs that TRIA works to obviate analysis of the *Bancec* presumption. TRIA clearly provides that "in every case in which a person has obtained a judgment against a *terrorist party* on a claim ... for which a *terrorist party* is not immune under 28 U.S.C. § 1605(a)(7), the blocked assets of that terrorist party (*including* the *blocked assets of any agency or instrumentality of that terrorist party)* shall be subject to execution or attachment in aid of execution...." TRIA § 201(a) (emphasis added). The first part of this passage refers to judgments against a "terrorist party"—not against an agency or instrumentality of the terrorist party. Yet the second part of this passage refers not only to the blocked assets of the terrorist party, but specifically includes the blocked assets of any "agency or instrumentality" of that terrorist party. TRIA thus explicitly provides that where a judgment against a terrorist party exists, not only its blocked assets, but the assets of its agencies and instrumentalities can be used to satisfy the judgment. The language of TRIA itself thus indicates that Congress intended to make the agencies or instrumentalities of statutorily defined terrorist parties liable for qualifying judgments rendered against the terrorist party in question. *See Estates of Ungar & Ungar ex rel. Strachman v. Palestinian Authority,* 304 F.Supp.2d 232, 241 (D.R.I.2004) (finding that because the Holy Land Foundation ("HLF") was an agency or instrumentality of Hamas, "*HLF's* blocked assets are also subject to attachment and execution under the TRIA in order to satisfy the present judgment against *Hamas* ") (emphasis added). [24]

The legislative history of TRIA also supports this interpretation. On the Senate floor, addressing the Senate in connection with the conference report accompanying TRIA, Senator Harkin, a sponsor of TRIA, stated:

> I rise to address a portion of this conference agreement relating to enforcement of judgments obtained by victims of terrorism against state sponsors of terrorism....
>
> Title II expressly addresses three particular issues which have vexed victims of terrorism in this context. First, there has been a dispute over the availability of "agency and instrumentality" assets to satisfy judgments against a terrorist state itself. Let there be no doubt on this point. Title II operates to strip a ***486** terrorist state of its immunity from execution or attachment in aid of execution by making the blocked assets of that terrorist state, including the blocked assets of any of its agencies or instrumentalities, available for attachment and/or execution of a judgment issued against that terrorist state. *Thus, for purposes of enforcing a judgment against a terrorist state, title II does not recognize any juridical distinction between a terrorist state and its agencies or instrumentalities.*

148 Cong. Rec. S11524, at S11528 (Nov. 19, 2002) (statement of Sen. Harkin) (emphasis added). Where statements by a sponsor on the floor are consistent with the statutory language and other legislative history, congressional intent may be inferred. *See Brock v. Pierce County,* 476 U.S. 253, 263, 106 S.Ct. 1834, 90 L.Ed.2d 248 (1986) (sponsor's statements not controlling but provide evidence of congressional intent when "consistent with the statutory language and other legislative history"); *Bowsher v. Merck & Co.,* 460 U.S. 824, 832–33, 103 S.Ct. 1587, 75 L.Ed.2d 580 (1983) (sponsor's statement, which had been the only explanation in the legislative history as to an amendment's meaning and purpose, was "authoritative guide" to statute's construction). Here, Senator Harkin's statements are clear and consistent with the interpretation suggested by TRIA's statutory language, and no contrary legislative history has been called to this Court's attention.

The Court notes that the Eleventh Circuit has rejected the argument that § 1610(f)(1)(A), a provision of the FSIA worded similarly to TRIA § 201(a), legislatively overruled *Bancec's* presumption of separate juridical status for liability purposes. However, while similar, TRIA § 201(a) is worded differently from § 1610(f)(1)(A) and, as indicated, is supported by legislative history suggesting an intent to override the *Bancec* presumption of independent status for the agencies and instrumentalities of terrorist parties. Section 1610(f)(1)(A) was a previous attempt by Congress to make blocked assets available to satisfy judgments against terrorist parties. [25] It provides:

> Notwithstanding any other provision of law, ... *any property* with respect to which financial transactions are prohibited or regulated pursuant to [certain statutes that authorize the blocking of assets] ... [or any] license issued pursuant thereto, *shall be subject to execution* or attachment in aid of execution of *any judgment relating to*

> *a claim for which a foreign state (including any agency or instrumentality of such state) claiming such property is not immune under section 1605(a)(7).*
>
> 28 U.S.C. § 1610(f)(1)(A) (emphasis added). *Alejandre* held that this provision did not override the *Bancec* presumption of separate juridical status for liability purposes. *See* 183 F.3d at 1287. Instead, the effect of § 1610(f)(1)(A) was merely to allow plaintiffs to execute upon property claimed by the foreign government without first obtaining a license from the CACR. *Id.* However, in reaching this conclusion, the Circuit Court noted,
>
> > Congress has previously demonstrated in the FSIA context that it knows how to express clearly an intent to make instrumentalities substantively liable for the debts of their related foreign governments. *Absent such a clear expression,* ***487** which does not appear in section 1610(f)(1)(A), we see no reason to interpret that section as contravening Congress' original understanding that the FSIA "[is] not intended to affect the substantive law determining the liability of a foreign state or instrumentality, or the attribution of liability among instrumentalities of a foreign state."
>
> *Id.* at 1287–88 (emphasis added) (*quoting Banco,* 462 U.S. at 620, 103 S.Ct. 2591). *See also Flatow v. Islamic Republic of Iran,* 308 F.3d at 1071 n. 10 (agreeing with *Alejandre* analysis).

In contrast, in the plain language of TRIA and its legislative history there *is* such a clear expression to make the instrumentalities substantively liable for the debts of their related foreign governments, in certain circumstances. TRIA § 201(a) specifically provides that "in every case in which a person has obtained a judgment against a *terrorist party* on a claim ... for which a *terrorist party* is not immune under 28 U.S.C. § 1605(a)(7), the blocked assets of that terrorist party (*including the blocked assets of any agency or instrumentality of that terrorist party)* shall be subject to execution or attachment in aid of execution...." TRIA § 201(a) (emphasis added). TRIA thus expressly provides that where a judgment against a terrorist party exists, not only its assets, but the assets of its agencies and instrumentalities can be used to satisfy the judgment. In contrast, § 1610(f)(1)(A) states that if a creditor seeks to execute on assets claimed by an agency or instrumentality of a foreign state, that agency or instrumentality must already not be "immune under § 1605(a)(7)." 28 U.S.C. § 1610(f)(1)(A).

Further support for this interpretation is gleaned from a comparison provided by the court in *Alejandre.* There, the court noted that in 1988, a bill was introduced in the House of Representatives that would have amended § 1610(a) to deprive a foreign state's U.S. property of immunity from execution if "the property belongs to an *agency or instrumentality* of a foreign state engaged in a commercial activity in the United States and the judgment relates to a claim for which the *foreign state* is not immune from jurisdiction by virtue of section 1605 or 1607." *See Alejandre,* 183 F.3d at 1287 n. 25 (*quoting* H.R. Res. 3763, 100th Cong. § 3(1)(D) (1988), 134 Cong. Rec. H6484–01) (emphasis added). TRIA's language is similar and operates to make the agency or instrumentality of a terrorist party liable for judgments against the terrorist party itself. Finally, a clear expression of such congressional intent consistent with this reading is found in the statement of Senator Harkin on the Senate floor, as quoted above.

Thus, this Court finds that TRIA allows for execution of the blocked assets of "juridically separate" entities to satisfy a judgment against a designated terrorist party, as defined by TRIA, when such entities are agencies or instrumentalities of that terrorist party.

However, given the common law distinction, preserved in the FSIA, between immunity from jurisdiction and immunity from execution, the question still remains of whether, even if the agency or instrumentality can be substantively liable for the debts of its related foreign state, whether and which of its assets are nonetheless immune from execution. Some courts have applied *Bancec's* separate juridical status presumption not only for liability determinations, but for exceptions to immunity. *See Alejandre,* 183 F.3d at 1284, 1287 n. 23 ("[T]he *Bancec* presumption of separate juridical status applies for purposes of determining both whether an instrumentality can be held responsible for the debts of its related foreign government and whether the instrumentality retains its ***488** immunity from execution."); *Foremost–McKesson, Inc. v. Islamic Republic of Iran,* 905 F.2d 438, 446 (D.C.Cir.1990) ("The presumption of the juridical separateness of entities also applies to jurisdictional issues."); *see also Zappia,* 215 F.3d at 251–52 (holding that plaintiff did not demonstrate sufficient intermingling of private banks with foreign sovereign to overcome *Bancec's* presumption of juridical separateness, and therefore immunity exception that might have applied to foreign sovereign did not apply to its instrumentalities); *Hercaire Int'l, Inc. v. Argentina,* 821 F.2d 559, 564–65 (11th Cir.1987) (because Argentina's 100 percent ownership of airline's stock was not sufficient to overcome the presumption of separate juridical existence, Argentina's

express waiver of immunity from execution for itself "and its agencies" did not operate to waive airline's immunity and thus airline's property was immune from attachment of its assets to satisfy judgment against Argentina).

This Court concludes that the "notwithstanding any other provision of law" language in TRIA operates as an exception to immunity from both jurisdiction and execution. In *Alejandre* the Eleventh Circuit observed that the "notwithstanding any other provision of law" provision of § 1610(f)(1)(A) *could* persuasively be read to be an exception to immunity, as well as functioning to remove a CACR license requirement for garnishing assets, but did not decide the issue. *See Alejandre,* 183 F.3d at 1287 n. 23.[26] Here, the Court finds that it makes sense to interpret § 201(a) of TRIA to indeed provide such an exception to immunity. First, TRIA is codified as a note to § 1610, which is one of the statutory sections providing exceptions to immunity. Second, although §§ 1610(a) and (b) list specific exceptions to executional immunity, and thus an additional exception to immunity would have been added to such list rather than codified elsewhere, this interpretation of this language makes sense, as it would be contradictory for Congress in the same breath to expressly make assets subject to execution and at the same time make the owner of those assets immune from suit to recover those assets. Third, the legislative history quoted above refers to immunity and for terrorist states conflates the immunity of the terrorist state and its agencies and instrumentalities. *See* 148 Cong. Rec. S11524, at S11528 (Nov. 19, 2002) (statement of Sen. Harkin) ("Title II operates to strip a terrorist state of its immunity from execution or attachment in aid of execution by making the blocked assets of that terrorist state, including the blocked assets of any of its agencies or instrumentalities, available for attachment and/or execution of a judgment issued against that terrorist state.").

Consistent with this Court's interpretation, other courts examining the scope of TRIA § 201(a) have concluded that the "notwithstanding any other provision of law" language specifically addresses immunity. *See United States v. Holy Land Found. For Relief & Dev.,* 445 F.3d 771, 787 (5th Cir.2006) ("We conclude that the 'notwithstanding' language ... appears to target statutory immunities to execution."); *Smith ex rel. Estate of Smith v.* ***489** *Fed. Reserve Bank of New York,* 280 F.Supp.2d 314, 319 (S.D.N.Y.2003) ("[T]o the extent that a foreign country's sovereign immunity potentially conflicts with Section 201(a), the 'notwithstanding' phrase removes the potential conflict."), *aff'd,* 346 F.3d 264 (2d Cir.2003); *Hill,* 2003 WL 21057173, at *2 ("[B]y its plain terms, the TRIA overrides any immunity from execution that blocked Iraqi property might otherwise enjoy under the Vienna Convention or the FSIA.").[27]

3. *Subject Matter Jurisdiction through Ancillary Jurisdiction*

As set forth above, because TRIA § 201(a) provides an exception to immunity from execution, this Court has subject matter jurisdiction over this action. Alternatively, at least with respect to the judgment debtors, this Court has subject matter jurisdiction through ancillary jurisdiction to enforce a judgment.

The Second Circuit has held that a foreign instrumentality's waiver of sovereign immunity "continues through post-judgment discovery and collection of the money judgment," and thus "where subject matter jurisdiction under the FSIA exists to decide a case, jurisdiction continues long enough to allow proceedings in aid of any money judgment that is rendered in the case." *First City, Texas Houston, N.A. v. Rafidain Bank,* 281 F.3d 48, 52, 53–54 (2d Cir.2002), *cert. denied,* 537 U.S. 813, 123 S.Ct. 75, 154 L.Ed.2d 17 (2002). Recently, another federal district court, in a proceeding to enforce a judgment by attaching property purportedly belonging to Iran, a foreign sovereign, chose this approach to finding subject matter jurisdiction over the enforcement proceeding. Faced with arguments by the trustees holding the property similar to those raised by the garnishee and amicus here, the court noted that "[t] o the extent that the trustee process defendants rely on *Verlinden* to argue that § 1609 is best construed as raising a threshold question of subject matter jurisdiction, it is largely irrelevant here, where the Court plainly has jurisdiction pursuant to 28 U.S.C. § 1963." *Rubin v. Islamic Republic of Iran,* No. 06 Civ. 11053, 2006 WL 2879759, at *2 n. 3 (D.Mass. Sept. 30, 2006) (further noting that "the Supreme Court's discussion of subject matter jurisdiction in *Verlinden* was centered on 28 U.S.C. §§ 1330 and 1604; neither § 1609 nor execution immunity more generally were addressed.").

Following this analysis, the Court here has subject matter jurisdiction over both the Weininger and McCarthy enforcement actions through ancillary jurisdiction to enforce the judgment, at least as to Cuba. With regard to the Weininger judgment, on December 13, 2005, this Court entered an order and judgment in favor of Weininger. Accordingly, this Court has subject matter jurisdiction over

this enforcement proceeding through ancillary jurisdiction to enforce a judgment. With regard to the McCarthy judgment, McCarthy obtained a ***490** federal judgment in the United States District Court for the Southern District of Florida, in an action on the state judgment, and on May 25, 2005 registered her federal judgment with this Court pursuant to 28 U.S.C. § 1963. Upon registration of the judgment, this Court obtained subject matter jurisdiction over the enforcement proceeding through ancillary jurisdiction to enforce a judgment. *See Rubin v. Islamic Republic of Iran,* No. 06 Civ. 11053, 2006 WL 2879759, at *1 (D.Mass. Sept. 30, 2006) ("This Court acquired jurisdiction over the present controversy [to attach assets purportedly belonging to Iran] when the plaintiffs registered here the judgment they had obtained against Iran in the United States District Court for the District of Columbia."); *see also RCA Corp. v. Tucker,* 696 F.Supp. 845, 850 (E.D.N.Y.1988) ("[A]s to subject matter jurisdiction, the authorities are unanimous that a federal court maintains ancillary jurisdiction to enforce its own judgments, and that, under Rule 69, Fed.R.Civ.P., no independent jurisdictional basis is necessary to commence an enforcement proceeding against a garnishee not a party to the original suit.").

Of course, this proceeding involves attempts to execute on the assets of entities not named in the original judgment. *Rubin* did not involve an attempt to enforce a judgment against a foreign state by attaching the assets of an agency or instrumentality. The Court recognizes that the Supreme Court has stated that "[w]e have never authorized the exercise of ancillary jurisdiction in a subsequent lawsuit to impose an obligation to pay an existing federal judgment on a person not already liable for that judgment." *Peacock v. Thomas,* 516 U.S. 349, 357, 116 S.Ct. 862, 133 L.Ed.2d 817 (1996). As aptly stated by the First Circuit:

> Where a postjudgment proceeding presents an attempt simply to collect a judgment duly rendered by a federal court, even if chasing after the assets of the judgment debtor now in the hands of a third party, the residual jurisdiction stemming from the court's authority to render that judgment is sufficient to provide for federal jurisdiction over the postjudgment claim. However, where that postjudgment proceeding presents a new substantive theory to establish liability directly on the part of a new party, some independent ground is necessary to assume federal jurisdiction over the claim, since such a claim is no longer a mere continuation of the original action.

U.S.I. Props., 230 F.3d at 498 (citations omitted). Here, however, TRIA expressly holds such entities liable for the judgment and renders them not immune from execution, and thus provides the independent basis of subject matter jurisdiction in this enforcement proceeding against these entities.

4. *Personal Jurisdiction*

The Court also finds no defect of personal jurisdiction here. Preliminarily, the Court observes that the entities against which the judgments are sought to be enforced have not challenged personal jurisdiction. However, these entities have not waived personal jurisdiction but instead have defaulted entirely. Several circuits have held that because relief from a void judgment is mandatory, "when entry of a default judgment is sought against a party who has failed to plead or otherwise defend, the district court has an affirmative duty to look into its jurisdiction both over the subject matter and the parties. In reviewing its personal jurisdiction, the court does not assert a personal defense of the parties; rather, the court exercises its responsibility to determine that it has the power to enter the default judgment." ***491** *Williams v. Life Sav. & Loan,* 802 F.2d 1200, 1203 (10th Cir.1986); *see also System Pipe & Supply, Inc. v. M/V Viktor Kurnatovskiy,* 242 F.3d 322, 324 (5th Cir.2001) (because a judgment entered without jurisdiction is void, "a district court has the duty to assure itself that it has the power to enter a valid default judgment"); *In re Tuli,* 172 F.3d 707, 712 (9th Cir.1999) ("When entry of judgment is sought against a party who has failed to plead or otherwise defend, a district court has an affirmative duty to look into its jurisdiction over both the subject matter and the parties.... To avoid entering a default judgment that can later be successfully attacked as void, a court should determine whether it has the power, *i.e.,* the jurisdiction, to enter the judgment in the first place."); *Estates of Ungar & Ungar ex rel. Strachman v. Palestinian Authority,* 325 F.Supp.2d 15, 45 (D.R.I.2004) ("A court which is asked to enter default judgment should assure itself that it has jurisdiction both over the subject matter and the parties.").

In light of these concerns, and the FSIA's requirement that "[n]o judgment by default shall be entered by a court of the United States ... against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court," 28 U.S.C. § 1608(e), this Court will respond to the parties' arguments concerning personal jurisdiction. [28]

JPM Chase asserts that "this Court must determine that it has personal jurisdiction over parties whose assets are sought to be attached, *i.e.,* that those parties have been properly served in accordance with 28 U.S.C. § 1608." (Mem. of Law in Response to Motion for Partial Summary Judgment on Claims for Turnover and in Support of Cross–Motion for Relief in the Nature of Interpleader, dated Mar. 10, 2006, at 19.) Under the FSIA, personal jurisdiction over an action against a foreign state (or its agencies or instrumentalities) is achieved by the existence of subject matter jurisdiction under § 1330(a) plus service of process in accordance with § 1608. *See* 28 U.S.C. § 1330(b) ("Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title."); *Verlinden,* 461 U.S. at 485 n. 5, 103 S.Ct. 1962; *Shapiro,* 930 F.2d at 1020 ("Under the FSIA, therefore, personal jurisdiction equals subject matter jurisdiction plus valid service of process."). In response, Plaintiffs contend that the FSIA does not apply to any determination of personal jurisdiction in this matter, because "the FSIA jurisdictional provisions only address cases in which the foreign sovereign is a party. In this garnishment and execution proceeding (where the actions have been filed against Chase and the Rabinowitz Firm as garnishees), however, personal jurisdiction over the judgment debtor/foreign sovereign is not required." (Pls. Reply Mem. at 12.) Plaintiffs further contend that "under New York law and procedure only the garnishees (*i.e.* Chase and the Rabinowitz Firm) ***492** were required to be served with the turnover pleadings, and the Cuba entities only had to be provided with notice of the proceeding." (*Id.* at 29 n. 23.)

In support of their arguments, Plaintiffs rely solely on *RCA Corp. v. Tucker,* which noted that under the New York CPLR, in turnover proceedings against a garnishee, the judgment debtor is not a necessary party but must merely be given notice. *See* 696 F.Supp. at 850. *RCA Corp.,* however, did not involve a foreign sovereign and did not involve the FSIA. Rule 69 authorizes the use of state law enforcement procedures to the extent that they do not conflict with federal law. *See* Fed.R.Civ.P. 69 ("The procedure on execution, in proceedings supplementary to and in aid of a judgment ... shall be in accordance with the practice and procedure of the state in which the district court is held ... except that any statute of the United States governs to the extent that it is applicable."). In light of Congress's intent to have the FSIA establish "a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities," *Verlinden,* 461 U.S. at 488, 103 S.Ct. 1962, the Court is not persuaded that the FSIA plays no role in determining personal jurisdiction in this case. *Cf. Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara,* 313 F.3d 70, 85 (2d Cir.2002) (noting that in FSIA cases, federal courts use state choice of law rules to resolve all issues except jurisdictional ones, which require application of federal law).

On the other hand, Plaintiffs' position is not wholly without merit. Section 1330(b)'s provisions for personal jurisdiction turn on § 1330(a)' s provisions for subject matter jurisdiction, which in turn are grounded on the statutory exceptions to immunity from jurisdiction found in §§ 1605–1607, not the statutory exceptions to immunity from execution and attachment found in §§ 1610–1611. *See* § 1330(a) ("The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605–1607 of this title or under any applicable international agreement."). The matter before the Court is an enforcement action—in particular, one seeking garnishment, which is a quasi in rem proceeding rather than a traditional in personam proceeding. *See FG Hemisphere,* 455 F.3d at 585 ("In contrast to a suit against the debtor, a garnishment proceeding is operative *in personam* against the garnishee to prevent him from paying the debt to the garnishment debtor and is operative *in rem* upon the property of the defendant debtor in the hands of the garnishee. Thus, garnishment is a *quasi in rem* action in which 'the plaintiff seeks to apply what he concedes to be the property of the defendant to the satisfaction of a claim against him.' ") (*quoting Shaffer v. Heitner,* 433 U.S. 186, 199 n. 17, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977)) (other citations and quotations omitted).

Nonetheless, the personal jurisdiction concern may be academic, because in the case at hand the alleged agencies and instrumentalities in question have been served by JPM Chase in accordance with the FSIA. JPM Chase has submitted

evidence demonstrating that it effected FSIA service pursuant to § 1608(b)(3)(B) upon the agencies and instrumentalities affected by these proceedings, and service as well upon the judgment debtors. Indeed, JPM Chase relies on such service to establish its own right to proper interpleader relief. ***493** JPM Chase served all the entities in question in this consolidated proceeding with a summons, notice of petition, and petition, in English and Spanish, that clearly indicate the nature of the relief sought and the accounts and assets upon which Plaintiffs seek to execute, as well as with its motion papers seeking interpleader relief.

Section § 1608(b)(3)(B) provides that if service cannot be made pursuant to § 1608(b)(1) (by special arrangement between the plaintiff and agency or instrumentality), or § 1608(b)(2) (by delivery to an agent authorized to receive process in the United States or in accordance with international conventions on service of judicial documents), then service can be made upon an agency or instrumentality of a foreign state by delivering a copy of the summons and complaint, together with a translation of each into the official language of the foreign state, "by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served," provided that such service is "reasonably calculated to give actual notice." 28 U.S.C. § 1608(b)(3)(B). JPM Chase has submitted to this Court documentation indicating that it has satisfied these requirements.

As to service on Cuba, Weininger has submitted an affidavit representing that service upon Fidel Castro, Raul Castro, the Army of the Republic of Cuba, and the Republic of Cuba has been made by DHL, although the service does not purport to comply with the FSIA but instead only with CPLR § 5225(b) (*See* Perkins Decl. ¶ 12.) McCarthy, however, has submitted documentation indicating that she has made service of her turnover petition in accordance with the FSIA upon the Republic of Cuba, as well as the various Cuban entities identified by Chase in its papers (including Banco Nacional, EMTELCUBA, RADIOCUBA, ETECSA, and CUBAEXPORT) with her petition and notice of petition in both English and Spanish, pursuant to FSIA § 1608(a)(3). (*See* R.56.1 Statement ¶ 40; DeMaria Aff. ¶ 9; Docket No. 104.) Moreover, JPM Chase has effected service on Cuba pursuant to the FSIA.

Therefore, to the extent that the Court must find personal jurisdiction over these entities pursuant to the FSIA by service pursuant to § 1608, the Court is satisfied that such personal jurisdiction exists. [29]

***494** 5. *Whether the Assets Belong to Agencies or Instrumentalities of Cuba*

Finally, this Court addresses whether the blocked assets in question indeed belong to agencies or instrumentalities of Cuba. In addition, although Plaintiffs no longer seek turnover from accounts in which Banco Nacional is listed as an owner, JPM Chase has indicated that Banco Nacional may own assets in the other accounts at issue, and Plaintiffs seek turnover of any such amounts allegedly belonging to Banco Nacional. Thus, in connection with blocked assets belonging to Banco Nacional, this Court addresses whether § 1611 is a bar to attachment.

According to JPM Chase, none of the blocked accounts are in the name of any Judgment Debtor, including the Republic of Cuba. (*See* Third–Party Petition of JPMorgan Chase Bank, N.A. under Fed.R.Civ.P. 22, CPLR §§ 5239 & 6221 and Section 134 of the New York Banking Law, dated Sept. 8, 2005 ("JPM Chase Petition"), ¶ 1; Kerr Decl. ¶ 4; JPM Chase Garnishee Statement.) Instead, the accounts are opened for the benefit of, or to hold payments to or for the account of, various Cuban agencies and instrumentalities. (*See* JPM Chase Petition ¶ 1; Kerr Decl. ¶ 4.) The FSIA defines an agency or instrumentality of a foreign state to mean

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).

i. *The EMTELCUBA Account*

According to Plaintiffs, the funds in the EMTELCUBA Account consist of settlement payments owed by AT & T to EMTELCUBA, and no other party has any known claim to these funds. (*See* R. 56.1 Statement ¶ 48 (citing Answer

and Defenses of AT & T Corp. to Third–Party Petition in Interpleader of JPMorgan Chase Bank, N.A., dated Oct. 28, 2005 ("AT & T Answer"), ¶ 30.)) JPM Chase has not contested this statement. AT & T admits that it deposited funds in the EMTELCUBA Account that represent settlement payments owed to EMTELCUBA. (AT & T Answer ¶ 30.)

Plaintiffs contend that EMTELCUBA is an agency or instrumentality of the Republic of Cuba based on (1) the Eleventh Circuit's purported previous characterization of EMTELCUBA as an alter ego of the Cuban Government's Ministry of Communications in the *Alejandre* case; and (2) EMTELCUBA's admission in the *Alejandre* case that it is an agency or instrumentality of the Republic of Cuba.

The Eleventh Circuit did not find that EMTELCUBA was indeed an alter ego of the Republic of Cuba or the Cuban Government's Ministry of Communications. Rather, it merely assumed such point for purposes of analyzing whether another entity that succeeded to EMTELCUBA's contracts was an agency or instrumentality of Cuba and liable for Cuba's debts. *See Alejandre,* 183 F.3d at 1280 n. 7 ("In order ***495** to facilitate our analysis of this case, we assume *arguendo* that EMTELCUBA is not a juridical entity separate from the Cuban Government's Ministry of Communications."). However, the Circuit Court noted that the record strongly supported such characterization. [30]

As for EMTELCUBA's purported admission that it is an agency or instrumentality of Cuba, EMTELCUBA stated in briefing submitted in the *Alejandre* case that it fell within the FSIA's statutory definition of agency or instrumentality because more than 50% of its ownership interests are owned by the Republic of Cuba. (*See* Brief of RADIOCUBA and EMTELCUBA submitted in *Alejandre v. Republic of Cuba,* No. 96–10126–CIVKing (S.D.Fla.1996), dated May 7, 1999 ("RADIOCUBA/EMTELCUBA Brief"), attached as Ex. P to Perkins Decl., at 3–4.) Whether this percentage of ownership interest remains the same today is not apparent to this Court.

In addition, Plaintiffs have submitted a letter dated October 10, 2000, from the Executive Office of the President, which indicates that for payment to Cuba judgment creditors in the *Alejandre* case made under another statute, the Department of the Treasury intended to draw in part on the EMTELCUBA account, as well as portions of the AT & T Long Lines Account believed to represent amounts due to EMTELCUBA. (*See* Letter from Jacob J. Lew, Director, Executive Office of the President, Office of Management and Budget, to The Honorable Connie Mack, United States Senate, dated October 10, 2000 ("Exec.Ltr."), attached as Ex. A to Reply Declaration of James W. Perkins in Support of Motion for Partial Summary Judgment, dated Apr. 14, 2006.) The Court credits this as further evidence supporting a finding that EMTELCUBA is a agency or instrumentality of Cuba.

In assessing whether these entities are agencies or instrumentalities of Cuba, the Court is "mindful that the instrumentality and its related government—not the plaintiff—will frequently possess most of the information needed to [make this determination]. These foreign entities obviously have little incentive to provide information that will help the plaintiff's case, and it may be difficult for the plaintiff to obtain discovery from them." *Alejandre,* 183 F.3d at 1285 n. 19. The Eleventh Circuit's words were addressed to analyzing whether an agency should be considered juridically separate from the foreign state, but the same reasoning holds true for assessing whether an entity is an agency or instrumentality of a foreign state. Moreover, following a default all factual allegations in the complaint other than those related to damages are accepted as true. *See* ***496** *Cotton v. Slone,* 4 F.3d 176, 181 (2d Cir.1993); *Alejandre v. Republic of Cuba,* 996 F.Supp. 1239, 1243 (S.D.Fla.1997) ("Because Cuba has presented no defense, the Court will accept as true Plaintiffs' uncontroverted factual allegations."). In light of EMTELCUBA's having been given notice of this proceeding, the Court credits Plaintiffs' evidence and finds that EMTELCUBA is an agency or instrumentality of Cuba, and thus that Plaintiffs may execute upon the blocked assets of EMTELCUBA.

JPM Chase has indicated that RADIOCUBA may also have an interest in this account and has attempted to bring RADIOCUBA before this Court. According to papers filed in the *Alejandre* case and relied on by Plaintiffs, in 1995, EMTELCUBA was dissolved and its assets transferred to RADIOCUBA. (*See* RADIOCUBA/EMTELCUBA Brief at 4.) In addition, according to these papers, RADIOCUBA also comes within the definition of an "agency or instrumentality" in that more than 50 percent of its ownership interests are owned by the Republic of Cuba. (*Id.*) In light of the absence of evidence to the contrary, this Court finds that to the extent these same blocked assets belong to RADIOCUBA, Plaintiffs may execute upon them.

Finally, JPM Chase has indicated that ETECSA may have succeeded to certain contractual rights of EMTELCUBA or RADIOCUBA, including claims to the blocked deposits. JPM

Chase suggests that ETECSA is an indirect subsidiary of a foreign state, in that it is owned by several Cuban companies that are in turn owned or controlled by Cuba.[31] Under *Dole Food Company v. Patrickson,* 538 U.S. 468, 123 S.Ct. 1655, 155 L.Ed.2d 643 (2003), a subsidiary of an instrumentality of a foreign state is not itself entitled to instrumentality status under the FSIA. *See id.* at 473, 123 S.Ct. 1655. Instead, only direct ownership of a majority of shares by the foreign state satisfies the FSIA's definition of instrumentality as an entity a "majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof." 28 U.S.C. § 1603(b)(2); *see Dole Food Co.,* 538 U.S. at 473, 123 S.Ct. 1655. However, JPM Chase has not offered any evidence that ETECSA is the owner of the assets at issue, other than to state that "[a]t the present time, it is unknown whether ETECSA succeeded to any contractual rights of EMTELCUBA or RADIOCUBA, including any claims to the blocked deposits as to which either of them have a claim." (Kerr Decl. ¶ 18(e) n. 5). ETECSA has been served but has not appeared. Accordingly, this Court finds no basis in the record from which to make a finding that ETECSA, rather than EMTELCUBA, owns these assets.

ii. *The AT & T Long Lines Account*

According to Plaintiffs, the funds in the AT & T Long Lines Account were deposited by AT & T and consist of (a) amounts owed by CATT (a wholly-owned Cuban subsidiary of AT & T) to EMTELCUBA for telecommunications settlement payments, (b) amounts owed by CATT to the Republic of Cuba for taxes, and (c) amounts owed by AT & T to CATT. (*See* R.56.1 Statement ¶ 52.) The Court has not been presented with any evidence to the contrary and notes that AT & T and ***497** CATT admit that such funds have been so deposited. (*See* AT & T Answer ¶ 33; Answer and Defenses of Cuban American Telephone and Telegraph Company to Third–Party Petition in Interpleader of JPMorgan Chase Bank, N.A., dated Oct. 28, 2005, ¶ 33.) Plaintiffs do not seek turnover of the amounts claimed by CATT or AT & T.

As indicated above, there is sufficient evidence in the record of this default proceeding to conclude that EMTELCUBA is an agency or instrumentality of Cuba. Accordingly, Plaintiffs may execute upon amounts owed to both the Republic of Cuba and to EMTELCUBA.

iii. *The Rabinowitz Boudin Account*

Plaintiffs assert that Rabinowitz Boudin is holding money in the Rabinowitz Boudin account on behalf of or in trust for the judgment debtors and/or their agencies or instrumentalities. JPM Chase's third-party petition for interpleader relief names Rabinowitz Boudin in its capacity as alleged fiduciary in respect of this account. Rabinowitz Boudin has not appeared in this action to identify on whose behalf it holds the deposits credited to this account.

According to Plaintiffs, the funds in the Rabinowitz Boudin Account are held by Rabinowitz Boudin as trustee for the account of the Republic of Cuba and its agencies and instrumentalities, including but not limited to Banco Nacional. (*See* R.56.1 Statement ¶ 51.) Plaintiffs have submitted documentation submitted in the *Alejandre* litigation consisting of (a) an affidavit by a Rabinowitz Boudin attorney indicating that the account is a fiduciary account maintained by the firm for deposit of litigation recoveries and that funds in the account consist of litigation recoveries owed to Banco Nacional, other Cuban juridical entities owned or controlled by Cuba, and the Republic of Cuba and other Cuban parties, except for approximately $20,000 in the account in 1963 when the Cuban Assets Control Regulations were promulgated; (b) an affidavit by an accountant retained by Rabinowitz Boudin indicating that the funds in such account in large part consist of recoveries owed to Banco Nacional, with some portion of these recoveries potentially owed to CUBAEXPORT; and (c) an affidavit from the Secretary and principal counsel of Banco Nacional indicating that the recovered funds in such account are owned by Banco Nacional and not CUBAEXPORT. (*See* Perkins Decl. Exs. Q, R, S (submitted in *Alejandre v. Republic of Cuba,* No. 96–10126–CIV–King (S.D.Fla.1996)).)

JPM Chase has named Rabinowitz Boudin in its capacity as alleged fiduciary in respect of this account, and contends that Rabinowitz Boudin has opened this account as an attorney trust account. (*See* JPM Chase Petition ¶¶ 18, 25.)

JPM Chase, relying on the same submissions made in the *Alejandre* case, agrees that Banco Nacional is the beneficial owner of most of the funds in the Rabinowitz Boudin Account and also notes based on these submissions that CUBAEXPORT, described as a Cuban state trading corporation, may also have an interest in some portion of the Rabinowitz Boudin Account. (*See* Kerr Decl. ¶ 18(b),(c).) However, JPM Chase also contends that Rabinowitz Boudin, as an alleged fiduciary in respect of this account, is the party in the best position to identify on whose behalf it holds funds in that account. (*See* JPM Chase Petition ¶ 28.)

The Court also takes note that the October 2000 letter from the Executive Office of the President indicates that for payment to the Cuba judgment creditors in the *Alejandre* case, the Department of the Treasury also intended to draw on the ***498** Rabinowitz Boudin Account. (*See* Exec. Ltr.)

Banco Nacional is apparently the central bank of the Republic of Cuba. (*See* R. 56.1 Statement ¶ 50.) JPM Chase states that Banco Nacional is "engaged in central banking activities" and is an agency or instrumentality within the meaning of the FSIA. (Kerr Decl. ¶ 18(b).) The Second Circuit has stated that "[s]tate-owned central banks indisputably are included in the § 1603(b) definition of 'agency or instrumentality.' " *S & S Machinery,* 706 F.2d at 414. Plaintiffs point out that other courts have recognized both Banco Nacional and CUBAEXPORT as "two Cuban government corporations" and "wholly owned corporations of the Government of Cuba." *See Dean Witter Reynolds, Inc. v. Fernandez,* 741 F.2d 355, 356, 357 (11th Cir.1984). In addition, at least one other court in this district has described Banco Nacional as an instrumentality of Cuba. *See Banco Nacional de Cuba v. Chemical Bank New York Trust Co.,* 594 F.Supp. 1553, 1556 (S.D.N.Y.1984). [32]

On this record, the Court is persuaded that to the extent the funds in the Rabinowitz Account belong to Banco Nacional or to CUBAEXPORT, they belong to agencies or instrumentalities of Cuba and Plaintiffs may execute upon them to satisfy their judgment against Cuba.

Finally, FSIA § 1611 presents no impediment to execution. § 1611(b) provides that:

> Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if-
>
> (1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver; or
>
> (2) the property is, or is intended to be, used in connection with a military activity and
>
> (A) is of a military character, or
>
> (B) is under the control of a military authority or defense agency.

28 U.S.C. § 1611(b). TRIA § 201(a) is appended to § 1610, which provides the sole bases for exceptions to immunity from execution of property. Section 1611(b) in turn states that a foreign central bank's property is immune "[n]otwithstanding the provisions of 1610." Notably, § 1611(b) lists certain exceptions to this immunity—such as waiver—that are found in § 1610(a), but it does not list exceptions based on terrorism. Plaintiffs argue that § 1611(b) presents no impediment to execution because TRIA § 201(a)'s provisions apply "notwithstanding any other provision of law." TRIA § 201(a), codified at § 1610 note. As previously noted, the intent of the "notwithstanding" language in TRIA is "to target statutory exceptions to immunity," *Holy Land Found.,* 445 F.3d at 787, and "to the extent that a foreign country's sovereign immunity potentially conflicts with Section 201(a), the 'notwithstanding' phrase removes the potential conflict." *Smith,* 280 F.Supp.2d at 319, *judgment* ***499** *aff'd,* 346 F.3d 264 (2d Cir.2003). Accordingly, TRIA, which was enacted later in time than § 1611, overrides the immunity conferred in § 1611.

C. *TURNOVER PURSUANT TO CPLR § 5225(b)*

Rule 69 of the Federal Rules of Civil Procedure authorizes use of state law procedure for enforcement of a judgment, subject to any governing federal law. *See* Fed.R.Civ.P. 69. Plaintiffs seek turnover pursuant to CPLR § 5225(b). That section provides for enforcement of money judgments through property not in the hands of the judgment debtor:

> Upon a special proceeding commenced by the judgment creditor, against a person in possession or custody of money or other personal property in which the judgment debtor has an interest, or against a person who is a transferee of money or other personal property from the judgment debtor, where it is shown that the judgment debtor is entitled to the possession of such property or that the judgment creditor's rights to the property are superior to those of the transferee, the court shall require such person to pay the money, or so much

> of it as is sufficient to satisfy the judgment, to the judgment creditor and, if the amount to be so paid is insufficient to satisfy the judgment, to deliver any other personal property, or so much of it as is of sufficient value to satisfy the judgment, to a designated sheriff. Costs of the proceeding shall not be awarded against a person who did not dispute the judgment debtor's interest or right to possession. Notice of the proceeding shall also be served upon the judgment debtor in the same manner as a summons or by registered or certified mail, return receipt requested. The court may permit the judgment debtor to intervene in the proceeding. The court may permit any adverse claimant to intervene in the proceeding and may determine his rights in accordance with section 5239.

NY C.P.L.R. § 5225(b).

Here, JPM Chase and Rabinowitz Boudin are each "a person in possession or custody of money or other personal property" in which the evidence has demonstrated the judgment debtors have an interest. One of the named judgment debtors is Cuba; by operation of TRIA, Cuba's agencies and instrumentalities also become the judgment debtors, and as set forth above, the evidence has demonstrated that these agencies and instrumentalities have an interest in the accounts. In addition, some evidence indicates that Cuba itself has an interest in the property—namely, in the AT & T Long Lines Account, CATT has indicated that some deposits in that account consist of amounts owed by CATT to the Republic of Cuba. The judgment debtors are "entitled to possession of such property" except for the blocked nature of the accounts. However, the U.S. Department of Justice has indicated that "[i]n the event the Court determines that the funds are subject to TRIA, the funds may be distributed without a license from the Office of Foreign Assets Control." (DOJ Ltr.) Accordingly, under CPLR § 5525(b) such property may be used to satisfy Plaintiffs' judgments.

D. *JPM CHASE'S MOTION FOR INTERPLEADER RELIEF*

1. *Interpleader Relief*

JPM Chase has moved for discharge in interpleader pursuant to Federal Rule of Civil Procedure 22, [33] as well as discharge pursuant to CPLR §§ 5209 and 5239.

***500** In relevant part, Rule 22 provides: "Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability.... A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim." Fed.R.Civ.P. 22(1).

"Rooted in equity, interpleader is a handy tool to protect a stakeholder from multiple liability and the vexation of defending multiple claims to the same fund." *Washington Elec. Coop., Inc. v. Paterson, Walke & Pratt, P.C.,* 985 F.2d 677, 679 (2d Cir.1993). "[W]hat triggers interpleader is 'a real and reasonable fear of double liability or vexatious, conflicting claims.' " *Id. (quoting Indianapolis Colts v. Mayor of Baltimore,* 741 F.2d 954, 957 (7th Cir.1984), *cert. denied,* 470 U.S. 1052, 105 S.Ct. 1753, 84 L.Ed.2d 817 (1985)). Accordingly, under Rule 22, interpleader is proper if the party requesting it "is or may be exposed to double or multiple liability." Fed.R.Civ.P. 22(1); *Washington Elec. Coop.,* 985 F.2d at 679. As a remedial joinder device, interpleader is to be liberally construed. *See State Farm Fire & Cas. Co. v. Tashire,* 386 U.S. 523, 533, 87 S.Ct. 1199, 18 L.Ed.2d 270 (1967); *6247 Atlas Corp. v. Marine Ins. Co.,* 155 F.R.D. 454, 461 (S.D.N.Y.1994) (both rule and statutory interpleader should be liberally construed).

Interpleader "prevents the stakeholder from being obliged to determine at his peril which claimant has the better claim, and when the stakeholder has no interest in the fund, forces the claimants to contest what essentially is a controversy between them without embroiling the stakeholder in the litigation over the merits of the respective claims." 7 Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1702 at 534 (3d ed.2001). Thus, Rule 22 "is designed to insulate a stakeholder from contradictory judgments and multiple liability and to relieve a stakeholder from having to determine which claim among several is meritorious." *John v. Sotheby's, Inc.,* 141 F.R.D. 29, 33 (S.D.N.Y.1992).

Interpleader litigation usually proceeds in two stages, the first determining whether interpleader is appropriate relief, and the second adjudicating the adverse claims. *See New York Life Ins. Co. v. Connecticut Dev. Auth.,* 700 F.2d 91, 95 (2d Cir.1983). "[T]his bifurcation is not mandatory, however, and the entire action may be disposed of at one time." *Id.* Here, the Court must simultaneously determine JPM Chase's entitlement to interpleader relief and adjudicate the adverse claims of the interpleaded defendants, because only if execution is authorized by TRIA, as determined by this Court, can the blocked deposits that are subject to turnover be paid into the Court's registry, and only then will the need for discharge of JPM Chase be presented. As set forth above, this Court has found that TRIA authorizes execution of these assets, and the Court now assesses JPM Chase's right to relief in the nature of interpleader.

As indicated, Rule 22 allows for interpleader where the party is requesting it "is or may be exposed to double or multiple liability." Fed.R.Civ.P. 22(1); *Washington Elec. Coop.,* 985 F.2d at 679; *see 6247 Atlas Corp.,* 155 F.R.D. at 462 (interpleader appropriate where stakeholder "legitimately fears" multiple liability). Here, JPM Chase contends that it is at risk of multiple liability and inconsistent ***501** legal obligations because Plaintiffs seek to execute against the blocked assets of juridically separate entities not previously sued or found liable for the acts in question, and in addition because it suggests that the jurisdictional basis for the original state court default judgments requires examination.

JPM Chase has identified a number of parties, in addition to Weininger and McCarthy, as having viable claims to the blocked assets. JPM Chase has alleged, upon information and belief, that the funds in the EMTELCUBA Account consist of payments made by AT & T to EMTELCUBA. (*See* JPM Chase Petition, ¶ 30.) AT & T admits that the funds it deposited into that account represented payments owed by AT & T to EMTELCUBA. (*See* AT & T Answer, ¶ 30.) As discussed above, RADIOCUBA may also have an interest in the EMTELCUBA Account, to the extent that it succeeded to the assets of EMTELCUBA.

According to JPM Chase, AT & T established the AT & T Long Lines Account to deposit monies it owed to Cuban entities, including CATT, EMTELCUBA, RADIOCUBA and possibly ETECSA. (*See* JPM Chase Petition, ¶ 33.) AT & T has stated that these funds were deposited by AT & T in satisfaction of amounts owed by CATT to EMTELCUBA, amounts owed by CATT to the Republic of Cuba, and amounts owed by AT & T to CATT, its wholly-owned subsidiary. (*See* AT & T Answer, ¶ 33.) Pursuant to an agreement with AT & T and CATT, Plaintiffs have agreed not to seek turnover of amounts owed by AT & T to CATT, on the basis that such funds are not the property of the Republic of Cuba or its agents or instrumentalities.

Finally, with respect to the Rabinowitz Boudin Account, JPM Chase alleges that the account was opened by Rabinowitz Boudin for deposit of recoveries in lawsuits on behalf of the Republic of Cuba and its agents and instrumentalities, including Banco Nacional and CUBAEXPORT. (*See* JPM Chase Petition, ¶¶ 25–26.) These allegations are supported by submissions made in the *Alejandre* case, as discussed above.

In light of these allegations, the Court finds that JPM Chase faces a reasonable fear of double liability or conflicting claims, and that relief by way of interpleader is warranted with respect to the EMTELCUBA Account, the AT & T Long Lines Account, and the Rabinowitz Boudin Account, with the exception of the portion of the AT & T Long Lines Accounts to which Plaintiffs have voluntarily excluded from their claims (approximately $6,332.843.49 as of September 30, 2005, plus any additional interest accruing thereon from September 30, 2005 up to the date of turnover to Plaintiffs). (*See* Stipulation of Agreement and Order Concerning Certain Funds in the Blocked Accounts, filed April 10, 2006 (Docket No. 152).)

2. *Attorney's Fees and Costs*

JPM Chase has also requested reasonable costs, expenses, and attorney's fees in an amount to be specified in an application submitted under Federal Rule of Civil Procedure 54. Attorney's fees and costs are generally awarded to a disinterested stakeholder who has "expended time and money participating in a dispute 'not of his own making and the outcome of which has no impact on him.' " *Fidelity Brokerage Services, LLC v. Bank of China,* 192 F.Supp.2d 173, 183 (S.D.N.Y.2002) (*quoting Companion Life Ins. Co. v. Schaffer,* 442 F.Supp. 826, 830 (S.D.N.Y.1977)); *Sparta Florida Music Group, Ltd. v. Chrysalis Records, Inc.,* 566 F.Supp. 321, 322 (S.D.N.Y.1983); *see also* ***502** *Septembertide Publ'g, B.V. v. Stein & Day, Inc.,* 884 F.2d 675, 683 (2d Cir.1989) ("A disinterested stakeholder who asserts interpleader is entitled to be awarded costs and attorney's fees."). Because JPM Chase meets these criteria, the Court grants it reasonable attorney's fees and costs, subject to an application to the Court in accordance with Rule 54.

The Court notes, however, that JPM Chase's litigation strategy, to the extent that it advocated a position against Plaintiffs, went beyond that of a typical disinterested stakeholder, whose legal expenses are associated merely with its efforts to secure interpleader. *See* 7 Wright, Miller & Kane, *Federal Practice and Procedure* § 1719 at 686–87 (3d ed. 2001) ("In the usual case the [attorney's] fee will be relatively modest, inasmuch as all that is necessary is the preparation of a petition, the deposit in court or posting of a bond, service on the claimants, and the preparation of an order discharging the stakeholder."). To this extent, JPM Chase's entitlement to attorney's fees may be adjusted.

Attorney's fees and costs "are generally awarded against the interpleader fund, but may, in the discretion of the court, be taxed against one of the parties when their conduct justifies it." *Septembertide,* 884 F.2d at 683. In this case, no claimant has exhibited behavior justifying such a decision by the Court, and therefore JPM Chase's attorney's fees and costs will be awarded against the interpleader fund, to be divided between the claimants on a pro rata basis.

IV. *ORDER*

For the reasons set forth above, it is hereby

ORDERED that the motions (Docket Nos. 122 and 124) for partial summary judgment on claims for turnover order of plaintiffs Janet Ray Weininger ("Weininger") and Dorothy Anderson McCarthy ("McCarthy") are GRANTED; and it is further

ORDERED that the cross motion (Docket No. 143) for relief in the nature of interpleader of JPMorgan Chase Bank, N.A. ("JPM Chase") is GRANTED; and it is further

ORDERED that judgment be entered in favor of Weininger and against JPM Chase and Rabinowitz, Boudin, Standard, Krinsky & Lieberman, P.C. ("Rabinowitz Boudin"), in their capacities as garnishees, directing JPM Chase and Rabinowitz Boudin to turn over to the United States Marshal, the entire balance of the following accounts: (1) AT & T Long Lines (Account No. G00875) (less the portion of this account that Plaintiffs have voluntarily excluded from their claims—approximately $6,332.843.49 as of September 30, 2005, plus any additional interest accruing thereon from September 30, 2005), (2) Rabinowitz Boudin Republic of Cuba (Account No. 092–6371190); and (3) Empresa de Telecomunicaciones de Cuba (Account No. 395–507995), not to exceed in total the sum of twenty-three million, nine hundred thirty-nine thousand, three hundred one dollars and ninety-five cents ($23,939,301.95), with interest thereon from December 13, 2005, to be calculated by the Clerk of Court, plus costs and disbursements to be taxed by the Clerk of Court, less a pro rata share of any reasonable attorney's fees and costs granted to JPM Chase by the Court on separate application; and it is further

ORDERED that judgment be entered in favor of McCarthy and against JPM Chase and Rabinowitz Boudin, in their capacities as garnishees, directing JPM Chase and Rabinowitz Boudin to turn over to the United States Marshal, the entire remaining balance of the following accounts: (1) ***503** AT & T Long Lines (Account No. G00875) (less the portion of this account that Plaintiffs have voluntarily excluded from their claims—approximately $6,332.843.49 as of September 30, 2005, plus any additional interest accruing thereon from September 30, 2005), (2) Rabinowitz Boudin Republic of Cuba (Account No. 092–6371190); and (3) Empresa de Telecomunicaciones de Cuba (Account No. 395–507995), not to exceed in total the sum of sixty-seven million dollars ($67,000,000), with interest thereon from February 2, 2005, to be calculated by the Clerk of Court, plus costs and disbursements to be taxed by the Clerk of Court, less a pro rata share of any reasonable attorney's fees and costs granted to JPM Chase by the Court on separate application; and it is further

ORDERED that within five (5) business days of service of this Order, JPM Chase turn over the funds specified above to the Marshal; and it is further

ORDERED that within fourteen (14) days of service of this Order, JPM Chase submit a detailed accounting of its attorney's fees and costs in an application to the Court pursuant to Federal Rule of Civil Procedure 54; and it is further

ORDERED that Weininger and McCarthy may respond to such application within ten (10) days of its filing, unless within such time the parties stipulate to an amount of attorney's fees and costs for the Court's endorsement; and it is further

ORDERED that within five (5) business days of service of an order by the Court ruling on JPM Chase's application for attorney's fees and costs, the Marshal shall transfer such funds

to Weininger and McCarthy in accordance with such payment instructions as may be provided jointly by counsel of record for Weininger and McCarthy; and it is further

ORDERED that, upon compliance with this Order, garnishee/respondent/third-party petitioner JPM Chase and garnishee/respondent Rabinowitz Boudin shall be fully discharged pursuant to CPLR §§ 5209 or 6204, as applicable, from any and all deposit obligations or other liabilities to the Republic of Cuba, to the agency or instrumentality of the Republic of Cuba otherwise entitled to claim the deposit, or adverse claimant-respondent to the full extent of such amount so held and paid to the Marshal in accordance with this Order, and that each and every party to this proceeding is hereby restrained and enjoined from instituting or prosecuting any claim or action against JPM Chase and/or Rabinowitz Boudin in any jurisdiction arising from or relating to any claim to the blocked assets which JPM Chase and Rabinowitz Boudin turn over to the Marshal in compliance with this Order.

The Clerk of Court is directed to close this case, subject to its being reopened for the purpose of considering any application for reasonable attorney's fees and costs as provided herein.

SO ORDERED.

All Citations

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Footnotes

1 JPM Chase characterizes its opposition to Plaintiffs' motions as a "response" rather than an opposition, presumably so as to not to jeopardize its status as a neutral stakeholder under interpleader doctrine.

2 *See* Letter to Judge Victor Marrero from Beth Goldman, Assistant United States Attorney, dated January 6, 2006 ("DOJ Ltr."), attached as Ex. O to Declaration of James W. Perkins in Support of Motion for Partial Summary Judgment for Turnover Order Pursuant to Fed.R.Civ.P. 13 and 69 and CPLR § 5525(b), dated Feb. 6, 2006 ("Perkins Decl.").

3 McCarthy had also sought turnover from certain accounts at JPM Chase listing Banco Nacional de Cuba as "owner." However, in response to submissions by JPM Chase indicating that material issues of fact exist as to whether these accounts are owned by Banco Nacional de Cuba, Plaintiffs have indicated that for purposes of the present motion, Plaintiffs no longer seek turnover from those accounts. (*See* Joint Mem. of Plaintiffs in Reply to JPMorgan Chase's Response Mem. and to Amicus Curiae Brief Filed by Cuban Electric Company, dated Apr. 14, 2006 ("Pls. Reply Mem."), at 3 n. 2.)

4 The factual recitation below is taken from the parties' submissions in support of and in opposition to Plaintiffs' and JPM Chase's motions, as well as the various attachments accompanying these documents, including: Plaintiffs' Janet Ray Weininger and Dorothy Anderson McCarthy's Joint Rule 56.1 Statement in Support of Motion for Partial Summary Judgment, dated Feb. 6, 2006 ("R.56.1 Statement"); Declaration of James W. Perkins in Support of Motion for Partial Summary Judgment for Turnover Order Pursuant to Fed.R.Civ.P. 13 and 69 and CPLR § 5525(b), dated Feb. 6, 2006 ("Perkins Decl."); Declaration of Joseph A. DeMaria, Esq. in Support of Motion for Partial Summary Judgment, dated Feb. 6, 2006 ("DeMaria Decl."); Reply Declaration of James W. Perkins in Support of Motion for Partial Summary Judgment for Turnover Order Pursuant to Fed.R.Civ.P. 13 and 69 and CPLR § 5525(b), dated Apr. 14, 2006 ("Perkins Reply Decl."); Rule 56.1 Statement of JPMorgan Chase Bank, N.A. in Limited Opposition to Plaintiffs' Joint Motions for Partial Summary Judgment, dated Mar. 10, 2006 ("JPM Chase R. 56.1 Statement"); Declaration of James Kerr, dated March 10, 2006 ("Kerr Decl."); Supplemental Declaration with Respect to Service, dated May 2, 2006 ("Kerr Suppl. Decl."). Except where specifically cited or quoted, no further reference to these documents will be made.

5 JPM Chase had also named the United States Treasury Secretary as an adverse claimant-respondent due the Government's blocking of the deposits, but pursuant to a stipulation so-ordered by the Court on December 21, 2005, dismissed the Secretary without prejudice.

6 Weininger had earlier attempted to effect service in this action on the Republic of Cuba by service upon Rabinowitz Boudin, referring to such firm as "Attorneys for the Republic of Cuba," but by letter dated October 14, 2005, Rabinowitz Boudin informed this Court that it did not represent the Republic of Cuba in this litigation and could not accept service on behalf of the Republic of Cuba. (*See* Letter from Rabinowitz Boudin to Judge Marrero, dated Oct. 14, 2005 (Docket No. 30).) The Court received an additional letter dated October 27, 2005 from Rabinowitz Boudin indicating that Weininger had attempted to serve the Cuban parties in this case in part by service on the Cuban Interests Section of the Embassy of Switzerland and the Permanent Mission of the Republic of Cuba to the United Nations, and that such entities were

not authorized to accept service on behalf of any of the Cuban entities. Weininger's cross-claim, however, is directed at Rabinowitz Boudin in its capacity as fiduciary holding property of the judgment debtors in the Rabinowitz Boudin Account.

7 This writ of execution also levied upon accounts under the name of Banco Nacional. As indicated earlier, however, for purposes of the present motion Plaintiffs no longer seek to execute upon those accounts.

8 The Court notes that some courts have also found jurisdiction over enforcement proceedings through ancillary jurisdiction to enforce a judgment where the foreign sovereign has already been found not immune from jurisdiction under the FSIA, and then determine whether a statutory exception to immunity from execution upon the particular property applies. This theory is discussed below.

9 The Court notes that at least with respect to the Weininger judgment, which was previously domesticated by this Court, the Court is not directly faced with enforcing a "foreign" judgment, but rather with its own judgment. Nonetheless, it may be appropriate here to reexamine whether there is any constitutional infirmity with that judgment.

10 The Court notes that *McCloud* engages in these steps in reverse of the order suggested by *Conopco* and *American Steel. Underwriters* does not dictate a particular order and accordingly the Court sees no harm in following the order suggested in *McCloud,* as long as both inquiries are made.

11 Plaintiffs have suggested that Florida law applies res judicata to bar collateral attacks on default judgments, although the case law they cite is less than conclusive on this point, and moreover, this proposition elides the second step of the two-part full faith and credit inquiry.

12 "The term 'amicus curiae' means friend of the court, not friend of a party. We are beyond the original meaning now; an adversary role of an amicus curiae has become accepted. But there are, or at least there should be, limits." *Ryan v. Commodity Futures Trading Comm'n,* 125 F.3d 1062, 1063 (7th Cir.1997) (Posner, J., in chambers) (citations omitted). Seeking on behalf of a non-appearing party to void a judgment already so exhaustively prosecuted, with the judgment debtors provided with ample notice and opportunity to appear at each stage, should be one of those limits.

13 In this regard, JPM Chase's argument here walks a very fine line. It declares that it does not oppose such relief, yet simultaneously demands that Plaintiffs demonstrate both subject matter jurisdiction in this proceeding *and* in the underlying Florida state court proceedings, and in fact maintains that reexamination of subject matter jurisdiction in the underlying proceedings is barred by res judicata. (*See* Kerr Decl. ¶¶ 6–7.)

14 The arguments which that court faced are different from those presented here. The New York Supreme Court authorized execution upon the judgment on the theory that (1) the Florida federal judgment had been registered in this Court, and CPLR § 5018(b) explicitly permits direct entry of a judgment rendered or filed by a federal district court in New York as a judgment of the New York state court; and (2) Cuba had received proper notice of the Florida federal default judgment under the FSIA. *See id.* at 908–09. Nonetheless, the New York state court did recognize the judgment, providing further reason for this Court to not re-open the issue.

15 The term "attachment in aid of execution" was intended to include attachments, garnishments, and supplemental proceedings available under federal or state law to obtain satisfaction of a judgment. *See* H.R. No. 94–1487, at 28 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6627; *Alejandre v. Telefonica Larga Distancia de Puerto Rico, Inc.,* 183 F.3d 1277, 1283 (11th Cir.1999).

16 Plaintiffs mistakenly suggest that the FSIA does not apply to any determination of jurisdiction—subject matter or personal—over this matter because "the FSIA jurisdictional provisions only address cases in which the foreign sovereign is a party ... [and] pursuant to Rule 69, Fed.R.Civ.P., this Court has authority to exercise jurisdiction here under the rules and procedures applicable under New York law, and those rules allow jurisdiction under quasi in rem principles where the Court has jurisdiction over garnishees holding property against which execution is allowed in satisfaction of the judgment." (Pl. Reply Br. at 12). Plaintiffs both conflate subject matter and personal jurisdiction and confuse jurisdiction with procedure. Rule 69 does not create jurisdiction or authorize jurisdiction pursuant to state law jurisdiction principles. *See U.S.I. Props. Corp. v. M.D. Constr. Co.,* 230 F.3d 489, 498 n. 8 (1st Cir.2000) ("The incorporation of state enforcement procedures through Rule 69 is not alone sufficient to create federal jurisdiction over such enforcement proceedings. The fact that Rule 69(a) may (by way of state law) afford procedural mechanisms for enforcing an existing federal judgment against a third party not otherwise liable does not obviate the need to establish the jurisdiction of the federal court over the supplemental proceeding. The Federal Rules of Civil Procedure can neither expand nor limit the jurisdiction of the federal courts, and the issue of jurisdiction remains distinct from the question of procedure.") (citations omitted); *Kashi v. Gratsos,* 712 F.Supp. 23, 25 (S.D.N.Y.1989) ("[Rule 69] does no more than establish a system of procedure for federal district courts. Neither this rule nor state law create or withdraw the district court's jurisdiction to enforce its judgment."); *see also* Fed.R.Civ.P. 82 ("These rules shall not be construed to extend or limit the jurisdiction of the United States

district courts."); *Owen Equip. & Erection Co. v. Kroger,* 437 U.S. 365, 370, 98 S.Ct. 2396, 57 L.Ed.2d 274 (1978) ("[I]t is axiomatic that the Federal Rules of Civil Procedure do not create or withdraw federal jurisdiction").

17 Subsection (b) addresses diplomatic property and is not applicable to this case.

18 TRIA § 201(d)(1) defines "act of terrorism" to mean "(A) any act or event certified under section 102(1) [Pub.L. 107–297, Title I, § 102(1), Nov. 26, 2002, 116 Stat. 2323, which is set out in a note under 15 U.S.C.A. § 6701]; or (B) ... any terrorist activity (as defined in section 212(a)(3)(B)(iii) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(B)(iii)))."

19 *Verlinden* addressed exceptions to immunity of foreign states and their agencies and instrumentalities from suit under §§ 1604, 1605, and 1607, and did not discuss immunity of property from execution or attachment under §§ 1609–1611. However, the Court in *Verlinden* stated that the FSIA "contains a comprehensive set of legal standards governing claims of immunity in *every* civil action against a foreign state or its political subdivisions, agencies or instrumentalities." 461 U.S. at 488, 103 S.Ct. 1962 (emphasis added).

20 In that case, Bancec, a credit institution wholly owned by Cuba had sued Citibank to recover on a letter of credit. Citibank counterclaimed and sought a setoff from Bancec for the value of Citibank's branches that had been seized by the Cuban government. *See Banco,* 462 U.S. at 615, 103 S.Ct. 2591. *Bancec* contended that its separate juridical status shielded it from liability for acts of the Cuban government. *Id.* at 617, 103 S.Ct. 2591.

21 The FSIA's legislative history also revealed that it was " 'not intended to affect the substantive law of liability [or] ... the attribution of responsibility between or among entities of a foreign state.' " *Id. (quoting* H.R.Rep. No. 94–1487, at 12 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, at 6610).

Perhaps even more relevant to this case, *Bancec* also quoted a section of the FSIA's legislative history on attachment and execution under § 1610(a)(2); the legislative history indicated that in determining whether property in the United States of a foreign state is immune from attachment and execution under that part of the statute, courts "will have to determine whether property 'in the custody of' an agency or instrumentality is property 'of' the agency or instrumentality, whether property held by one agency should be deemed to be property of another, [and] whether property held by an agency is property of the foreign state." *Id.* at 621 n. 8, 103 S.Ct. 2591 (*quoting* H.R.Rep. No. 94–1487 at 28, U.S.C.C.A.N.1976, at 6627).

22 Because Bancec's claim arose under international law, which "is part of our law," the court applied international law and federal common law as informed by both international law principles and congressional policies. *Id.* at 622–23, 103 S.Ct. 2591.

23 Applying these principles, the Supreme Court concluded that Bancec could be held liable, because Bancec's claim against which Citibank sought a setoff had devolved into the hands of the Cuban government, the Cuban government would be the only beneficiary of any recovery, and Bancec itself had filed a claim against Citibank. Under such circumstances, giving effect to Bancec's separate juridical status "would permit the real beneficiary of such an action, [ ] Cuba, to obtain relief in our courts that it could not obtain in its own right without waiving its sovereign immunity and answering for the seizure of Citibank's assets." *Id.* at 631–32, 103 S.Ct. 2591.

24 The Court also takes note of another case pointed to by Plaintiffs, *Rubin v. Islamic Republic of Iran,* No. 01 Civ. 1655, 2005 WL 670770 (D.D.C. March. 23, 2005). In that case, plaintiffs had obtained a judgment against Iran, the Iranian Ministry of Information and Security, and certain senior Iranian officials. *See id.* at *1 n. 2. To satisfy the judgment, the court authorized execution under TRIA upon accounts owned by the Iranian consulate. *See id.* at *3, *5. The court therefore appeared to follow a reading of TRIA that authorizes the use of an agency or instrumentality's assets to satisfy a judgment against a terrorist party without engaging in any *Bancec* analysis. This Court notes, however, that the *Rubin* court did not expressly examine the issue, and that it also referred to the consular assets as "belonging to the defendants." *Id.* at *1. Thus, the case is not definitive on the issue.

25 That provision was waived by the President the same day it was signed into law, although the scope of the waiver is in dispute. *See generally* David M. Ackerman, Congressional Research Service, *Suits Against Terrorist States* (Jan. 25, 2002), *available at* http://fpc.state. gov/documents/ organization/8045.pdf.

26 The Circuit Court did not decide the issue because, by its analysis, there were two inquiries: whether the instrumentality could be liable for the debts of its related foreign government, and whether the instrumentality retained its immunity from execution. *Id.* Because it found that plaintiffs had not overcome the presumption that the instrumentality was juridically separate and therefore not liable for the debts of its related foreign government, the Court did not address whether, even if the instrumentality was liable, its assets were nonetheless immune from execution. *Id.*

27 The issue in these cases was the scope of the "notwithstanding any other provision of law" language. The courts determined that the language addressed exceptions to immunity and therefore did not override other statutes that did not conflict with immunity provisions. *See, e.g., Holy Land Found.,* 445 F.3d at 787 (holding that because TRIA's

"notwithstanding" language addresses statutory immunities to execution, it does not preempt, trump, or otherwise interfere with operation of criminal forfeiture statutes, which do not involve immunity of assets from execution); *Smith,* 280 F.Supp.2d at 319 (although the "notwithstanding" language removes conflicts related to sovereign immunity, it does "not mean ... that the TRIA covers the entire field and nullifies all previous statutes that pertain to blocked assets"), *aff'd,* 346 F.3d at 271 (2d Cir.2003) (holding that the "notwithstanding" clause applies "only when some 'other provision of law' conflicts with TRIA").

28 This "satisfactory to the court" standard is identical to the standard under Federal Rule of Civil Procedure 55(e) for entry of default judgments against the United States, and is intended to provide foreign governments with the same protections from default judgments that the federal government enjoys. *See Commercial Bank of Kuwait v. Rafidain Bank,* 15 F.3d 238, 242 (2d Cir.1994); *Campuzano v. Islamic Republic of Iran,* 281 F.Supp.2d 258, 268 (D.D.C.2003); *Smith ex rel. Estate of Smith v. Islamic Emirate of Afghanistan,* 262 F.Supp.2d 217, 221 (S.D.N.Y.2003).

29 Under the law of this Circuit, the assertion of personal jurisdiction may also need to satisfy due process. *See Shapiro,* 930 F.2d at 1020 (applying minimum contacts due process standard to foreign state); *Texas Trading Mill.,* 647 F.2d 300, 314 (2d Cir.1981) (establishing that "the safeguards of due process" apply to FSIA cases). Recently the D.C. Circuit, as well as a California federal district court, have concluded that such "minimum contacts" are not required. *See Price v. Socialist People's Libyan Arab Jamahiriya,* 294 F.3d 82, 90 (D.C.Cir.2002) (concluding that under § 1605(a)(7), the only required link between the defendant nation and United States territory is the nationality of the plaintiff, and that § 1605(a)(7) allows personal jurisdiction over defendants even in circumstances that do not satisfy the "minimum contacts" test of the Due Process Clause); *see also Cruz v. United States,* 387 F.Supp.2d 1057, 1067 (N.D.Cal.2005) (applying *Price's* reasoning to agencies and instrumentalities of a foreign state). The Supreme Court has not decided this issue, but has signaled that the approach established by the Second Circuit in *Texas Trading* may be incorrect because foreign states may not be persons under the Due Process Clause. *See Republic of Argentina v. Weltover, Inc.,* 504 U.S. 607, 619, 112 S.Ct. 2160, 119 L.Ed.2d 394 (1992) ("[a]ssuming, without deciding, that a foreign state is a 'person' for purposes of the Due Process Clause," and citing to *South Carolina v. Katzenbach,* 383 U.S. 301, 323–324, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966), which held that states are not "persons" for purposes of the Due Process Clause). *See generally* Joseph W. Glannon & Jeffrey Atik, *Politics and Personal Jurisdiction: Suing State Sponsors of Terrorism under the 1996 Amendments to the Foreign Sovereign Immunities Act,* 87 Georgetown L.J. 675 (1999) (concluding that there is no constitutional impediment to the exercise of personal jurisdiction contemplated by the 1996 amendments to the FSIA).

30 The evidence that the Court in *Alejandre* looked to as supporting the characterization of EMTELCUBA as an entity not juridically separate from Cuba consisted of: (1) documentation indicating that EMTELCUBA is a national directorate of the the Ministry of Communications under its oversight and control; (2) a Ministry press release announcing operating agreements between carriers and "EMTELCUBA, of the Ministry of Communications"; (3) that when Cuba unilaterally deprived EMTELCUBA of its business by granting another entity an exclusive telephone operating concession, and the ministry transferred facilities and equipment to that entity, it was unclear whether EMTELCUBA was compensated separately from the Ministry; (4) licenses from the Office of Foreign Assets Control referencing "*Cuba's* share of compensation due for its portion of the jointly provided international telecommunications service"; and (5) that such licenses contained a clause describing deductions from payments for telecommunications services "owed *to Cuba"* under the operating agreement negotiated between the carrier and EMTELCUBA. *Id.*

31 JPM Chase describes ETECSA as being owned by three Cuban companies, a Dutch subsidiary of a publicly owned Italian company, and a Panamanian company. (*See* Kerr Decl. ¶ 18(e) n. 5.) It does not put forth evidence that the three Cuban companies are in turn owned or controlled by Cuba, but as demonstrated by such argument apparently believes this to be the case.

32 Plaintiffs also contend that Banco Nacional represented in briefs submitted in the *Alejandre* case that it comes within the FSIA's definition of an agency or instrumentality, but Plaintiffs have not attached such briefs to their papers here. Plaintiffs' memorandum directs the Court to Exhibit P of the Perkins Declaration, but Exhibit P contains a brief by RADIOCUBA and EMTELCUBA in the *Alejandre* case, not a brief by Banco Nacional.

33 Federal procedure provides for both rule interpleader pursuant to Federal Rule of Civil Procedure 22 and statutory interpleader pursuant to 28 U.S.C. § 1335. The two differ in terms of jurisdictional, venue, and other requirements. *See 6247 Atlas Corp. v. Marine Ins. Co., Ltd.,* 155 F.R.D. 454, 461 (S.D.N.Y.1994).

ANNEX 194

International Centre for Settlement of Investment Disputes
Washington, D.C.

In the proceedings between

Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A.

(Claimants)

and

The Argentine Republic
(Respondent)

ICSID Case No. ARB/03/19

and

In the arbitration under the Rules of the
United Nations Commission on International Trade Law between

AWG Group
(Claimant)

and

The Argentine Republic
(Respondent)

DECISION ON LIABILITY

Members of the Tribunal
Professor Jeswald W. Salacuse, President
Professor Gabrielle Kaufmann-Kohler, Arbitrator
Professor Pedro Nikken, Arbitrator

Secretary of the Tribunal
Mr. Gonzalo Flores

Date: 30 July 2010

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Investments made by investors of one Contracting Party shall be fully and completely protected and safeguarded in the territory and maritime zone of the other Contracting Party, in accordance with the principle of just and equitable treatment mentioned in article 3 of this Agreement.

Article III.1 of the Argentina-Spain BIT provides:

Article III
PROTECTION

Each Party shall protect within its territory investments made in accordance with its legislation by investors of the other Party and shall not obstruct, by unjustified or discriminatory measures, the management, use, enjoyment, extension, sale and, where appropriate, liquidation of such investments.

And finally, Article 2(2), entitled "Promotion and Protection of Investment" of the Argentina-United Kingdom BIT states:

Investments of Investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy protection and constant security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use enjoyment or disposal of investments in its territory of investors of the other Contracting Party. Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party.

159. At the outset, it should be noted that whereas the Claimants' pleadings refer to these treaty provisions as guaranteeing "full protection and security," a term found in many bilateral investment treaties, that specific phrase appears nowhere in the three BITs applicable to these cases. The Argentina-France BIT promises that investments will be "fully and completely protected and safeguarded…"; the Argentina-Spain BIT promises only that the Contracting Parties "shall protect" investments; and the Argentina-United Kingdom BIT promises "protection and constant security." It remains to be seen whether these three BITs are in effect promising

differing levels of protection and whether the level of protection they provide is different from that offered by the many treaties employing the terminology of "full protection and security".

B. *Analysis and Jurisprudence*

160. In seeking to apply these provisions, this Tribunal is confronted initially with two basic questions: Protection from whom? Protection against what? In other words, from whom is a Contracting Party to protect an investor and against what specific actions by such person is a Contracting Party to secure protection? The Claimants argue that in withdrawing certain alleged guarantees made to the Concessionaire and its investors Argentina withdrew "…the legal protection and security previously granted to an investment…".[108] Thus, Claimants' interpretation of the above-quoted treaty provisions is that Argentina promised to protect the investments of the other Contracting Party from actions that Argentina itself might take in the exercise of its legal and regulatory authority. The Respondent, on the other hand, takes the position that the provisions on protection and security apply primarily to protection from physical acts against an investor or investment and that only in exceptional circumstances should they be applied to other situations.

161. The origin of the terms "full protection and security", "constant protection and security," or simply "protection and security" appears to lie in the bilateral commercial treaties that countries concluded in the nineteenth and early twentieth centuries, such as the friendship, commerce and navigation (FCN) treaties made by the United States during that period.[109] For example, of twenty-two early commercial treaties concluded by the United States before 1920, fourteen contained reference to "special protection" and the remaining eight specified "full and perfect protection" of persons' private property.[110] As an illustration, Article 3 the FCN treaty that the United States concluded with Brunei in 1850 provided that His Highness the Sultan of Borneo "…engages that such Citizens of the United States of America shall as far as lies within in his power, within his dominions enjoy *full and complete protection and security* for themselves

[108] Claimants' Post-Hearing Submission, para. 361.

[109] K. Vandevelde, *"The Bilateral Investment Treaty Program of the United States,"* 21 Cornell Int'l L.J. 203, 204. (1988).

[110] W. Wilson, R., *"Property-protection Provisions in United States Commercial Treaties,"* 45 Am. J. Int'l L. 84, 92-96(1951).

and for any property which they may acquire…" (emphasis added).[111] A number of bilateral treaties of other countries also employed this term.[112]

162. Traditionally, courts and tribunals have interpreted the content of this standard of treatment as imposing a positive obligation upon a host State to exercise due diligence to protect the investor and his property from physical threats and injuries, not as imposing an obligation to protect covered investments and investors from all injuries from whatever sources. In the *ELSI case,*[113] in which the United States brought a claim against Italy on grounds that the requisition of a U.S. investor's factory by the Mayor of Palermo, Italy, violated Article V(1) of the United States-Italy FCN treaty obligating the Contracting Parties to provide investors "the most constant protection and security," the International Court of Justice Chamber stated that: "The reference in Article V to the provision of 'constant protection and security' cannot be construed as the giving of a warranty that property shall never in any circumstances be occupied or disturbed."[114]

163. With the development of bilateral investment treaties, whose texts were influenced by the language of the earlier of FCN treaties, the drafters of BITs incorporated the term "full protection and security," or some variation thereof, in this new legal instrument designed to protect and promote foreign investment in a new era. Early interpretations of BIT provisions on full protection and security applied them essentially to protect investors and investments from physical injuries and threats, particularly from actions, usually unauthorized, by a country's army units or individual soldiers, or from disgruntled workers.[115] In each of these cases, the tribunals stressed that the treaty provision was not a guarantee against all injuries that might befall an investment but only required the host country to exercise due diligence. On the meaning of due diligence, tribunals and scholars have often referred to the statement of Professor A.V. Freeman in his lectures at the Hague Academy of International Law: "The 'due diligence' is nothing more nor less than the reasonable measures of prevention which a well-administered government could

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111 Treaty of Friendship, Commerce and Navigation with Brunei, 10 Stat. 909; Treaty Series 331 (entered into force July 11, 1853).

112 See for example the bilateral treaty between Italy and Venezuela, stating that "citizens of each State should enjoy in the territory of the other 'the fullest measure of protection and security of person and property, and should have in this respect the same rights and privileges accorded to nationals.' Quoted in the *Sambiaggio* case, Italy-Venezuela Mixed Claims Commission, U.N. Reports of International Arbitral Awards, vol.X, p. 512.

113 *Elettronica Sicula S.p.A. (ELSI*), (U.S. v. Italy), I.C.J. Reports 1989.

114 *Ibid*. § 108, p.65.

115 See *e.g.*, Asian Agricultural Products Limited v. Sri Lanka (ICSID Case No. ARB/ 87/3) Award (27 June 1990); *American Manufacturing and Trading, Inc. v. Zaire* (ICSID Case No. ARB/93/1) Award (21 February 1997).

be expected to exercise under similar circumstances."[116] The late Professor Ian Brownlie observed that the decisions of tribunals give no definition of 'due diligence', but that 'obviously no very dogmatic definition would be appropriate, since what is involved is a standard which will vary according to the circumstances.'[117]

164. The fact that the "full protection and security" standard implies only an obligation of due diligence, as opposed to strict liability, has also been widely recognized in more recent arbitral case decisions.[118] On the other hand, there seems to exist no consensus as to the extent to which the full protection and security standard may exceed the State's obligation to provide mere physical security to the investor and his assets.

165. Traditionally, the cases applying full protection and security have dealt with injuries to physical assets of investors committed by third parties where host governments have failed to exercise due diligence in preventing the damage or punishing the perpetrators. In the present case, the Claimants are attempting to apply the protection and security clause to a different type of situation. They do not complain that third parties have injured their physical assets or persons, as in the traditional protection and security case. They are instead asserting that Argentina denied it protection and security by dint of the actions which Argentina itself took in exercise of its governmental powers against AASA's contractual rights under the Concession Contract and the governing legal framework. This Tribunal must therefore decide whether the treaty provisions apply to the Claimants' situation.

166. In recent years, a few arbitral tribunals have sought to expand the scope and content of the "full protection and security" clause beyond protection from physical injury, and have interpreted it to apply to unjustified administrative and legal actions taken by a government or its subdivisions that injured an investment's alleged legal rights. It is on these decisions that the Claimants rely, particularly *CME v. the Czech Republic*[119]and *Azurix Corp. v. Argentina*.[120] For example, in *CME*, which Claimants cite in support of their argument, the tribunal stated: "The

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116 AV Freeman, *Responsibility of States for the Unlawful Acts of Their Armed Forces*; 88 Recueil des Cours (1956) 261.

117 I. Brownlie, *Principles of Public International Law* (1990) 454.

118 See, among others, *Saluka supra* note 96; at para. 483; *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), at para. 668; *Waguih Elie George Siag & Clorinda Vecchi v. the Arab Republic of Egypt* (ICSID Case No. ARB/05/15), Award (1 June 2009), at para.447.

119 *Supra* note 99.

120 *Supra* note 92.

host State is obligated to ensure that neither by amendment of its laws nor by actions of its administrative bodies is the agreed and approved security and protection of the foreign investor's investment withdrawn or devalued."[121]

167. However, the precedential effect of the *CME* case might be reduced by the fact it was not a unanimous decision, and that the tribunal did not conduct a detailed analysis of this particular point. Furthermore, as is well known, the tribunal in the *Lauder* case, which was very closely related to the *CME* case, reached a diametrically different conclusion. With respect to the application of the full protection and security clause in the U.S.-Czech BIT, the tribunal in *Lauder* held that "… none of the facts alleged by the Claimants constitutes a violation by the Respondent of the obligation to provide full protection and security under the Treaty."[122]

168. The *CME* tribunal was interpreting Article 3(2) of the Netherlands-Czech Republic BIT, stipulating that "each Contracting Party shall provide to such investments full security and protection" (emphasis added). That treaty formulation is somewhat different from the BIT provisions applicable to the present case. Notably the Argentina-Spain and Argentina-U.K. BITs refer only to "protection" and to "protect" without the qualifying word "full" or "fully," while the Argentina-France BITs states that investors shall be "fully protected." Does the difference in formulation affect the scope of protection afforded by the BITs? The tribunal in *Azurix Corp. v. Argentina* implied that it did, for it justified on that basis a finding that the Argentina-United States BIT providing for "full protection and security" applied to measures taken by a government and was not limited to physical actions. It stated: "However when the terms 'protection and security' are qualified by full and no other adjective or explanation, they extend, in their ordinary meaning, the content of this standard beyond physical security."[123] Thus, *Azurix* seemed to suggest that the omission of "full" or "fully," as is the case with two of the applicable BITs in the present cases, restricted the scope of protection only to physical security and protection. The tribunal in *Biwater* adhered to the same line of argument and noted that full protection and security "implies a State's guarantee of stability in a secure environment, both physical, commercial and legal. It would in the Arbitral Tribunal's view be unduly artificial to

121 *Supra* note 100 at para. 613.
122 *Supra* note 99, at para.309.
123 *Supra* note 92, at para. 408.

confine the notion of "full security" only to one aspect of security, particularly in light of the use of this term in a BIT, directed at the protection of commercial and financial investments."[124]

169. Other tribunals have given less weight to the precise language used in the treaty when determining the scope of the full protection and security standard. For example, in *Parkerings v. Lithuania*[125] the tribunal found that: "It is generally accepted that the variation of language between the formulation 'protection' and 'full protection and security' does not make a difference in the level of protection a State is to provide."[126]

170. With regard to the third treaty in the present cases, the Argentina-France BIT requires that investors are to be "… fully and completely protected …in accordance with the principle of just and equitable treatment mentioned in Article 3…" The interpretation of this treaty provision raises questions as to the interplay and scope of the two standards of "full and completely protected" and "fair and equitable treatment." If the Tribunal should find that a breach of the fair and equitable treatment standard has taken place, does that mean that a breach of the guarantee of full and complete protection has also taken? Some tribunals in the presence of a formulation like the language employed in Article 3 quoted above have found that both breaches take place simultaneously.[127]

171. The present Tribunal, however, takes the view that under Article 3, quoted above, the concept of full protection and security is included within the concept of fair and equitable treatment, but that the scope of full protection and security is narrower than the fair and equitable treatment. Thus, State action that violates the full protection and security clause would of necessity constitute a violation of fair and equitable treatment under the French BIT. On the other hand, all violations of fair and equitable treatment are not automatically also violations of full protection and security. Under the French BIT, it is possible for Argentina to violate its obligation of fair and equitable treatment toward the Claimants without violating its duty of full protection and security. In short, there are actions that violate fair and equitable treatment that do not violate full protection and security.

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[124] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania* (ICSID Case No. ARB/05/22), Award, (24 July 2008), at para. 729.

[125] *Parkerings-Compangiet AS v. the Republic of Lithuania* (ICSID Case No. ARB/05/08), Award (August 14, 2007).

[126] Para. 354, citing Rubins N., Kinsella S., *International Investment, Political Risk and Dispute Resolution* (2005) to justify this proposition.

[127] *National Grid plc v. Argentine Republic* (UNCITRAL), Award (3 November 2008).

172. The fact that the French BIT employs the fair and equitable treatment standard and the full protections and security standard in two distinct articles and refers to them as separate and distinct standards leads to the conclusion that the Contracting Parties must have intended them to mean two different things. Thus, in interpreting these two standards of investor treatment it is desirable to give effect to that intention by giving the two concepts distinct meanings and fields of application.

173. In this respect, this Tribunal is of the view that the stability of the business environment and legal security are more characteristic of the standard of fair and equitable treatment, while the full protection and security standard primarily seeks to protect investment from physical harm. This said, this latter standard may also include an obligation to provide adequate mechanisms and legal remedies for prosecuting the State organs or private parties responsible for the injury caused to the investor.

174. The *Enron* tribunal discussed the more limited scope of the full protection and security standard by noting that "there might be cases where a broader interpretation could be justified, but then it becomes difficult to distinguish such situation from one resulting in the breach of fair and equitable treatment, and even from some form of expropriation."[128] Generally, this Tribunal also believes that an overly extensive interpretation of the full protection and security standard may result in an overlap with the other standards of investment protection, which is neither necessary nor desirable.

175. As far as this Tribunal is concerned, it is inclined to think that the absence of the word "full" or "fully" in the full protection and security provisions in the Argentina-Spain and the Argentina-U.K. BITs supports this view of an obligation limited to providing physical protection and legal remedies for the Spanish and U.K. Claimants and their assets.

176. The importance of the precise legal formulation used in a BIT provision is further illustrated in the *Siemens* award.[129] In that case, the investor initiated the arbitration under the German-Argentina BIT, alleging *inter alia* that Argentina breached its obligation to accord full

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[128] *Supra* note 92, at para. 286; see also *PSEG Global et al. v. Republic of Turkey* (ICSID Case No. ARB/02/5), Award (19 January 2007), at para. 259.

[129] *Supra* note 93.

protection and security through the conduct that led to the frustration of the investor's contract. The respondent and the claimant had opposing positions on the scope of the protection under the BIT standard. According to Argentina, "security" implied only physical security, while the investor attributed to this term a wider meaning, in particular because the Treaty referred to "legal security." Thus, the tribunal had to interpret whether "security" referred merely to physical security or to security in a wider sense. Having noted that the definition of investment included tangible and intangible assets, the tribunal said that "the obligation to provide full protection and security is wider than 'physical'' protection and security." It provided the following reasoning:

> It is difficult to understand how the physical security of an intangible asset would be achieved. In the instant case, "security" is qualified by "legal". In its ordinary meaning "legal security" has been defined as "the quality of the legal system which implies certainty in its norms and, consequently, their foreseeable application." It is clear that in the context of this meaning the Treaty refers to security that it is not physical. In fact, one may question given the qualification of the term "security", whether the Treaty covers physical security at all. Arguably it could be considered to be included under "full protection", but that is not an issue in these proceedings. [§303]

Based on this understanding of 'full protection and security', the tribunal concluded that Argentina's initiation of the renegotiation of the contract for the sole purpose of reducing its costs, unsupported by any declaration of public interest, affected the legal security of Siemens' investment, and thus constituted a violation of its obligations under the BIT. In these cases, none of the three BITs concerned refers to "legal security". Therefore, this Tribunal is of the opinion that the various formulations of protection and security employed in the present BITs cannot extend to an obligation to maintain a stable and secure legal and commercial environment.

177. While strict textual interpretation of the treaty language would lead this Tribunal to conclude that the applicable BITs in the present cases do not have the expansive scope on which the Claimants are basing their claim, there is another reason for the Tribunal not to follow the interpretation made in, *inter alia*, *CME* and *Azuri*x. Neither the *CME* nor *Azurix* awards provide a historical analysis of the concept of full protection and security or give any clear reason as to why it was departing from the historical interpretation traditionally employed by courts and tribunals and expanding that concept to cover non-physical actions and injuries.

178. A few awards since *CME* have maintained the more traditional approach to interpreting the notion of full protection and security. In *Saluka*,[130] the tribunal determined that the Czech Republic did not violate the Czech Republic-Netherlands BIT which promised investors "full security and protection" when it took measures to stop trading in the claimant's securities. The tribunal stated: "The practice of arbitral tribunals seems to indicate however that the 'full protection and security clause' is not meant to cover just any kind of impairment of an investor's investment but to protect more specifically the physical integrity of an investment against interference by the use of force."[131] More recently, a similar rationale has been applied by arbitral tribunals in *BG v. Argentina*, *PSEG v. Turkey* and *Rumeli v. Kazakhstan*.[132]

C. The Tribunal's Conclusions

179. Having considered the specific language of each of the three applicable BITs and the historical development of the "full protection and security" standard under international law, as well as the recent jurisprudence, this Tribunal is not persuaded that it needs to depart from the traditional interpretation given to this term. Consequently, the Tribunal concludes that under all the applicable BITs, Argentina is obliged to exercise due diligence to protect investors and investments primarily from physical injury, and that in any case Argentina's obligations under the relevant provisions do not extend to encompass the maintenance of a stable legal and commercial environment. As a result, in the instant cases Argentina has not violated its obligations under the respective BIT provisions.

VIII. Responsibility for Failure to Accord Fair and Equitable Treatment

A. *The Applicable Treaty Provisions*

180. The Claimants further allege that Argentina has breached the applicable BITs in that it has failed to accord the Claimants' investments "fair and equitable treatment" as required by the treaties. Specifically they assert that Argentina has breached Articles 3 and 5(1) of the Argentina France-BIT which provide:

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130 *Supra* note 96.

131 *Ibid. at* para. 484.

132 *BG Group Plc v. the Argentine Republic* (UNCITRAL), Award (24 December 2007), at paras. 323-328; *PSEG v. Turkey*, *supra* note 128, at paras. 258-259; *Rumeli v Kazakhstan*, *supra* note 118, at para. 669.

ANNEX 195

In proceedings pursuant to the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments, entered into on 11 December 1990 and the UNCITRAL Arbitration Rules:

BG Group Plc.

Claimant

and

The Republic of Argentina

Respondent

Final Award

24 December 2007

Before the Tribunal comprising:

Alejandro M. Garro, Arbitrator

Albert Jan van den Berg, Arbitrator

Guillermo Aguilar Alvarez C., President

Representing the Claimant:

Freshfields Bruckhaus Deringer
Nigel Blackaby
Lluis Paradell
Sylvia Noury
Andrea Saldarriaga
Marval, O'Farrell & Mairal
Francisco Macías

Representing the Respondent:

Procuración del Tesoro de la Nación
Osvaldo César Guglielmino
Cintia Yaryura
Jorge Barraguirre
Florencio Travieso

Administrative Secretary of the Arbitral Tribunal

Lucía Ojeda

Formal seat of the arbitration: Washington, D.C.

I n d e x

the duty of protection and constant security of investments is part of the standard of fair and equitable treatment.

b. Argentina's Position

319. Argentina denied that it has violated the standard of protection and constant security under the BIT and criticized that BG does not specify which duty to act it has violated. Argentina contended that BG has neither a factual nor a legal basis to make Argentina responsible for having omitted due diligence.

320. In contesting the relevance of the case law relied upon by BG, Argentina stated, without the benefit of any references, that jurisprudence and doctrine are unanimous in conceiving that the standard of protection and security is a standard of "physical protection". BG, however, has not invoked any act of physical violence against its investment.[261]

321. Relying on *Tecmed,* Argentina highlights that *"the security and protection guarantee is not absolute and that it does not impose upon the Government issuing it strict liability."* In the context of the present case, Argentina submitted that MetroGAS had all the possibilities of resorting to the legal system in force in Argentina in order to protect its contractual rights under the same terms and conditions as any other litigant.[262]

322. Finally, Argentina relies on the notion of emergency and draws attention to the fact that, during the period under examination, the country was undergoing the worst economic, social and institutional crisis of its history.[263]

2. The Tribunal's Findings

323. The Tribunal can be relatively brief in relation to the allegations of BG. BG's claim with respect to the standard of protection and constant security must fail.

324. The Tribunal observes that notions of "protection and constant security" or "full protection and security" in international law have traditionally been associated with situations where the physical security of the investor or its

261. *Memorial de Contestación*, paragraph 574.
262. *Memorial de Contestación*, paragraphs 575 and 576.
263. *Memorial de Contestación*, paragraph 577.

investment is compromised. Indeed, the authorities relied upon by BG confirm this:

a) in *AAPL* the tribunal had to determine under the Sri Lanka-U.K. BIT whether the physical destruction of property of AAPL and the killing of a farm manager and permanent staff members were in violation of the provision of protection and security under Article 2.2 of the Sri Lanka-U.K. BIT; [264]

b) in *AMT* the tribunal found that under the U.S.–Zaire BIT, Zaire had violated the protection and security standard required by the treaty in relation to lootings carried out against AMT's investment.[265]

325. Similarly at issue in *E.L.S.I* was the occupation of the investor's plant by its workers following its requisition by the Mayor of Palermo[266] and *Wena Hotels Limited v. Arab Republic of Egypt* relates to the forceful seizure of property.[267]

326. The Tribunal is mindful that other tribunals have found that the standard of "*protection and constant security*" encompasses stability of the legal framework applicable to the investment. By relating the standards of "*protection and constant security*" and "*fair and equitable treatment*" such tribunals have found that the host State is under an obligation to provide a "*secure investment environment*".[268] However, in light of the decisions quoted above, the Tribunal finds it inappropriate to depart from the originally understood standard of "*protection and constant security*".

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264. *AAPL* (paragraphs 28 and 53).
265. *AMT* (paragraphs 6.05-6.12).
266. Exhibit JL-195 (*Elletronica Sicula S.p.A. (E.L.S.I.) (United States of America v. Italy),* 1989 ICJ Report 1989 RLA 56, Judgment dated 20 July 1989).
267. Exhibit JL-331 (*Wena Hotels Ltd v A RA-b Republic of Egypt,* ICSID Case No ARB/98/4, Award of 8 December 2000, paragraphs 84-95).
268. Exhibit JL-495 (*Azurix Corp. v The Argentine Republic*, ICSID Case No. ARB/01/12, Award dated 14 July 2006, paragraph 408); *Siemens v. The Argentine Republic,* ICSID Case No ARB/02/8, Award of 6 February 2007, paragraph 303, referring to the Argentina-Germany BIT which includes, however, the qualified term of ¨legal security¨ in the relevant provision.

327. Considering the facts of this dispute and the Parties' submissions, the Tribunal notes that BG has not alleged physical violence or damage in the implementation of the measures adopted by Argentina, nor does the Tribunal see that such violence or damage has in fact occurred.

328. Accordingly, the Tribunal concludes that Argentina has not breached the standard of protection and constant security set out in Article 2.2 of the Argentina-U.K. BIT.

C. Unreasonable and Discriminatory Measures

329. BG also contended that, in violation of the second sentence of Article 2.2 of the BIT, Argentina impaired BG's use and enjoyment of its investment by unreasonable and discriminatory measures, by placing a disproportionate and discriminatory burden on MetroGAS and BG. Argentina objected to BG's allegations.

330. The second sentence of Article 2.2 of the BIT provides as follows:

> Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Contracting Party.

1. Unreasonable Measures

(a) Summary of Parties' Contentions

(i) BG's Position

331. BG contended that Argentina's measures are unreasonable because they dismantled the entire tariff regime of the gas distribution industry.

332. As the term "unreasonable measures" is not defined, BG relies on the following definition provided by the commentator R. Happ that,

> [I]t is possible to understand 'unreasonable' in two different ways: Either as a procedural concept, that is whether the governmental measure furthers the government's objectives (sic.) is the less restrictive measure and whether the impairment is proportional to the achieved end; or as a substantive concept. However, since it is always in the eye of the beholder

ANNEX 196

THE MATTER OF AN ARBITRATION
UNDER THE UNCITRAL ARBITRATION RULES 1976

SALUKA INVESTMENTS BV (THE NETHERLANDS)
Claimant
v
THE CZECH REPUBLIC
Respondent

PARTIAL AWARD

Arbitral Tribunal

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250. The Czech Republic denies that it has violated Article 5 of the Treaty. In essence, it submits that the measures which it resorted to in order to address the IPB situation in the spring of 2000 and which culminated in the decision by the CNB to put IPB into forced administration were "permissible regulatory actions" which cannot be considered as expropriatory.

251. In support of its principal defense, the Czech Republic also avers that each of the measures cited by Saluka in its attempt to demonstrate that the Czech Republic's actions were not genuine regulatory measures were indeed authorised by Czech law.

252. Subsidiarily, the Czech Republic argues that, since Saluka sold its IPB shares back to Nomura after June 2000 for the same amount as it purchased them, Saluka "has failed to establish a deprivation of sufficient magnitude to form the basis of an expropriation claim".

C. The Law

253. The Tribunal agrees with Saluka that the principal, if not the sole, issue which it must determine in the present chapter of its Award is whether the actions by the Czech Republic complained of by the Claimant are lawful or unlawful measures.

254. The Tribunal acknowledges that Article 5 of the Treaty in the present case is drafted very broadly and does not contain any exception for the exercise of regulatory power. However, in using the concept of deprivation, Article 5 imports into the Treaty the customary international law notion that a deprivation can be justified if it results from the exercise of regulatory actions aimed at the maintenance of public order. In interpreting a treaty, account has to be taken of "any relevant rules of international law applicable in the relations between the parties"[6] – a requirement which the International Court of Justice ("ICJ") has held includes relevant rules of general customary international law.[7]

255. It is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner *bona fide* regulations that are aimed at the general welfare.

256. Nearly forty-five years ago, the Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens ("Harvard Draft Convention"),[8] which instrument is relied upon by the Czech Republic, recognised the following categories of non-compensable takings:

> An uncompensated taking of an alien property or a deprivation of the use or enjoyment of property of an alien which results from the execution of tax laws; from a general change in the value of currency; from the action of the competent authorities of the State in the maintenance of public order, health or morality; or from the valid exercise of belligerent rights or otherwise incidental to the normal operation of the laws of the State shall not be considered wrongful.

257. As Saluka correctly reminded the Tribunal, the above-quoted passage in the Harvard Draft Convention is subject to four important exceptions. An uncompensated taking of the sort referred to shall not be considered unlawful provided that:

(a) it is not a clear and discriminatory violation of the law of the State concerned;

(b) it is not the result of a violation of any provision of Articles 6 to 8 [of the draft Convention];

(c) it is not an unreasonable departure from the principles of justice recognised by the principal legal systems of the world;

(d) it is not an abuse of the powers specified in this paragraph for the purpose of depriving an alien of his property.

258. These exceptions do not, in any way, weaken the principle that certain takings or deprivations are non-compensable. They merely remind the legislator or, indeed, the adjudicator, that the so-called "police power exception" is not absolute.

259. The Tribunal further recalls that, in an accompanying note to the 1967 OECD Draft Convention on the Protection of Foreign Property,[9] it is provided that measures taken in the pursuit of a State's "political, social or economic ends" do not constitute compensable expropriation.

260. Similarly, the United States Third Restatement of the Law of Foreign Relations in 1987[10] includes *bona fide* regulations and "other action of the kind that is commonly accepted as within the police power of State" in the list of permissible – that is, non-compensable – regulatory actions.

261. It is clear that the notion of deprivation, as that word is used in the context of Article 5 of the Treaty, is to be understood in the meaning it has acquired in customary international law.[11]

262. In the opinion of the Tribunal, the principle that a State does not commit an expropriation and is thus not liable to pay compensation to a dispossessed alien investor when it adopts general regulations that are "commonly accepted as within the police power of States" forms part of customary international law today. There is ample case law in support of this proposition. As the tribunal in *Methanex Corp. v. USA* said recently in its final award, "[i]t is a principle of customary international law that, where economic injury results from a *bona fide* regulation within the police powers of a State, compensation is not required".[12]

263. That being said, international law has yet to identify in a comprehensive and definitive fashion precisely what regulations are considered "permissible" and "commonly accepted" as falling within the police or regulatory power of States and, thus, non-compensable. In other words, it has yet to draw a bright and easily distinguishable line between non-compensable regulations on the one hand and, on the other, measures that have the effect of depriving foreign investors of their investment and are thus unlawful and compensable in international law.

264. It thus inevitably falls to the *adjudicator* to determine whether particular conduct by a state "crosses the line" that separates valid regulatory activity from expropriation. Faced with the question of *when, how and at what point an otherwise valid regulation becomes, in fact*

and effect, an unlawful expropriation, international tribunals must consider the circumstances in which the question arises. The context within which an impugned measure is adopted and applied is critical to the determination of its validity.[13]

265. In the present case, the Tribunal finds that the Czech Republic has not "crossed that line" and did not breach Article 5 of the Treaty, since the measures at issue can be justified as permissible regulatory actions.

D. Analysis and Findings

266. Saluka's shares in IPB were assets entitled to protection under the Treaty. Pursuant to Article 5 of the Treaty, the Czech Republic was prohibited from taking any measures depriving, directly or indirectly, Saluka of its investment in IPB unless one or more of the cumulative conditions set out in that Article were complied with. If the Tribunal finds that the Czech Republic has adopted such measures without having complied with one or more of these conditions, the conclusion will inevitably follow that the Respondent has breached Article 5 of the Treaty.

267. There can be no doubt, and the Tribunal so finds, that Saluka has been deprived of its investment in IPB as a result of the imposition of the forced administration of the bank by the CNB on 16 June 2000.

268. In Part III of the present Award, the Tribunal has reviewed in considerable detail the facts which led the CNB, on 16 June 2000, to "introduce forced administration" of IPB pursuant to Section 26(1)(d) of the Czech Banking Act.[14]

269. A translation of the CNB decision of 16 June 2000 has been produced as an exhibit before the Tribunal. It sets forth the many reasons which convinced the CNB, as the Czech banking regulator, to decide that the time had come to impose forced administration of IPB and appoint an administrator to exercise the forced administration. The decision also refers to the Czech legislation on which the CNB relied.

270. Rather than attempting to summarise the CNB's decision, the Tribunal reproduces it here *in extenso*, in translation supplied by the Respondent:

Decision

> On the basis of the establishment that INVESTIČNÍ A POŠTOVNÍ BANKA, akciová společnost, with its registered office in Praha 1, Senovážné nam. 32, IČO (Identification No.): 45 31 66 19 (the "Bank") continually fails to maintain payment ability both in Czech currency and in foreign currencies and, accordingly, fails to comply with its obligation under Section 14 of Act No. 21/1992 Coll., the Banking Act, as amended (the "Banking Act"), the Czech National Bank has decided, pursuant to the provision of Section 26(1)(d), in accordance with the provisions of Section 30, Section 26(2), Section 26(6) and Section 26(3)(b) and with regard to the provisions of Section 27(1)(a) and (b) of the Banking Act, as follows:
>
> I. Forced administration shall be introduced in the Bank as of June 16, 2000.

unavoidable, as stated by the Deputy Finance Minister, Mr Zelinka, on 9 June 2000 (*i.e.* on the Friday before the Monday when the second bank run set in).

481. Furthermore, there is some indication that the Government "sources" deliberately engineered the circulation of negative information about IPB in order to precipitate IPB's failure. Mr Zelinka's statement of 9 June 2000 may well be interpreted in this sense. Once forced administration was publicly stated to be unavoidable, that statement became a self-fulfilling prophecy, because the bank run was certain to set in the following Monday. This conduct of the Government was unjustifiable and unreasonable and contributed in all probability to the unsustainability of IPB's situation. The Respondent has provided no convincing evidence to the contrary.

D. Full Security and Protection

482. The Claimant has argued that the Czech Republic has also violated its obligation under Article 3.2 of the Treaty which "more particularly" provides that each Contracting Party shall accord to the investments of investors covered by the Treaty "full security and protection".

1. Meaning of the Standard

483. The "full protection and security" standard applies essentially when the foreign investment has been affected by civil strife and physical violence.[54] In the *AMT* arbitration, it was held that the host State "must show that it has taken all measures of precaution to protect the investments of [the investor] in its territory".[55]

484. The standard does not imply strict liability of the host State however. The *Tecmed* tribunal held that "the guarantee of full protection and security is not absolute and does not impose strict liability upon the State that grants it".[56] The host State is, however, obliged to exercise due diligence.[57] As the tribunal in *Wena*, quoting from *American Manufacturing and Trading*,[58] stated,

> 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 and should not be permitted to invoke its own legislation to detract from any such obligation.[59]

Accordingly, the standard obliges the host State to adopt all reasonable measures to protect assets and property from threats or attacks which may target particularly foreigners or certain groups of foreigners.[60] The practice of arbitral tribunals seems to indicate, however, that the "full security and protection" clause is not meant to cover just any kind of impairment of an investor's investment, but to protect more specifically the physical integrity of an investment against interference by use of force. In light of the following findings, it appears not to be necessary for the Tribunal to precisely define the scope of the "full security and protection" clause in this case.

2. Application of the Standard

485. The Claimant contends that the Czech Republic has failed to accord Saluka's investment full protection and security by its oppressive use of public powers, post-forced administration, with a view to depriving Saluka of any residual economic benefit or use of its investment and by harassing its officers and employees. The measures complained of by the Claimant relate more specifically to

(a) the suspension of trading of IPB shares;

(b) the prohibition of transfers of Saluka's shares; and

(c) the police searches of premises occupied by Nomura and its employees.

The Tribunal will assess these three groups of measures separately.

a) The Suspension of Trading in IPB Shares

486. According to the Claimant, the CSC's preliminary injunction of 15 June 2000 imposing an immediate suspension of trading in IPB shares as well as the subsequent successive extensions thereof were unjustified. The Respondent argues that there was nothing improper with the suspension decisions.

487. Saluka has lodged appeals against the CSC's suspension decisions. The appeals were rejected, however, by the competent Presidium of the CSC.

488. On 1 January 2001, the Czech Securities Act was amended to the effect that shareholders no longer had standing to appeal a CSC's suspension of trading in the shares held by the shareholders. Consequently, after 1 January 2001 Saluka was excluded from challenging suspensions of trading in its IPB shares.

489. The Respondent argues that the amendment to the Czech Securities Act was of general application and was not specifically targeted against Saluka.

490. Even assuming that the suspension of trading of shares may be State conduct within the scope of the "full security and protection" clause, the Tribunal, without deciding that question, finds that this claim of the Claimant is without merit. On this account, the Czech Republic cannot be said to have failed to provide "full protection and security" to Saluka's investment. The reasoning behind the CSC's suspension decisions cannot be said to have been totally devoid of legitimate concerns relating to the securities market. The suspensions of trading in IPB shares were at least justifiable on regulatory grounds. Also, the elimination of shareholders' right of appeal does not *per se* transcend the limits of a legislator's discretion. Shareholder's rights vary greatly in different jurisdictions. The amendment of the Czech Securities Act cannot be said to be totally unreasonable and unjustifiable by some rational legal policy.

ANNEX 197

9 General Treatment Standards

From: The Law of Investment Treaties (2nd Edition)
Jeswald W. Salacuse

Content type: Book content
Product: Investment Claims [IC]
Series: Oxford International Law Library
Published in print: 01 May 2015
ISBN: 9780198703976

Subject(s):

Investor — Investment — BITs (Bilateral Investment Treaties) — Specialized treaty frameworks — National treatment — Full protection and security — Arbitrary (unreasonable) & discriminatory treatment standard — Fair and equitable treatment standard — Most-favoured-nation treatment (MFN)

investments ‘complete protection and security’, ‘full protection and security’, ‘full legal protection and security’, or simply ‘protection and security’. Moreover, some treaties may articulate specific treatment standards as independent commitments, while others may link them to or condition them on another standard. For example, while many early US bilateral investment treaties (BITs) simply required host countries to grant investors ‘full protection and security’, the 2005 US–Uruguay BIT specifies that ‘full protection and security’ requires each party to provide ‘the level of police protection required under customary international law’.[4] As a result of these differences, the degree of protection afforded individual investments may vary significantly among treaties. Consequently, persons interpreting investment (p. 230) treaty provisions should give careful attention to the differing ways individual treaty texts articulate their protections. At the same time, it should be emphasized that treatment standards are almost always expressed in general and even vague terms and thus render the task of applying them to concrete, complex fact situations, like those that usually arise in investment disputes, even more difficult.

9.3 Protection and Security

(a) In general

In virtually all investment treaties, contracting parties promise to give some degree of ‘protection’ and ‘security’ to the investors and investments of other contracting parties. The precise formulation of that promise varies among treaties. For example, the first BIT ever concluded, the agreement between Germany and Pakistan in 1959, provided that investments by nationals or companies of either party are to ‘enjoy *protection and security* in the territory of the other party’.[5] On the other hand, Article 4(1) of the Germany–Argentina BIT of 1991 states that investments should enjoy ‘full legal protection and full legal security’,[6] and Article IV(2) of the Ecuador–El Salvador BIT of 1994 provides for ‘full legal protection’ for the investments of either party’s nationals.[7] Article 3 of the China–Qatar BIT of 1999 merely states that the contracting party investments and the activities associated with those investments ‘shall be accorded fair and equitable treatment and shall *enjoy protection* in the territory of the other Contracting Party’.[8] Despite the generality and vagueness of these provisions, they do seem to imply that the host state has an obligation to take measures to protect covered investors and investments from certain negative actions that may affect them.[9] Beyond this (p. 231) basic observation, treaty provisions on full protection and security do little to answer three difficult but essential questions:

1. Against whom is the host state to protect covered investors and investments?
2. Against what actions is the host state to protect investors and their investments?
3. Precisely what measures must a host state take in order to meet its treaty obligations?

To answer these questions, one must consider the historical origins of this standard that has now become a common feature of investment treaties.

(b) Historical origins of the standard

The origin of the terms ‘full protection and security’, ‘constant protection and security’, or simply ‘protection and security’ appears to lie in the bilateral commercial treaties that many countries concluded in the nineteenth and early twentieth centuries. One example is the friendship, commerce, and navigation (FCN) treaties made by the United States during that period.[10] Of the twenty-two commercial treaties concluded by the United States before 1920, fourteen contained reference to ‘special protection’ and the remaining eight required ‘full and perfect protection’ of persons’ private property.[11] As an illustration, Article 3 of the 1850 FCN treaty between the United States and Brunei provided that His Highness the Sultan ‘engages that such Citizens of the United States of America shall as far as lies within

his power, within his dominions enjoy *full and complete protection and security* for themselves and for any property which they may acquire' (emphasis added).[12] The bilateral treaties of other countries also employed this term.[13]

Arbitral decisions, judicial decisions, and other forms of international practice have given meaning to the term 'protection and security' over the years. Indeed, it is only through jurisprudence that one can fully understand the content of this standard. Most cases involved actions by third persons, such as mobs, revolutionaries, or insurgents, who had physically damaged investments covered under the treaty. Injured investors sought compensation from the host government on the grounds that the government had not taken sufficient measures to protect the investment or the investor. For example, in the *Sambiaggio* case,[14] the (p. 232) Italy–Venezuela Mixed Claims Commission in 1903 had to adjudicate whether Venezuela was monetarily liable to Italian nationals for damage resulting from the acts of revolutionaries operating in Venezuelan territory. Article 4 of the Italy–Venezuela Treaty of 1861 stated that each state's citizens should enjoy 'the fullest measure of protection and security of person and property, and should have in this respect the same rights and privileges accorded to nationals' of the territory. The umpire in the case declared that he 'accepts the rule that if in any case of reclamation submitted to him it is alleged and proved that Venezuelan authorities failed to exercise due diligence to prevent damages from being inflicted by revolutionists, that country should be held responsible'.[15] He ultimately denied Italy's claims that the treaty imposed strict liability.

Probably the most authoritative case interpreting the FCN treaty provisions on protection and security was a 1989 decision of a chamber of the International Court of Justice (ICJ) in the *ELSI* case.[16] In that case, the United States brought a claim against Italy under the US–Italy FCN treaty for injuries incurred by Raytheon, a US company, with respect to its subsidiary in Sicily. A factory of Raytheon's subsidiary in Palermo was taken over by workers and then requisitioned by the mayor in order to forestall its closure by the investor for economic reasons. The United States alleged that such actions violated Italy's obligation to give US investors 'the most constant protection and security', as required by Article V(1) of the FCN treaty. The United States did not contend, however, that the obligation constituted a guarantee resulting in strict liability. Instead, it pointed to the 'well-established aspect of the international standard of treatment … that States must use "due diligence" to prevent wrongful injuries to the person or property of aliens within their territory'. The ICJ Chamber found that the Italian government had taken adequate measures to protect the investor and its property, stating that '[t]he reference in Article V to the provision of "constant protection and security" cannot be construed as the giving of a warranty that property shall never in any circumstances be occupied or disturbed'.[17]

In general, jurisprudence relating to the FCN provisions on protection and security recognizes that this standard requires host countries to take steps to protect investors against physical injury to their persons or properties, whether by government agents or third persons. However, the FCN provision does not make the host state a guarantor of the safety of the investor or its property. It requires only that the host state exercise due diligence in carrying out its obligations under the treaty. As one commentator has observed, the decisions of tribunals and the other sources offer no definition of 'due diligence', noting: 'No doubt the application of this standard will vary according to the circumstances, yet, if "due diligence" be taken to denote a fairly high standard of conduct the exception will overwhelm the rule.'[18] A host state satisfies its due diligence obligation when it (p. 233) takes all the reasonable measures of protection that a well-administered government would take in a similar situation.[19]

(c) Full protection and security in the modern era

With the development of bilateral and other investment treaties since 1960, the inclusion of provisions granting investors some form of protection and security has become standard. It can thus be found in countless BITs, NAFTA,[20] the Energy Charter Treaty (ECT),[21] and the 2009 ASEAN Comprehensive Investment Agreement,[22] among others. These provisions have also been the basis of several investor–state arbitrations, and so arbitral tribunals have had to interpret and apply them in a new era. In doing so, contemporary tribunals have relied on the jurisprudence interpreting FCNs to a significant extent but have also extended the scope of protection in certain instances.

The first such BIT case was *Asian Agricultural Products Limited v Sri Lanka (AAPL)*.[23] In *AAPL*, an ICSID tribunal considered the claims of a UK investor in shrimp farming in Sri Lanka which had suffered injuries as a result of the destruction of its facilities by Sri Lankan security forces during an alleged operation against rebels. The claimant maintained that the UK–Sri Lanka BIT's provision guaranteeing 'full protection and security' went beyond the minimum standard of customary international law and imposed an unconditional obligation of protection on the host country. Therefore, failure to comply with the obligation entailed 'strict or absolute liability' for the host state once damage to the investor's property was established. In response, Sri Lanka contended that the 'full protection and security' standard incorporates, rather than supplants, the customary international legal standard of responsibility requiring due diligence on the part of states and reasonable justification for the destruction of property, but not (p. 234) imposing strict liability. A central issue throughout the case was the standard of liability to be applied to the Sri Lankan security forces.

The tribunal unanimously rejected the UK investor's contentions that the 'full protection and security' standard imposed 'strict liability' on the host state; however, a majority of the arbitrators did find the Sri Lankan government responsible for the property destruction under the customary international law standard requiring 'due diligence' protection from the host state. The tribunal acknowledged that customary international law contemplated a 'sliding scale of liability related to the standard of due diligence'. This scale would range from the older 'subjective' criteria that take into account the relatively limited existing possibilities of local authorities in a given context to an 'objective' standard of vigilance in assessing the required degree of protection and security with regard to what one should legitimately expect from a reasonably well-organized modern state with respect to the level of security afforded to foreign investors.[24] Applying this reasoning to the facts of the case, the tribunal concluded that the Sri Lankan government could reasonably have used other means than those employed by its troops to exclude suspected rebel elements from the shrimp farm staff. Further, those other actions would have minimized the risk of death and destruction in the counter-insurgency operation. The tribunal also found that the failure to take such precautionary measures was especially significant because such measures fall within the normal exercise of governmental inherent powers. The tribunal concluded that Sri Lanka, both through inaction and omission, 'violated its due diligence obligation which requires undertaking all possible measures that could be reasonably expected to prevent the eventual occurrence of killings and property destructions'.[25]

Subsequent cases have found host governments liable for not taking steps to protect an investor's factory from looting by government troops in Zaire, and for not employing measures to prevent the seizure of a hotel by disgruntled employees in Egypt. In the case of *American Manufacturing and Trading, Inc v Zaire* (*AMT*),[26] the tribunal rejected Zaire's defence that it should not be liable for the acts of marauding soldiers who looted the investor's factory on at least two consecutive occasions without any intervention by government authorities. The tribunal stated that the protection and security treatment standard constituted an objective obligation 'which must not be inferior to the minimum standard of vigilance and of care required by international law'.[27] It therefore found it

unnecessary to discuss whether Zaire was bound by an obligation of result or simply an obligation of conduct, but found it sufficient that Zaire took no measures whatsoever to ensure the protection and security of the investment in question. Consequently, Zaire's failure to take any protective measures to ensure the security of AMT's investment engaged its international responsibility. The tribunal stated:(p. 235)

> the obligation incumbent upon Zaire is *an obligation of vigilance*, in the sense that Zaire as the receiving State of investments made by AMT, an American company, shall take all measures necessary to ensure the full enjoyment of protection and security of its investment and should not be permitted to invoke its own legislation to detract from any such obligation. Zaire must show that it has taken all measure of precaution to protect the investments of AMT on its territory. It has not done so … (emphasis added).[28]

A similar result can be found in *Wena Hotels Ltd v Arab Republic of Egypt*,[29] in which an ICSID tribunal considered a UK investor's claim under the UK–Egypt BIT. The case concerned the seizure of a hotel by its employees. Relying solely on the standards developed in the *AAPL* and *AMT* cases, the tribunal found Egypt responsible for the failure to accord the investment 'fair and equitable treatment' and 'full protection and security' because it did not take any action to prevent the seizures or to immediately restore control over the hotel to Wena.

A finding of liability for failure to provide promised protection and security is necessarily fact driven. It must be based on the details of the threat as well as the government's response to that threat. The burden of proving the facts that constitute the threat, the nature and inadequacy of the government's response, and the connection of these factors to the injury suffered by the investor all rest on the claimants. Failure to carry that burden will result in a denial of government liability. For example, in the case of *Técnicas Medioambientales Tecmed SA v United Mexican States*,[30] a Spanish company that had invested in a Mexican waste disposal facility brought a claim under the Spain–Mexico BIT. It alleged that Mexico had breached its obligation to provide 'full protection and security' from various social movements, disturbances, and demonstrations against the investor's activities. The investor claimed that Mexican authorities had encouraged the community to react adversely to the landfill and its operation. The investors also asserted that the authorities did not act as quickly, efficiently, and thoroughly as they should have to prevent or terminate the adverse actions of the local population. The tribunal found that the claimant failed to provide sufficient evidence to establish a causal link between the public protests and Mexico's inaction or to show that Mexico acted unreasonably under the circumstances.[31] Like many previous tribunals, the tribunal concluded that 'the guarantee of full protection and security is not absolute and does not impose strict liability upon the State that grants it'.[32]

A lack of evidence led to similar results in *Eureko v Poland*,[33] which involved the alleged harassment and intimidation of the investor's local representatives, as well as in *Noble Ventures v Romania*,[34] which concerned protests and demonstrations by employees.

(p. 236) Traditionally, tribunals have interpreted provisions guaranteeing protection and security as protecting investors and their investments from *physical* injury caused by the actions of host governments, their agents, or third parties. The US–Uruguay BIT quoted earlier appears to adopt this position by making explicit that '"full protection and security" requires each Party to provide the level of police protection required under customary international law'.[35] At the beginning of the twenty-first century, a few cases have sought to expand the term's scope to include protection against allegedly unjustified governmental actions that injure an investor's legal rights but cause no physical injury. The first such case to take this position was *CME Czech Republic v Czech Republic*,[36] a dispute brought under the Netherlands–Czech Republic BIT in which the investor claimed that certain acts and

omissions of the Czech Media Council (a quasi-governmental media regulatory body) amounted to a violation of the obligation to provide full protection and security. The tribunal found that the Media Council's conduct was aimed at removing the security and legal protection from the investor's investment and so violated the standard of full protection and security. The tribunal stated: 'The host State is obligated to ensure that neither by amendment of its laws nor by actions of its administrative bodies is the agreed and approved security and protection of the foreign investor's investment withdrawn or devalued.'[37]

The decision in *CME* could be seen as a strong precedent for the expansion of the full protection and security clause to cover non-physical injuries sustained by investors. However, its precedential force would seem to be weakened by two factors. First, in the related case of *Lauder v Czech Republic*,[38] which involved the same parties and the same set of facts as in *CME*, the tribunal found no violation of the full protection and security clause. Second, the *CME* tribunal did not provide a historical analysis of the concept of full protection and security, failed to give any clear reason as to why it departed from the historical interpretation traditionally employed by courts and tribunals, and instead chose to expand the concept to cover non-physical actions and injuries.[39]

Other cases have nonetheless followed the approach of *CME*. In *Azurix v Argentina*,[40] a US investor argued that the limits of 'full protection and security' were not confined to physical protection but also included the kind of protection described in *CME*. The investor alleged that Argentina breached the standard in question by failing to apply the relevant regulatory framework and the concession (p. 237) agreement applicable to the claimant's investment. Argentina thereby destroyed the security provided to those investments. In response, Argentina contested the relevance of the *AAPL* and *AMT* cases on the grounds that they involved physical destruction of the investor's facilities by the armed forces. As for the relevance of *CME*, it pointed out that relying on *CME* was questionable without referring to *Lauder*, where, on the same facts, the tribunal reached the opposite conclusion. As a final argument, Argentina requested that the tribunal consider that during the period under review the country was undergoing the worst economic, social, and institutional crisis in its history.

Relying on *AAPL, AMT, Wena Hotels*, and *Occidental*,[41] the tribunal concluded that the interrelation between the 'fair and equitable treatment' and 'full protection and security' 'indicates that full protection and security may be breached even if no physical violence or damage occurs'.[42] Focusing on the specific language of the clause in which full protection and security is granted, the tribunal stated:

> The cases referred to above show that full protection and security was understood to go beyond protection and security ensured by the police. It is not only a matter of physical security; the stability afforded by a secure investment environment is as important from an investor's point of view. The Tribunal is aware that in recent free trade agreements signed by the United States, for instance, with Uruguay, full protection and security is understood to be limited to the level of police protection required under customary international law. However, when the terms "protection and security" are qualified by "full" and no other adjective or explanation, they extend, in their ordinary meaning, the content of this standard beyond physical security.[43]

Thus, *Azurix* seems to suggest that the omission of the words 'full' or 'fully', which are included in some investment treaties, restricts the scope of protection to physical security and protection but that the inclusion of those words expands the scope of protection to cover non-physical injuries. On the other hand, in the later case of *Parkerings-Compangiet AS v The Republic of Lithuania*,[44] the tribunal took a different view, stating: 'It is generally accepted that the variation of language (p. 238) between the formulation "*protection*" and

"*full protection and security*" does not make a difference in the level of protection a host State is to provide.'[45]

Another later case, also involving Argentina, justified the expansion of full protection and security to non-physical injuries in a different way. In *Siemens v Argentina*,[46] the investor initiated arbitration under the German–Argentina BIT and alleged, *inter alia*, that Argentina breached its obligation to accord full protection and security by engaging in conduct that frustrated the contract. According to Argentina, 'security' implied only physical security. The investor, however, gave the term a wider meaning, particularly because of the treaty's reference to 'legal security'. Having noted that the definition of investment included tangible and intangible assets, the tribunal found that 'the obligation to provide full protection and security is wider than "physical" protection and security'. It offered the following reasoning:

> It is difficult to understand how the physical security of an intangible asset would be achieved. In the instant case, 'security' is qualified by 'legal'. In its ordinary meaning 'legal security' has been defined as 'the quality of the legal system which implies certainty in its norms and, consequently, their foreseeable application.' It is clear that in the context of this meaning the Treaty refers to security that is not physical. In fact, one may question given the qualification of the term 'security', whether the Treaty covers physical security at all. Arguably it could be considered to be included under 'full protection', but that is not an issue in these proceedings.[47]

Based on this textual interpretation of the standard, the tribunal concluded that Argentina's initiation of the renegotiation of the contract constituted a violation of its obligations under the BIT because it was done for the sole purpose of reducing its costs, was unsupported by any declaration of public interest, and affected the legal security of Siemens' investment. Moreover, the qualifying adjective 'legal' was meant to extend the scope of the full protection and security clause. One may question the tribunal's reasoning regarding the emphasis it placed on the fact that intangible assets are not subject to physical injury. Merely because some assets are subject to physical injury and others are not does not necessarily mean that a treaty's contracting parties intended to depart from the traditional definition and scope of full protection and security. One could equally well conclude from reading the treaty's provisions that the contracting parties only intended to protect assets from physical injury that are capable of physical injury.

Some awards since the *CME* decision have maintained the more traditional approach to interpreting full protection and security. In *Saluka Investments BV (p. 239) (The Netherlands) v The Czech Republic*, the tribunal determined that the Czech Republic did not violate the Netherlands–Czech Republic BIT when it took measures to stop trading in the claimant's securities. Under the BIT, investors were promised 'full security and protection'. In reaching its decision, the tribunal stated: 'The practice of arbitral tribunals seems to indicate however that the "full protection and security clause" is not meant to cover just any kind of impairment of an investor's investment but to protect more specifically the physical integrity of an investment against interference by the use of force.'[48] The tribunals in *BG v Argentina*,[49] *PSEG v Turkey*,[50] *Rumeli v Kazakhstan*,[51] and *Suez, Sociedad General de Aguas de Barcelona SA, and Vivendi Universal SA v The Argentine Republic*[52] reached a similar conclusion. Many cases since, however, have found that full protection and security does extend beyond physical protection.[53]

In addition to the apparent divergence of views on the scope of the full protection and security clause, it would seem that the treaty provisions and cases represent two different views of the nature of full protection security. On the one hand, some, such as the tribunal in *Saluka*, view it as part of a minimum standard of international law elaborated in customary international law. On the other hand, some, such as the tribunal in *CME*, view it

as an independent, self-contained treaty standard to be interpreted without reference to the limitations of customary international law. The NAFTA Free Trade Commission, which is empowered under the NAFTA treaty to make authoritative interpretations of the treaty, has sought to clarify the issue by opting for the traditional approach. In 2001, it issued such an interpretation for the term 'full protection and security' as found in Article 1105(1) of NAFTA: 'The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens'.[54]

(p. 240) (d) Conclusion

In reviewing the jurisprudence related to the meaning of the term 'full protection and security' and the variations of the term found in investment treaties, one may conclude the following:

1. The core element under this standard is an obligation on the part of a contracting state to exercise due diligence in providing physical protection and security from injurious acts by government agents or third parties to the investor and its investment. The standard imposes an objective obligation that must not be less than the minimum standard of vigilance and care required by international law. Qualifying words such as 'constant' or 'full' that are found in many treaties might strengthen the required standard of 'protection and security' by requiring a standard of 'due diligence' higher than the 'minimum standard' of general international law.

2. The due diligence obligation requires a host state to undertake all measures that could be reasonably expected to prevent damage to foreign investments. Since due diligence means, according to the cases and commentators, 'nothing more nor less than the reasonable measures of prevention which a well-administered government could be expected to exercise under similar circumstances', [55] it would seem that a state's lack of resources or the existence of crisis conditions are not defences to a state's obligation to meet this objective standard. A state may breach its obligation by action, failure to act, omission to act, or by instigation or connivance. Moreover, a state may not absolve itself of international responsibility arising out of a treaty violation by invoking its legislation as a defence.

3. The nature and scope of the protection and security standard under a given treaty depends on its precise wording and its place in the treaty relative to other standards of investment treatment.

4. Certain arbitral cases indicate that protection may be expanded to cover non-physical injuries caused by host states or their instrumentalities. Thus, the host state may be held responsible for the failure to provide 'legal security', which is defined by tribunals as the quality of the legal system and particularly the certainty of its norms and their foreseeable application. Additionally, the interrelationship of 'fair and equitable treatment' and 'full protection and security' might allow for full protection and security to be breached without physical violence or damage; however, the force and durability of this trend is not yet clear or certain.

(p. 241) 9.4 Fair and Equitable Treatment

(a) Background

Virtually all investment treaties contain promises by the contracting parties to give 'fair and equitable treatment' to investors and the investments of other contracting parties. Although the precise formulation of these promises of fair and equitable treatment and the conditions attached thereto vary considerably among treaties, fair and equitable treatment is a core

before an investor could invoke international arbitration. Although Maffezini did (p. 283) not have recourse to the Spanish courts as required by the treaty, he argued that he was not required to do so because the Spain–Chile BIT did not contain a similar eighteen-month requirement and, by virtue of the MFN clause in the Spain–Argentina BIT, he was entitled to avail himself of the lesser requirements in the Spain–Chile BIT.

Interpreting the broad MFN clause, which provided that 'in all matters subject to this agreement treatment shall be no less favourable than that extended … to investors of a third country', the ICSID tribunal concluded that Maffezini was entitled to avail himself of the lighter procedural burden included in the Spain–Chile BIT. Therefore, Maffezini did not have to pursue his claim for eighteen months in Spanish courts before requesting ICSID arbitration. Some subsequent cases followed this approach.[214] On the other hand, some tribunals have refused to allow the claimants to import dispute resolution provisions from other treaties.[215] The difference in the result in these cases can be explained largely by the fact that the MFN clauses in the latter cases were much narrower in scope than the MFN clause in the former cases.

Footnotes:

1 In the ICSID case of *Suez, Sociedad General de Aguas de Barcelona SA, and Vivendi Universal SA v The Argentine Republic*, the tribunal defined 'treatment' as follows: 'The word "treatment" is not defined in the treaty text. However, the ordinary meaning of that term within the context of investment includes the rights and privileges granted and the obligations and burdens imposed by a Contracting State on investments made by investors covered by the treaty.' *Suez, Sociedad General de Aguas de Barcelona SA, and Vivendi Universal SA v The Argentine Republic*, ICSID Case No ARB/O3/19 (Decision on Jurisdiction) (3 August 2006) ¶ 55.

2 UNCTAD, *Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking* (2007) 28.

3 TJ Grierson-Weiller and IA Laird, 'Standards of Treatment' in P Muchlinski et al, *The Oxford Handbook of International Investment Law* (OUP, 2008) 262.

4 Treaty between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment (4 November 2005), Art 5(2)(b). See also 2012 US Model BIT, Art 5.2(b).

5 Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments (25 November 1959).

6 Artikel 4:

> (1) Kapitalanlagen von Staatsangehoerigen oder Gesellschaften einer Vertragspartei geniessen im Hohheitsgebiet der abderen Vertragspartei vollen rechtlichen Schutz und volle rechtliche Sicherheit. Vertrag zwischen der Bundesrepublik Deutschland und der Argentinischen Republik über die Förderung und den gegenseitigen Schutz von Kapitalanlagen (9 April 1991).

7 ARTICULO IV 'Protección de inversiones':

> (2) Cada Parte Contratante, una vez que haya admitido en su territorio inversiones de inver-sionistas de la otra Parte Contratante, concederá plena protección legal a tales inversiones y les acordará un tratamiento no menos favorable que el otorgado a las inversiones de sus propios inversionistas nacionales o de inversionistas de terceros Estados. Convenio entre el Gobierno de la Republica del Ecuador y el Gobierno de la Republic de El

Salvador para la Promoción y Protección Reciprocas de Inversiones (16 May 1994).

8 Agreement between the Government of the People's Republic of China and the Government of the State of Qatar Concerning the Encouragement and Reciprocal Protection of Investments (9 April 1999), Art 3.1.

9 R Dolzer and C Schreuer, *Principles of International Investment Law* (OUP, 2008) 149.

10 K Vandevelde, 'The Bilateral Investment Treaty Program of the United States' (1988) 21 Corn Int'l LJ 203, 204.

11 R Wilson, 'Property-protection Provisions in United States Commercial Treaties' (1951) 45 AJIL 84, 92–6.

12 Treaty of Friendship, Commerce and Navigation with Brunei (entered into force 11 July 1853) 10 Stat 909; Treaty Series 331.

13 See eg the bilateral treaty between Italy and Venezuela, stating that 'citizens of each state should enjoy in the territory of the other "the fullest measure of protection and security of person and property, and should have in this respect the same rights and privileges accorded to nationals"'. Quoted in the *Sambiaggio* case, Italy–Venezuela Mixed Claims Commission, UN Reports of International Arbitral Awards, vol 10, p 512.

14 ibid.

15 ibid 534.

16 *Elettronica Sicula SpA (ELSI) (United States v Italy)* (Judgment) (20 July 1989) [1989] ICJ Rep 15.

17 ibid ¶108, p 65.

18 J Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP, 2012) 552.

19 On the meaning of due diligence, tribunals and scholars have often referred to the statement of Professor AV Freeman in his lectures at the Hague Academy of International Law: 'The "due diligence" is nothing more nor less than the reasonable measures of prevention which a well-administered government could be expected to exercise under similar circumstances.' AV Freeman, 'Responsibility of States for the Unlawful Acts of Their Armed Forces' (1956) 88 *Receuil des Cours* 261. See also *Asian Agricultural Products Ltd v Sri Lanka*, ICSID Case No ARB/87/3 (Final Award) (27 June 1990) ¶ 170.

20 NAFTA, Art 1105, entitled 'Minimum Standard of Treatment', provides: '1. Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.'

21 ECT, Art 10, entitled 'Promotion, Protection, and Treatment of Investments', provides in part in para 1: '[s]uch investments shall enjoy the most constant protection and security'.

22 Art 11(1), on the Treatment of Investments states: 'Each member state shall accord to covered investments of investors of any other member state fair and equitable treatment and full protection and security.' Art 11 (2) further provides: 'For greater certainty … (b) full protection and security requires each Member State to take such measures as may be reasonably necessary to ensure the protection and security of covered investments.'

23 *Asian Agricultural Products Ltd v Sri Lanka*, ICSID Case No ARB/87/3 (Final Award) (27 June 1990). The Sri Lanka–United Kingdom Agreement on the Promotion and Protection of Investments (entered into force 18 December 1980) (1980) 19 ILM 886.

24 ibid ¶ 170.

25 ibid ¶ 85(B).

26 *American Manufacturing and Trading, Inc v Zaire*, ICSID Case No ARB/93/1 (Award) (21 February 1997).

27 ibid ¶ 6.06.

28 ibid ¶ 6.05.

29 *Wena Hotels Ltd v Arab Republic of Egypt*, ICSID Case No ARB/98/4 (Award on Merits) (8 December 2000).

30 *Técnicas Medioambientales Tecmed SA v United Mexican States*, ICSID Case No ARB(AF)/00/ 2 (Award) (29 May 2003).

31 ibid ¶¶ 176, 177.

32 ibid ¶ 177.

33 *Eureko BV v Republic of Poland*, UNCITRAL (Partial Award) (19 August 2005).

34 *Noble Ventures Inc v Romania*, ICSID Case No ARB/01/11 (Award) (12 October 2005).

35 Treaty between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment (4 November 2005), Art 5(2)(b).

36 *CME Czech Republic BV v Czech Republic*, UNCITRAL (Partial Award) (13 September 2001).

37 ibid ¶ 613.

38 *Lauder v Czech Republic*, UNCITRAL (Award) (3 September 2001).

39 On this point, see *Suez, Sociedad General de Aguas de Barcelona SA, and Vivendi Universal SA v The Argentine Republic*, ICSID Case No ARB/03/19 and *AWG Group Ltd v The Argentine Republic*, UNCITRAL (Decision on Liability) (30 July 2010) ¶ 177.

40 *Azurix v Argentine Republic*, ICSID Case No ARB/01/12 (Award) (14 July 2006).

41 *Occidental Exploration and Production Co v The Republic of Ecuador*, LCIA Case No UN3467 (Final Award) (1 July 2004). The tribunal pointed out the fact that in some BITs fair and equitable treatment and full protection and security appear as a single standard, in others as separate protections. Under the BIT in question, the tribunal observed that, since 'fair and equitable treatment' and 'full protection and security' appeared sequentially, they constituted different obligations. The tribunal subsequently held:

> the Respondent has breached its obligations to accord fair and equitable treatment under Article II(3)(a) of the Treaty. In the context of this finding the question of whether in addition there has been a breach of full protection and security under this Article becomes moot as a treatment that is not fair and equitable automatically entails an absence of full protection and security of the investment.

ibid ¶ 187.

42 *Azurix v Argentine Republic*, ICSID Case No ARB/01/12 (Award) (14 July 2006) ¶ 406.

43 ibid ¶ 408.

44 *Parkerings-Compangiet AS v The Republic of Lithuania*, ICSID Case No ARB/05/08 (Award) (11 September 2007).

45 ibid ¶ 354, citing N Rubins and S Kinsella, *International Investment, Political Risk and Dispute Resolution* (Oceana Publications, 2005) to justify this proposition.

46 *Siemens v Argentina*, ICSID Case No ARB/02/8 (Award) (6 February 2007).

47 ibid ¶ 303.

48 *Saluka Investments BV (The Netherlands) v The Czech Republic*, UNCITRAL (17 March 2006) ¶ 484.

49 *BG Group plc v Republic of Argentina*, UNCITRAL (Award) (24 December 2007) ¶ 326.

50 *PSEG Global, Inc, The North American Coal Corp, and Konya Ingin Electrik Üretim ve Ticaret Ltd Sirketi v Republic of Turkey*, ICSID Case No ARB/02/5 (Award) (19 January 2007) ¶¶ 258–259.

51 *Rumeli Telekom AS and Telsim Mobil Telekomunikasyon Hizmetleri AS v Republic of Kazakhstan*, ICSID Case No ARB/05/16 (Award) (29 July 2008) ¶ 668.

52 *Suez, Sociedad General de Aguas de Barcelona SA, and Vivendi Universal SA v The Argentine Republic*, ICSID Case No ARB/03/19 and *AWG Group Ltd v The Argentine Republic*, UNCITRAL (Decision on Liability) (30 July 2010) ¶ 179.

53 See eg *Unglaube v Republic of Costa Rica*, ICSID Case No ARB/08/1 and ARB/09/20 (Award) (16 May 2012) ¶ 281 (rejecting the standard expressed by the tribunal in *Saluka*); *Total SA v Argentine Republic*, ICSID Case No ARB/04/01 (Decision on Liability) (27 December 2010) ¶ 343; *Frontier Petroleum Services Ltd v Czech Republic*, UNCITRAL (Final Award) (12 November 2010) ¶ 263; *Mohammad Ammar Al-Bahloul v Republic of Tajikistan*, SCC Case No V064/2008 (Partial Award on Jurisdiction and Liability) (2 September 2009) ¶ 246.

54 NAFTA Free Trade Commission, *Notes of Interpretation of Certain Chapter 11 Provisions* (31 July 2001) B(2).

55 Freeman (n 19 above).

56 R Dolzer, 'Fair and Equitable Treatment: A Key Standard in Investment Treaties' (2005) 39 Int'l Lawyer 87.

57 Dolzer and Schreuer (n 9 above) 119.

58 UNCTAD, *Fair and Equitable Treatment*, UNCTAD/ITE/IIT/11 (1999) vol 3, p 26.

59 UNCTAD, *International Investment Instruments: A Compendium* (1996) vol 1, p 4.

60 ibid vol 1, p 3.

61 The Bogota Agreement, Art 22 included the following provision:

> Foreign capital shall receive equitable treatment. The States therefore agree not to take unjustified, unreasonable or discriminatory measures that would impair the legally acquired rights or interests of nationals of other countries in the enterprises, capital, skills, arts or technology they have supplied.

62 This draft, prepared under the leadership of Herman Abs (Director-General of the Deutsche Bank) and Lord Shawcross (the UK Attorney-General), stipulated in Art 1 that 'each party shall at all times ensure fair and equitable treatment to the property of the nationals of the other Parties'. H Abs and L Shawcross, 'The Proposed Convention to Protect Foreign Investment: A Round Table: Comment on the Draft by the Authors' (1960) 9 J Pub L 119, 119–24.

12 Protection Against Expropriation, Nationalization, and Dispossession

From: The Law of Investment Treaties (2nd Edition)
Jeswald W. Salacuse

Content type: Book content
Product: Investment Claims [IC]
Series: Oxford International Law Library
Published in print: 01 May 2015
ISBN: 9780198703976

Subject(s):

Investor — Right to property — Expropriation — Specialized treaty frameworks — BITs (Bilateral Investment Treaties)

In the Yukos cases, the Russian government, apparently for political motives due to the fact that Yukos' principal shareholder Mikhail Khordokovsky was a political opponent of Russian President Vladimir Putin, caused its taxation authorities to launch a number of tax cases against Yukos, leading to the freezing of Yukos assets, the rendering of tax claims amounting to billions of dollars against the company, and ultimately the holding of auctions of Yukos assets to secure payment of those claims but which allowed state enterprises to obtain Yukos assets at bargain prices. Reviewing the complex facts of the cases, the arbitration tribunal concluded: 'the auction of YNG [Yukos' main oil production subsidiary] was not driven by motives of tax collection but by the desire of the State to acquire Yukos' most valuable asset and bankrupt Yukos. In short, it was in effect a devious and calculated expropriation by Respondent of YNG'.[35] It acknowledged, (p. 325) however, that 'Respondent has not explicitly expropriated Yukos or the holdings of its shareholders, but the measures that Respondent has taken in respect of Yukos … have had an effect "equivalent to nationalization or expropriation"',[36] an implicit reference to the language of Article 13 of the ECT which states that 'investment … shall not be nationalized, expropriated or subjected to measures having effect equivalent to nationalization or expropriation …'.

Where a situation presents a clear case of a taking or seizing control of an investor's assets, determining that an expropriation or nationalization has taken place is usually not difficult. However, a difficulty may arise in determining whether the asset expropriated is a protected 'investment' under the treaty. It should be noted that treaties do not protect all investor assets from expropriation—only those that are considered 'investments' under the relevant treaty. Chapter 7 discusses the meaning of 'investment' as it is used in investment treaties. Thus, in the *Swembalt* case, Latvia argued that the ship and the lease of the area where it was to be docked did not constitute an investment 'made in accordance with the laws and regulations' of Latvia, as required by the treaty, and therefore it was not protected against expropriation. The tribunal concluded otherwise in deciding in favour of the investors.

12.5 Indirect Expropriations, Nationalizations, and Dispossessions

In the investment climate of the early twenty-first century, direct expropriations happen infrequently. Far more frequent are *indirect* expropriations, situations in which host states invoke their legislative and regulatory powers to enact measures that reduce the benefits investors derive from their investments but without actually changing or cancelling investors' legal title to their assets or diminishing their control over them. There are various possible explanations for the shift by host governments from direct expropriations to regulatory actions that may constitute indirect expropriations. First, host states that need foreign capital may be reluctant to harm their countries' investment climate by taking the drastic and conspicuous step of openly seizing foreign property. Official acts that seize title or control of a foreign investor's property will attract negative publicity and are likely to do serious damage to the state's reputation as a site for foreign investments. Second, complex contemporary investment transactions, such as concessions, mineral development agreements, and long-term economic development contracts, which are based on shared benefits and risks between the host country and the investor are susceptible to being altered to the benefit of the host country through its regulatory power. In short, effective use of regulatory powers allows the host country (p. 326) to have many of the benefits of an expropriation without actually taking title or seizing control. And third, all host countries have a legitimate right to regulate investors and investments in their territory, but the precise boundary between legitimate regulation and acts that violate a Treaty's expropriation provisions is often difficult to determine. Thus, while the *Feldman* tribunal, quoted earlier, stated that recognizing a direct expropriation was relatively easy, it also said, 'it is much less clear when governmental action that interferes with broadly-defined

property rights … crosses the line from valid regulation to a compensable taking, and it is fair to say that no one has come up with a fully satisfactory means of drawing this line'.[37] This lack of a clear line between valid regulation and illegal indirect expropriation may lead governments to use their regulatory power more aggressively against foreign investments than they would otherwise, when they deem it in the public interest.

Because of these factors, cases alleging indirect expropriations have become increasingly important in recent years and instances of direct expropriations have become less frequent. An indirect expropriation leaves the investor's title untouched but significantly reduces an investor's ability to utilize or benefit from the investment. A typical feature of indirect expropriation is that the state denies the very existence of an expropriation and justifies its actions as a legitimate exercise of its regulatory or 'police powers', thereby rejecting the investor's claim of compensation.[38] In many cases, aggrieved investors will allege that a governmental action negatively affecting their investment is both an indirect expropriation and a violation of the fair and equitable treatment standard discussed in Chapter 10. For example, in arbitral decisions arising from the Argentine economic crisis at the beginning of the twenty-first century, tribunals found that governmental actions did not constitute an expropriation but did deny the investor fair and equitable treatment.[39]

In determining whether a regulatory action by a host state constitutes an indirect expropriation, tribunals look primarily to its effect on the investment rather than to the form of the state action or the intent of the government in making it. Thus, in the Energy Charter case of *Nykomb Synergetics Technology Holding AB v Latvia*, the claimant argued that the Latvian government's refusal to pay a double tariff, as was allegedly promised, constituted an 'indirect' or 'creeping' expropriation under Article 13(1), asserting that the denial of such a substantial part of the project's expected income made the enterprise economically unviable and the investment worthless. In that case, the tribunal said:(p. 327)

> regulatory takings may under the circumstances amount to expropriation or the equivalent of an expropriation. The decisive factor for drawing the border line towards expropriation must primarily be the degree of possession taking or control over the enterprise the disputed measures entail. In the present case, there is no possession taking of Windau or its assets, no interference with the shareholder's rights or with the management's control over and running of the enterprise—apart from ordinary regulatory provisions laid down in the production license, the off-take agreement, etc.[40]

Thus, despite the fact that a regulatory act may have a negative effect on an investment, expropriation will not be found if the investor retains control of the investment.

As numerous cases have indicated, in evaluating a claim of expropriation it is important to recognize a state's legitimate right to regulate and exercise its police power in the interests of public welfare. Such actions should not be confused with acts of expropriation. The *American Law Institute's Restatement (Third) of the Foreign Relations Law of the United States* underscores this point when it states that 'a state is not responsible for loss of property or for other economic disadvantage resulting from *bone fide* general taxation, regulation, forfeiture for crime, or other action that is commonly accepted as within the police power of states, if it is not discriminatory'.[41]

33 ibid ¶ 38.

34 Agreement between the Government of the Kingdom of Sweden and the Government of the Republic of Latvia on the Promotion and Reciprocal Protection of Investments (10 March 1992), Art 4(1), provides:

> (1) Neither Contracting Party shall take any measures depriving, directly or indirectly, an investor of the other Contracting Party of an investment unless the following conditions are complied with:
>
> (a) the measures are taken in the public interest and under due process of law;
>
> (b) the measures are distinct and not discriminatory; and
>
> (c) the measures are accompanied by provisions for the payment of prompt, adequate and effective compensation, which shall be transferable without delay in a freely convertible currency.

35 *Hulley Enterprises Ltd (Cyprus) v The Russian Federation*, PCA AA 226 (Final Award) (18 July 2014) ¶ 1037; *Yukos Universal Ltd (Isle of Man) v the Russian Federation*, PCA AA 227, (Final Award) (18 July 2014) ¶1037; *Veteran Petroleum Ltd (Cyprus) v the Russian Federation*, PCA AA 228 (Final Award) (18 July 2014) ¶ 1037 .

36 ibid ¶ 1580.

37 *Feldman v Mexico*, ICSID Case No ARB(AF)/99/1 (Award on Merits) (16 December 2002) ¶ 100.

38 Dolzer and Schreuer (n 9 above) 92.

39 eg *LG&E v Argentine Republic*, ICSID Case No ARB/02/1 (Decision on Liability) (3 October 2006); *CMS Gas Transmission Co v The Argentine Republic*, ICSID Case No ARB/01/8 (Award) (12 May 2005); *Sempra Energy International v The Argentine Republic*, ICSID Case No ARB/02/16 (Award) (28 September 2007).

40 *Nykomb Synergetics Technology Holding AB v Latvia*, SCC 118/2001 (Award) (16 December 2003) ¶ 4.3.1.

41 American Law Institute, *Restatement of the Law (Third), The Foreign Relations Law of the United States* (3rd edn, 1987) vol 1, § 712, Committee g.

42 *Waste Management, Inc v United Mexican States (No 2)*, ICSID Case No ARB(AF)/00/3 (Final Award) (30 April 2004) ¶¶ 143–144.

43 *Pope & Talbot Inc v The Government of Canada*, UNCITRAL (Interim Award) (26 June 2000) ¶¶ 96, 104.

44 *Metalclad Corp v Mexico*, ICSID Case No ARB(AF)/97/1 (Award) (30 August 2000) ¶ 103.

45 *Re Revere Copper and Brass Inc v Overseas Private Investment Corp* (Award) (24 August 1978) (1978) 17 ILM 1321.

46 ibid 1348–53.

47 *Link-Trading Joint Stock Co v Department for Customs Control of the Republic of Moldova*, UNCITRAL (Final Award) (18 April 2002). See also *Burlington Resources, Inc v Republic of Ecuador*, ICSID Case No ARB/08/5 (Decision on Liability) (14 December 2012) ¶ 393, which found that customary international law limits the power to tax in two ways: taxes may not be discriminatory and they may not be confiscatory.

ANNEX 198

8 Arbitration under Investment Treaties

Nigel Blackaby, Constantine Partasides QC, Alan Redfern, Martin Hunter

From: Redfern and Hunter on International Arbitration (6th Edition)
Nigel Blackaby, Constantine Partasides, Alan Redfern, Martin Hunter

Content type: Book content
Product: Investment Claims [IC]
Published in print: 01 September 2015
ISBN: 9780198714248

Subject(s):
Investment — Investor

8.112 It is clear that there is significant overlap between the customary and the treaty standards, and that the distinctions between the two 'may well be more apparent than real'.[222] In recent years, BIT tribunals have 'seemed to be less interested in the theoretical discussion on the relationship between the FET and the MST [minimum standard of treatment] and turned their attention primarily to the content (p. 482) of the FET [fair and equitable treatment] obligation, whether or not it is qualified by the MST'.[223]

(c) Full protection and security

8.113 As in the case of 'fair and equitable treatment', it is difficult to give a precise meaning to the notion of 'full protection and security'. However, its scope may be illustrated by reference to its practical application. In contrast with most of the other investor protections, which impose restrictions or prohibitions on certain types of host state activity, the 'full protection and security' clause seeks to impose certain positive obligations on the host state to protect investments.

8.114 Arbitral tribunals have traditionally found breaches of the 'full protection and security' obligation in situations in which the host state failed to prevent physical damage to qualifying investments by not taking measures that fell within the normal exercise of governmental functions of policing and maintenance of law and order.[224] In *AAPL v Sri Lanka*,[225] the tribunal held that Sri Lanka violated its obligation of full protection and security by not taking all possible measures to prevent the destruction of an investor's shrimp farm and the killing of more than twenty of its employees during a counterinsurgency operation.

8.115 The standard applied is one of 'due diligence', or an *obligation de moyens*, requiring the host state to exercise reasonable care, within its means,[226] to protect investments, rather than a 'strict liability' standard. However, there is no need for the claimant to establish negligence or bad faith.

8.116 The obligation of the host state to provide full protection and security to investors is independent, and not relative to the level of protection provided by the state to its own nationals or to nationals of other states. Therefore the fact that the state did not protect the property of its own nationals is no defence to a claim by an investor of breach of this obligation.[227] However, the resources available to a (p. 483) state and the reasonable deployment of those resources will be elements that are taken into account. For example, if, in the context of civil disturbances, a factory belonging to a foreign investor were burned down because all of the police were protecting a neighbouring domestically owned installation, liability might well be established. If, however, the police were fully engaged in protecting the population, and many local businesses, whether locally or foreign-owned, were damaged, it may be difficult to establish liability.

8.117 Whilst this standard has normally been applied in situations of physical protection of real and tangible property, its scope has been extended to other circumstances.[228] For instance, it has been held that withdrawal of an authorisation vital to the operation of the investment amounts to a breach of 'full protection and security'.[229] Similarly, a change in the legal framework, making it impossible to preserve and continue contractual arrangements underpinning the investment, has also been found incompatible with a BIT's 'full protection and security' provision.[230]

(d) No arbitrary or discriminatory measures impairing the investment

8.118 Most investment treaties impose an obligation upon the host state not to impair the management or operation of the investment by arbitrary or discriminatory measures.[231] For instance, Article II(3)(b) of the United States–Ecuador BIT[232] provides: 'Neither Party shall

212 See Dolzer and Stevens, *Bilateral Investment Treaties* (Martinus Nijhoff, 1995), p. 59; *BG Group PLC v Republic of Argentina*, Final Award, UNCITRAL, 24 December 2007, IIC 321 (2007), at [275]–[310].

213 *Neer v Mexico*, Opinion, United States–Mexico General Claims Commission, (1926) 4 RIAA 60, at 61–62.

214 Paulsson and Petrochilos, 'Neer-ly misled?' (2007) 22 ICSID Rev—Foreign Investment LJ 242, at 257.

215 Mann, 'British treaties for the promotion and protection of investments' (1981) 52 BYIL 241, at 244.

216 See, e.g., *Enron Corporation and Ponderosa Assets LP v Argentine Republic*, n. 188, at [258]; *Compañia de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic*, Award, n. 177, at [7.4.5]. See generally Schreuer and Dolzer, *Principles of International Investment Law*, n. 160, pp. 137–138.

217 The content of the international minimum standard is itself open to debate: see UNCTAD, *Fair and Equitable Treatment*, Series on Issues in International Investment Agreements (UN, 1999), available online at http://unctad.org/en/Docs/psiteiitd11v3.en.pdf, pp. 39–40. See also Paulsson and Petrochilos, 'Neer-ly misled?' (2007) 22 ICSID Rev—Foreign Investment LJ 242.

218 *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic*, Decision on Annulment, n. 77, at [7.4.7].

219 *Pope & Talbot Inc. v Government of Canada*, Award on Damages, UNCITRAL, 31 May 2002, IIC 195 (2002), at [52] and [55]; *International Thunderbird Gaming Corporation v The United Mexican States*, Award, n. 206, at [194].

220 *Mondev International Ltd v United States of America*, Final Award, ICSID Case No. ARB(AF)/99/2, IIC 173 (2002).

221 Ibid., at [116].

222 *Saluka Investments BV v Czech Republic*, Partial Award, n. 189, at [292]–[295]. See also *CMS Gas Transmission Co. v Republic of Argentina*, n. 200, at [284]:

> While the choice between requiring a higher treaty standard and that of equating it with the international minimum standard might have relevance in the context of some disputes, the Tribunal is not persuaded that it is relevant in this case. In fact, the Treaty standard of fair and equitable treatment and its connection with the required stability and predictability of the business environment, founded on solemn legal and contractual commitments, is not different from the international law minimum standard and its evolution under customary law.

223 UNCTAD, *Fair and Equitable Treatment: A Sequel*, Series on Issues in International Investment Agreements II (UN, 2012), available online at http://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf, p. 59.

224 *Asian Agricultural Products Ltd (AAPL) v Republic of Sri Lanka*, Final Award, n. 14; *American Manufacturing and Trading Inc. v Republic of Zaire*, Award, n. 64; *Rumeli Telekom AS and Telsim Mobil Telekomunikasyon Hizmetleri AS v Republic of Kazakhstan*, Award, ICSID Case No. ARB/05/16, IIC 344 (2008). See generally Schreuer, 'Full protection and security' (2010) 1 J Intl Disp Settlement 353.

225 *Asian Agricultural Products Ltd (AAPL) v Republic of Sri Lanka*, Final Award, n. 14.

226 *Pantechniki SA Contractors & Engineers v Republic of Albania*, Award, n. 129, at [81]–[84].

227 *American Manufacturing and Trading Inc. v Republic of Zaire*, Award, n. 64.

228 *Waguih Elie George Siag and Clorinda Vecchi v Arab Republic of Egypt*, Award, ICSID Case No. ARB/05/15, IIC 374 (2009), at [445]–[448]; *AES Summit Generation Ltd and AES-Tisza Erömü Kft v Republic of Hungary*, Award, ICSID Case No. ARB/07/22, IIC 455 (2010), at [13.3.2]; *Marion Unglaube and Reinhard Unglaube v Republic of Costa Rica*, Award, ICSID Case Nos ARB/08/1 and ARB/09/20, IIC 554 (2012), at [281]. Other tribunals, however, have rejected this extension of the standard: see, e.g., *Rumeli Telekom AS and Telsim Mobil Telekomunikasyon Hizmetleri AS v Republic of Kazakhstan*, Award, n. 224, at [668]–[669]; *AWG Group Ltd v Argentine Republic*, Decision on Liability, UNCITRAL, 30 July 2010, IIC 443 (2010), at [174]–[177].

229 *Antoine Goetz and ors v République du Burundi*, Award, ICSID Case No. ARB/95/3, IIC 16 (1999), at [125]–[131].

230 *CME Czech Republic BV (The Netherlands) v Czech Republic*, Partial Award, n. 156, at [613]; *National Grid Plc v Argentine Republic*, Award, UNCITRAL, 3 November 2008, IIC 361 (2008), at [189]; *Azurix Corporation v Argentine Republic*, Award, n. 189, at [408].

231 Not all investment treaties use the term 'arbitrary'; some instead refer to 'unreasonable or discriminatory' measures. As explained by the tribunal in *National Grid*, n. 230, at 197, the terms are synonymous: 'It is the view of the Tribunal that the plain meaning of the terms "unreasonable" and "arbitrary" is substantially the same in the sense of something done capriciously, without reason.'

232 Treaty between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment, signed on 27 August 1993, entered into force on 11 May 1997.

233 *Case Concerning Elettronica Sicula SpA (ELSI) (United States of America v Italy)*, Judgment, 15 ICJ 76 (1999), ICGJ 95 (1989). See also *LG&E Energy Corporation and ors v Argentine Republic*, Decision on Liability, n. 147, at [158]. For a definition based on the plain meaning of the term 'arbitrary', *see Azurix Corporation v Argentine Republic*, Award, n. 189, at [392] ('In its ordinary meaning, "arbitrary" means "derived from mere opinion", "capricious", "unrestrained", "despotic" ').

234 *ELSI*, at [128].

235 Decision on Jurisdiction and Liability ICSID Case No. ARB/06/18, IIC 424 (2010).

236 Ibid., at [262].

237 *Azurix Corporation v Argentine Republic*, Award, n. 181, at [393].

238 *El Paso Energy International Co. v Argentine Republic*, Award, ICSID Case No. ARB/03/15, IIC 519 (2011), at [319]–[325].

239 *LG&E Energy Corporation and ors v Argentine Republic*, n. 147, at [262].

240 *Marion Unglaube and Reinhard Unglaube v Republic of Costa Rica*, Award, n. 228, at [263].

241 *The Loewen Group Inc. and Raymond L Loewen v United States of America*, Award, n. 206, at [127]. The tribunal was considering the judgment of a US trial court. The tribunal observed that bad faith or malicious intention is not an essential element of unfair and inequitable treatment, and it is sufficient if there is a lack of due process that offends a sense of judicial propriety. Although the tribunal found the trial court proceedings to be

ANNEX 199

Date of Dispatch to the Parties: February 21, 1997

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

AMERICAN MANUFACTURING & TRADING, INC.

v.

REPUBLIC OF ZAIRE

ICSID Case ARB/93/1

AWARD

RENDERED BY THE ICSID ARBITRAL TRIBUNAL

composed of

Mr.	Sompong	SUCHARITKUL	President
Mr.	Heribert	GOLSONG	Arbitrator
and			
Mr.	Kéba	MBAYE	Arbitrator
Mr.	Nassib	ZIADE	Secretary

AWARD

RENDERED BY THE ARBITRAL TRIBUNAL

Constituted under the Auspices
of the International Centre for Settlement of Investment Disputes
(ICSID)

in the Matter

AMERICAN MANUFACTURING & TRADING, INC.

v.

REPUBLIC OF ZAIRE

(ICSID CASE ARB/93/1)

Appearance before the Tribunal

For : AMT	For : ZAIRE
Mr. Hassan YAHFOUFI	Mr. Manzila LUNDUM SAL'ASAL
Mr. Daniel D. DINUR	H.E. Mr. Ramazani BAYA
	(designated without appearance)

PART ONE : INTRODUCTION

I : INSTITUTION OF ARBITRAL PROCEEDINGS

1.01 American Manufacturing & Trading Corporation (Zaire), Inc. (AMT), an American company incorporated in the State of Delaware of which the majority shareholders are nationals of the United States of America, addressed to the Secretary General of the International Centre for Settlement of Investment Disputes (ICSID) a letter of 25 January 1993, instituting arbitral proceedings against the Republic of Zaire by virtue of Article 36 of the Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States, of 18 March 1965 (the CONVENTION).

1.02 After acknowledging receipt of this request for arbitration on 26 January 1993, the Secretary General transmitted on the same day a copy of said request to the Republic of Zaire delivered by special courier to the Minister of Plan of Zaire at Kinshasa, as well as by a registered letter addressed to the Ambassador of Zaire in Washington, D.C. The Secretary-General of ICSID registered the request on 2 February 1993.

1.03 The request of AMT is based on the provisions of a Bilateral Treaty concluded between the United States of America and the Republic of Zaire concerning the Reciprocal Encouragement and Protection of Investment (the BIT) of which the English and French text submitted by AMT was certified as true copy by the Secretary of State of the United States of America on 21 February 1995. The BIT was signed on 3 August 1984, and entered into force on 28 July 1989.

1.04 By letter of 2 July 1993, received by ICSID on 7 July 1993, the Claimant party informed ICSID of a change of name, and that it would hence forth be called "American Manufacturing & Trading, Inc."

1.05 In the Request for Arbitration (paragraphs 10, 11 and 15) as well as in the Additional Request of 16 March 1993, AMT in its final submission requests the Tribunal to adjudge and declare :-

(1) That the Republic of Zaire has violated the rights of AMT recognized and protected by the provisions of BIT of 1984;

(2) That the Republic of Zaire is thereby responsible for failing to fulfill its obligations of protection provided by the BIT, especially as regards the destructions caused by the elements of the armed forces of Zaire on 23-24 September 1991 and on 28-29 January 1993, in respect of damage to the properties and installations belonging to Société Industrielle Zaïroise (SINZA) Société privée à responsabilité limitée (SPRL) limited liability private company. 94 per cent of whose stocks are subscribed by AMT, including all losses suffered by SINZA as the result of the looting; and

(3) That the Republic of Zaire be condemned to pay to AMT, as a measure of compensation and as damages and interests, an indemnity equivalent to :

a) The fair market value of all the losses suffered by the investment of AMT in Zaire;

b) The loss of profits *(Lucrum Cessans)* which AMT would have acquired on its own behalf; and

c) The interests on the amount of compensation under a) and b) at a commercial rate equal to the appropriate international rate of interest for transactions in dollars from 23 September 1991 until the final payment.

1.06 Furthermore, AMT requests the Tribunal (paragraph 16 of the Request for Arbitration) to condemn the Republic of Zaire to pay for all the costs of the arbitral

proceedings, including the fees and expenses of the Members of the Tribunal, the charges for the use of ICSID facilities, as well as all other expenses incurred by AMT in the course of the proceedings, consisting of the total amount of the fees and expenses of its own counsel, advocates and other persons called upon to appear before the Tribunal, and the interests thereon calculated at a commercial rate equal to the appropriate international rate for transactions in dollars from the date of the rendering of the Award until the day of the final payment.

1.07 In its Request (paragraph 15), AMT asserts that in the report prepared by a branch office of Lloyds in Zaire on 14 November 1991, the direct losses were estimated at US$ 10,524,023, without prejudice to the calculation of the total amount of compensation and interests that AMT will subsequently present. In its submission of additional claims of 16 March 1993 (paragraph 3), AMT adds that the value of the goods taken, destroyed or looted during the incidents of 28-29 January 1993 is estimated at US$ 324.868.

II : CONSTITUTION OF THE TRIBUNAL

2.01 Without any positive reaction on the part of the Republic of Zaire to the notification of the Request for Arbitration by ICSID more than 60 days after 2 February 1993, the date of registration of the Request for Arbitration, above all with regard to the nomination of arbitrators, and in the absence of agreement between the Parties, AMT has opted as for the number of arbitrators for the formula to constitute the Tribunal in accordance with the provisions of Article 37 (2)(b) of the Convention which provides for an Arbitral Tribunal composed of three arbitrators : each Party appointing one arbitrator and the President of the Tribunal appointed by agreement of the Parties.

2.02 At the same time, AMT has nominated Mr. Heribert GOLSONG, of German nationality as arbitrator and proposed Mr. Robert COUZIN, of Canadian nationality, as President of the Arbitral Tribunal in accordance with Article 3 (1)(a) of the ICSID

Arbitration Rules. In the absence of any nomination by the Government of Zaire more than 90 days following the delivery of notification of registration of the Request for Arbitration to the parties, AMT has requested by its letter of 5 July 1993, addressed to the Chairman of the Administrative Council of ICSID, to appoint the arbitrator not yet appointed and to nominate the arbitrator to perform the function of the President of the Tribunal in accordance with Article 4 (1) of the ICSID Arbitration Rules. The Chairman of the Administrative Council is bound to give effect to this request by AMT within 30 days following its receipt in accordance with Article 4 (4) of the Arbitration Rules, (letter of the Secretary-General of ICSID of 8 July 1993).

2.03 By a letter of 13 July 1993, ICSID informed the parties that the Secretary-General intended to recommend to the Chairman of the Administrative Council to appoint to the Tribunal Judge Kéba MBAYE and Professor Sompong SUCHARITKUL and to nominate Professor SUCHARITKUL as President of the Tribunal. Judge Kéba MBaye, national of Senegal, domiciled in Dakar, is a former President of the Supreme Court of Senegal and former Vice-President of the International Court of Justice. Professor Sompong Sucharitkul, national of Thailand, domiciled in San Francisco, United States, is a former member of International Law Commission and a former Ambassador of Thailand. He is currently Professor of Law at Golden Gate University School of Law. The appointments of these arbitrators as well as the nomination of the President of the Tribunal, have been confirmed by the Chairman *ad interim* of the Administrative Council of the Centre and communicated to the Parties on 26 July 1993.

2.04 Upon notification of the acceptance by Judge MBaye and Professor Sucharitkul, the Arbitral Tribunal of ICSID was thus constituted on 4 August 1993 in accordance with ICSID Arbitration Rule 6 (1). The establishment of the Tribunal and its composition were duly notified to the Parties on 4 August 1993. The Arbitral Tribunal is composed of :-

Mr.	Sompong	SUCHARITKUL	President
Mr.	Heribert	GOLSONG	Member
Mr.	Kéba	MBAYE	Member

Mr. Nassib G. Ziadé, Counsel, ICSID, was designated as Secretary of the Tribunal by the Secretary-General of ICSID.

III : PROCEDURAL DEVELOPMENTS

A. THE FIRST SESSION OF THE TRIBUNAL

3.01 On 1 October 1993, the Arbitral Tribunal held its first meeting with the Parties in Washington, D.C. This session was devoted exclusively to the questions concerning organization of the procedures to follow, including the written proceedings as well as the oral proceedings. In the absence of representation on the part of Zaire, the oral phase of the proceedings has become inevitable. The Tribunal fixed the time-limits for the filings of the Memorial and the Counter-Memorial by the Parties. The conclusion of the Tribunal were recorded in details in the Minutes of the Meeting for preliminary procedural consultation of 1 October 1993, of which a copy was distributed to each Party to the dispute.

B. WRITTEN PLEADINGS FILED BY THE PARTIES

3.02 In accordance with the time-limits fixed for the filing of written pleadings and the requests made by each Party in turn for extension of the time-limits thus fixed by the Tribunal, the Parties filed the following written pleadings :

a) The Memorial by the Claimant
on 9 December 1993;

b) The Counter-Memorial by the Respondent raising at the same time an objection to the jurisdiction of ICSID and of the Tribunal
on 30 May 1994;

c) The Reply by the Claimant, replying and making observations on the objection to the jurisdiction of ICSID and of the the Tribunal
on 17 June 1994;

d) The Rejoinder by the Respondent
on 19 July 1994.

3.03 a) The Memorial, filed by the Claimant on 9 December 1993 with 8 annexes, reiterated and consolidated the claims contained in the Request for Arbitration of 20 January 1993 and the Additional Request of 16 March 1993, giving an account of the events preceding and giving rise to the dispute between the Parties. The Memorial recalled the origin of the investments made by AMT which through SINZA was engaged in industrial and commercial activities in Zaire, namely, (a) the production and sale of automotive and dry cell batteries; and (b) the importation and resale of consumer goods and foodstuffs.

3.04 In its Memorial, AMT gave further details of the losses suffered by SINZA as the result of the destruction of property located in the industrial complex for the production of automotive and dry cell batteries and the looting on 23-24 September 1991 by certain members of the Zairian armed forces stationed at Camp Kokole in Zone de la Gombe. These soldiers also broke into the commercial complex and the stores, destroyed, damaged and carried away all the finished goods and almost all the raw materials and objects of value found on the premises. The commercial complex was reopened in February 1992, but since the second destruction of 28-29 January 1993, it was permanently closed.

3.05 In the Annexes, the Memorial estimated the total amount of compensation at US$ 14,339,610. This total comprises : (a) US$ 12,793,850 for the industrial complex in 1991; (b) US$ 1,220,900 for the commercial complex and the two stores in 1991; and (c) US$ 324,860 for the physical damage suffered by the commercial complex and the two stores in 1993.

3.06 AMT requested a sum of US$ 21,574,405 to be paid by the Government of Zaire as compensation, plus 8 per cent interest on this sum since 23 September 1991, and for the sum of US$ 305,368 since 30 January 1993. In addition, AMT claimed compensation for all expenses incurred in the course of the proceedings, the two reports of Lloyds for US$ 126,500, and all other expenses and fees paid by AMT including those of the Centre, of the Members of the Tribunal as well as of the Counsel and Advocate and other expenses that the Tribunal may consider appropriate.

3.07 In its Memorial, AMT based its claims on the provisions of Article 42 (1) of the Convention and on Articles II (4), III (1) and IV (2) of the BIT.

3.08 b) The Counter-Memorial filed by the Respondent on 30 May 1994, contained a summary of the facts, emphasizing that SINZA *"has been the object of looting in 1991, as it was indeed the case with all the others"*.

3.09 The Counter-Memorial raised several preliminary objections to the jurisdiction of ICSID and consequently to the competence of the Tribunal, on the ground of a defect in the status of AMT without the capacity to act in the name of SINZA. The Respondent challenged the jurisdiction of ICSID to entertain the case instituted by AMT, without the existence of a dispute between AMT and the Republic of Zaire, but in the actual case , the dispute was ultimately between SINZA, a Zairian Company, and the Republic of Zaire.

3.10 Zaire raised the objection based on AMT's failure to comply with Article VIII of

the BIT, requiring settlement of dispute by means of consultation between representatives of the two Parties and, failing that, by other diplomatic channels. The Counter-Memorial maintained that it was only after all these means had failed that it would have been possible to have recourse to ICSID Arbitration.

3.11 The Counter-Memorial raised another objection on the ground of inadmissibility of AMT's request for non-compliance with Articles II, IV and IX of the BIT without adducing any evidence that the State of Zaire *"has granted in like circumstances a treatment no less favorable to SINZA than it had accorded to its own nationals or companies"*.

3.12 Besides, Zaire relied on Article IX of the BIT which stipulates that the present Treaty (BIT) shall not supersede, prejudice, or otherwise derogate from the laws, regulations, administrative practices or procedures or adjudicatory decisions of either Party, basing itself on Zairian Ordinance Law No. 69-044 of 1 October 1966, relating to the injuries suffered as the result of the disturbances which declared inadmissible all actions based on general law in matters of civil liability, seeking to condemn the State to pay compensation for the losses or injuries suffered in connection with the riots or insurrections. The Counter-Memorial confirmed as a consequence that the claim made by AMT was inadmissible, because the Treaty under reference could not derogate from this legal provision on public policy matters.

3.13 Finally, the Government of Zaire raised an additional objection based on the inadmissibility of AMT's claim for violations of Articles 45 and 46 of the Code of Investment of Zaire, AMT being a United States company which has never made any direct investment in the State of Zaire, whereas SINZA, the direct investor for this purpose is a legal entity of Zairian nationality, exclusively empowered to institute arbitral proceedings under Article 45 of Zairian Investment Code.

3.14 c) The Reply, filed by AMT on 17 June 1994, answered the objections raised

by the Government of Zaire to the jurisdiction of ICSID and consequently to the competence of the Tribunal. AMT presented its observations on the questions of inadmissibility of its claims as to the jurisdiction of ICSID as well as its merits.

3.15 In its Reply, AMT rejected all the objections and exceptions raised by the Respondent, underlying the fact that it was AMT which was always the direct investor in Zaire, as majority stockholder of SINZA, an industrial corporation established in Zaire but deemed to be a legal entity of United States nationality for the purpose of ICSID jurisdiction.

3.16 In this Reply, the Claimant took occasion to propose the date for the hearing before the Tribunal in the course of the first week of September 1994. After consultation with the Parties, the Tribunal fixed the date of the beginning of hearing on 4 November 1994 at the headquarters of ICSID in Washington, D.C., and this date was communicated to the Parties by the Secretary of the Tribunal in his letter of 23 August 1994. On 13 October 1994, AMT requested that this date be postponed till after 4 November 1994. Upon this request, the Tribunal fixed 5 and 6 December 1994 as new dates for the hearing of the Tribunal at the offices of the World Bank in Paris.

3.17 d) The Rejoinder, filed by the Republic of Zaire on 19 July 1994, reconfirmed the position of the Government of Zaire as reflected in the Counter-Memorial and earlier documents, regarding lack of jurisdiction on the part of ICSID and the inadmissibility of AMT's claim, rejecting all allegations put forward by AMT in support of its claim for compensation plus interests, which the Claimant alleged that the State of Zaire had the duty to pay.

3.18 In short, the Republic of Zaire has never contended on the merit that the property of SINZA was not damaged. SINZA was actually subjected to the same plight as those who were victims of the looting of 1991 and 1993. But, the Rejoinder further maintained, that *"the question of compensation is something else, because none of these victims has ever received any treatment more favorable that that accorded to SINZA"*. To the best of the Government of Zaire's knowledge, no victim of the looting of 1991 and 1993 has been compensated by the Zairian Government, for which no proof of compensation was ever furnished by AMT.

3.19 In the end, the Republic of Zaire reaffirmed its disposition with regard to ICSID, which has never been one of disdain, as AMT had led to believe, and that it was a false accusation by AMT.

C. THE ORAL PROCEDURE

3.20 a) Representation of the Parties : By letter dated 2 November 1994, AMT communicated to ICSID the names of the persons composing its representation :

1. Mr. Hassan YAHFOUFI, President of AMT; and
2. Mr. Daniel D. DINUR, Counsel and Advocate.

Apart from these representatives, the following witnesses would give evidence before the Tribunal :

1. Mr. David W. NICHOLAS, a U.S. national;
2. Mr. Madioko Julian MUTSHUNU, a Zairian national; and
3. Mr. Firas Mohammad YAHFOUFI, a Lebanese national.

3.21 By a letter No. 130.03/000817, dated 30 November 1994, from Minister LUNDA-BULULU to the President of the Tribunal, the Government of Zaire nominated its representation to the oral procedure, as follows :

1. Attorney Manzila Lundum SAL'ASAL, Advocate of the Government in this case; and
2. His Excellency Mr. Ramazani BAYA, ambassador of the

Republic of Zaire to France.

3.22 b) The Oral Hearing By the above-cited letter of 30 November 1994, the Government of Zaire requested a postponement of the hearing until towards the end of January 1995. Having notified the Parties that the hearing could not at this stage be postponed and was as such maintained, the Tribunal held the sittings of the oral hearing in Paris on 5 December 1994 as scheduled, having also received a communication from the Claimant opposing any postponement of the hearing, (Procedural Order No. 2, 6 December 1994).

3.23 The oral hearing took place in Paris, as scheduled, at the offices of the World Bank on 5 and 6 December 1994. The Claimant, AMT, was represented by the persons previously designated. However, the Respondent remained without representation except in the person of a Counsellor of the Embassy without nomination, authorization or accreditation of any kind.

3.24 AMT thus proceeded to present its proofs and all grounds in support of its claims for reparation for the losses and injuries caused by members of the armed forces of Zaire during the destructions of 1991 and 1993 and the injurious consequences which ensued. The Tribunal heard the evidence given by two witnesses as well as a deposition of an expert concerning the assessment of compensation and interests thereon. The witnesses and the expert were questioned by the Arbitrators and by the President of the Tribunal on 5 December 1994, as provided by Article 35 of the Arbitration Rules.

D. PROCEDURAL ORDER NO. II

3.25 In the course of the hearing on 5 December 1994 at the offices of the World Bank in Paris, the Tribunal adopted a Procedural Order No. II, of which the relevant Paragraphs read as follows :

THE TRIBUNAL...

Having noted that the Respondent failed to present its case at the oral hearing, and

Having duly deliberated thereon,

GRANTS the Respondent a period of grace in accordance with Article 45 (2) of the ICSID Convention and ICSID Arbitration Rule 42, and in the present case

DECIDES to hold a supplemental hearing in Paris on 13 and 14 February 1995, provided that

a) The Republic of Zaire informs the Arbitral Tribunal that it agrees to cover the fees and expenses of the Arbitrators as well as the administrative fees related to such hearing, and

b) The Republic of Zaire deposits not later than 25 January 1995 the funds requested by the Secretary of the Tribunal in his letter of today's date to cover the fees and expenses referred to above.

3.26 The Republic of Zaire has not chosen to confirm either its intention to appear before the Tribunal in the course of the supplemental hearing scheduled for 13 and 14 February 1995, or its acceptance of the conditions stipulated in paragraphs a) and b) of the Procedural Order No. II, cited above. The supplemental hearing was thus never held in Paris.

3.27 The time has come for the Tribunal to pronounce upon the questions presented by the Parties as to the competence of ICSID and that of the Tribunal itself, as well as on the merit of the dispute. The Tribunal will therefore examine these questions

successively before reaching its conclusions.

PART TWO : QUESTIONS OF COMPETENCE

IV : GENERAL CONSIDERATIONS : OBJECTION TO THE COMPETENCE

4.01 The various procedural steps relating to the competence of the Tribunal have been mentioned and described in paragraphs 1, 2 and 3 above.

4.02 After the Tribunal had had its first session at the headquarters of ICSID in the absence of Zaire, the Respondent, the latter submitted a "Counter-Memorial" dated 30 May 1994. Zaire never failed to take that opportunity to express its gratitude to the Tribunal for acceding to its request for an extension of the time-limit for the filing of its Counter-Memorial.

4.03 In its Counter-Memorial, Zaire maintains that the Tribunal is incompetent to hear the case brought before it by AMT. In support of this proposition, Zaire resorts to the following :

- Lack of status;
- Incompetence of ICSID to consider the proceeding instituted before it by AMT;
- Non-compliance by AMT with Article VIII of Zaire-U.S. Treaty (BIT); and
- Violations of Articles II, IV and IX of the same Treaty.

Zaire further concludes that AMT's claim was inadmissible by reason of its violations of Articles 45 and 46 of the Zairian Investments Code.

4.04 In its Rejoinder of 19 July 1994, Zaire reiterates its argument regarding the

inadmissibility of AMT's claim for the reasons elaborated in the Counter-Memorial which Zaire reconfirms in its entity.

4.05 The core defense of Zaire consists in the argument that the Zairo-United States Treaty may well relate to the natural and juridical persons of the United States or Zairian nationality; and although AMT is clearly a U.S. company, it has never made any direct investment in its name in the Republic of Zaire. According to Zaire, AMT has furnished no proof whatsoever of its direct investment. Zaire indicates that AMT has merely participated, as a stockholder, in the investment made by SINZA, a Zairian company. Zaire thereupon concludes that SINZA, being a Zairian company, cannot benefit from the Zaire-U.S. Treaty. Deducing consequences from this observation, Zaire contends that the Centre is without competence, considering that the dispute in question is between a State and a national that same State, such a dispute has never entered into the scope of application of the Convention.

4.06 In its Rejoinder, Zaire denies ever entertaining any disdainful attitude towards the Tribunal and explains that its failures were due to the *"unfortunate and disastrous"* consequences triggered by the disturbances which happened to take place in the country.

4.07 The Tribunal notes that it has amply taken into consideration the circumstances referred to by Zaire throughout the proceedings. The Tribunal has in effect demonstrated a deep understanding in regard to Zaire.

4.08 In any event, as Zaire itself admits, it follows clearly from the facts of the case that Zaire has been in default, while invoking the incompetence of ICSID and of the Tribunal.

4.09 After having carefully examined the different arguments raised by Zaire to persuade the Tribunal to declare itself incompetent, the Tribunal has decided to join the preliminary objections to the merits of the case. On the other hand, the Tribunal deems

it its duty to ascertain whether it is properly seized of the case and that it shall, in all cases, examine the question of its own competence before embarking upon consideration of the merits of the case.

V. QUESTIONS RELATING TO THE COMPETENCE OF THE TRIBUNAL AND THAT OF ICSID

A. REGISTRATION OF THE REQUEST FOR ARBITRATION

5.01 The competence of the Tribunal is obviously derived from that of the Centre. One may presume that by registering the Request for Arbitration of AMT, the Secretary General of ICSID does not consider, *"on the basis of the information contained"* in the Request *"that the dispute is manifestly outside the jurisdiction of the Centre"*. In reality, the Secretary-General would not have registered this Request if, in accordance with Article 36 (3) of the Convention on the Settlement of Investment Disputes between States and Nationals of other States, it was otherwise. Nevertheless, this fact does not prevent the Tribunal from examining the competence of ICSID, because, evidently Article 36 (3) does not confer upon the Secretary-General of ICSID, responsible for the registration of Request, notably as concerns verification of the competence of the Centre, the task other than a mere obligation of an extremely light control which in the execution does not, in any sense, bind the Tribunal in any way in the latter's appreciation of its own competence or lack thereof. The Tribunal will still have a number of questions to raise and also to find answers thereto.

5.02 In the process, the Tribunal will have to apply, in the present case, in addition to the Convention and the Rules of Procedure for Arbitration proceedings (Arbitration Rules), the Bilateral Treaty between the United States of America and the Republic of Zaire concerning the Reciprocal Encouragement and Protection of Investment (BIT).

Neither Party has contested the applicability of this Treaty to the present case.

B. GROUNDS ADVANCED BY ZAIRE FOR ITS OBJECTIONS TO THE COMPETENCE

5.03 The Tribunal will now examine the different grounds upon which Zaire founds its objections to the competence. It will, in addition, inquire into every question relating to its competence, as is already indicated.

(1) First Ground : The three prerequisites of ICSID Competence

5.04 In the first place, the Tribunal must respond to the question whether ICSID is competent in the present case. The problem of competence of the Centre is treated in Article 25 of the Convention. For this purpose, three conditions are required :

a) There must be a legal dispute arising out of an investment;
b) The dispute must have arisen between a Contracting State and a national of another Contracting State; and
c) The parties must have consented to submit their dispute to the Centre.

5.05 The Tribunal will take up these three conditions for verification of the fulfillment.

(a) A LEGAL DISPUTE *(RATIONE MATERIAE)*

5.06 **Is it a legal dispute?**

Under Article 25 of the Convention, *"The jurisdiction of the Centre shall extend to any legal dispute..."*

In this regard, there does not seem to be the least discrepancy between the Parties and the Tribunal is of the view that there is clearly a legal dispute and not

a dispute of another nature, the dispute requiring the application of rules of law and calling for legal solutions.

(b) A DISPUTE BETWEEN A STATE AND A NATIONAL OF ANOTHER STATE *(RATIONE PERSONAE)*

5.07 **Is it a dispute between a Contracting State and a national of another Contracting State?**

The same Article 25 of the Convention expressly provides that the dispute must be between *"a Contracting State (or any constituent subdivision or agency of a Contracting State) and a national of another Contracting State"*. In this case, the Contracting State is the Republic of Zaire. The dispute is with AMT. Is AMT truly, in accordance with Article 25, *"a national of another Contracting State"*? Zaire admits that AMT is clearly a national of another Contracting State, the United States of America. The Tribunal, in turn, reaches the same conclusion. Article 25 (2) defines what is regarded as a national of a Contracting State, as follows :

(a) "Any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and

(b) "Any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention."

5.08 The criticism of Zaire is not directed against the nationality of AMT but rather against its status or capacity to act. In effect, on its first ground in the Counter-Memorial, Zaire denies that AMT possesses any capacity to act in the present case. To support this argument, Zaire recalls that Article 1 of the Treaty identifies the beneficiaries of the advantages *"which it has in mind and cites, on the one hand the juridical person, national of one of the Signatory States of the Treaty..."*, and on the other, *"natural persons of Zairian nationality or of American nationality who invest in the United States or in the Republic of Zaire"*, and Zaire thus contends that AMT *"is not an investor in the Republic of Zaire"*. An investor, in the view of Zaire, is certainly SINZA in its own country, an investor in whose name AMT could not act. AMT therefore does not have the capacity to act, according to Zaire.

5.09 The Tribunal finds that the dispute is brought before the Centre by AMT. It does not consider it possible to contest that AMT is not a juridical person with United States nationality. Besides, an appropriate document has been filed with the Tribunal which clearly proves this fact. It suffices for this purpose to refer to the developments contained in paragraphs 4.03 to 4.05 above. Furthermore, it should be recalled, Zaire also recognizes this fact.

5.10 Indeed, Zaire denies that the dispute is with AMT. It regards the dispute rather as being with SINZA that has assumed the function of Claimant, since it is SINZA that has been established in the territory of Zaire, which has operated the industry damaged

by the destruction, the object of the dispute. Besides, Zaire continues, SINZA is a Zairian company and the dispute it has with Zaire would have to be settled in accordance with the normal law of Zaire, and not by and in accordance with the procedure provided by the ICSID Convention.

5.11 The Tribunal does not concur in the argument presented by Zaire because it does not find it pertinent. In fact, Zaire itself recognizes in its Reply (page 2, paragraph 2 (1) in fine) that AMT *"invested by participating in the capital of SINZA"*. But at the same time, Zaire contends that the fact that AMT participated in the capital even at one hundred per cent (100 %) to form a Zairian company, SINZA, does not confer upon AMT any power to act in the place and instead of SINZA.

5.12 This reasoning has not convinced the Tribunal. For the Tribunal, the Zaire-United States Treaty concerning the Reciprocal Encouragement and Protection of Investments (BIT) states, in its preamble, that "**The two States parties,** *desiring to promote greater economic cooperation between themselves*", particularly *"with respect to investment by nationals and companies of each Party in the territory of the other Party."*

5.13 And in Article I on definitions, it is provided in paragraph (a) that *"Company means any kind of juridical entity, including any corporation, company, association, or other organization, that is duly incorporated , constituted, or otherwise duly organized, regardless of whether or not the entity is organized for pecuniary gain, privately or governmentally owned, or organized with limited or unlimited liability."*

5.14 In paragraph (c) of the same Article I, the authors of the Treaty have made it even more abundantly clear when they define the term "investment". In effect, it is provided that the term *"investment" means every kind of investment, owned or controlled directly or indirectly, including equity, debt, and service and investment contracts;* and

includes : ..... *ii) "A company or shares of stock or other interests in a company or interests in the assets thereof."*

5.15 It is uncontested that SINZA belongs to AMT 94 per cent and that AMT, formed in the United States of America with 55 per cent of its shares owned by United States citizens, is controlled by the Americans, and hence is a U.S. company. Thus, SINZA should be considered in terms of the perfectly clear provisions of the Treaty as an investment of AMT. It follows that SINZA falls within the category of juridical person envisaged in Article 25 (2) of the Convention as previously cited. It is not called into question whether, as Zaire suggests, AMT can act in the name of SINZA. AMT acts in its own name and in its capacity as an American enterprise having invested in Zaire, that is to say, a national of a State party having a dispute with another State party which has welcomed his investments on its territory.

5.16 For the foregoing reasons, the argument based on the defect in the capacity of the Claimant must be rejected.

(c) THE CONSENT OF THE PARTIES TO THE DISPUTE *(RATIONE VOLUNTATIS)*

5.17 **Is there absence of consent of the Parties?**

The Tribunal will now examine, as earlier stated, whether the Parties have consented to submit the dispute to the Centre. Such a question is directly linked to the first ground already examined.

The first question that comes to mind is this : Is it necessary, in the present case, that there must be consent between the State (Zaire) and the national (AMT) of another State (U.S.A.), to submit the dispute to the Centre? The bilateral Treaty does not suffice since it provides that the disputes of the type to be considered by the Tribunal must be justiceable before ICSID.

In other words, does the consent of the United States creates an obligation for its national? Should there not be, in addition to that consent, also the consent by AMT itself relating to a specific dispute? Can the United States impose upon its national the passage of consent to ICSID? Or, better still, in the absence of AMT's consent, will the Treaty signed by the United States of America and Zaire suffice to take its place?

5.18 The Tribunal holds that this question must be answered in the negative. The requirement of the consent of the parties does not disappear with the existence of the Treaty. The Convention envisages an exchange of consents between the Parties. When Article 25 states in paragraph 1 that "the parties" must have consented in writing to submit the dispute to the Centre, it does not speak of the States or more precisely, it speaks of a State and a national of another State. It appears therefore that the two States cannot, by virtue of Article 25 of the Convention, compel any of their nationals to appear before the Centre; this is a power that the Convention has not granted to the States.

5.19 By the same token, reference should be made to Article VII, paragraph 2 of the Treaty, which provides : *"Each Party hereby consents to submit investment disputes to the International Centre for the Settlement of Investment Disputes (Centre) for settlement by conciliation or binding arbitration."* This provision is further clarified by paragraph 3, *in fine*, of the same Article VII which reads : *"If the dispute cannot be resolved through consultation and negotiation, then the dispute shall be submitted for settlement in accordance with the applicable dispute-settlement procedures upon which the Parties to the dispute may have previously agreed."*

5.20 It appears clearly that if Zaire and the United States agree that the disputes of the type which is submitted to the Tribunal could be brought before ICSID, they have thus, each on its part, accepted the competence of ICSID to be eventually proceeded against by a national of the other co-contracting State. But this acceptance is not automatic for all disputes, the Parties in question, (that is to say, a State and a national of another State), remain masters of the procedure of their choice which they may deem appropriate

to apply in order to resolve an emerging dispute. This is the way it is necessary to understand the meaning of Article VII, paragraph 3, *"in fine"*, and sub-paragraph (a) of paragraph 4 of the same Article.

5.21 On the other hand, to be more convinced, it is enough to read paragraph 4 of Article VII of which sub-paragraph (b) is thus worded : *"Once the national or company concerned has so consented, either party to the dispute may institute proceedings before the Centre or Additional Facility at any time after six months from the date upon which the dispute arose"*, provided the *"dispute has not, for any reason, been submitted by the national or company for resolution in accordance with any applicable dispute settlement procedures previously approved by the parties to the dispute"*, and *"the national or company concerned has not brought the dispute before the courts of justice or administrative tribunals or agencies of competent jurisdiction of the Party that is a party to the dispute."*

5.22 Finally, it is convenient to cite the end of paragraph 4, which reads : *"If the parties to the dispute disagree over whether conciliation or binding arbitration is the more appropriate procedure to be employed, the procedure desired by the national or company concerned shall be followed."* A right of option is thus recognized for the national of the other contracting State.

5.23 It seems that upon reading this provision of the Treaty, it cannot be contended that consent of the parties to come before ICSID simply results from a pre-existing agreement by the United States and Zaire. It is therefore necessary to show that there has also been an agreement between the Parties, or in the absence of this agreement, it would have been necessary to apply Article VII, paragraph 4 *in fine* which confers upon a national of the other State the power to compel the State party to the dispute to appear before the Centre. This is very much the case before us.

In the present case, it happens that AMT (the national envisaged in paragraph 4)

has opted for a proceeding before ICSID. AMT has expressed its choice without any equivocation; this willingness together with that of Zaire expressed in the Treaty, creates the consent necessary to validate the assumption of jurisdiction by the Centre.

(2) **Other Supplementary Grounds Examined by the Tribunal**

5.24 The second ground raised by Zaire is founded on the fact that ICSID is competent only to entertain proceedings between nationals and juridical persons of different nationalities and the présent case is apparently a proceeding between SINZA, a Zairian corporation and the Republic of Zaire, the competence of the said ICSID is therefore not well-founded in this case.

5.25 The Tribunal has already found in paragraphs 5.06 to 5.16 above that the present case is in fact between AMT and Zaire, by virtue of the Convention and the Treaty between the United States of America and Zaire. The argument advanced by Zaire as its second ground cannot therefore be sustained, an argument which, in the ultimate analysis, is but an aspect of the first ground already rejected by the Tribunal.

5.26 In the third place, Zaire has raised a ground based upon AMT's failure to apply Article VIII of the Zaire-U.S. Treaty before instituting arbitral proceedings.

This Article provides that *"Any dispute between the Parties concerning the interpretation or application of this Treaty should, if possible, be resolved through consultations between representatives of the two Parties, and if this should fail, through other diplomatic channels."*

5.27 Zaire contends that, to the best of its knowledge, AMT has not used, as a prior requirement, the various means of dispute resolution referred to above, before addressing ICSID, and in so doing deduces from this fact that AMT has violated the above cited provision, which should entail rejection of its claim.

5.28 The Tribunal notes that Article VIII of the Treaty, as the title suggests *"Settlement of Disputes between the Parties concerning Interpretation or Application of this Treaty"*, does not relate to the dispute of the type which is brought before it, but rather the disputes between two signatory States as to the interpretation or application of the Treaty. It follows that this ground also must fail.

5.29 The fourth ground presented by Zaire is based on the alleged violation of Articles II, IV and IX of the Zaire-U.S. Treaty. Article II relates to the investments and prescribes the obligation of the parties to apply to these investments the most favorable treatment.

5.30 As for Article IV, it concerns compensation in certain circumstances.

5.31 These two provisions are clearly concerned with the merit of the case and the Tribunal does not see how they can be invoked to pre-empt the admissibility of AMT's claim, subject to the reservation regarding its soundness.

5.32 Consequently, the Tribunal declares these grounds inadmissible.

5.33 The fifth ground presented by Zaire is founded on the alleged violation of Article IX of the Zaire-U.S. Treaty. Article IX, entitled "Preservation of Rights", runs :

"This Treaty shall not supersede, prejudice, or otherwise derogate from :

(a) laws and regulations, administrative practices or procedures, or adjudicatory decisions of either Party;

(b) international legal obligations; or

(c) obligations assumed by either Party, including those contained in an investment agreement or an investment authorization,

whether extant at the time of entry into force of this Treaty or

thereafter, that entitle investments, or associated activities, of nationals or companies of the other Party to treatment more favorable than that accorded by this Treaty in like situations."

5.34 Zaire deduces from these provision that *"Ordinance-Law No. 69-044 of 1 October 1966 relating to losses and injuries caused by the disturbances, declaring inadmissible any action based on ordinary law in matters of civil liability and seeking to condemn the State to compensate for the damage caused either by riots or insurrections..."*, AMT's claim is inadmissible. This Treaty cannot derogate from the prescription of the above-cited ordinance-Law in public policy matters.

5.35 This way of proceeding cannot be retained by the Tribunal. In effect, the Treaty is supreme over the law. But what is more decisive is that Zaire gives to Article IX an interpretation which is untenable.

5.36 Certainly, the manner in which Article IX of the Treaty is formatted could mislead any reader and could entail an interpretation not in conformity with the object and purpose of the provisions in question. Such an interpretation would lead to an absurd result and an unacceptable fact. A careful reading, consistent with the title of the Article, clearly shows that a typographical error has tempted us to join the part of the Article starting with *"Whether extant at the time of entry into force of this Treaty or thereafter, that entitle investments....."* to paragraph (c) only, whereas, although the French word *"donne"* does not end with *"ent"* in French, and does not take a plural form, the end of paragraph (c) concerns points (a), (b), and (c), and has no other object but to preserve the treatments which would remain more favorable than those resulting from the Treaty. The format in the English version of Article IX reaffirms this method of viewing the provision.

5.37 It follows that this ground is also unfounded.

5.38 The sixth and final ground presented by Zaire is based in essence on its first ground, (that is to say, it is SINZA that has the capacity to act) and rests on the provisions of Article 45 of the Zairian Investments Code which provides for an arbitral proceeding organized by Articles 159 to 174 of Titles III and IV of the Code of Procedure of Zaire.

5.39 The Tribunal has already responded to this argument. This last ground is not well founded either.

5.40 It remains for the Tribunal to recall Article VII of the Treaty.

5.41 Under paragraph 3 of Article VII of the Treaty, the parties to the dispute shall initially seek to resolve the dispute by consultation and negotiation. And it is only when the parties have failed to settle their dispute by these two means of settlement that they have to resort to another method of settlement.

5.42 This ground is raised by the Tribunal *proprio motu*.

5.43 When Article VII is carefully read, it will become clear that the efforts of negotiation and consultation have not been slight. There have been serious endeavors. In fact, by way of illustration the Parties can agree on any of the third-party dispute settlement procedures, of which the decisions are non-binding, such as the machinery of enquiry available under the ICSID Additional Facility.

5.44 In the case on hand, there have been incontestably serious negotiation attempts undertaken by AMT. These endeavors are recalled in paragraphs 12 and 13 of the Request for Arbitration filed by AMT on 20 January 1993. They result profusely from the documents filed. Unfortunately, they have been without any success.

5.45 It follows that this last ground also is unfounded.

5.46 It thus appears that none of the grounds advanced by Zaire or by the Tribunal itself in support of lack of competence on the part of the Tribunal is valid and that the proceeding instituted by AMT before ICSID is perfectly admissible.

PART THREE : QUESTIONS OF MERIT

VI. THE RESPONSIBILITY OF THE STATE OF ZAIRE

6.01 After having examined the questions of competence, of the Centre as well as of the Tribunal, and having reached an affirmative conclusion, by discarding each of the grounds invoked by the Republic of Zaire in support of its objections to the competence and by dismissing *proprio motu* other conceivable grounds for declining jurisdiction by ICSID and the Tribunal itself, the Tribunal must now examine the questions of merit.

A. LEGAL BASIS OF STATE RESPONSIBILITY

6.02 Once the questions of competence have been determined in the affirmative, it is necessary in the first place to determine the legal basis of the right to compensation and consequently the quantum of the compensation.

6.03 AMT suggests in paragraph 11 of its Request for Arbitration dated 25 January 1993, and repeated in its Memorial of 8 December 1993 that the Republic of Zaire has breached its obligations arising out of the Bilateral Treaty between Zaire and the United States of America of 1984 (BIT). These obligations are incorporated in the various provisions of the BIT, in particular, Articles II (4), III and IV (1)(b) and (2)(b).

6.04 a) **Obligation of Protection and Security of Investment**

In the first place, AMT invokes its right to the treatment of protection and security corresponding to the obligation provided by Article II paragraph 4 of the BIT which reads :

ARTICLE II : TREATMENT OF INVESTMENT

(4) *"Investment of nationals and companies of either Party shall at all times be accorded fair and equitable treatment and shall enjoy protection and security in the territory of the other Party. The treatment, protection and security of investment shall be in accordance with applicable national laws, and may not be less than that recognized by international law..... Each Party shall observe any obligation it may have entered into with regard to investment of nationals or companies of the other Party."*

6.05 The obligation such as cited above contracted by the Republic of Zaire and the United States of America constitutes an obligation of guarantee for the protection and security of the investments made by nationals and companies of one or the other Party, in the case before us, by American nationals or companies, AMT, in the territory of Zaire, at Kinshasa. The obligation incumbent upon Zaire is an obligation of vigilance, in the sense that Zaire as the receiving State of investments made by AMT, an American company, shall take all measures necessary to ensure the full enjoyment of protection and security of its investment and should not be permitted to invoke its own legislation to detract from any such obligation. Zaire must show that it has taken all measure of precaution to protect the investments of AMT on its territory. It has not done so, by mere recognition of the existing reality of the damage caused while designating SINZA as the victim and alleging that its own national legislation has exonerated Zaire from all obligations to make reparation for the injuries sustained on its territory in the

circumstances such as those giving rise to the present dispute. In this regard, the Tribunal has demonstrated the contrary.

6.06 These treatments of protection and security of investment required by the provisions of the BIT of which AMT is beneficiary must be in conformity with its applicable national laws and must not be any less than those recognized by international law. For the Tribunal, this last requirement is fundamental for the determination of the responsibility of Zaire. It is thus an objective obligation which must not be inferior to the minimum standard of vigilance and of care required by international law.

6.07 The question to be considered relates to the means by which to ascertain whether there has been a breach of duty on the part of the State of Zaire in regard to its obligation of vigilance, such as provided by Article II paragraph 4 of the BIT to ensure the protection and security of the investment made by AMT in Zaire. What then is the practical criterion to determine the level of the precautionary measure to be taken by the receiving State consistent with the minimum standard recognized by international law? More particularly, what are the appropriate measures to be adopted by the Republic of Zaire in the circumstances to protect the security of the investment of AMT? Has Zaire taken any of these measures? These questions are not at all answered by Zaire.

6.08 It would not appear useful for the Tribunal to enter into the debate whether in the case on hand Zaire is bound by an obligation of result or simply an obligation of conduct. The Tribunal deems it sufficient to ascertain, as it has done, that Zaire has breached its obligation by taking no measure whatever that would serve to ensure the protection and security of the investment in question. The Tribunal finds that Zaire has breached the obligation it has contracted by signing the above-cited provisions of the BIT in the face of the events from which the ensuing disastrous consequences have been sufficiently described in the documents filed with the Tribunal. Zaire is responsible for its inability to prevent the disastrous consequences of these events adversely affecting the investments of AMT which Zaire had the obligation to protect.

6.09 *Res ipsa loquitur* : what has happened is self-explanatory without requiring extraneous proof. Yet, Zaire has never denied its breach of the obligation of vigilance. Simply, admits Zaire that it is SINZA which *"has been the object of looting in 1991 as indeed it was the case with all the others."* But, continues Zaire, AMT has not adduced any evidence to show that the State of Zaire *"has accorded in like circumstances a treatment less favorable to SINZA than that which it has accorded to its own nationals or companies."* Or else, Zaire could have contended that it has accorded to SINZA a treatment no less favorable in the circumstances than that which it has accorded to nationals or companies of any third State whatsoever.

6.10 If the argument advanced by Zaire does not seem altogether unfounded, the fact remains that Zaire has manifestly failed to respect the minimum standard required of it by international law. It should be added that Zaire has equally failed to perform a similar obligation with regard to a third State or all other third States. In effect, the argument advanced by Zaire that it has not accorded to nationals and companies of these States any protection or reparation, is not pertinent for the Tribunal. Since the repetition of breaches and failures to perform similar obligations it owes to third States will not in any way exonerate the objective responsibility of the State of Zaire for the breach of its obligation of the treatment of protection and security it owes to AMT by virtue of Article II paragraph 4 of the BIT.

6.11 Consequently, the reasoning presented by Zaire is not acceptable. The responsibility of the State of Zaire is incontestably engaged by the very fact of an omission by Zaire to take every measure necessary to protect and ensure the security of the investment made by AMT in its territory.

6.12 **b) Obligation to prevent losses resulting from the event envisaged in Article IV paragraph 1 (b)**

The engagement of the responsibility of the State of Zaire is more specifically reinforced by the provisions of Article IV paragraph 1 (b) of the BIT : titled : Compensation for Damages due to War and Similar Events", covering, in part the cases in which :

"1. Nationals or companies of either Party whose investments in the territory of the other Party suffer.....

(b) damages due to revolution, state of national emergency revolt, insurrection, riot or act of violence in the territory of such other Party..."

6.13 Without discussing for the moment the question of the quantum of appropriate compensatory indemnity, it suffices to confirm once more the engagement of the responsibility of the State of Zaire for all the losses resulting *"from riot or act of violence in the territory of such other Party"*, in this case, Zaire. Such is the case without the Tribunal enquiring as to the identity of the author of the acts of violence committed on the Zairian territory. It is of little or no consequence whether it be a member of the Zairian armed forces or any burglar whatsoever. This responsibility Zaire cannot set aside by invoking its own national legislation. It is an international obligation which Zaire has freely contracted within the framework of the BIT.

6.14 It is by the process of this two-fold reasoning based on the double legal foundation of the bilateral Treaty, either Article II (4), or Article IV (1)(b), or the combination of both provisions that the Tribunal arrived at the conclusion that the Republic of Zaire is inevitably responsible for the losses and damages resulting from the events of 23-24 September 1991 and of 28-29 January 1993, without having to determine by whom these losses were caused. And this falls directly within the scope of Article IV paragraph (1)(b) of the said Treaty, which serves at the same time to reinforce further the engagement of the responsibility of the State of Zaire for ensuring the protection and security of the investment made by AMT on the Zairian territory in accordance with

Article II paragraph 4 of the BIT, as well as the obligation to prevent the occurrence of any act of violence on its territory. It is the duty or obligation to prevent the occurrence of a given event that is at issue.

6.15 c) **Obligation to make restitution or to pay compensation for the destruction of property** ***"by the forces or authorities of the other Party which was not caused in combat action"***

Furthermore, AMT alleges in its Request for Arbitration and in its Memorial that the losses and damages suffered by SINZA resulted from *"the destruction of property by the forces or the authorities of the other Party which was not caused in combat action"*.

6.16 It is true that the damages and injuries sustained by AMT were not caused in combat actions. However, there has never been any claim that the injuries suffered in the course of the events of 23-24 September 1991 and of 28-28 January 1993 were caused in combat actions.

6.17 The only question that occupies the attention of the Tribunal up till now is whether there is a third reason to strengthen still further the responsibility of the State of Zaire with particular regard to the losses and damages suffered by AMT during the course of the above mentioned events. This third reason, if there ever was one, would merely serve as a complementary ground to engage the responsibility of the State of Zaire. The Tribunal could very well leave aside the question whether there is in reality a third legal basis in this case to engage once more the responsibility of Zaire for the same losses or injuries incurred to the detriment of AMT.

6.18 The Tribunal does not see any use in seeking to reach a definite conclusion to establish for the third time the responsibility of the Republic of Zaire, for the same losses and for the same injuries caused to the detriment of AMT. The Tribunal therefore refrains from making any pronouncement on this very question.

6.19 The Tribunal fails to see any usefulness in searching for yet an additional legal ground on which to found the responsibility of the State of Zaire by application of Article IV paragraph 2 (b) of the Zaire-U.S. Bilateral Treaty in favor of AMT. When it subsequently examines this question, it will not be to draw any conclusions regarding responsibility, but it will be simply to review the method of evaluation of the compensation due to AMT.

B. LEGAL CONSEQUENCES OF STATE RESPONSIBILITY

6.20 With the establishment of doubly reinforced legal foundation for the responsibility of the State of Zaire vis-a-vis AMT, it is now time to examine the legal consequences flowing from the ascertainment of international responsibility of the State of Zaire.

6.21 The delicate question that the Tribunal is called upon to consider is how the Tribunal should proceed to assess the amount of compensation or indemnification required by international law in order to restore to AMT the conditions previously existing as if the events had never occurred or taken place. This question may be better examined in the light of a critical analysis of the amount of compensation and interests thereon which the Tribunal must determine with precision and on a solid basis of a well-defined scientific measurement. Otherwise as an alternative, the Tribunal could have recourse to another path to follow, that of exercising its sovereign discretion to determine the amount of compensation to be paid to AMT by the Republic of Zaire, taking into account the actual injury suffered.

6.22 Zaire contends in its Rejoinder of 19 July 1994 that *"The Republic of Zaire has never claimed that the property of SINZA was never damaged. SINZA has been subjected to the same plight as all those who were victims of the looting in 1991 and 1993."* *"But"*, adds Zaire, *"the question of compensation is something else, because none of these victims has been accorded a treatment more favorable than SINZA."*

6.23 The question of the amount of compensation should be considered separately from the question of responsibility which has been definitively determined. Zaire has claimed that it has now fulfilled all the obligations it was bound to perform if only no one could provide any proof that Zaire had accorded a treatment in regard to indemnification or compensation more favorable than that it has accorded to SINZA or to AMT, the Claimant in the present instance. Zaire adds that, having offered no one any compensation, it has in this sense not violated the principle of equality and of non-discrimination of treatment.

6.24 The argument as presented above by the Republic of Zaire could only be appreciated by the Tribunal to the extent that Zaire had accorded a favorable treatment to one of its own nationals or companies or to one of the nationals or companies of any third State whatsoever. In the absence of such a treatment, there would not be any possible comparison to ascertain the level or even the type of the treatment, whether by means of restitution, compensation or indemnification, or else precisely Zaire has not accorded any indemnity, any compensation. Accordingly, the Tribunal does not find such an argument sustainable. The contention of the Republic of Zaire is untenable. It is therefore rejected by the Tribunal. The only remaining issue is that envisioned in Article II of the BIT, that is to say the treatment, the protection and security at least equivalent to *"those recognized by international law."* It is therefore upon this basis that the Tribunal will proceed to assess the compensation due to AMT.

PART FOUR : THE QUANTUM OF DAMAGES THE AMOUNT OF COMPENSATION

7.01 Having firmly established the responsibility of the State of Zaire for all the losses, injuries and damages sustained by AMT, and caused by the acts of violence committed

to the detriment of the investment made by AMT on the territory of Zaire, the Tribunal will now determine the quantum of compensation to be paid by Zaire regardless of the existence or absence of fault or independently thereof. Suffice it to prove that Zaire has not fulfilled its obligation of vigilance, and *a fortiorissime*, Zaire has also breached its obligation to prevent the occurrence of a given event, above all whether there have been acts of violence on the Zairian territory, giving rise to losses, damages and injuries sustained by AMT.

A. THE METHOD OF ASSESSMENT OF COMPENSATION

7.02 There are apparently several different methods of assessment of the quantum or the total amount of compensation plus interests thereon which should be equitable in the circumstances of the present case.

7.03 Two different criteria seem to attract the attention of AMT as Claimant. The first is the criterion reflected in the most favorable treatment as required by the minimum standard provided in Article II paragraph 4 of the Zaire-U.S. Bilateral Treaty. The second criterion preferred by AMT is the one proposed in Article III of the Treaty. This article, entitled "Compensation for Expropriation" provides for compensation *"equivalent to the fair market value of the expropriated investment"*. The said compensation shall *"include interests at a rate equivalent to current international rates from the date of expropriation, and be freely transferrable at the prevailing market rate of exchange on the date of expropriation"*. The case in hand is clearly not a case of expropriation. But can it be assimilated to expropriation? The answer of the Tribunal is in the negative.

7.04 AMT has invoked, in support of its preference, Article IV paragraph (2)(b) of the Zairo-U.S. Bilateral Treaty as the legal basis for its claim for compensation in accordance with Article III of the said Treaty, viewing the case as one of *"destruction*

of property by the forces or the authorities of the other Party which was not caused in combat actions". It appears that this choice was essentially prompted by AMT's preference as to the method of calculation of compensation and interests thereon which should be allocated to it (Article III of the BIT). But for the Tribunal, the essence lies in the determination with certainty the basis of the responsibility and on that basis it may proceed to fix the just compensation due to AMT.

7.05 It has never been alleged that the destructions in question, neither that of 23-24 September 1991 nor that of 28-29 January 1993, were caused in combat actions. It is necessary to ascertain further whether there was *"destruction of property by the forces or the authorities"* of the Republic of Zaire.

7.06 AMT maintains that the destructions of both events in September 1991 and January 1993 were committed by the Zairian armed forces from Camp Kokolo. It is true that they appeared to be (in whole or in part - in this regard, the Tribunal is not certain) soldiers in uniform with weapons of the army, including grenades and automatic weapons belonging to the armed forces. The question to be considered by the Tribunal is whether the destruction of property was committed by the Zairian forces or authorities not in combat actions in the sense of Article IV paragraph 2(b) of the BIT.

7.07 To obtain more precise clarification on sub-paragraph (b) of paragraph 2 of Article IV, it is sufficient to read carefully once more sub-paragraph (a) which speaks of requisition of property by "the forces" or "the authorities" of the other Party, an action which can be assimilated to expropriation. It is suddenly apparent that in fact this relates to the organized forces, which even according to the evidences furnished by the only witness heard in this case is not at all the case in the circumstances of this case.

7.08 In the present case, it is true from the information received that they were the military, at least persons in military attire who manifestly acted individually without any one being able to show either that they were organized or that they were under order.

nor indeed that they were concerted.

7.09 The nature of the looting and the destruction of property which were looted show clearly that it was not "the army" or "the armed forces" that acted as such in the circumstance. And this in no way resembles expropriation or requisition by the State.

7.10 And the fact that thereafter the President of the Republic of Zaire decided of his own accord to pardon these persons who acted in 1991 and in 1993 against the property of others does not alter anything in the circumstance. On the contrary, it clearly shows that they were separate individuals and not the forces that performed the action, because the Tribunal does not see how one could speak of a pardon similar to an armistice if it was the armed forces that acted in a given circumstance. An armistice may be either of a general or a personal character, but it must always refer to a determinate offense.

7.11 Moreover, an armistice or such a pardon to persons who acted in 1991 and in 1993 does not entail in international law the effect of exculpating for those receiving pardon save to the extent and from the point of view of Zairian law, and does not produce the result of exoneration for the responsibility of the State of Zaire in respect of the destruction of property belonging to nationals or companies and forming integral part of the investment made by them in Zaire.

7 12 The Tribunal does not consider it necessary to insist on this question beyond measure. In effect, its relevance is not here discussed as a foundation of the responsibility of Zaire. That is why the Tribunal prefers at this stage to concern itself with the method of calculation of the amount of compensation to which AMT is entitled because of the injury sustained.

7.13 As between the two methods of assessment of the amount of compensation to be paid to AMT by the Republic of Zaire, the Tribunal does not see any substantial difference in practice. In principle, it is necessary to asses the true value or the actual

market value of the properties destroyed or the losses suffered by AMT. Is it necessary to add on top of that also the current interest to the total sum of compensation from the date of each destruction occurring in the territory of Zaire? The answer of the Tribunal will have to take into account the existing conditions of the country and not by making abstraction based on a criterion for the assessment which does not correspond at all to the reality, nor to the current happenings in Zaire, nor indeed to the commercial and industrial activities of the Claimant.

7.14 AMT would have liked to adopt a method of calculating compensation including interests practicable in the normal circumstances prevailing in an ideal country where the climate of investment is very stable, such as Switzerland or the Federal Republic of Germany. The Tribunal does not find it possible to accede to this way of evaluating the damages with interests in the circumstance under consideration, in which it is apparent that the situation remains precarious and that the *lucrum cessans* or the loss of profits is not at all measurable without a solid base on which to found any profit to take or for predicting the growth or expansion of the investment made. It would be neither practical nor reasonable to apply the method of assessment of compensation in a way so far removed from the striking realities of the current situation.

7.15 Preferably, the Tribunal will opt for a method that is most plausible and realistic in the circumstances of the case, while rejecting all other methods of assessment which would serve unjustly to enrich an investor who, rightly or wrongly, has chosen to invest in a country such as Zaire, believing that by so doing the investor is constructing a castle in Spain or a Swiss chalet in Germany without any risk, political or even economic or financial or any risk whatsoever.

B. COMPENSATION FOR THE LOSSES SUSTAINED

7.16 For practical reasons founded on equitable principles, the Tribunal finds that the Republic of Zaire which is responsible in international law, is under a duty to

compensate AMT for the very losses which have been caused by the acts of violence and looting occurring in September 1991 and in January 1993.

7.17 In effect, the Republic of Zaire has pleaded in its Rejoinder that *"No one on earth could ignore the fact that for the past four years, the Republic of Zaire has been going through a most painful and unfortunate period in its history."* Zaire continues, *"This requires a benevolent and compassionate attention on the part of all our partners, even those who have encountered unfortunate and disastrous consequences, for there was a time when these same persons were enjoying the benefit of the good situation of the State of Zaire."*

7.18 The Tribunal has never denied the Republic of Zaire any opportunity to defend itself for the sake of good administration of justice. The Tribunal has never forsaken the principle of the right to be heard. Even without the Republic of Zaire entering an appearance to present its case, the Tribunal fully takes into account the situation in Zaire.

7.19 The Tribunal appointed Mr. Bernard Decaux, of French nationality, former civil servant of the World Bank, as independent expert for the purpose of evaluating the damages and losses suffered by Société SINZA (Zaire) in 1991/1993. Having assumed his functions to this end on 26 June 1996, the expert prepared and submitted his report on 5 September 1996 on the evaluation of the damages and losses suffered. According to the expert, the evaluation of the damages and losses suffered by Société SINZA (Zaire) in 1991/1993 is as follows :-

		US $
1.	**Damages to the equipments of the production line (dry cell and car battery)**	
	- Dry cell production line	1,750,000
	- Car baterry production line	1,465,000
	- Factory repair shop	72,500
	Subtotal	3,287,500

2.	**Damages to the building belonging to AMT**	
	- Factory building	311,000
	- Office building	28,500
	- Living quarters	86,600
	Subtotal	426,100
3.	**Value of goods damaged**	
	- In offices (furnitures and equipment)	22,500
	- In living quarters (furnitures and equipment)	25,900
	Subtotal	48,400
4.	**Losses suffered by AMT (looting)**	
	- Factory inventory	670,000
	- Vehicles	20,500
	- Merchandise and cash in the retail store	
	- Accounts receivable	
	- Appraisal fees	
	Subtotal	690,500
5.	**TOTAL (1+2+3+4)**	**4,452,500**

7.20 This report was submitted to the Parties. It was contested by AMT in its response of 15 October 1996. The Republic of Zaire has not submitted its observations.

7.21 Thus the Tribunal must now determine the amount of compensation. The Tribunal proceeds to exercise its discretionary and sovereign power to determine the quantum of compensation that the Republic of Zaire shall pay to AMT, taking into account all the circumstances of the case before it.

PART FIVE : THE DECISIONS OF THE TRIBUNAL

FOR REASONS STATED IN THE PRECEDING PARTS OF THE PRESENT AWARD,

THE TRIBUNAL UNANIMOUSLY DECIDES

(1) On the competence

- that the Tribunal is competent to adjudicate the dispute between the Parties which is within the jurisdiction of the Centre, being a legal dispute arising out of an investment between a Contracting State and a national of another Contracting State in accordance with Articles 25 and 41 of the said Convention;

(2) On the admissibility of the Request for Arbitration

- that the Request for Arbitration made in writing in the Request of 25 January 1993 is admissible;

(3) On the responsibility of the State of Zaire

- that the responsibility of the Republic of Zaire as the Respondent is constituted for all the damage caused by the events of 23-24 September 1991 and of 28-29 January 1993, the object of the claim for compensation by AMT;

(4) On the claim for compensation

- that the Republic of Zaire is condemned to pay to AMT for the injuries sustained by the latter (inclusive of the principal, interests and all other claims) an all-inclusive total sum of

U.S. Dollars 9,000,000 (nine million), carrying an overdue interest of 7.5 percent per annum from the date of this Award, if this amount is not paid within sixty days of the notification of the Award;

(5) On the expenses between the Parties to the arbitral proceedings

- that each of the Parties shall bear an equal share of the expenses incurred in the present arbitral proceedings, including the fees and expenses of the Tribunal, and the entirety of its own expenses and fees for its own counsel and others.
- that the Republic of Zaire shall in addition pay to AMT the sum of U.S. Dollars 104,828.96 representing one half of the costs of the proceedings for which advance payments have been made by AMT.

SO DECIDED

Heribert GOLSONG	Sompong SUCHARITKUL	Kéba MBAYE
Arbitrator	President	Arbitrator
Date : February 10, 1997	Date : Feb 5, 1997	Date :
Place : London	Place : San Francisco	Place :

* Individual opinions of Mr. Heribert GOLSONG and of Mr. Kéba MBAYE are attached to this Award in accordance with Article 48 (4) of the Convention.

ANNEX 200

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES (ICSID): WENA HOTELS LTD. V. ARAB REPUBLIC OF EGYPT (PROCEEDING ON THE MERITS)*

[December 8, 2000]

+Cite as 41 ILM 896 (2002)+

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Washington, D.C.

Wena Hotels Limited

v.

Arab Republic of Egypt

Case No. ARB/98/4

AWARD

President:	Monroe LEIGH, Esq.
Members of the Tribunal:	Prof. Ibrahim FADLALLAH Prof. Don. WALLACE, Jr.
Secretary of the Tribunal:	Mr. Alejandro A. ESCOBAR

In Case No. ARB/98/4

between

Wena Hotels Limited,

represented by

Mr. Emmanuel Gailliard; Mr. John Savage; and Mr. Peter Griffin of the Law Firm Shearman & Sterling

and

The Arab Republic of Egypt,

represented by

Mr. Eric A. Schwartz and Mr. Simon B. Stebbings of the Law Firm of Freshfields Bruckhaus Deringer; and

Counselor Osama Ahmed Mahmoud, and Counselor Hussein Mostafa Fathi from the Egyptian State Lawsuits Authority

THE TRIBUNAL,
Composed as above,
Makes the following Award:

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CERTIFICATE

Wena Hotels Limited

v.

Arab Republic of Egypt

(ICSID Case No. ARB/98/4)

I hereby certify that the attached is an additional true copy of the Award of the Arbitral Tribunal rendered in the above case, and of its accompanying Statement by Professor Don Wallace, Jr.

Certified copies of the Award and of its accompanying Statement were first dispatched to the parties on December 8, 2000. The Award, is therefore deemed to have been rendered on December 8, 2000, in accordance with Article 49(1) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

/s/
Ko-Yung Tung
Secretary-General

Annex 200

Washington, D.C., December 19, 2000

I. THE PROCEEDINGS

1. The present arbitration was initiated on July 10, 1998, when Claimant, Wena Hotels Limited ("Wena"),[1] filed a request for arbitration with the Secretary-General of the International Centre for Settlement of Investment Disputes ("ICSID"). The request was filed against Respondent, the Arab Republic of Egypt ("Egypt"), and asserted that "[a]s a result of Egypt's expropriation of and failure to protect Wena's investment in Egypt, Wena has suffered enormous losses leading to the almost total collapse of its business."[2] Wena requested the following relief:

> (a) a declaration that Egypt has breached its obligations to Wena by expropriating Wena's investments without providing prompt, adequate and effective compensation, and by failing to accord Wena's investments in Egypt fair and equitable treatment and full protection and security;
>
> (b) an order that Egypt pay Wena damages in respect of the loss it has suffered through Egypt's conduct described above, in an amount to be quantified precisely during this proceeding but, in any event, no less than USD 62,820,000; and
>
> (c) an order that Egypt pay Wena's costs occasioned by this arbitration, including the arbitrators' fees and administrative costs fixed by ICSID, the expenses of the arbitrators, the fees and expenses of any experts, and the legal costs incurred by the parties (including fees of counsel).[3]

The Acting Secretary-General registered the request for arbitration on July 31, 1998.

2. In accordance with Article 37(2)(a) of the Convention on the Settlement of Investment Disputes between States and nationals of Other States ("the ICSID Convention"), the parties agreed that the Tribunal was to consist of three arbitrators, one appointed by each party and the third, presiding, arbitrator, appointed by agreement of the parties or, in the absence of such agreement, by agreement of the two party-appointed arbitrators. Wena appointed Professor Ibrahim Fadlallah, a national of Lebanon, as an arbitrator. Egypt then appointed Hamzeh Ahmed Haddad, a national of Jordan, as an arbitrator. In accordance with Article 38 of the ICSID Convention, the Chairman of ICSID's Administrative Council was requested by Wena to appoint the third, presiding, arbitrator. The Center informed the parties that the Secretary-General of ICSID was planning to recommend Mr. Monroe Leigh, a United States national, for the Chairman's appointment. Having received no objection from either party, the Center informed the parties that the Chairman of the ICSID's Administrative Council had appointed Mr. Leigh as the arbitrator to be the President of the Arbitral Tribunal. Having received from each arbitrator the acceptance of his appointment, the Center informed the parties that the Tribunal was deemed to be constituted and the proceedings to have begun on December 18, 1998. The parties subsequently agreed that the Tribunal had been properly constituted under the provisions of the ICSID Convention.

3. The Tribunal held its first session, at the Permanent Court of Arbitration in The Hague, on February 11, 1999. During this first session, Egypt objected to the request for arbitration filed by Wena and expressed reservations as to the Tribunal's jurisdiction to hear the request.

4. The Tribunal, pursuant to Article 41(2) of the ICSID Convention, granted the parties an opportunity to brief the jurisdictional objections. The parties filed four sets of papers (including accompanying documentary annexes) with the Tribunal:

(1) Respondent's Memorial on its Objections to Jurisdiction (submitted on March 4, 1999);

(2) Claimant's Response to Respondent's Objections on Jurisdiction (submitted on March 25, 1999);

(3) Respondent's Reply on Jurisdiction (submitted on April 8, 1999); and

(4) Claimant's Rejoinder on Jurisdiction (submitted on April 22, 1999).

In its briefing, Egypt raised four objections to jurisdiction. First, Egypt asserted that it had "not agreed to arbitrate with the Claimant as it is, by virtue of ownership, to be treated as an Egyptian company."[4] Second, Egypt argued that "[t]he Claimant has made no investment in Egypt."[5] Third, Egypt claimed that "[t]here is no legal dispute between the Claimant and the Respondent."[6] Finally, Egypt contended that "[t]he Claimant's consent to arbitration in the Request for Arbitration is insufficient and its Request premature."[7]

5. The Tribunal heard oral argument on Respondent's objections to jurisdiction during a second session, at the offices of the World Bank in Paris, on May 25, 1999. During the session, Egypt withdrew two of its four objections. First, it noted that the "the papers that we have now been supplied as part of [Wena's briefing] do indicate at least a *prima facie* case that the Claimant has made an investment, that money was spent in the development and renovation of the hotels and that the money was paid for by the Claimant, rather than any other party."[8] Thus, "for the purpose of establishing jurisdiction only, the Respondent is willing to accept that an investment has been made."[9]

6. Second, Respondent also withdrew its procedural objections to Claimant's request for arbitration. As Egypt appropriately observed, even if the Tribunal had endorsed its objections, the alleged defects could have been easily rectified. Noting that "it is not our wish to raise argument simply for the purpose of being difficult or to delay," Egypt advised "that as far as that particular objection is concerned, we are prepared to forgo it."[10]

7. In its Decision on Jurisdiction dated June 29, 1999, the Tribunal concluded that Respondent's two remaining jurisdictional objections should be denied and that jurisdiction should be exercised over the dispute. Specifically, the Tribunal: (1) declined to adopt Egypt's contention that Wena should be treated as an Egyptian company for purposes of the Agreement for the Promotion and Protection of Investments between Egypt and the United Kingdom ("IPPA"),[11] and (2) found, without prejudice to the merits of the case, that Wena had at least alleged a *prima facie* legal dispute with Egypt.[12] The Tribunal proceeded to set a briefing schedule on the merits and proposed dates for oral argument.

8. On August 14, 1999, Professor Hamzeh Ahmed Haddad resigned from the Tribunal — apologizing that, as a result of his new duties as Minister of Justice for Jordan, he would no longer be able to continue as a member of the Tribunal. The Tribunal was reconstituted on September 14, 1999 with the appointment by Egypt of Mr. Michael F. Hoellering as the replacement for Professor Haddad.

9. The parties filed four sets of papers (each including voluminous accompanying documentary annexes) with the Tribunal addressing the merits of the case:

(1) Claimant's Memorial on the Merits (submitted on July 26, 1999);

(2) Respondent's Memorial on the Merits (submitted on September 6, 1999);

(3) Claimant's Reply on the Merits (submitted on September 27, 1999); and

(4) Respondent's Rejoinder on the Merits (submitted on October 18, 1999).

10. Regrettably, the session on the merits — which had been scheduled for November 15-18, 1999 — had to be postponed by the sudden hospitalization of Mr. Hoellering for a medical emergency. On November 15, 1999, Mr. Hoellering resigned from the Tribunal — apologizing for the inconvenience "this unexpected turn of events" had caused.

11. The Tribunal was reconstituted on December 9, 1999, with the appointment by Egypt of Professor Don Wallace, Jr. as the replacement for Mr. Hoellering. The Tribunal subsequently fixed a new schedule for oral argument on the merits.

12. The Tribunal heard witnesses and oral argument on the merits during its third session, at the offices of the World Bank in Paris, on April 25-29, 2000.[13] In lieu of closing argument, the Tribunal permitted the parties to file post-hearing briefs. The Tribunal also requested that the parties submit proposed findings of fact, chronologies of events and statements of their attorney's fees and costs. In accordance with this schedule, the parties filed a final round of papers with the Tribunal:

(1) Claimant's Post-Hearing Brief (submitted on May 30, 2000);

(2) Respondent's Post-Hearing Memorial (submitted on May 30, 2000);

(3) Claimant's Post-Hearing Reply (submitted on June 15, 2000); and

(4) Respondent's Post-Hearing Rebuttal Memorial (submitted on June 15, 2000).

13. On July 13, 2000, the Tribunal issued a Procedural Order concerning the introduction of certain documents into the proceeding subsequent to the hearing. As part of this Order, the Tribunal admitted into the record, without prejudice to their probative value, nine documents submitted by Wena with its Post-Hearing Reply brief[14] and a memorandum dated January 19, 1997 on the El-Nile Hotel prepared by Arthur Andersen & Co., which the Tribunal had received from the U.S. Agency for International Development.[15]

14. On November 1, 2000, the Secretary of the Tribunal issued a letter, advising the parties of the closure of the proceedings, pursuant to Arbitration Rule 38(1).

II. THE FACTS

15. This dispute arose out of long-term agreements to lease and develop two hotels located in Luxor and Cairo, Egypt. Having received voluminous submissions from the two parties and heard five days of oral testimony, the Tribunal hereby makes the following findings of fact:

A. U.K.-Egypt Agreement for the Promotion and Protection of Investments

16. On June 11, 1975, the United Kingdom and the Arab Republic of Egypt entered into an Agreement for the Promotion and Protection of Investments ("IPPA").[16] Under Article 2(1) of the IPPA, Egypt and the United Kingdom promised to "encourage and create favorable conditions for nationals or companies of other Contracting Party to invest capital in its territory." They also guaranteed that "[i]nvestments of nationals or companies of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party."[17] Finally, Egypt and the United Kingdom agreed that "[i]nvestments of nationals or companies of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation . . . in the territory of the other Contracting Party except for a public purpose related to the internal needs of the Party and against prompt, adequate and effective compensation."[18] As discussed in the Tribunal's previous Decision on Jurisdiction, Wena is a British company for purposes of the IPPA.[19]

B. Luxor and Nile Hotel Agreements

17. On August 8, 1989, Wena and the Egyptian Hotels Company ("EHC"), "a company of the Egyptian Public Sector affiliated to the General Public Sector Authority for Tourism"[20] entered into a 21 year, 6 month "Lease and Development Agreement" for the Luxor Hotel in Luxor, Egypt.[21] Pursuant to the agreement, Wena was to "operate and manage the 'Hotel' exclusively for [its] account through the original or extended period of the 'Lease,' to develop and raise the operating efficiency and standard of the 'Hotel' to an upgraded four star hotel according to the specification of the Egyptian Ministry of Tourism or upgratly [sic] it to a five star hotel if [Wena] so elects. . . ."[22] The agreement provided that EHC would not interfere "in the management and or/operation of the 'Hotel' or interfere with the enjoyment of the lease" by Wena and that disputes between the parties would be resolved through arbitration.[23] The lease was awarded to Wena in a competitive bid, after Wena agreed to pay a higher rent than another potential investor.[24]

18. On January 28, 1990, Wena and EHC entered into an almost identical, 25-year agreement for the El Nile Hotel in Cairo, Egypt.[25] Wena also entered into an October 1, 1989 Training Agreement with EHC and Egyptian Ministry of Tourism "to train in the United Kingdom . . . Egyptian nationals in the skills of hotel management. . . ."[26]

C. Events Leading up to the April 1, 1991 Seizures

19. Shortly after entering into the agreements, disputes arose between EHC and Wena concerning their respective obligations. Wena claims that it "found the condition of the Hotels to be far below that stipulated in the lease [and] withheld part of the rent, as the lease permitted."[27] In turn, Egypt claims that Wena "failed to pay rent due to EHC . . . and EHC in turn liquidated the performance security posted by Claimant."[28] In the view which the Tribunal takes of this case it is not necessary at this time to determine the truth of these conflicting allegations. It is sufficient for this proceeding simply to acknowledge, as both parties agree, that there were serious disagreements between Wena and EHC about their respective obligations under the leases.

20. On May 3, 1990, Wena instituted arbitration proceedings in Egypt against EHC concerning their disputes over the Luxor Hotel. In an award dated November 14, 1990, the *ad hoc* arbitral tribunal ordered EHC to make repairs to the Luxor Hotel and ordered Wena to pay its outstanding rental obligations.[29] Wena subsequently brought an action in the South Cairo Court to have the arbitration set aside.[30]

21. At about the same time, "toward the end of 1990," according to Wena's parliamentary consultant, Mr. Humfrey Malins, M.P., "rumour, I think, must have reached Mr. Faragy because he told me that there were rumours that there would be violence and the hotels would be violently seized back."[31] As a result, in December 1990, Mr. Malins traveled to Egypt to meet with the Egyptian Minister of Tourism, Minister Fouad Sultan, and the Egyptian Minister of the Interior, Minister Halim Moussa.[32] Mr. Malins recounted that "[b]oth Ministers gave me their separate, absolute assurances . . . that no violence could or would take place."[33]

22. Nevertheless, disagreements between Wena and EHC continued. On February 11, 1991, Mr. Nael El-Farargy, Wena's founder, wrote to Minister Sultan, seeking his intervention to resolve these on-going disputes as well as to offset financial difficulties caused by the Gulf War.[34] In his letter, Mr Farargy mentions that EHC had threatened to repossess the hotels through force:

> *officials from the Egyptian Hotels Company threatened to storm the hotels and expel us*, and this was after our Company had spent the sums previously outlined. The matter reached a point were [sic] the Chairman of the Board of Directors of the Egyptian Hotels Company issued a decision for his company to take possession of the Luxor Hotel without a legal ruling or any other measure [to support his decision].[35]

23. In response to Mr. Farargy's request, on February 26, 1991, Minister Sultan convened a meeting in his offices to "discuss the differences between the Egyptian Hotels Company and Wena. . . ."[36] The attendees at the meeting included the Minister, representatives of EHC (including EHC's Chairman, Mr. Kamal Kandil), and Wena's lawyer (Mr. Ahmad Al Khawaga). During the meeting, Minister Sultan declared that "[t]he Ministry took no pleasure from any misunderstandings with investors; however, at the same time it could not accept any excesses in respect of any of the Government's rights."[37] The Minister proposed a series of compromises between the parties. Wena, however, subsequently did not accept the Minister's proposals.[38]

24. On March 21, 1991, Mr. Kandil wrote to Minister Sultan, noting that Wena had refused to accept the Minister's proposals.[39] Mr. Kandil proposed to Minister Sultan:

> that the following steps be taken:
>
> (One) the Letter of Guarantee for the Nile Hotel be seized and the sum deducted from their debt;
>
> (Two) the contractual relationship for the two hotels be terminated;
>
> (Three) *the two hotels be taken and the license withdrawn*;
>
> (Four) list all development work at the two hotels and deduct it from their debt; and,
>
> (Five) in the even that the company is still in debt following these measures, proceedings should be taken to seize [the outstanding money] in the United Kingdom.[40]

Alternatively, Mr. Kandil suggested that Minister Sultan establish a 10-day grace period for Wena to "pay its debts," with the understanding, however, that "[i]n the event that the payment is not made, the license for the two hotels would be withdrawn and the Egyptian Hotels Company would take the measures that it view appropriate to preserve its rights."[41] Mr. Kandil closed the letter by advising Minister Sultan: "*We leave the matter to you.*"[42]

25. Marginalia on this March 21, 1991 letter (in Minister Sultan's handwriting), indicate that Minister Sultan telephoned the British Ambassador to Egypt, asking the Ambassador to ascertain Wena's response to the proposed compromises from the February 26, 1991 meeting.[43]

26. Contemporaneously, on March 25, 1991, Mr. Malins wrote to Minister Sultan asking for another meeting in mid-April or May to discuss the continued disputes between Wena and EHC.[44] Mr. Malins concluded his letter by requesting an understanding from the Minister that no actions would be taken until that meeting could occur: "please confirm what must surely be [sic] right, mainly that all matters be 'absolutely frozen,' with no detrimental action of whatever nature being taken pending our meeting. . . ."[45]

27. Minister Sultan personally did not reply to Mr. Malins' letter. Instead, although the letter had been sent to Minister Sultan and not EHC, on March 31, 1991, Mr. Kandil responded to Mr. Malins, referencing "your fax dated 25th March 1991, concerning your request for a meeting, — in your capacity as the parliament advisor for Wena Ltd. . . ."[46] Mr. Kandil mentioned the February 26, 1991 meeting and Wena's refusal to accept the proposed compromises. Mr. Kandil ended his letter by threatening that "the owning company will take all necessary measures to protect its rights which is considered a state ownership."[47]

D. Seizures of the Nile and Luxor Hotels (April 1, 1991)

1. Decision to Seize the Hotels

28. On March 27, 1991, EHC's Board of Directors met "to consider what action should be taken."[48] According to Mr. Munir Abdul Al-Aziz Gaballah Shalabi, of the Legal Affairs Division at EHC, the Board decided "to present

Wena with an ultimatum to implement" the proposed compromises from the February 26, 1991 meeting with Minister Sultan.[49] He further explained that "Wena having failed to meet the deadline, it was decided that EHC would take possession of the Nile Hotel."[50] Similarly, Mr. Yusseri Mahmud Hamid Hajjaj, EHC's Manager for the Upper Egypt Hotels Division at EHC, stated that "[faced] with [Wena's] breaches of contract, the board of directors of EHC had no choice but to issue its decision of March 27, 1991 to take over the Luxor Hotel and to place it under its own management with effect from April 1, 1991."[51]

29. The decision to seize the hotels was "confirmed by a resolution of the Chairman of the Board No. 215 of 1991, dated March 30, 1991."[52] Although this resolution is mentioned by Mr. Munir in his witness statement and is referenced in at least two contemporaneous documents,[53] a copy of this resolution was not provided to the Tribunal.

30. EHC purported to notify Wena of its decision to terminate both the Nile and Luxor Leases and to reclaim the Hotels in a letter from Mr. Kandil to Mr. Farargy dated March 30, 1991.[54] In the letter, Mr. Kandil stated that:

> the board of Directors of the [Egyptian Hotels] Company had decided:
>
> a — to terminate the two hotels Contracts.
>
> b — to receive the hotels and operate them *with knowledge of the owning company* starting form April 1, 1991.
>
> c — to complain to the courts and to the Public Prosecutor in order to recover [our] company's dues which amount to millions of Egyptian pounds and that are considered as public funds, either by legal or diplomatic . . . *means including freezing of your accounts receivable.*
>
> d — to warn security services to be aware of your arrival from abroad in order to present you to courts *to decide what you owe and to collect it.*[55]

However, there is no evidence that this letter was received before the seizures on April 1, 1991.[56] Of the two copies of the March 30, 1991 letter provided to the Tribunal, one was sent by registered mail to Wena's Gatwick Hotel in England and does not appear to have been received until April 5, 1991.[57] The second copy bears a fax legend indicating that the letter had been faxed by EHC and received by Wena on April 14, 1991.[58] Although Mr. Munir testified that the second copy had been faxed to Wena's offices in England on March 30, 1991, no fax cover sheet or confirmation sheet has been submitted to support this claim.[59]

31. In an Administrative Decision Number 216, dated March 31, 1991 and signed by Mr. Kandil, two EHC officials — Messrs. Fakhri Hamid Al-Batuti and Atif Abd Al-Al — were authorized to act on behalf of EHC "in respect of the Nile Hotel."[60] Mr. Yusseri was given the same authority concerning the Luxor Hotel.[61] EHC planned to evict Wena simultaneously from both hotels during the early evening on April 1, 1991 when they expected no resistance because "all the senior people of Wena would be taking the Ramadan breakfast at home. . . ."[62]

32. Egypt does not dispute "that the repossession by EHC of the Luxor and Nile Hotels and EHC's eviction of the Claimant from the Hotels on April 1, 1991 was wrong."[63]

2. Seizure of the Nile Hotel

33. On April 1, 1991, at approximately 6:15 p.m., Mr. Simon Webster and Ms. Angela Jelcic, Wena's foreign managers, left the Nile Hotel to have dinner at the nearby Nile Hilton Hotel.[64] Short thereafter, several buses owned by EHC arrived at the Nile Hotel.[65]

34. According to a statement made that evening to the Kasr El-Nile Police by Mr. Muhammad Abdul Hameed Wakid, an attorney for Wena Hotels, "about one hundred and fifty persons, some of whom were carrying sticks and cudgels, assaulted the hotel against us immediately after Ramadan breakfast."[66] When he "tried to enquire of them who they were they stated that they had come to seize the hotel according to instructions from the Chairman of the Board of Directors of their company to do so."[67] According to Mr. Wakid, "[t]hey seized all the keys of the offices and safes in which the company's funds and hotel receipts from the guests are deposited [and] seized the hotel in full and they threatened any person who resisted them and attacked them. . . ."[68]

35. Similarly, Mr. Tamim Foda, Wena's resident manager at the Nile Hotel, stated in a subsequent police deposition:

> At about 6:30 p.m., when it was time to take the fast breaking meal, I was reviewing some documents concerning my work . . . I have been surprised by violent knocking on the door and its breaking, shouting in the hall of the hotel and I saw three persons bursting into my office. They attacked me, slapping my face and breaking my eye-glasses. They took possession of my office by force and everything inside it. . . . I was prevented from getting in touch with anybody outside the hotel and they told me that all the telephones were cut. . . . I was entrusted to three persons holding rods and cudgels who took me out of the hotel by force and while I was going out I saw more than one hundred men inside the hotel, holding rods and cudgels, some of them were taking out a number of cartons, belongings and implements of the hotel to vehicles parking in front of the door of the hotel. I waited outside the hotel until arrival of the police when I was taken inside for inspection under guard of the police.[69]

36. Mr. Mostafa Ahmed Osman, Financial Manager for Wena, who was "taking my fast breaking meal at the restaurant on the ninth floor," reported being "surprised by strange and suspicious persons [who] took me downstairs by force holding my arms to the administrative offices on the mezzanine. . . ."[70] According to Mr. Osman, one of the EHC employees "threatened me, saying that he holds a licensed weapon and that he is ready to use it if I resist. He informed me that all communications inside and outside the hotel have been cut."[71]

37. A guest of the hotel restaurant, Mr. Sherif Ibrahim Mohamed Khalifa, who "was with my wife to take the fast breaking meal at the hotel as it is our favorite place," witnessed similar scenes.[72] In his statement to the police, Mr. Khalifa said that he "heard shoutings, sounds of breaking and crushing at the hotel."[73] When he went downstairs from the restaurant, he "found may [sic] person in the lobby, a state of absolute disorder, holding rods and some of them taking out carton cases and other things that I do not know, to vehicles parking in front of the hotel. These vehicles were bearing the badge of the Egyptian Hotels Co."[74] Afraid of "being attacked[,] I rushed out of the hotel with my wife."[75]

38. Another guest of the restaurant, Mr. Mohamed Sabry Ismail Emam, stated that he "heard shoutings and sounds of breaking coming from the side of the kitchen and somebody announcing in a loud voice that all the employees of the WENA HOTELS LTD have to go downstairs."[76] When he "tried to go downstairs escaping from this situation, one of the a/m took me downstairs and told me to go out quietly as the hotel had been seized by the Egyptian Hotels Co." and he noted several people "carrying carton cases and taking them to buses parking in front of the hotel, bearing the badge of the Egyptian Hotels Co."[77]

39. A *Daily Telegraph* article describing the seizure reported that "[o]ne British tourist said he was punched and gouged by 'semi-military types' who ordered him out of bed at 2 a.m."[78] The article also quoted a "British visitor" as saying:

> The new managers said we could stay, but I did not feel safe. They told me they were repossessing the hotel on government orders because of an argument between Wena managers and the authorities.[79]

40. Mr. Hany Mohamed Hassan Mohamed Wahba, a security guard at the Nile Hotel, also stated in a subsequent deposition to the police:

> While I was at the main entrance of the hotel, I saw a bus bearing the badge of the Egyptian Hotels Co. and numerous persons going into the hotel. They caught me and I was subject to personal searching. They were holding rods and cudgels and requested the key of the main door of the hotel. When I told them that I do not keep it and tried to inquire about the matter, as they were numerous, they tried to attack me and my colleagues.[80]

Mr. Wahba stated that he was taken "to the rear gate by force threatening me with the rods and cudgels."[81] As he was taken, Mr. Wahba "saw the guests of the hotel rushing out in a state of fear and terror caused by their bursting into the hotel in this savage way."[82] Mr. Wahba also reported seeing "a group of the a/m persons going upstairs and another group cutting the telephone wires, a third group burst into the reception and broke the cupboards containing the guests' registers."[83] Eventually, when he was released, Mr. Wahba "proceeded with a number of the employees of the WENA HOTELS LTD who were thrown out with me, to the Tourist Police where we informed verbally about the event. Then the Policeman came to the hotel."[84]

41. At approximately 8:45 p.m., Ms. Jelcic returned to the Nile hotel. She testified that she had just returned to her room when a group of men broke in, grabbed her and removed her from the hotel.[85] According to Ms. Jelcic, the men "had like Navy blue pants, dark pants, which is kind of unusual because they do not normally, you know, dress alike, so that gave me the illusion as if they were some sort of organization. . . ."[86] Ms. Jelcic testified that she and other Wena employees (including Mr. Webster) then stood outside the hotel, looking into the lobby where she says she noticed "about four gentlemen or so that were standing in the lobby, towards the back of the lobby, and they were radically different from the other people that were in the lobby. . . . [t]hey were very well groomed, very well dressed. . . ."[87] According to Ms. Jelcic, some of the Egyptian Wena staff "told me that they were Ministry of Tourism officials."[88] However, Ms. Jelcic admitted that she "personally did not recognize them, no, but my staff, obviously the staff that were there saw the people come into the hotel on previous occasions, so I had no reason to doubt them."[89] Mr. Webster also testified that, although he did not personally recognize any officials from the Ministry of Tourism, two of his Egyptian staff "said to me that there were officials from the Ministry of Tourism in the lobby at the time."[90]

42. Further evidence of their contemporaneous impression that the Ministry of Tourism was involved in the seizure of the Nile Hotel is reflected in the police statements that Ms. Jelcic and Mr. Webster made to the Kasr El-Nile police. Ms. Jelcic's statement, for example, begins "I would like to make a complaint, charge and case against the Egyptian Hotels Company and the Ministry of Tourism of Egypt."[91] Similarly, Mr. Webster's statement, which is titled "Against the Egyptian Hotels Company/Ministry of Tourism," concludes "[w]e therefore place and hold the Egyptian Hotel Company and Ministry of Tourism responsible for items as listed below and not returned immediately."[92]

43. However, in his testimony, Minster Sultan adamantly rejected the suggestion that Ministry officials might have been present during the seizure: "I am sure that none of them have been there. I am sure of that, and, please, those who are accusing the Ministry should have come up with physical evidence showing representatives of the Ministry were there."[93] Mr. Munir also testified that "[t]here was no official of the Ministry of Tourism" present during the seizure.[94]

44. According to Ms. Jelcic and Mr. Webster, Wena staff went to both the nearby Kasr El-Nile police station and the Tourist police station seeking assistance.[95] Although both Ms. Jelcic and Mr. Webster testified that — with the

exception of one, lone policeman who arrived two to three hours later — both police forces refused to assist Wena,[96] there is evidence that officers from Kasr El-Nile police did begin an investigation at around 11:00 p.m.[97]

45. The report by the Kasr El-Nile Police records that they were "informed by the Director of the Security Department in the El-Nile Hotel," perhaps Mr. Wahba, "that the Management of the Egyptian Hotels Corporation had previously sent a number of its employees to seize the hotel in full. . . ."[98] According to the report, four officers from the Kasr El-Nile police station went to investigate. When they arrived, they met with officials from EHC, who "presented to us a photocopy of the administrative order number 216 dated 31/3/1991 stamped and signed by Mr. Muhammad Kamal Qindeel, Chairman of the Board of Directors of the Egyptian Hotels Corporation."[99] During their investigation that evening, the Kasr El-Nile Police reported that "damage was noticed which resulted from the use of force to locks in the rooms of the secretaries, the resident manager and the administrative business and the room for [reception?] customers and the buffet and the room of the lawyer to the Wena Company who is resident in the hotel."[100]

46. As previously indicated, at approximately 1:00 a.m., Ms. Jelcic, Mr. Webster, and several other Wena employees went to the nearby Kasr El-Nile police station to file a complaint.[101] According to Ms. Jelcic and Mr. Webster, the police at first refused to let them make a statement, and then only would allow them to submit statements dealing with the loss of personal items, not the illegality of EHC's seizure.[102] Several other employees also prepared statements, reporting the loss of money, jewelry, watches, and other personal items.[103]

3. Seizure of the Luxor Hotel

47. Also on April 1, 1991, at approximately 7:00 p.m., several EHC employees, led by Mr. Yusseri, took possession of the Luxor Hotel.[104]

48. According to a subsequent statement to the Luxor police by Mr. Bahia El Din Abdel Hadi El Wakeel, a security guard at the Luxor Hotel, "more than 100 people from the EHC seized the Wena Hotel by force in spite myself and others responsible for the security and guards in the hotel presence at the time."[105] Mr. Wakeel also stated that "EHC forced their entry through by force . . . which caused panic, fear, and hysteria for the guests and employees."[106] Two other guards, Messrs. Ismael Ahmed Hefni and Ahmed Hamza Mostafa, made short statements, agreeing with Mr. Wakeel's description of events.[107]

49. Mr. Muhammad Nagib Al-Sayyid, Wena's General manager of the Luxor Hotel, also filed a police statement, asserting that, at approximately 7:00 p.m., EHC personnel entered his office, seized the hotel's papers and ordered him to leave the hotel.[108] Mr. Nagib reported the incident to the Luxor Tourist Police, who accompanied Mr. Nagib back to the hotel and subsequently opened an investigation into the seizure.[109]

50. These contemporaneous descriptions comport with the subsequent report by the Advocate General at the Office of the Assistant Attorney General for Upper Egypt, which concluded that EHC "broke into the Hotel . . . entered by force into the management office, broke open the doors and Offices of the Hotels Ltd. [and] forced the personnel they found there to quit the Hotel."[110]

E. Events Following the Seizures of the Nile and Luxor Hotels

51. Minister Sultan testified that he first learned of the seizures by reading the newspaper the next morning.[111] Minister Sultan stated that he "requested one of my associates to investigate the issue and we found that he [Mr. Kandil] is mistaken by taking the law into his hands. . . ."[112] Minister Sultan also testified that "we most probably discussed that with the Prime Minister. . . ."[113]

52. Minister Sultan repeatedly stated that he "was furious"[114] at EHC's decision to seize the hotels, that EHC's actions were "wrong,"[115] and that "[i]f I had the slightest idea about that incident, I would have immediately stopped it because during that time I was also involved in the SPP dispute. . . ."[116] However, Minister Sultan also admitted that he did not take any action to return Wena to the hotels, to punish EHC or its officials, or to withdraw the hotels licenses so that EHC could not operate the hotels.[117] Minister Sultan explained that by reinstating Wena "I would be taking again of siding [sic] with someone, whereas the dispute should be settled through arbitration or a court."[118]

53. From April 1, 1991 through February 25, 1992, the Nile Hotel remained in the control of EHC. The Luxor Hotel remained in EHC's control until April 21, 1992. During this time, Wena made several efforts to recover possession of the hotels — including seeking the assistance of officials in the United States and United Kingdom.[119] For example, on July 9, 1991, Mr. Farargy wrote to the Egyptian Ambassador to the United Kingdom, complaining about the apparent collapse of negotiations between Wena and a representative of the Egyptian government.[120] Apparently, also during this time, the Civil Defense Authority (which is responsible for fire safety) issued at least two reports — on May 22, 1991 and November 12, 1991 — about unsafe conditions at the Nile Hotel.[121]

54. On January 16, 1992, the Chief Prosecutor of Egypt ruled that the seizure of the Nile Hotel was illegal and that Wena was entitled to repossess the hotel.[122] However, the Nile Hotel was not immediately returned to Wena. On February 21, 1992, Mr. Webster wrote to the British Embassy in Cairo, complaining of Minister Sultan's "uncooperative stance" and the delays that Wena was experiencing in recovering the hotels: "if he [Minister Sultan] wishes to press settlement of account, then we too will press for settlement of monies outstanding to Wena."[123] Mr. Webster concluded his letter by saying that "[w]e are of the impression that the Minister is either poorly informed or part of the entire scheme."[124]

55. On February 25, 1992, the Nile Hotel was returned to Wena's control.[125] Just two days before the hotel was returned, on February 23, 1992, the Ministry of Tourism withdrew the Nile Hotel's operating license because of fire safety violations and "the hotel was closed down."[126] According to Mr. Munir, these safety violations had pre-dated EHC's seizure of the hotel in April 1991.[127] In a contemporaneous report to the Kasr El-Nile police, an EHC official confirmed that on February 23, 1992, just before returning the Nile Hotel to Wena, EHC had issued "decree no. 148/92 to stop operations" in response to orders from the Ministries of Interior and Tourism.[128]

56. According to the witnesses produced by Wena, upon returning to control of the Nile Hotel, they found the hotel vandalized.[129] Although Mr. Munir denied that any such vandalism occurred, he confirmed that EHC had removed and auctioned much of the hotel's fixtures and furniture.[130] According to Wena's management, it never operated the Nile Hotel again.[131]

57. On April 21, 1992, the Chief Prosecutor of Egypt ruled that EHC's seizure of the Luxor Hotel was illegal and ordered that the hotel should be returned to Wena.[132] On April 28, 1992, Wena reentered the hotel.[133] According to Wena's witnesses, the Luxor Hotel had also been damaged, although not nearly as badly as the Nile Hotel.[134] The Ministry of Tourism denied Wena a permanent operating license for the Luxor Hotel; instead, it granted only a series of temporary licenses because of alleged defects in the drainage system and the fire safety system, which Wena complains prohibited it from properly operating the hotel.[135]

58. After the return of the hotels, Wena sought compensation from Egypt.[136] On November 11, 1992, Mr. Malins wrote to the Honorable Lee Hamilton, a senior member of the U.S. House of Representatives, complaining that "the Minister of Tourism, Dr. Fouad Sultan, will not consider our requests" and that "it is clear that subsequent to any perceived movement, Dr. Sultan personally intervenes to obstruct a solution."[137]

59. On April 10, 1993, the Kasr El-Nile court convicted several representatives of EHC — including Messrs. Kandil and Munir — under Article 369/1 of the Egyptian Criminal Code (dispossession by violence), holding

that unlawful force was used to expel Wena from the Nile Hotel.[138] These convictions were subsequently upheld by the Southern Cairo Court of Appeal, on January 16, 1994.[139] According to Mr. Munir, the decision is currently under appeal to the Court of Cassation.[140] Neither Mr. Kandil nor Mr. Munir was sentenced to serve any jail time; both were fined only 200 Egyptian pounds, which Mr. Munir stated that he had not paid.[141] Since then, Mr. Munir has been promoted to become the Head of the Legal Affairs division at EHC and is expecting a further promotion.[142] According to Ms. Jelcic, Mr. Kandil is currently an advisor to a senior member of the Egyptian parliament.[143]

60. On December 2, 1993, Wena initiated arbitration in Egypt against EHC for breaching the Nile Hotel lease.[144] Similar arbitration was initiated by Wena against EHC for breaching the Luxor Hotel lease on January 12, 1994.[145]

61. On April 10, 1994, an arbitration award of EGP 1.5 million for damages from the invasion of the Nile Hotel was issued in favor of Wena. However, the award also required Wena to surrender the Nile Hotel to EHC's control.[146] On June 21, 1995, Wena was evicted from the Nile Hotel.[147] Nearly two years later, on June 9, 1997, Wena received the damages awarded by the Nile Hotel arbitration, less fees — a total of EGP 1,477,498.30.[148]

62. The Luxor Hotel arbitration also found in favor of Wena, awarding the company, in a September 29, 1994 decision, EGP 9.06 million for damages from the seizure.[149] The award subsequently was nullified by the Cairo Appeal Court on December 20, 1995, on the basis, among other things, that the arbitrator appointed by EHC had not signed the final decision.[150] On August 14, 1997, Wena was evicted form the Luxor Hotel and, according to Mr. Yusseri, the hotel was turned over to a court-appointed receiver requested by EHC.[151]

F. Harassment

63. Wena has also alleged "a campaign of continual harassment" by Egypt since the seizure of the two hotels, including the following allegations: "in 1991 the Minister of Tourism made defamatory statement about Wena that were reproduced in the media; in 1992 Egypt revoked the Nile Hotel's operating license without reason; in 1995 Egypt imposed an enormous, but fictitious, tax demand on Wena; in 1996 Egypt removed the Luxor Hotel's police book, effectively rendering it unable to accept guests; and, last but not least, in 1997 Egypt imposed a three-year prison sentence and a LE 200,000 bail bond on the Managing Director of Wena based on trumped-up charges."[152]

64. The Tribunal has received some limited testimony and other evidence on these various allegations. However, because it finds, as discussed in section III, *infra*, that Egypt's actions concerning the April 1, 1991 seizures of the two hotels are sufficient to determine liability, the Tribunal does not find it necessary to make a finding on the veracity of these additional allegations.

G. Relationship between EHC and Egypt

65. From 1983 through September 1991, EHC was a "public sector" company, wholly owned by the Egyptian Government, and operating in accordance with law Number 97 of 1983 governing Public Sector Companies and Organizations.[153] In September 1991, Egypt enacted the Public Business Sector Companies Law, which reorganized the "314 State owned economic companies," pooling them into "16 (reduced later to 12) State owned holding companies supervised by the Minster for [the] public Sector."[154] However, at the time of the seizures of the Nile and Luxor Hotels, EHC was governed by Law Number 97 of 1983.

66. As explained by Minster Sultan during his testimony, under Law Number 97 of 1983, the sole shareholder of EHC was Egypt.[155] EHC's shareholder assembly was chaired by the Minister of Tourism and would be attended by several other government officials.[156] The Minister of Tourism also was responsible for the appointment of at least one half of the Board of Directors of EHC, and furthermore nominated EHC's Chairman.[157] Indeed, in May 1989, Mr. Kamal Kandil was appointed, at the nomination of Minister Sultan, Chairman and CEO of EHC by Egyptian

Prime Minister's Decree Number 539 of 1989.[158] According to Mr. Munir's statement "EHC's Directors were also appointed by the Ministry of Tourism and Civil Aviation."[159]

67. Of considerable relevance to this proceeding, the Minister of Tourism was also empowered to dismiss the Chairman and the members of the Board of EHC if "it appears that the continued presence of these persons would affect the proper functioning of the company."[160]

68. Until at least the passage of the September 1991 Public Business Sector Companies Law, "EHC operated within broad policy guidelines laid down by the Egyptian Government."[161] As Minister Sultan explained during a parliamentary debate on July 14, 1992, at the time of the seizures, "the tourism sector with its companies" was "[s]ubordinated to the Minster of Tourism."[162] In a letter from February 1992, the Ministry of Tourism contrasted the relationship between EHC and the Egyptian Government before and after the passage of the September 1991 law, by explaining:

> After the issuance of the new law of the Business Sector and after its implementation starting from Oct. 1991, the Egyptian Hotels Company has full autonomy in all of its business dealings without intervention from the Ministry.[163]

69. The documents also reflect that EHC and the Ministry of Tourism considered EHC's money to be "public money" or "public funds,"[164] and EHC's rights to be "a state ownership."[165] Indeed, during the February 26, 1991 meeting chaired by Minister Sultan, the Minister is recorded as saying that "[t]he Ministry took no pleasure from any misunderstandings with investors; however, at the same time it could not accept any excesses in respect of *any of the Government's rights*."[166] Similarly, in his April 1, 1991 statement to the Luxor police, Mr. Atitu Sirri Atitu, "Manager of the Legal Department at Egyptian Hotels Company for hotels in the Luxor area," explained that "the Egyptian Hotels Company, *as a Government company*, was compelled to preserve the *public money* by the means it viewed in as being in accordance with the *public interest*."[167]

H. Consultancy Agreement between Wena Hotels Ltd. and Mr. Kamal Kandil

70. Egypt has contended that the "claimant improperly sought to influence the Chairman of EHC with respect to the award of the leases."[168] Both parties agree that, on or about August 20, 1989, Wena Hotels Ltd. entered into a consultancy agreement with Mr. Kamal Kandil.[169] The second paragraph of the agreement provides that Mr. Kandil's duties "shall be to give advice and assistance to the company as to the opportunities available to the company for developing its hotel business in Egypt."[170]

71. On March 26, 1991, Wena (through its attorneys, Tuck & Mann) issued a Writ of Summons in England against Mr. Kandil, alleging that, under the agreement, Wena had made five payments to Mr. Kandil between August 18, 1989 and January 30, 1990.[171] The total of these payments, which Wena sought to reclaim, was GB£ 52,000.

72. On August 19, 1991, Mr. Kandil responded to this Writ in a letter written to the Senior Master of the Royal Court of Justice.[172] In his letter, Mr. Kandil objected to Wena's writ, claiming that "there was no Contract between the Claimant Company and myself," that there was only "a Draft Contract which is not a Contract because it was neither signed nor sealed between the Parties," and that "the signature which appears is not mine."[173] Mr. Kandil asserted that the "subject of the above-mentioned Draft Contract was to develop new hotels in Egypt, these hotels being the Ramses Village project in Abou Simbal and a Conference Center in Aswan City. . . ."[174] Mr. Kandil also stated that "[i]n the Draft Contract I did not act in my quality of Chairman of the Egyptian Hotels Company nor did the Draft Contract concern either the Nile Hotel or the Luxor Hotel, instead I acted as Tourist Consultant for the Aswan Government and Chairman of the Board of Directors of Misr Aswan Tourist Co."[175]

73. As corroborating evidence of Mr. Kandil's statements, Wena has submitted two letters it sent to the Governor of Aswan in December 1989 and January 1990 (including one letter on which Mr. Kandil was copied), concerning the Abou Simbal and Aswan City developments.[176]

74. Mr. Farargy testified that the Egyptian government was aware of the consultancy agreement and that Mr. Kandil "offered his help and assistance officially above board with their knowledge."[177] According to Minister Sultan, however, he was not personally aware that "Mr. Kandil was an agent to Farargy" and that when he did learn about it, "I passed that to the prosecutor requesting a full fledged investigation. . . ."[178] Both parties agree, however, that "the investigation appears . . . to have bene closed"[179] and that "Mr. Kandil was never prosecuted in Egypt in connection with the Consultancy Agreement."[180] Unfortunately, other than this consensus that Mr. Kandil was never prosecuted, the Tribunal has been presented with no evidence of any investigation the Egyptian government might have undertaken in this matter.

III. LIABILITY

75. In its Memorial on the Merits, Wena claims that "Egypt violated the IPPA, Egyptian law and international law by expropriating Wena's investments without compensation."[181] Wena also argues that "Egypt violated the IPPA and other international norms by failing to protect and secure Wena's investments."[182]

76. Egypt denies Wena's claims, asserting that it has neither "violated the IPPA's prohibition on expropriation without compensation"[183] nor "breached any obligation under international law to protect and secure the claimant's investment."[184] In addition to its objections to the substance of Wena's claims, Egypt has also raised two affirmative defenses. First, Egypt asserts that "Claimant's claims in respect of the seizure of the hotels and acts of vandalism are time barred."[185] Second, Egypt contends that "Claimant improperly sought to influence the Chairman of EHC [Mr. Kamal Kandil] with respect to the award of the leases that are the subject of this arbitration" and, therefore, as a result of this alleged corruption, "Claimant cannot now properly appear before an international tribunal, constituted in accordance with the IPPA, and claim compensation for the alleged loss of leasehold interests that were improperly obtained in the first place."[186] The Tribunal has carefully considered all of these claims. The Tribunal devoted particular attention to the allegations of corruption raised by Egypt.

77. Despite the able representation of Egypt's counsel, the Tribunal concludes that Egypt did violate its obligations under the IPPA by failing to provide Wena's investments in Egypt "fair and equitable treatment" and "full protection and security"[187] and by failing to provide Wena with "prompt, adequate and effective compensation" following the expropriation of its investments.[188] The Tribunal also finds that Wena's claims are not time barred. Finally, although Egypt has raised serious allegations of misconduct and corruption, the Tribunal finds that Egypt (which bears the burden of proving such an affirmative defense) has failed to prove its allegations. The Tribunal's rationale is discussed in more detail below.

A. Law Applicable to this Arbitration

78. Before Disposing of the merits of this case, the Tribunal must consider the applicable law governing its deliberations. As both parties agree, "this case all turns on an alleged violation by the Arab Republic of Egypt of the agreement for the promotion and protection of investments that was entered into in 1976 between the United Kingdom and the Arab Republic of Egypt."[189] Thus, the Tribunal, like the parties (in both their submissions and oral advocacy), considers the IPPA to be the primary source of applicable law for this arbitration.

79. However, the IPPA is a fairly terse agreement of only seven pages containing thirteen articles. The parties in their arguments have not treated it as containing all the rules of law applicable to their dispute, and this is also the view of the Tribunal. In particular, Egypt has relied on Egyptian law, namely, the Egyptian Civil Code to raise its first

defense — that Wena's claims are time barred. In its response to that defense, Wena has taken the position that both Egyptian law and international law are applicable to the dispute.[190] Under Article 42(1) of the ICSID Convention:

> The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed upon by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflicts of laws) and such rules of international law as may be applicable.

The Tribunal finds that, beyond the provisions of the IPPA, there is no special agreement between the parties on the rules of law applicable to the dispute. Rather, the pleadings of both parties indicate that, aside from the provisions of the IPPA, the Tribunal should apply both Egyptian law (*i.e.*, "the law of the Contracting State party to the dispute") and "such rules of international law as may be applicable." The Tribuna notes that the provisions of the IPPA would in any event be the first rules of law to be applied by the Tribunal, both on the basis of the agreement of the parties and as mandated by Egyptian law as well as international law.

B. The Issue of Egypt's Substantive Liability

1. Summary of Wena's Claims

80. As noted already, Wena raises two claims against Egypt. First, it contends that Egypt's actions constitute an unlawful expropriation without "prompt, adequate and effective" compensation in violation of Article 5 of the IPPA, as well as Egyptian law and other international law.[191] Second, Wena argues that Egypt violated Article 2(2) of the IPPA, and other international norms, by failing to accord Wena's investments "fair and equitable treatment" and "full protection and security."[192]

81. Egypt disputes both allegations, contending, *inter alia*, "that the Claimant has no legitimate grievance against the Respondent, who neither authorized nor participated in the repossession of the Luxor and Nile Hotels on April 1, 1991 or most of the subsequent events of which the Claimant complains."[193]

82. The Tribunal disagrees. There is substantial evidence that, even if Egyptian officials other than officials of EHC did not participate in the seizures of the hotels on April 1, 1991, 1) Egypt was aware of EHC's intentions to seize the hotels and did nothing to prevent those seizures, 2) the police, although responding to the seizures, did nothing to protect Wena's investments; 3) for almost one year, Egypt (despite its control over EHC both before and after April 1, 1991) did nothing to restore the hotels to Wena; 4) Egypt failed to prevent damage to the hotels before their return to Wena; 5) Egypt failed to impose any substantial sanctions on EHC (or its senior officials responsible for the seizures), suggesting its approval of EHC's actions; and 6) Egypt refused to compensate Wena for the losses it suffered.

83. The Tribunal shall consider each of Wena's claims, beginning with its assertion that Egypt violated its obligations under Article 2(2) of the IPPA to provide "full protection and security" to Wena's investments.

2. Article 2(2) of the IPPA: "Fair and Equitable Treatment" and "Full Protection and Security"

84. The Tribunal agrees with Wena that Egypt violated its obligation under Article 2(2) of the IPPA to accord Wena's investment "fair and equitable treatment" and "full protection and security." Although it is not clear that Egyptian officials other than officials of EHC directly participated in the April 1, 1991 seizures, there is substantial evidence that Egypt was aware of EHC's intentions to seize the hotels and took no actions to prevent EHC from doing so. Moreover, once the seizures occurred, both the police and the Ministry of Tourism took no immediate action to

restore the hotels promptly to Wena's control. Finally, Egypt never imposed substantial sanctions on EHC or its senior officials, suggesting Egypt's approval of EHC's actions.

Article 2(2) of the IPPA provides:

> Investments of nationals or companies of either Contracting Party shall at all time be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Each Contracting Party shall ensure that the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party is not in any way impaired by unreasonable or discriminatory measures. Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting party.[194]

In interpreting a similar provision from the bilateral investment treaty between Zaïre and the United States, another ICSID panel has recently held that "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 [sic] investments and should not be permitted to invoke its own legislation to detract from any such obligation."[195] Of course, as still another ICSID panel has observed, a host state's promise to accord foreign investment such protection is not an "absolute obligation which guarantees that no damages will be suffered, in the sense that any violation thereof creates automatically a 'strict liability' on behalf of the host State."[196] A host state "is not an insurer or guarantor. . . . [i]t does not, and could hardly be asked to, accept an absolute responsibility for all injuries to foreigners."[197] Here, however, there is no question that Egypt violated its obligation to accord Wena's investments "fair and equitable treatment" and "full protection and security."

85. Even if Egypt did not instigate or participate in the seizure of the two hotels, as Wena claims,[198] there is sufficient evidence to find tat Egypt was aware of EHC's intentions and took no actions to prevent the seizures or to immediately restore Wena's control over the hotels. As discussed in section II.C, *supra*, in December 1990, Wena's parliamentary consultant, Mr. Malins, traveled to Egypt expressly to meet with minister Sultan and the Egyptian Minister of the Interior to express Wena's concerns about such a seizure.[199] Mr. Malins recounted that "[b]oth Minsters gave me their separate, absolute assurances . . . that no violence could or would take place."[200] In February 1991, Wena wrote to Minister Sultan, mentioning that EHC was again threatening to repossess the hotels through force:

> *officials from the Egyptian Hotels Company threatened to storm the hotels and expel us*, and this was after our Company had spent the sums previously outlined. The Matter reached a point where the Chairman of the Board of Directors of the Egyptian Hotels Company issued a decision for his company to take possession of the Luxor Hotel without a legal ruling or any other measure [to support his decision].[201]

86. Then, on March 21, 1991 (only eleven days before the seizures), Mr. Kandil wrote to Minister Sultan, proposing that, among other things, "the two hotels be taken and the license withdrawn."[202] Mr. Kandil closed the letter by advising Minister Sultan: "We leave the matter to you."[203] Marginalia, in Minister Sultan's handwriting, confirm that the Minister received and reviewed the letter.[204]

87. Finally, on March 25, 1991 (only six days before the seizure), Mr. Malins wrote to Minister Sultan asking for another meeting and requesting an understanding from the Minister that no actions would be taken until that meeting could occur: "please confirm what must surely be [sic] right, mainly that all matters be 'absolutely frozen,' with no detrimental action of whatever nature being taken pending our meeting. . . ."[205] As evidence of the close coordination between the Ministry of Tourism and EHC, Mr. Kandil (and not Minister Sultan) responded to this letter on March 31, 1991 (the day immediately before the seizures).[206] Mr. Kandil ended his letter by threatening that "the owning company will take all necessary measures to protect its rights which is considered a state ownership."[207]

88. Despite all these warnings, Egypt took no action to protect Wena's investment. Minister Sultan sought to defend Egypt's failure to prevent the seizure by explaining he was not aware that EHC planned to illegally seize the hotels,[208] and that "[i]f I had the slightest idea about that incident, I would have immediately stopped it. . . ."[209] Even if the Tribunal were to accept this explanation for Egypt's failure to act *before* the seizures, it does not justify the fact that neither the police nor the Ministry of Tourism took any immediate action to protect Wena's investments *after* EHC had illegally seized the hotels.

89. For example, despite the convincing evidence that a large number of people forcibly seized the Nile Hotel at approximately 7:00 p.m.,[210] it is undisputed that the Kasr El-Nile police (located only a few minutes away) did not begin an investigation until four hours later and it is not evident that the Ministry of Tourism police (also located nearby) ever responded to Wena's request for assistance.[211] Moreover, even after the Kasr El-Nile police began their investigation, they took no steps to remove EHC and restore Wena to control of the hotel. The Luxor police, although more prompt in their response, also declined to expel EHC and restore the Luxor hotel to Wena.[212]

90. The Ministry of Tourism also failed to take any immediate action to protect Wena's investments. Although he testified that he "was furious"[213] at EHC's decision to seize the hotels and that EHC's actions were "wrong,"[214] Minister Sultan also acknowledged that he did not take any action to return the hotels to Wena, to punish EHC or its officials, or to withdraw the hotel's licenses so that EHC could not operate the hotels.[215] Under Law Number 97 of 1983 governing Public Sector Companies and Organizations, Minister Sultan was empowered to dismiss the Chairman and the members of the Board of EHC if "it appears that the continued presence of these persons would affect the proper functioning of the company."[216] Also, given its power as the sole shareholder in EHC,[217] with several of its senior officials participating in and one of them chairing EHC's shareholder assembly,[218] and with "EHC operat[ing] within broad policy guidelines laid down by the Egyptian Government,"[219] Egypt could have directed EHC to return the hotels to Wena's control and make reparations.

91. Instead, neither hotel was restored to Wena until nearly a year later, after decisions by the Chief Prosecutor of Egypt,[220] which Wena asserts were only obtained as a result of diplomatic pressure on Egypt.[221] Even after the Chief Prosecutor's first decision (concerning the Nile Hotel) was issued on January 16, 1992, in which he found the seizures "illegal," the Ministry of Tourism delayed returning control of the Nile Hotel to Wena. For example, on February 21, 1992, Mr. Webster wrote to the British Embassy in Cairo, complaining of Minister Sultan's "uncooperative stance" and the delays that Wena was experiencing in recovering the hotels: "if he [Minister Sultan] wishes to press settlement of account, then we too will press for settlement of monies outstanding to Wena."[222] Mr. Webster concluded his letter by saying that "[w]e are of the impression that the Minister is either poorly informed or part of the entire scheme."[223]

92. Moreover, neither hotel was returned to Wena in the same operating condition that it had been in before the seizures. According to Wena's witnesses, both hotels had been vandalized.[224] Although Mr. Munir denied that any such vandalism occurred, he confirmed that EHC had removed and auctioned much of the Nile Hotel's fixtures and furniture.[225] Furthermore, neither hotel had a permanent operating license. In fact, just two days before the Nile Hotel was returned to Wena, the Ministry of Tourism withdrew that hotel's operating license because of alleged fire safety violations.[226] Although, as Mr. Munir noted, these safety violations had pre-dated EHC's seizure of the hotel in April 1991,[227] it is noteworthy that the Ministry of Tourism allowed EHC to operate the Nile Hotel from April 1991 through February 1992, despite these violations, and revoked the license only on February 23, 1992, just prior to restoring the hotel to Wena's control.

93. Egypt also refused to compensate Wena for the losses it had experienced.[228] On November 11, 1992, Mr. Malins wrote to the Honorable Lee Hamilton, a senior member of the U.S. House of Representatives, complaining that "the Minister of Tourism, Dr. Fouad Sultan, will not consider our requests" and that "it is clear that subsequent to any perceived movement, Dr. Sultan personally intervenes to obstruct a solution."[229]

94. Finally, neither EHC nor its senior officials were seriously punished for their actions in forcibly expelling Wena and illegally possessing the hotels for approximately a year. Although several representatives of EHC — including Messrs. Kandil and Munir — were convicted for their actions, neither Mr. Kandil nor Mr. Munir was sentenced to serve any jail time. Instead, both were fined only EGP 200, which Mr. Munir stated that he has never paid.[230] Also, neither official appears to have suffered any repercussions in their careers. As noted above, the Ministry of Tourism chose not to exercise its authority to remove Mr. Kandil as Chairman of ECH and, according to Ms. Jelcic, he currently is serving as an advisor to a senior member of the Egyptian parliament.[231] Since the seizures, Mr. Munir has been promoted to become the Head of the Legal Affairs Division at EHC and is expecting a further promotion in the near future.[232] This absence of any punishment of EHC and its officials suggest that Egypt condoned EHC's actions.

95. For all of these reasons, the Tribunal concludes that Egypt violated its obligation under Article 2(2) of the IPPA, by failing to accord Wena's investments "fair and equitable treatment" and "full protection and security."

3. Article 5 of the IPPA: Expropriation Without "Prompt, Adequate and Effective" Compensation

96. The Tribunal also agrees with Wena that Egypt's actions constitute an expropriation and one without "prompt, adequate and effective compensation," in violation of Article 5 of the IPPA. That article provides in relevant part that:

> (1) Investments of nationals or companies of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as 'expropriation') in the territory of the other Contracting Party except for a public purpose related to the internal needs of the Party and against prompt, adequate and effective compensation. Such compensation shall amount to the market value of the investment expropriated immediately before the expropriation itself or before there was an official Government announcement that expropriation would be effected in the future, whichever is the earlier, shall be made without delay, be effectively realizable and be freely transferable. The national or company affected shall have a right under the law of the Contracting Party making the expropriation, to prompt review, by a judicial or other independent authority of that Party, of whether the expropriation is in conformity with domestic law and of the valuation of his or its investment in accordance with the principles set out in this paragraph.[233]

97. Although, as Professor Ian Brownlie has commented, "the terminology of the subject is by no means settled,"[234] the fundamental principles of what constitutes an expropriation are well established under international law. For example, as the ICSID tribunal in *Amco Asia v. Indonesia* noted, "it is generally accepted in International Law, that a case of expropriation exists not only when a state takes over private property, but also when the expropriating state transfers ownership to another legal or natural person.[235] The tribunal continued by observing that an expropriation "also exists merely by the state withdrawing the protection of its courts form the owner expropriated, and tacitly allowing a *de facto* possessor to remain in possession of the thing seized. . . ."[236]

98. It is also well established that an expropriation is not limited to tangible property rights. As the panel in *SPP v. Egypt* explained, "there is considerable authority for the proposition that Contract rights are entitled to the protection of international law and that the taking of such rights involves an obligation to make compensation therefore."[237] Similarly, Chamber Two of the Iran-U.S. Claims Tribunal observed in the *Tippets* case that "[a] deprivation or taking of property may occur under international law through interference by a state in the use of that property or with the enjoyment of its benefits, even where legal title to the property is not affected."[238] The chamber continued by noting:

> [w]hile assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government, thus requiring compensation

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> under international law, such a conclusion is warranted whenever events demonstrate that the owner has been deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral.[239]

99. Here, the Tribunal has no difficulty finding that the actions previously described constitute such an expropriation. Whether or not it authorized or participated in the actual seizures of the hotels, Egypt deprived Wena of its "fundamental rights of ownership" by allowing EHC forcibly to seize the hotels, to possess them illegally for nearly a year, and to return the hotels stripped of much of their furniture and fixtures.[240] Egypt has suggested that this deprivation was merely "ephemeral" and therefore did not constitute an expropriation.[241] The Tribunal disagrees. Putting aside various other improper actions, allowing an entity (over which Egypt could exert effective control) to seize and illegally possess the hotels for nearly a year is more than an ephemeral interference "in the use of that property or with the enjoyment of its benefits."[242]

100. Moreover, even after the hotels were returned to Wena, Egypt failed to satisfy its obligation under the IPPA, and international norms generally, by refusing to offer Wena "prompt, adequate and effective compensation" for the losses it had suffered as result of Egypt's failure to act.[243] For example, as already noted, on November 11, 1992, Mr. Malins wrote to U.S. Congressman Lee Hamilton, complaining that "the Minister of Tourism, Dr. Fouad Sultan, will not consider our requests" and that "it is clear that subsequent to any perceived movement, Dr. Sultan personally intervenes to obstruct a solution."[244]

101. For all these reasons, the Tribunal concludes that Egypt violated its obligation under Article 5 of the IPPA, by failing to provide Wena with "prompt, adequate and effective compensation" for the losses it suffered as a result of the seizures of the Luxor and Nile Hotel.

C. Whether Wena's Claims are Time Barred

102. In its Memorial on the Merits, Egypt argues that Wena's claims are time barred under Article 172(i) of the Egyptian Civil Code.[245] This article provides that:

> A case filed for damages claimed for an illegal act, shall fall by prescription by lapse of three years from the day the wronged person learns of the damage taking place and of the person who is responsible for it, in all events the case shall fall with the lapse of 15 years from the day the illegal act takes place.[246]

Egypt also observes that "[e]ven if, contrary to the above, the Tribunal were to refuse to apply Article 172(i), it nevertheless would clearly still have the discretion to determine whether there has been unreasonable delay in the submission of the Claimant's claims to ICSID."[247] Finally, Egypt contends that "if Egyptian law is not applied, it would be reasonable . . . to have regard to the principles of prescription that are common to both of the Contracting Parties to the IPPA, *i.e.*, in this case, the United Kingdom," noting that the statute of limitation, under the English Limitation Act 1980, for breach of Contract or tortious behavior is six years.[248]

103. Ironically, as Wena notes, Respondent did not previously raise this "time bar" claim in its objections to jurisdiction.[249] To the contrary, Respondent asserted, as part of its objections, that Wena's Request for Arbitration was "premature."[250]

104. Setting aside this apparent inconsistency, however, the Tribunal sees no legal or equitable reason to bar Wena's claim. First, contrary to Respondent's claim that "Claimant severely compromised the ability of the Respondent to defend itself in these proceedings,"[251] the Tribunal agrees with Wena that, given the voluminous evidence produced by the parties as well as the extensive testimony provided by several witnesses (in particular,

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EHC's counsel, Mr. Munir, who showed a remarkable recollection of the case), neither party seems to have been disadvantaged — which, of course, is one of the equitable reasons for disallowing an untimely claim.

105. Another equitable principle is the notion of "repose" — that a respondent who reasonably believes that a dispute has been abandoned or laid to rest long ago should not be surprised by its subsequent resurrection.[252] Here, however, the Tribunal finds that Wena has continued to be aggressive in prosecuting its claims and that Egypt has had ample notice of this on-going dispute.[253]

106. Second, as Wena notes, municipal statutes of limitation do not necessarily bind a claim for a violation of an international treaty before an international tribunal. In *Alan Craig v. Ministry of Energy of Iran*, Chamber Three of the Iran-U.S. Claims Tribunal declined to apply an Iranian statute of limitation, despite the applicability of Iranian law.[254] The tribunal noted:

> Municipal statutes of limitation have not been considered as binding on claims before an international tribunal, although such periods may be taken into account by such a tribunal when determining the effect of an unreasonable delay in pursuing a claim.[255]

This general principle was recognized as long ago as 1903 by the Italy-Venezuela Mixed Claims Commission, which held in the *Gentini* case that, although local statutes of limitation cannot be invoked to defeat an international claim, international tribunals may consider equitable principles of prescription to reject untimely claims.[256] Indeed, in the *Gentini* case, the American Umpire dismissed a thirty-year old claim. As discussed above, however, the Tribunal sees no reason to exercise such discretion in this case, where Egypt has had ample notice of Wena's continued claims and where neither party appears to have been substantially harmed in its ability to bring its case.

107. Egypt contends that Article 42(1) of the ICSID Convention mandates that the Tribunal must apply Article 172(i)'s three-year statute of limitation. The Tribunal does not agree. Article 42(1) of the ICSID Convention provides that a Tribunal shall apply domestic law "and such rules of international law as may be applicable." As Wena notes, the decision in the *Amco Asia* case advised that one situation where a tribunal should apply rules of international law is "to ensure the precedence of international law norms where the rules of the applicable domestic law are in collision with such norms."[257] Here, strict application of Article 172(i)'s three-year limit, even if applicable, would collide with the general, well-established international principle recognized since before the *Gentini* case: that municipal statutes of limitation do not bind claims before an international tribunal (although tribunals are entitled to consider such statutes as well as equitable principles of prescription when handling untimely claims).

108. Moreover, as discussed in Section III.A, *supra*, the principal source of substantive law in this case is the IPPA itself. The Tribunal notes that although the IPPA's concise provisions do not contain detailed procedures for bringing an arbitration, Article 8(1) does expressly provide that if a dispute "should arise and agreement cannot be reached within three months between the parties to this dispute through pursuit of local remedies, through conciliation or otherwise, then," and only then, may a party institute ICSID proceedings.[258] This provision suggests a greater concern that the parties not rush into arbitration than that the parties will delay the initiation of proceedings.

109. Finally, although not necessary to the Tribunal's decision, the Tribunal is not convinced by the interpretation of Egyptian law presented by Respondent. As Respondent's expert noted, normally "[a]ctions for liability for administrative acts are time-barred after fifteen years."[259] Article172(i), to the contrary, is viewed as an "exception to the general principle concerning the statute of limitation [because] it relates to . . . unlawful acts."[260] Dr. Elehwany reached the conclusion that the normal 15-year prescription did not apply and that the exceptional three-year period of Article 172(i) did, because "what was being attributed to Egypt is liability for the physical acts *the police* are alleged to have committed on 1 April 1991 — namely the storming Nile and Luxor Hotels, the forcible eviction of the hotel guests and staff, the theft of cash, the detention of employees, the wrecking of everything. . . ."[261]

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110. Of course, as Egypt argued on the merits, and the Tribunal agrees, it has not been demonstrated that the police physically participated in the seizure of the hotels. As discussed in section III.B., *supra*, Egypt's liability does not arise form physical acts by the police, but from Egypt's failure to accord Wena's investments as required by IPPA, "full protection and security" — by failing to prevent or immediately reverse EHC's physical acts. Such failure to provide legal protection would appear to constitute the typical administrative act for which the normal, fifteen-year prescription period applies. Thus, Egypt's response to the contention that it failed to provide "full protection and security" is inadequate.

D. Consultancy Agreement with Mr. Kandil

111. Finally, the Tribunal considers Egypt's contention that "Claimant improperly sought to influence the Chairman of EHC with respect to the award of the leases" for the Luxor and Nile hotels.[262] If true, these allegations are disturbing and ground for dismissal of this claim. As Egypt properly notes, international tribunals have often held that corruption of the type alleged by Egypt are contrary to international *bones mores*.[263] However, as Professor Lalive notes, "the delicate problems remains" for an arbitral tribunal "to determine precisely where the line should be drawn between legal and illegal contracts, between illegal bribery and legal 'commissions.'"[264]

112. As noted above in section II.H (paragraphs 70-74), it is undisputed that Wena and Mr. Kandil entered into an agreement in August 1989, that the purpose of the agreement was for Mr. Kandil "to give advice and assistance to the company as to opportunities available to the company for developing its hotel business in Egypt,"[265] that between August 18, 1989 and January 30, 1990 Wena made a total of GB£ 52,000 in payments to Mr. Kandil, and that on March 26, 1991, Wena initiated a lawsuit against Mr. Kandil for allegedly breaching the agreement.[266]

113. Egypt notes that, coincidentally, the first payment (on August 18, 1989) was ten days after the execution of the Luxor Hotel lease and that the last payment (on January 30, 1990) was two days after the signing of the Nile Hotel lease. It also observes that the amount paid to Mr. Kandil exceeds that which would have been authorized under the consultancy agreement.

114. Wena, however, contends that the agreement did not concern the Nile and Luxor hotels, but was to help Wena pursue development opportunities in Misr Aswan, where Mr. Kandil was a tourist consultant. This assertion is supported by both Mr. Kandil's response to Wena's March 1991 lawsuit,[267] as well as the letters Wena has submitted from December 1989 and January 1990, evincing its interest in the Abou Simbal and Aswan City developments in Misr Aswan.[268]

115. Wena also noted that according to Mr. Yusseri, the Luxor lease was awarded to Wena in a competitive bid with another investor, with Wena winning the lease because it agreed to pay a higher rent.[269] Finally, Mr. Farargy testified that the Egyptian government was aware of the agreement that Mr. Kandil "offered his help and assistance officially above board with their knowledge."[270]

116. Although the Tribunal believes Minister Sultan's testimony that he was not personally aware that "Mr. Kandil was an agent to Farargy" and that when he did learn about it, "I passed that to the prosecutor requesting a full fledged investigation,"[271] it is undisputed that Mr. Kandil was never prosecuted in Egypt in connection with this agreement.[272] Regrettably, because Egypt has failed to present the Tribunal with any information about the investigation requested by Minister Sultan, the Tribunal does not know whether an investigation was conducted and, if so, whether the investigation was closed because the prosecutor determined that Mr. Kandil was innocent, because of lack evidence, or because of complicity by other government officials. Nevertheless, given the fact that the Egyptian government was made aware of this agreement by Minister Sultan but decided (for whatever reasons) not to prosecute Mr. Kandil, the Tribunal is reluctant to immunize Egypt from liability in this arbitration because it now alleges that the agreement with Mr. Kandil was illegal under Egyptian law.

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117. Moreover, with the exception of the coincidence in the timing of the payments and the signing of the Luxor and Nile hotels (and the apparent over-payment of Mr. Kandil), the Tribunal notes that Egypt — which bears the burden of proving such an affirmative defense — has failed to present any evidence that would refute Wena's evidence that the Contract was a legitimate agreement to help pursue development opportunities in Misr Aswan. Nor did either party offer to present live testimony from Mr. Kandil.

IV. DAMAGES

118. Article 5 of the IPPA between Egypt and the United Kingdom provides that in the event of an expropriation, the private investor shall be entitled to "prompt, adequate, and effective compensation" and "such compensation shall amount to the market value of the investment immediately before the expropriation."[273] The Tribunal shall apply this standard to the determination of damages.

119. Altogether Wena claims damages of GB£ 20.4 million for lost profits, GB£ 22.8 million for lost opportunities and GB£ 2.5 million for reinstatement costs, making a total of GB£ 45.7 million.[274] In addition, it seek interest on the previous sum and makes a claim of US$ 1,251,541 for counsel fees and costs of experts and witnesses incurred in pursuing its claim.[275]

120. In the alternative, Wena claims US$8,819,466.93 as the amount of its investment in the Egyptian hotel venture.[276]

121. The Respondent disputes these requests, contending that the claims summarized in paragraphs 119-120 are inappropriate and greatly overstated.[277] In the alternative, the Respondent suggest that if anything were awarded for damages it should be the amount of Wena's investment in the Egyptian hotel venture, which, according to Respondent's expert, could not be more than GB£ 750,000.[278]

122. Although experts presented by each party adopted variations of the well-known discounted cash flow ("DCF") method of calculating the amount of the damages sustained by Wena, the experts reached widely varying results from their calculations.[279] Since, however, the Tribunal is not persuaded that the DCF method is appropriate in this case, it deems it unnecessary to enter into a detailed discussion of the differences that the experts' calculations disclosed.

123. The Tribunal agrees with Egypt that, in this case, Wena's claims for lost profits (using a discounted cash flow analysis), lost opportunities and reinstatement costs are inappropriate — because an award based on such claims would be too speculative. As another ICSID panel recently noted in the *Metalclad* decision:

> Normally, the fair market value of a going concern which has a history of profitable operation may be based on an estimate of future profits subject to a discounted cash flow analysis. However, where the enterprise has not operated for a sufficiently long time to establish a performance record or where it has failed to make a profit, future profits cannot be used to determine going concern or fair market value.[280]

Similarly, the ICC panel in the *SPP (Middle East) v. Egypt* arbitration case declined to accept a discounted cash flow projection because, *inter alia*, "by the date of cancellation the great majority of the work had still to be done," and "the calculation put forward by the Claimants produces a disparity between the amount of the investment made by the Claimants" and the "supposed value" of the investment as calculated by the DCF analysis.[281]

124. Like the *Metalclad* and *SPP* disputes, here, there is insufficiently "solid base on which to found any profit . . . or for predicting growth or expansion of the investment made" by Wena.[282] Wena had operated the Luxor Hotel for less than eighteen months, and had not even completed its renovations on the Nile Hotel, before they were seized on April 1, 1991. In addition, there is some question whether Wena had sufficient finances to fund its renovation and

operation of the hotels.[283] Finally, the Tribunal is disinclined to grant Wena's request for lost profits and lost opportunities given the large disparity between the requested amount (GB£ 45.7 million) and Wena's stated investment in the two hotels (US$8,819,466.93).[284]

125. Rather, the Tribunal agrees with the parties that the proper calculation of "the market value of the investment expropriated immediately before the expropriation"[285] is best arrived at, in this case, by reference to Wena's actual investments in the two hotels. As noted above, Wena pleads in the alternative for award of at least the amount of Wena's proven investment in the Egyptian hotel venture. Similarly, Respondent pleads in the alternative that if any award were made it should not be more than the amount of Wena's proven investment.

126. The Tribunal is not persuaded by the relevance of the Respondent's contention that much of the Egyptian investment came from affiliates of Wena rather than from Wena. Instead the panel takes the view that whether the investments were made by Wena or by one of its affiliates, as long as those investments went into the Egyptian hotel venture, they should be recognized as appropriate investments. The panel was persuaded from the testimony it received that it is a widely established practice for hotel enterprises to adopt allocation measures, which spread the profits form the group operations into various jurisdictions where there are tax advantages to the group as a whole.

127. On the basis of investment, Claimant states its loss as US$8,819,466.93. However, the panel in pursuing an objection raised by the Respondent that there were certain elements of double counting,[286] decided that the gross figure should be diminished by US$322,000.00 to eliminate probably double counting in certain instances. Beyond that, however, the panel was not persuaded by Respondent's evidence that there were significant other instances of double counting. Thus, the figure of US$8,819,466.93 should be diminished by US$322,000.00, leaving a total of US$8,497,466.93, which the Tribunal judges to be the approximate total for Wena's investment. From this, the Tribunal agreed that $435,570.38 should be deducted for the amount received already by Claimant as a result of the Egyptian arbitration award (the equivalent of EGP 1,477,498.30 at the exchange rate of $1 = EGP 3.3921 on June 9, 1997, the date of payment of the Egyptian award).[287]

128. To this should be added an appropriate sum for interest. Claimant has claimed interest but neither specified a rate nor whether interest should be compounded.[288] Moreover, the IPPA, the lease agreements, and the ICSID Convention and Rules are all silent on the subject of interest. The Panel is of the view that in this case interest should be awarded and that it would be appropriate,to adopt a rate of 9%, to be compounded quarterly.[289]

129. Like the distinguished panel in the recently-issued *Metalclad* decision, this Tribunal also has determined that compounded interest will best "restore the Claimant to a reasonable approximation of the position in which it would have been if the wrongful act had not taken place."[290] Although the *Metalclad* tribunal awarded compound interest without comment, this panel feels that a brief explanation of its decision is warranted.[291] This Tribunal believes that an award of compound (as opposed to simple) interest is generally appropriate in most modern, commercial arbitrations. As Professor Gotanda has observed "almost all financing and investment vehicles involve compound interest. . . . If the claimant could have received compound interest merely by placing its money in a readily available and commonly used investment vehicle, it is neither logical nor equitable to award the claimant only simple interest."[292] For similar reasons, Professor Mann has "submitted that . . . compound interest may be and, in absence of special circumstances, should be awarded to the claimant as damages by international tribunals."[293]

130. Thus, the total, with interest through December 1, 2000 (US$11,431,386.88) is US$19,493,283.43. To this figure there should be added an appropriate sum to reimburse Claimant for attorney's fees and related costs, as reparation for losses sufficiently related to its central claims and in keeping with common practice in international arbitration. It will be recalled that the Tribunal, in its *Decision on Jurisdiction*, rejected Wena's claims for costs incurred in rebutting Egypt's objections to jurisdiction.[294] Accordingly, the Tribunal shall only reimburse Claimant for that portion of its attorney's fees and costs incurred in presenting the merits of this arbitration. Wena has claimed

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US$1,107,703 for these expenses.[295] Thus, including the Claimant's attorney's fees and costs, the grand total to be awarded Claimant is US$20,600,986.43. This award will be payable within 30 days from the date hereof. Thereafter, it will accumulate additional interest at 9% compounded quarterly until paid.

V. CONCLUSION

131. In sum, the Tribunal concludes that Egypt breached its obligations under Article 2(2) of the IPPA by failing to accord Wena's investments in Egypt "fair and equitable treatment" and "full protection and security." Even if the Egyptian Government did not authorize or participate in the attacks, its failure to prevent the seizures and subsequent failure to protect Wena's investments give rise to liability. The Tribunal also finds that Egypt's actions amounted to an expropriation — transferring control of the hotels from Wena to EHC without "prompt, adequate and effective compensation" in violation of Article 5 of the IPPA.

132. The Tribunal also dismisses the two affirmative defenses raised by Egypt. First, the Tribunal does not agree with Egypt's contention that Wena's claims are time barred. Second, although Egypt has raised some disturbing allegations regarding payments made to Mr. Kandil, the Tribunal finds that Egypt has failed to meet its evidentiary burden of proving that these payments were illegitimate.

VI. THE OPERATIVE PART

133. For these reasons

THE TRIBUNAL, unanimously,

134. FINDS that Egypt breached its obligations to Wena by failing to accord Wena's investments in Egypt fair and equitable treatment and full protection and security in violation of Article 2(2) of the IPPA;

135. FINDS that Egypt's actions amounted to an expropriation without prompt, adequate and effective compensation in violation of Article 5 of the IPPA;

and

136. AWARDS to Wena US$20,600,986.43 in damages, interest, attorneys fees and expenses. This award will be payable by Egypt within 30 days from the date of this Award. Thereafter, it will accumulate additional interest at 9% compounded quarterly until paid.

/s/
Prof. Ibrahim Fadlallah

/s/
Prof. Don Wallace, Jr.

/s/
Monroe Leigh, Esq.

Statement of Professor Don Wallace, Jr.

Professor Wallace concurs in the Tribunal's entire award and is persuaded that compound interest should be awarded. However, he is not persuaded that compounding should be quarterly.

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ENDNOTES

1. Wena Hotels Limited is a British company incorporated in 1982 under the laws of England and Wales. *See* Certificate of Incorporation on Change of Name of Wena Hotels Limited (April 22, 1982) [Annexes W1 & E-J2]. Note, in referencing the documentary annexes submitted by the parties, the notation "W" indicates a document submitted by Claimant, Wena Hotels Limited. The notation "E-J" indicates a document submitted by Respondent, the Arab Republic of Egypt as part of its briefing on jurisdiction; a notation of "E-M" indicates a document submitted by Egypt as part of its briefing on the merits.

2. Claimant's Request for Arbitration, at 1 (submitted on July 10, 1998).

3. *Id.*, at 18.

4. Respondent's Memorial on its Objections to Jurisdiction, at 1 (submitted on March 4, 1999) ("Respondent's Memorial on Jurisdiction").

5. *Id.*

6. *Id.*, at 2.

7. *Id.*

8. Tribunal's Decision on Jurisdiction, at 8-9 (released on June 29, 1999) (quoting Recordings from Tribunal's Session on Jurisdiction, Offices of the World Bank, Paris (on May 25, 1999)).

9. *Id.*, at 9.

10. *Id.*

11. *Id.*, at 10-19.

12. *Id.*, at 21-23.

13. Full, verbatim transcripts were made of the session and distributed to the parties and the Tribunal following each day of the hearing.

14. Annexes W179 & 187-194.

15. Annex W183. Wena had sought the Arthur Anderson report (which was prepared for the benefit of Egypt under a Contract with the U.S. Agency for International Development) from Egypt as early as August 30, 1999. Notwithstanding this request and the Tribunal's subsequent directions to search for this document, Egypt never produced a copy of the report. At the Tribunal's April 25, 2000 session on the merits (and, again, in the Respondent's Post-Hearing Memorial), Egypt's counsel explained what efforts the Egyptian State Lawsuit Authority had taken to obtain a copy of the report, without success. *See* Transcript of Tribunal's Session on the Merits ("TR") Day 1, at 80:27-81:21; Respondent's Post-Hearing Memorial, Appendix E (submitted on May 30, 2000). Shortly after the session, however, the ICSID Secretariat obtained a copy of the report form the U.S. Agency for International Development.

16. Agreement for the Promotion and Protection of Investments, June 11, 1975, U.K.-Egypt ("IPPA") [Annexes W2 & E-J22].

17. *Id.*, art 2(2).

18. *Id.*, art. 5(1).

19. *See* Certificate of Incorporation on Change of Name of Wena Hotels Limited (April 22, 1982) [Annexes W1 & E-J2]. As discussed above, although Egypt never challenged the fact that Wena Hotels Limited was incorporated as a British company, it asserted as part of its objections to jurisdiction that Wena "by virtue of Mr. El-Farargy's ownership and his Egyptian nationality, [should] be treated as an Egyptian company pursuant to Article 8(1)" of the IPPA. Respondent's Reply on Jurisdiction, at 2 (submitted on April 8, 1999). The Tribunal, however, rejected Egypt's proposed construction of Article 8(1) of the IPPA and, thus, determined that Wena was an English company for purposes of the IPPA. *See* Decision on Jurisdiction, at 10-19.

20. *See* section II.G, *infra*, concerning the relationship between EHC and Egypt.

21. Luxor Hotel Lease and Development Agreement (August 8, 1989) [Annex W5]

22. *Id.*, art. III.

23. *Id.*, arts. I, XIII & XV(3).

24. Direct Examination of Mr. Yusseri Mahmud Hamid Hajjaj, TR Day 5, at 4:3-11 ("Yusseri Direct Ex.").

25. El Nile Hotel Lease and Development Agreement (January 28, 1990) [Annex W4].

26. An Agreement between His Excellency Fouad Sultan, Minster of Tourism for the Egyptian Government, jointly with Mr. Kamal Kandil of the Egyptian Hotels Company and Wena Hotels Limited (October 1, 1989) [Annex W6].

27. Claimant's Request for Arbitration, at 8.

28. Respondent's Memorial on Jurisdiction, at 4.

29. Final Award in *Wena Hotels Ltd. v. Egyptian Hotel Company* (November 14, 1990) [Annex E-M17].

30. Declaration of Mr. Nael El-Farargy, ¶ 14, attached to Claimant's Memorial on the Merits (submitted on July 26, 1999) ("Farargy Declaration"). The Respondent's Memorial on Jurisdiction also reports that Wena brought "a nullity action (No. 18644 of 1990), which was refused by South Cairo Court on February 27, 1994." Respondent's Memorial on Jurisdiction, at 4. However, a copy of the South Cairo Court's decision was not provided to the Tribunal.

31. Direct Examination of Mr. Humfrey Malins, M.P., TR Day 4, at 174:26-29 ("Malins Direct Ex."). The Tribunal generally found Mr. Malins to be a reliable and convincing witness, with no apparent financial or personal stake in the outcome of the arbitration. *See also* Farargy Declaration, ¶¶ 17-19.

32. Malins Direct Ex., TR Day 4, at 175:1-4.

33. *Id.*, at 175:25-29. *See also* Declaration of Mr. Humfrey Malins, M.P., ¶ 4, attached to Claimant's Memorial on the Merits ("Malins Declaration").

34. Letter from Mr. Nael El-Farargy (Wena Hotels Ltd.) to Minister Fouad Sultan (Minister of Tourism) (February 11, 1991) [Witness Statement of Minister Fouad Sultan, Attachment A, attached to Respondent's Memorial on the Merits (submitted on September 6, 1999) ("Sultan Statement"); also Annexes E-M21 & W127]. At the time of the events that are the subject of this dispute, Minister Sultan was the Minister for Tourism and Civil Aviation of Egypt. Minister Sultan held this position from 1985 to 1993. Sultan Statement, ¶ 3. Although Minister Sultan has now returned to the private sector (serving as Chairman and Managing Direct of Alahly for Development and Investment S.A.E.), the Tribunal shall for convenience refer to the witness as Minister Sultan.

35. *Id.* (emphasis added; brackets in original English translation) [Sultan Statement, Attachment A; also Annexes E-M21 & W127].

36. Minutes of Meeting between Representatives of the Ministry of Tourism, EHC and Wena (February 26,1991) [Sultan Statement, Attachment B; also Annexes E-M22 & W124].

37. *Id.*

38. Direct Examination of Mr. Nael El-Farargy, TR Day 1, at 147:17-25 ("Farargy Direct Ex."). *See also* Letter from Mr. Kamal Kandil (Chairman, EHC) to Mr. Ahmad Al-Khawaga (Attorney for Wena) (March 3, 1991) [Annexes W125 & E-M23]; Witness Statement of Mr. Munir Abdul Al-Aziz Gaballah Shalabi, ¶ 13, attached to Respondent's Rejoinder on the Merits (submitted on October 18, 1999) ("Munir Statement"). The Witness Statement of Mr. Munir should not be confused with the Summary of Evidence to be given by Mr. Munir Abdul Al-Aziz Gaballah Shalabi, attached to Respondent's Memorial on the Merits. because counsel for Egypt were unable to obtain a signed witness statement from Mr. Munir before submitting their Memorial on the Merits, counsel submitted a short Summary of Evidence instead — providing the witness statement when it subsequently became available.

39. Letter from Mr. Kamal Kandil (Chairman, EHC) to Minister Fouad Sultan (Minister of Tourism) (March 21, 1991) [Sultan Statement, Attachment D; also Annex W126].

40. *Id.* (emphasis added; brackets in original English translation).

41. *Id.*

42. *Id.* (emphasis added).

43. *Id.* (Arabic original). *See also* Cross examination of Minister Fouad Sultan, TR Day 3, at 235:23-237:27 ("Sultan Cross-Ex."); Sultan Statement, ¶ 17.

44. Letter from Mr. Humfrey Malins, M.P. (Parliamentary Consultant, Wena) to Minister Fouad Sultan (Minister of Tourism) (March 25, 1991) [Annex W 128].

45. *Id.*

46. Letter from Mr. Kamal Kandil (Chairman, EHC) to Mr. Humfrey Malins, M.P. (Parliamentary Consultant, Wena) (March 31, 1991) [Annexes W81 & W129]. During the session on the merits, Minister Sultan suggested that perhaps Mr. Malins' March 25, 1991 letter had been faxed to EHC, not the Minister of Tourism (thus, potentially explaining why Mr. Kandil, and not Minister Sultan, responded to the letter). *See* Sultan Cross-Ex., TR Day 4, at 47:9-10 & 48:29-49:1. However, both the attached fax cover sheet and confirmation sheet for Mr. Malins' letter show that the letter was faxed to number 2829771 in Egypt. *See* Annex W128. Subsequent inquiry by counsel for Wena "on May 29, 2000 to France Telecom's International Yellow Pages service" determined that the "same number (2829771) was given as the fax number listed for the Egyptian Ministry of Tourism." Claimant's Post-Hearing Brief, at 16 & n. 5 (submitted on May 30, 2000). In contrast, as reflected in EHC's contemporaneous letterhead, the fax number for EHC at that time was 3911322. *See* Annex W129.

47. *Id.*

48. Munir Statement, ¶ 14.

49. *Id.*

50. *Id.*

51. Witness Statement of Mr. Yusseri Mahmud Hamid Hajjaj, ¶ 8, attached to Respondent's Memorial on the Merits ("Yusseri Statement").

52. Munir Statement, ¶ 14.

53. *See, e.g.*, Kasr El-Nile Police Report, at 4 (April 1 & 2, 1991) [Annex E-M25]; Resolution Number [blank] for the Year 1991) [Annex E-M26].

54. Letter from Mr. Kamal Kandil (Chairman, EHC) to Mr. Nael El-Farargy (Wena Hotels Ltd.) (March 30, 1991) [Annexes W80 & W186].

55. *Id.* (Brackets in original English translation); emphasis added by the Tribunal.

56. Mr. Munir also asserted that a copy of Resolution Number 215 concerning the seizures was "sent to Wena in EHC's letter dated 30 March 1991 addressed to its head office in England." Munir Statement, ¶ 14. However, there is no evidence to confirm that a copy of this resolution was attached to the letter. *See* Annex W 80.

57. *See* registered mail receipt in Annex W80.

58. *See* fax legend in Annex W186.

59. Cross-examination of Mr. Munir Abdul Al-Aziz Gaballah Shalabi, TR Day 5, at 76:22-78:3 ("Munir Cross-Ex."). During the fifth day of the Tribunal's session on the merits, the absence of a confirmatory fax cover sheet (or a fax number of the letter) was noted. Both parties agreed that EHC should be asked to search its files for any record that could confirm that the document was faxed on March 30, 1991. TR Day 5, at 77:12-78:15.

60. Administrative Decision Number 216 (March 31, 1991) [Annex E-M28].

61. *Id. See also* Yusseri Statement, ¶ 9.

62. Munir Cross-Ex., TR Day 5, at 55:26-56:1. *See also* Munir Statement, ¶ 18. The Tribunal notes that this plan to seize the hotels surreptitiously, while Wena management were away from the hotels, contradicts Mr. Munir's claim that EHC had previously notified Wena of its intentions to repossess the hotels.

63. Respondent's Memorial on Jurisdiction, at 4.

64. Direct Examination of Mr. Simon Webster, TR Day 3, at 12:8-9 ("Webster Direct Ex."); Direct Examination of Ms. Angela Jelcic, TR Day 3, at 91:26-92:5 ("Jelcic Direct Ex.").

65. *See, e.g.*, Police Statements, at 6, 9, 10 & 12 (July 6, 1991) [Annex W134]; Webster Direct Ex., TR Day 3, at 12:15-21; Jelcic Direct Ex., TR Day 3, at 95:13-19. Mr. Munir, however, testified that he arrived at the hotel in a single bus, with "approximately 35 accountants, receptions and other management staff required to run the hotel." Munir Statement, ¶ 17.

66. Kasr El-Nile Police Reports, at 3 (April 1, 1991) [Annex E-M25]. *See also id.*, at 2.

67. *Id.*, at 3.

68. *Id.*

69. Police Statement of Mr. Tamim Foda, at 5-6 (July 5, 1991) [Annex W134].

70. Police Statement of Mr. Mostafa Ahmed Osman, at 3 (July 6, 1991) [Annex W134].

71. *Id.*, at 3-4.

72. Police Statement of Mr. Sherif Ibrahim Mohamed Khalifa, at 8 (July 6, 1991) [Annex W134].

73. *Id.*

74. *Id.*, at 9.

75. *Id.*

76. Police Statement of Mr. Mohamed Sabry Ismail Emam, at 10 (July 6, 1991) [Annex W134] (capital letters in original).

77. *Id.*

78. "British Tourists are Beaten and Thrown Out of Egypt Hotels," *Daily Telegraph* (April 4, 1991) [Annex W7].

79. *Id.*

80. Police Statement of Mr. Hany Mohamed Hassan Mohamed Wahba, at 11-12 (July 6, 1991).

81. *Id.*, at 12.

82. *Id.*

83. *Id.*

84. *Id.* (capital letters in original).

85. Jelcic Direct Ex., TR Day 3, at 92:17-93:24. *See also* Declaration of Ms. Angela Jelcic, ¶ 13, attached to Claimant's Memorial on the Merits ("Jelcic Declaration").

86. Jelcic Direct Ex., TR Day 3, at 94:11-16.

87. Jelcic Direct Ex., TR Day 3, at 97:1-5.

88. Jelcic Direct Ex., TR Day 3, at 97:7-8. *See also* Jelcic Declaration, ¶ 13 ("I recognized certain EHC executives and personnel, some of whom were standing with some other well-groomed men in suits. These men were identified as Ministry of Tourism officials by our staff who recognized them.").

89. Jelcic Direct Ex., TR Day 3, at 97:10-13.

90. Webster Direct Ex., TR Day 3, at 14:6-12. *See also* Webster Direct Ex., TR Day 3, at 14:25-15:6 & 16:9-12.

91. Statement of Ms. Angela Jelcic to Kasr El-Nile Police (April 2, 1991) [Annex W82]

92. Statement of Mr. Simon Webster to Kasr El-Nile Police (April 2, 1991) [Annex W83]. Similar contemporaneous evidence of Wena's impression that the Egyptian government was involved in the seizures is reflected in several of the newspaper articles describing the events. For example, an article in the *Caterer and Hotelkeeper* reported that "Mr. Farargy believed the attack . . . was organised either by government elements or people who are fiercely opposed to foreign ownership in Egypt." "Wena Hotels Attacked by Crowds," *Caterer & Hotelkeeper* (April 18,1991) [Annex W85]. Similarly, an article in the *Crawley Observer* quoted "Wena Managing Director Bernard Dihrberg" as saying "[t]his is a legal dispute with the Egyptian government. We owe money to them and they owe money to us." "Mob Turn on Hotel Workers," *The Crawley Observer* (April 24, 1991) [Annex W86].

93. Sultan Cross-Ex., TR Day 4, at 52:19-22.

94. Direct Examination of Mr. Munir Abdul Al-Aziz Gaballah Shalabi, TR Day 5, at 12:29 ("Munir Direct Ex.").

95. Jelcic Direct Ex., TR Day 3, at 97:23-98:13; Webster Direct Ex., TR Day 3, at 16:17-17:12 & 19:8-15; Jelcic Declaration, ¶ 14; Declaration of Mr. Simon Webster, ¶¶ 30-31, attached to Claimant's Memorial on the Merits ("Webster Declaration").

96. *Id.*

97. *See* Kasr El-Nile Police Report (April 1, 1991) [Annex E-M25]; Munir Cross-Ex., TR Day 5, at 101:11-12.

98. Kasr El-Nile Police Report, at 1 (April 1, 1991) [Annex E-M25].

99. *Id.*

100. Kasr El-Nile Police Reports, at 9 (April 1, 1991) [Annex E-M25] (brackets in original English translation).

101. *See* Jelcic Direct Ex., TR Day 3, at 100:22-101:4; Webster Direct Ex., TR Day 3, at 20:2-8.

102. *See* Jelcic Direct Ex., TR Day 3, at 100:26-101:15; Webster Direct Ex., TR Day 3, at 21:20-22:1; Statement of Ms. Angela Jelcic to Kasr El-Nile Police (April 2, 1991) [Annex W82]; Statement of Mr. Simon Webster to Kasr El-Nile Police (April 2, 1991) [Annex W83].

103. *See* Kasr El-Nile Police Reports (April 2, 1991) [Annex E-M25]. The Tribunal also heard testimony from Mr. Tahir Al-Misiri Qasim (TR Day 4 at 223:8 *et seq.*) and Mr. Sameer Muhammad Khatir (TR Day 4 at 231:23 *et seq.*) to the effect that there was no violence at the time of the takeover. This testimony is inconsistent with the testimony of Webster and Jelcic and the other witnesses who testified consistently with Webster and Jelcic. Since the testimony of Mr. Qasim and Mr. Khatir has also been found inconsistent with the decision of the Southern Cairo Court of Appeal, which characterized the situation at the Nile Hotel on April 1, 1991 as including many acts of violence, the Tribunal has chosen not to rely on the testimony of these two witnesses.

104. Yusseri Statement, ¶¶ 9-11.

105. Police Statement Number 984, at 1 (April 2, 1991) [Annex W132].

106. *Id.*

107. *Id.*, at 3.

108. Police Statement Number 959, at 1 (April 1, 1991) [Annex E-J18].

109. *Id.*

110. Memorandum from the Public Prosecutor's Office, at 3 (April 13, 1992) [Annex W133].

111. Sultan Cross-Ex., TR Day 4, at 55:14-18. *See also* Sultan Statement, ¶ 20.

112. Sultan Cross-Ex., TR Day 4, at 55:21-23.

113. Sultan Cross-Ex., TR Day 4, at 56:2.

114. *See, e.g.*, Direct Examination of Minister Fouad Sultan, TR Day 3, at 180:19-21 ("Sultan Direct Ex."); Sultan Cross-Ex., TR Day 4, at 58:12-13.

115. *See, e.g.*, Sultan Direct Ex., TR Day 3, at 176:11-14 ("I fully agree that it is a wrong action taken by the EHC, notwithstanding their rights, but they should not have taken that action. They should have gone to arbitration or to the court.").

116. Sultan Direct Ex., TR Day 3, at 175:9-11. Minister Sultan apparently was referring to the dispute between Southern Pacific Properties (Middle East) Limited ("SPP") and the Arab Republic of Egypt regarding the development of tourist complex in Egypt, which eventually resulted in a decision that Egypt had expropriated SPP's investment and an award in favor of SPP. *See Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, 8 ICSID Review 328 (1993) [Annex W61].

117. *See, e.g.*, Sultan Cross-Ex., TR Day 4 at 57:10-28 & 59:9-61:1.

118. Sultan Direct Ex., TR Day 4, at 176:25-28. *See also* Sultan Cross-Ex., TR Day 4, at 57:17-21 ("As I said, I will not take back again the law in my hand and take action with the police to evict him [Mr. Kandil] from the hotel. This is something which has to be settled according to our description [sic] laws by a court and not by an administrative decision.").

119. *See, e.g.*, Malins Declarations, ¶ 6.

120. *See* Letter from Mr. Nael El-Farargy (Wena Hotels Ltd.) to His Excellency, Ambassador Shaker (Egyptian Ambassador to the United Kingdom) (July 9, 1991) [Annex W50].

121. *See* Letter from the Director General of the Civil Defense Authority (January 4, 1992) [Annex E-M43].

122. *See* Munir Direct Ex., TR Day 5, at 31:6-7; Munir Statement, ¶ 22.

123. Letter from Mr. Webster (Wena Hotels Ltd.) to Mr. Ceurvost (British Embassy, Egypt) (February 21, 1991) [Annex W130].

124. *Id. See also* Webster Direct Ex., TR Day 3, at 26:6-16.

125. Munir Statement, ¶ 22.

126. Munir Direct Ex., TR Day 5, at 30:10-28. *See also* Munir Statement, ¶ 22-23.

127. *Id.*

128. Police Report on Hand-over of the Nile Hotel (February 25, 1992) [Annex W137].

129. *See, e.g.*, Malins Direct Ex., TR Day 4, at 179:1-20; Webster Direct Ex., TR Day 3, at 26:20-24; Jelcic Direct Ex., TR Day 3, at 109:3-8.

130. *See* Munir Cross-Ex., TR Day 5, at 89:3-11; Munir Statement, ¶ 24.

131. Jelcic Direct Ex., TR Day 3, at 110:23-25; Farargy Declaration, ¶ 27.

132. Yusseri Statement, ¶ 13.

133. Report on Hand-over of the Luxor Hotel (April 28, 1992) [Annex E-M30].

134. *See, e.g.*, Malins Direct Ex., TR Day 4, at 179:1-20; Jelcic Direct Ex., TR Day 3 at 110:13-22.

135. *See, e.g.*, Yusseri Direct Ex., TR Day 5, at 113:7-11; Jelcic Direct Ex., TR Day 3, at 113:15-20; Letter from Classic Edition Travel to Wena (March 16, 1995); Letter from Inter Air Travel Limited to Wena (April 11, 1995).

136. *See, e.g.*, Malins Direct Ex., TR Day 4, at 180:23-181:23.

137. Letter from Mr. Humfrey Malins, M.P. (Parliamentary Consultant, Wena) to the Honorable Lee H. Hamilton (Chairman, Subcommittee on Europe & the Middle Easy, U.S. House of Representatives) (November 11, 1992) [Annex W131].

138. *See* decision of the Southern Cairo Court of Appeal (January 16, 1994) [Annex W135].

139. *Id.*

140. *See* Munir Direct Ex., TR Day 5, at 32:11-17; Munir Cross-Ex., TR Day 5, at 91:11-92:12.

141. Decision of the Southern Cairo Court of Appeal (January 16, 1994) [Annex W135]; Munir Cross-Ex., TR Day 5, at 94:23.

142. Munir Cross-Ex., TR Day 5, at 93:20-94:26.

143. Redirect Examination of Ms. Angela Jelcic, TR Day 3, at 155:22-156:22 ("Jelcic Redirect Ex.").

144. Nile Hotel Arbitration Award, at 1 (April 10, 1994) [Annex E-M19].

145. Luxor Hotel Arbitration Award, at 1 (September 29, 1994) [Annex E-J31].

146. Nile Hotel Arbitration Award (April 10, 1994) [Annex E-M19].

147. Annual Return and Financial Statements for Wena Hotels Limited (period ended December 31, 1995) [Annex E-J14]; Letter from Kevin Heath, Esq. (Lester Aldridge, Solicitors for Wena) to Mr. Nael El-Farargy (Wena Hotels Ltd.) (March 20, 1999) [Annex W16].

148. Check drawn in Wena's favor by the Egyptian Ministry of Justice [Annex W93].

149. Luxor Hotel Arbitration Award, at 1 (September 29, 1994) [Annex E-J31].

150. Cairo Court of Appeal's Judgement (December 20, 1995) [Annex E-J32].

151. Yusseri Direct Ex., TR Day 5, at 112:9-29; Annual Return and Financial Statements for Wena Hotels Limited (period ending December 31, 1996) [Annex E-J15].

152. Claimant's Request for Arbitration, at 16.

153. *See* Munir Statement, ¶ 3; Egyptian Law Number 97 of 1983 governing Public Sector Authorities and Affiliated Companies ("Law Number 97 of 1983") [Annex W65].

154. Sultan Statement, ¶ 4.

155. Sultan Cross-Ex., TR Day 3, at 227:26-28.

156. *Id.*, at 228:2-8

157. *See* Sultan Statement., ¶ 8; Sultan Cross-Ex., TR Day 3, at 211:26-212:2; Law Number 97 of 1983, art. 30 [Annex W65].

158. *See* Prime Minister's Decree No. 539 of 1989 [Annex E-M27]; Sultan Statement, ¶ 8; Sultan Cross-Ex., TR Day 3, at 211:17-23. Mr Kandil's appointment "by virtue of the Decree of the Prime Minister No. 539/1989" was noted in both the Nile and Luxor agreements. *See* Luxor Hotel Lease and Development Agreement, at 1 [Annex W4]; El Nile Hotel Lease and Development Agreement, at 1 [Annex 5].

159. *See* Munir Statement, ¶ 4.

160. Law Number 97 of 1983, art. 37 [Annex W65]. *See also* Sultan Cross-Ex., TR Day 3, at 214:18-215:11; Munir Cross-Ex., TR Day 5, at 44:4-17.

161. Munir Statement, ¶ 4.

162. Record of the Lower House Session No. 99, at 36 (July 14, 1992) [Annex W67] (Arabic original). *See also* Sultan Cross-Ex., TR Day 3, at 209:12-26.

163. Letter form Mr. Abdel-Moneim Rashad (Director General, Minister's Office – Ministry of Tourism) to Ms. Angela Jelcic (Wena Hotels Ltd.) (February 20, 1992) [Annex W66].

164. *See, e.g.*, Luxor Police State Report No. 959 of 1991, at 12 & 26 (April 1, 1991) [Annex E-M18]; Kasr El-Nile Police Report, at 6 (April 1, 1991) [Annex E-M25] ("The Egyptian Hotels Corporation is a public sector company and its funds are property of the state."); Letter from Mr. Kamal Kandil (Chairman, EHC) to Mr. Nael El-Farargy (Wena Hotels Ltd.) (March 30, 1991) [Annex W80]. *See also* Munir Cross-Ex., TR Day 5, at 47:10-11.

165. Letter from Mr. Kamal Kandil (Chairman, EHC) to Mr. Humfrey Malins, M.P. (Parliamentary Consultant, Wena) (March 31, 1991) [Annex W129].

166. Minutes of Meeting between Representatives of the Ministry of Tourism, EHC and Wena (February 26, 1991) (emphasis added) [Sultan Statement, Attachment B; also Annexes E-M22 & W124]. During testimony regarding the meaning of this statement, Minister Sultan explained that "I cannot give up entitlements or the rights of the State. If the right of the State is to collect rent I cannot give that right up." Sultan Cross-Ex., TR Day 3, at 230:2-4.

167. Luxor Police State Report No. 959 of 1991, at 8 (emphasis added) [Annex E-M18].

168. Respondent's Post-Hearing Memorial at 15.

169. *See* Consultancy Agreement between Mr. Kamal Kandil and Wena Hotels Limited [Annex W149].

170. *Id.*

171. Writ of Summons issued by Wena Hotels Limited against Mr. Mohamed Kamal Ali Mohamed Kandil (March 26, 1991) [Annex E-M7].

172. Letter from Mr. Kamal Kandil to the Senior Master of the Royal Court of Justice (August 19, 1991) [Annex W150].

173. *Id.*, at 1.

174. *Id.*

175. *Id.*

176. *See* Facsimile from Mr. Dimopolous (Wena Hotels Ltd.) to Mr. Kamal Kandil (Chairman, EHC) (December 13, 1989), enclosing letter from Mr. Nael El-Farargy (Wena Hotels Ltd.) to His Excellency, the Governor of Aswan (December 11, 1989) [Annex W188]; letter from Mr. Nael El-Farargy (Wena Hotels Ltd.) to His Excellency, the Governor of Aswan (January 15, 1990) [Annex W189].

177. Farargy Direct Ex., TR Day 1, at 142:27-28. *See also* Farargy Direct Ex., TR Day 1, at 142:26-143:6.

178. Sultan Direct Ex., TR Day 3, at 188:11-14.

179. Respondent's Post-Hearing Memorial, at 14.

180. Claimant's Post-Hearing Reply, at 16 (submitted on June 15, 2000).

181. Claimant's Memorial on the Merits, at 43-51.

182. *Id.*, at 51-54.

183. Respondent's Memorial on the Merits, at 8-40.

184. *Id.*, at 40-42.

185. *Id.*, at 42-44.

186. Respondent's Post-Hearing Memorial, at 15.

187. IPPA, art. 2(2) [Annexes W2 & E-J22].

188. IPPA, art 5(1) [Annexes W2 & E-J22].

189. Respondent's Opening Statement, TR Day 1, at 29:24-28. *See also* Claimant's Opening Statement, TR Day 1, at 15:24-25 ("the basis of this action is the breach of [the] Bilateral Treaty by Egypt").

190. *See, e.g.*, Claimant's Reply on the Merits, at 48-50. *See also* Claimant's Memorial on the Merits, at 42; Respondent's Memorial on the Merits, at 7-8 (referring, in regard to Respondent's second defense, to "practices condemned by both Egyptian and international law.").

191. *See, e.g.*, Claimant's Memorial on the Merits, at 43-51; Claimant's Reply on the Merits, at 29-38 (submitted on September 27, 1999); Claimant's Post-Hearing Brief, at 41-44.

192. Claimant's Memorial on the Merits, at 51-54; Claimant's Reply on the Merits, at 39-44; Claimant's Post-Hearing Brief, at 44-46.

193. Respondent's Post-Hearing Rebuttal Memorial, at 8 (submitted on June 15, 2000).

194. IPPA, art. 2(2) [Annex W2 & E-J22].

195. *American Manufacturing and Trading, Inc. v. Republic of Zaïre*, ICSID Case No. ARB/93/1, at 28 (1997) [Annex W115]. Article II(4) of the Zaïre-United States bilateral investment treaty, much like Article 2(2) of the IPPA, provides that "[i]nvestment of nationals and companies of either Party shall at all times be accorded fair and equitable treatment and shall enjoy protection and security in the territory of the other party." *Id.*, at 28 [Annex W115].

196. *AAPL v. Sri Lanka*, ICSID Case No. ARB/87/3, at 545 (1990) [Annex W117; a digested version of the decision has also been provided at Annex E-M35] The wording of Article 2(2) of the bilateral investment treaty in that case (between Sri Lanka and the United Kingdom) is almost identical to that in the same article in the IPPA: "Investment of nationals and companies of either Party shall at all times be accorded fair and equitable treatment and shall enjoy protection and security in the territory of the other Party." Agreement for the Promotion and Protection of Investments, February 13, 1980, U.K.-Sri Lanka [Annex W41].

197. *AAPL v. Sri Lanka*, at 546 (quoting Alwyn V. Freeman, *Responsibility of States for Unlawful Acts of Their Armed Forces*, 14 (1957)) [Annex W117; also Annex E-M35].

198. The evidence submitted by the parties does suggest a unity of interest between EHC and Egypt such that it is possible that Egypt might have authorized and participated in the seizures of the hotels. The repeated reference in contemporaneous documents to EHC as a "government company," to its money as "public money" and to its rights as "the Government's rights" or "state ownership" is particularly compelling in this regard. *See, e.g.*, Luxor Police State Report No. 959 of 1991, at 8, 12 & 26 (April 1, 1991) [Annex E-M18]; Kasr El-Nile Police Report, at 6 (April 1, 1991) [Annex E-M25]; Letter from Mr. Kamal Kandil (Chairman, EHC) to Mr. Nael El-Farargy (Wena Hotels Ltd.) (March 30, 1991) [Annex W80]; Letter from Mr. Kamal Kandil (Chairman, EHC) to Mr. Humfrey Malins, M.P. (Parliamentary Consultant, Wena) (March 31, 1991) [Annex W129]; Minutes of Meeting between Representatives of the Ministry of Tourism, EHC, and Wena (February 26, 1991) [Sultan Statement, Attachment B; also Annexes E-M22 & W124]. Nevertheless, the Tribunal concludes that Wena has failed to satisfy its burden of proving that Egypt actually participated in the seizures of the two hotels. For example, although both Ms. Jelcic and Mr. Webster believe that Ministry of Tourism officials were present at the Nile Hotel, they both admit that they were, personally, unable to identify any such officials. *See, e.g.*, Jelcic Direct Ex., TR Day 3, at 97:10-13; Webster Direct Ex., TR Day 3, at 14:6-12.

199. Malins Direct Ex., TR Day 4, at 175:1-4.

200. *Id.*, at 175:26-29. *See also* Malins Declaration, ¶ 4.

201. Letter from Mr. Nael El-Farargy (Wena Hotels Ltd.) to Minister Fouad Sultan (Minister of Tourism) (February 11, 1991) (emphasis added; brackets in original English translation) [Sultan Statement, Attachment A; also Annexes E-M21 & W127].

202. Letter from Mr. Kamal Kandil (Chairman, EHC) to Minister Fouad Sultan (Minister of Tourism) (March 21, 1991) [Sultan Statement, Attachment D; also Annex W126].

Annex 200

203. *Id.*

204. *Id.* (Arabic original). *See also* Sultan Cross-Ex., TR Day 3, at 235:23-237:27; Sultan Statement, ¶ 17.

205. Letter from Mr. Humfrey Malins, M.P. (Parliamentary Consultant, Wena) to Minister Fouad Sultan (Minister of Tourism) (March 25, 1991) [Annex W128].

206. Letter from Mr. Kamal Kandil (Chairman, EHC) to Mr. Humfrey Malins, M.P. (Parliamentary Consultant, Wena) (March 31, 1991) [Annex W128].

207. *Id.*

208. Sultan Cross-Ex., TR Day 3, at 233:2-5.

209. Sultan Cross-Ex., TR Day 3, at 175:9-10.

210. *See, e.g.*, Kasr El-Nile Police Reports (April 1-2, 1991) [Annex E-M25]; Police Statement of Mr. Tamim Foda (July 6, 1991) [Annex W134]; Police Statement of Mr. Mostafa Ahmed Osman (July 6, 1991) [Annex W134]; Police Statement of Mr. Sherif Ibrahim Mohamed Khalifa (July 6, 1991) [Annex W134]; Police Statement of Mr. Mohamed Sabry Ismail Emam (July 6, 1991) [Annex W134]; "British Tourists are Beaten and Thrown Out of Egypt Hotels," *Daily Telegraph* (April 4, 1991) [Annex W7].

211. *See* Jelcic Direct Ex., TR Day 3, at 97:23-98:13; Webster Direct Ex., TR Day 3, at 16:17-17:12 & 19:8-15; Jelcic Declaration, ¶ 14; Webster Declaration, ¶¶ 30-31; Kasr El-Nile Police Report (April 1, 1991) [Annex E-M25]; Munir Cross-Ex., TR Day 5, at 101:11-12.

212. *See* Police Statement Number 984 (April 2, 1991) [Annex W132]; Police Statement Number 959 (April 1, 1991) [Annex E-J18].

213. *See, e.g.*, Sultan Direct Ex. TR Day 3, at 180:19-21 Sultan Cross-Ex., TR Day 4, at 58:12-13.

214. *See, e.g.*, Sultan Direct Ex., TR Day 3, at 176:11-14 ("I fully agree that it is a wrong action taken by the EHC, notwithstanding their rights, but they should not have taken that action. They should have gone to arbitration or to the court.").

215. *See, e.g.*, Sultan Cross-Ex., TR Day 4 at 57:10-28 & 59:9-61:1.

216. Law Number 97 of 1983, art. 37 [Annex W65]. *See also* Sultan Cross-Ex., TR Day 3, at 214:18-215:11; Munir Cross-Ex., TR Day 5, at 44:4-17.

217. Sultan Cross-Ex., TR Day 3, at 227:26-28.

218. *Id.*, at 228:2-8.

219. Munir Statement, ¶ 4. *See also* Record of the Lower House Session No. 99, at 36 (July 14, 1992) [Annex W67]; Letter from Mr. Abdel-Moneim Rashad (Director General, Minister's Office — Ministry of Tourism) to Ms. Angela Jelcic (Wena Hotels Ltd.) (February 20, 1992) [Annex W66].

220. *See* Munir Direct Ex., TR Day 5, at 31:6-7; Munir Statement, ¶ 22; Yusseri Statement, ¶ 13.

221. *See, e.g.*, Farargy Declaration, ¶ 26.

222. Letter from Mr. Webster (Wena Hotels Ltd.) to Mr. Ceurvost (British Embassy, Egypt) (February 21, 1991) [Annex W130].

223. *Id. See also* Webster Direct Ex., TR Day 3, at 26:6-16.

224. *See, e.g.*, Malins Direct Ex., TR Day 4, at 179:1-20; Webster Direct Ex., TR Day 3, at 26:20-24; Jelcic Direct Ex., TR Day 3, at 109:3-8 & 110:13-22.

225. *See* Munir Cross-Ex., TR Day 5, at 89:3-11; Munir Statement, ¶ 24.

226. *See* Munir Direct Ex., TR Day 5, at 30:10-28; Munir Statement, ¶ 22-23; Police Report on Hand-over of the Nile Hotel (February 25, 1992) [Annex W137].

227. Munir Direct Ex., TR Day 5, at 30:10-28.

228. *See, e.g.*, Malins Direct Ex., TR Day 4, at 180:23-181:23.

229. Letter from Mr. Humfrey Malins, M.P. (Parliamentary Consultant, Wena) to the Honorable Lee H. Hamilton (Chairman, Subcommittee on Europe & the Middle East, U.S. House of Representatives) (November 11, 1992) [Annex W131].

230. *See* Decision of the Southern Cairo Court of Appeal (January 16, 1994) [Annex W134]; Munir Cross-Ex., TR Day 5, at 94:23.

231. Jelcic Redirect Ex., TR Day 3, at 155:22-156:22.

232. Munir Cross-Ex., TR Day 5, at 93:20-94:26.

233. IPPA, art 5(1) [Annex W2 & E-J22].

234 Ian Brownlie, *Principles of International Law*, 537 (4th Ed. 1990) [Annex W104]. Professor Brownlie also accurately observes that "in any case form should not take precedence over substance." *Id.*

235. *Amco Asia Corporation, et al. v. Republic of Indonesia*, Award on the Merits, ICSID Case No. ARB/81/1, at 62 (1984) [Annex W94].

236. *Id.*

237. *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, 8 ICSID Review 328, 375 (1993) [Annex W61]. *See also* G.C. Christie "What Constitutes a Taking of Property Under International Law," 38 Brit. Y.B. Int'l L. 308, 310-311 (1962) (citing *German Interests in Polish Upper Silesia*, Judgement No. 7, PCIJ, Series A (1926)) [Annex E-M11].

238. *Tippets, Abbett, McCarthy, Stratton v. TAMS-AFFA Consenting Engineers of Iran et al.*, Iran-U.S. Claims Tribunal, Award No. 141-7-2, at 225 (June 22, 1984) [Annex E-M12]. In some legal systems, a lease of land or a building is deemed real property.

239. *Id.*

240. *See generally* discussion in section III.B.1, *supra*.

241. *See, e.g.*, Respondent's Memorial on the Merits, at 10-11; Respondent's Rejoinder on the Merits, at 6-8.

242. *Tippets*, at 225 [Annex E-M12]. Such a deprivation easily qualifies as an expropriation within the meaning of Article 3(a) of the Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, 55 *Amer. J. Int'l L.* 545 (1961) ("A 'taking of property' includes not only an outright taking of property but also any such unreasonable interference with the use, enjoyment, or disposal of property as to justify an inference that the owner will not be able to use, enjoy or dispose of the property within a reasonable period of time after the inception of such interference." ("as quoted in G.C. Christie "What Constitutes a Taking of Property Under International Law," 38 Brit. Y.B. Int'l L. 308, 330 (1962) [Annex E-M11]).

243. IPPA, art 5(1) [Annex W2 & E-J22]. *See also* Ian Brownlie, *Principles of International Law*, 537 (4th ed. 1990) ("Expropriation of particular items of property is unlawful unless there is provision for payment of effective compensation." [Annex W104].

244. Letter from Mr. Humfrey Malins, M.P. (Parliamentary Consultant, Wena) to the Honorable Lee H. Hamilton (Chairman, Subcommittee on Europe & the Middle East, U.S. House of Representatives) (November 11, 1992) [Annex W131]. *See also* Malins Direct Ex., TR Day 4, at 180:23-181:23; Letter from Mr. Nael El-Farargy (Wena Hotels Ltd.) to His Excellency, Ambassador Shaker (Egyptian Ambassador to the United Kingdom) (July 9, 1991) (complaining about the apparent breakdown in negotiations between Egypt and Wena) [Annex W50].

245. Respondent's Memorial on the Merits, at 42-44.

246. Translation of Article 172(I) of the Egyptian Civil Code (Annex E-M36].

247. Respondent's Memorial on the Merits, at 43.

248. *Id.*, at 44.

249. Claimant's Reply on the Merits, at 49.

250. *See, e.g.*, Respondent's Memorial on Jurisdiction, at 2.

251. Respondent's Post-Hearing Memorial, at 25.

252. *See, e.g.*, *Gentini Case*, Italy-Venezuela Mixed Claims Commission, X R.S.A. 551, 560-561, (1903) [Annex W147].

253. *See, e.g.*, Letter from Mr. Nael Farargy (Wena Hotels Ltd.) to His Excellency Dr. Kamal El Ganzouri (Prime Minister of Egypt) (February 23, 1998) (complaining of Wena's "long and bitter disputes with the Egyptian State over direct foreign investment in Egypt.") [Annex W15].

254. *Alan Craig v. Ministry of Energy of Iran*, 3 Iran-U.S. Claims Tribunal 280 (1984) [Annex W155]. *See also* George Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* 480-482 (1996) [Annex E-M47].

255. *Id.*, at 287.

256. *Gentini Case*, Italy-Venezuela Claims Commission, X R.S.A. 551 (1903) [Annex W147]

257. *Amco Asia Corporation, et al. v. Republic of Indonesia*, ICSID Case No. ARB/81/1, International Arbitration Report 649, 654 (1986) [Annex W102].

258. IPPA, art 8(1) [Annexes W2 & E-J22].

259. Legal opinion of Dr. Hossam Al' din Kamil Elehwany, at 23 (September 1999) [Annex E-M8].

260. *Id.*

261. *Id.*, at 25 (emphasis added).

262. Respondent's Post-Hearing Memorial, at 15.

263. *See, e.g.*, Professor Ibrahim Fadlallah, *L'ordre public dans les sentences arbitrales*, Académie de Droit International, Recueil des Cours, 377 (1994-V); Professor Pierre Lalive, "Transnational (or Truly International) Public Policy and International Arbitration," *ICCA Congress Series*, No. 3, 276-277 (1987) [Annex E-M10].

264. Lalive, at 277 [Annex E-M10].

265. Consultancy Agreement between Mr. Kamal Kandil and Wena Hotels Limited [Annex W149].

266. Writ of Summons issued by Wena Hotels Limited against Mr. Mohamed Kamal Ali Mohamed Kandil (March 26, 1991) [Annex E-M7].

267. Letter from Mr. Kamal Kandil to the Senior Master of the Royal Court of Justice (August 19, 1991) [Annex W150] (the "subject of the above-mentioned Draft Contract was to develop new hotels in Egypt, these hotels being the Ramses Village project in Abou Simbal and a Conference Center in Aswan city. . . . I did not act in my quality of Chairman of the Egyptian Hotels Company nor did the Draft Contract concern either the Nile Hotel or the Luxor Hotel, instead I acted as Tourist Consultant for the Aswan Government and Chairman of the Board of Directors of Misr Aswan Tourist Co.").

268. Facsimile from Mr. Dimopolous (Wena Hotels Ltd.) to Mr. Kamal Kandil (Chairman, EHC) (December 13, 1989), enclosing letter from Mr. Nael El-Farargy (Wena Hotels Ltd.) to his Excellency, the Governon of Aswan (December 11, 1989) [Annex W188]; letter from Mr. Nael El-Farargy (Wena Hotels Ltd.) to his Excellency, the Governor of Aswan (January 15, 1990) [Annex W189].

269. Yusseri Direct Ex., at 4:3-11.

270. Farargy Direct Ex., TR Day 1, at 142:27-28. *See also* Farargy Direct Ex., TR Day 1, at 142:26-143:6.

271. Sultan Direct Ex., TR Day 3, at 188:11-14.

272. *See, e.g.*, Claimant's Post-Hearing Reply, at 16; Respondent's Post-Hearing Memorial, at 14.

273. IPPA, art. 5 [Annexes W2 & E-J22].

274. Claimant's Post-Hearing Brief, at 67.

275. *Id.*, at 68; Claimant's Statement of Fees and Expenses [Annex W194].

276. Claimant's Post-Hearing Brief, at 67 & n. 64; Claimant's Post-Hearing Reply, at 36.

277. Respondent's Post-Hearing Memorial, at 25-42; Respondent's Post-Hearing Rebuttal Memorial, at 22-34.

278. Respondent's Post-Hearing Memorial, at 43; Respondent's Post-Hearing Rebuttal Memorial, at 34; *Provisional Evaluation of Lost Investment* and *Review of Financial Information* prepared by Pannell Kerr Forster, attached to Respondent's Rejoinder on the Merits; Direct Examination of Mr. Hugh Matthew Jones, TR Day 4, at 135:12-15.

279. *See Expert Report* prepared by BDO Hospitality Consulting, attached to Claimant's Memorial on the Merits (calculating a profit of GB£ 4 million for the Luxor Hotel and a profit of GB£ 21.3 million for the Nile Hotel); *Reports for El-Nile and Luxor Hotels* prepared by Pannell Kerr Forster, attached to Respondent's Post-Hearing Memorial (calculating a profit of less than GB£ 10,000 for the Luxor Hotel and an actual loss for the Nile Hotel).

280. *Metalclad Corporation v. United Mexican States*, ¶¶ 119-120, ICSID Case No. ARB(AF)/97/1 (2000) (internal citation omitted). The *Metalclad* award is publicly available from the U.S Securities Exchange Commission, Washington, D.C. 20549, and

electronically at http://www.edgar-online.com, as an attachment to an 8-K filing of September 5, 2000 by Metalclad Corporation. *See also Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, 8 ICSID Review 328, 381 (1993) [Annex W61] ("In the Tribunal's view, the DCF method is not appropriate for determining the fair compensation in this case because the project was not in existence for a sufficient period of time to generate the data necessary for a meaningful DCF calculation.").

281. *SPP (Middle East) Ltd. (Hong Kong), et al. v Arab Republic of Egypt*, ¶ 65, Appendix IV of ICC Arbitration (1983) [Annex E-M38].

282. *American Manufacturing & Trading, Inc. v Republic of Zaïre*, ICSID Case No. ARB/93/1, at 28 (1997) [Annex W115].

283. *See, e.g., Review of Financial Information* prepared by Pannell Kerr Forster, attached to Respondent's Rejoinder on the Merits.

284. Approximately GB£ 6 million at current exchange rates.

285. IPPA, art. 5 [Annexes W2 & E-J22].

286. *See* Provisional Evaluation of Lost Investment, ¶¶ 2.2-2.3 & 2.8, attached to Respondent's Rejoinder on the Merits.

287. Check drawn in Wena' favor by the Egyptian Ministry of Justice [Annex W93].

288. Claimant's Post-Hearing Brief, at 68.

289. *Report for El-Nile Hotel* prepared by Pannell Kerr Forster, at 18, attached to Respondent's Post-Hearing Memorial ("Long-term government bonds in Egypt are currently yielding 10%. . . .").

290. *Metalclad Corporation v. United Mexican States*, ¶ 128, ICSID Case No. ARB(AF)/97/1 (2000).

291. As several authorities have noted, "virtually all monetary judgements . . . contain rulings on interest," and yet, this decision to award interest is often made without any discussion. *See, e.g.*, J. Gillis Wetter, *Interest as an Element of Damages in Arbitral Process*, 5 Int'l Fin. L. Rev. 20 (1986); F.A. Mann, *Compound Interest as an Item of Damage in International Law*, 21 Univ. of California, Davis L. J. 577, 578 (1988).

292. John Y. Gotanda, *Awarding Interest in International Arbitration*, 90 Amer. J. Int'l L. 40, 61 (1996).

293. F.A. Mann, *Compound Interest as an Item of Damage in International Law*, 21 Univ. of California, Davis L. J. 577, 586 (1988). *See also id.*, at 585 ("In this spirit it is necessary first to take account of modern economic conditions. It is a fact of universal experience that those who have a surplus of funds normally invest them to earn compound interest. On the other hand, many are compelled to borrow from banks and therefore must pay compound interest. This applies, in particular, to business people whose own funds are frequently invested in brick and mortar, machinery and equipment, and whose working capital is obtained by way of loans or overdrafts from banks."); *Starrett Housing Corp. v. Iran*, 16 Iran-U.S. Claims Tribunal 112, 251-254 (1987) (Holtzmann, concurring).

294. Tribunal's Decision on Jurisdiction, at 9 (released on June 29, 1999).

295. Claimant's Statement of Fees and Expenses as of June 13, 2000 (Annex W194); letter from Mr. John Savage (Counsel for Wena) to Mr. Alejandro Escobar (Secretary to the Tribunal) (November 21, 2000).

Annex 200

ANNEX 201

International Centre for the Settlement of Investment Disputes (ICSID)

June 27, 1990

In the Matter of Arbitration between

ASIAN AGRICULTURAL PRODUCTS LTD. (AAPL)

v.

REPUBLIC OF SRI LANKA

CASE No. ARB/87/3

FINAL AWARD

President	: Dr. Ahmed Sadek EL-KOSHERI
Members of the Tribunal	: Professor Berthold GOLDMAN, and
	: Dr. Samuel K.B. ASANTE
Secretary of the Tribunal	: Mr. Bertrand P. MARCHAIS

In Case No. ARB/87/3,

Between Asian Agricultural Products Ltd. (AAPL),
represented by:
Dr. Heribert Golsong, as Counsel
[of the law firm of Fulbright & Jaworski]

And

The Republic of Sri Lanka
represented by:
[Messrs. William Rand, Robert Hornick, Paul Friedland and Evan Gray of the law firm of Coudert Brothers, as Counsel; and Messrs. M.S Aziz and A. Rohan Perera, as Agents]

THE TRIBUNAL
Composed as above,
After deliberation,
Made the following Award:

1. On July 8, 1987, the International Centre for the Settlement of Investment Disputes (hereinafter called "the Centre" of "ICSID") received a Request for Arbitration from Asian Agricultural Products Ltd. (Hereinafter called "AAPL" or "the claimant"), a Hong Kong corporation.

The Request stated that AAPL wished to institute arbitration proceedings against the Democratic Socialist Republic of Sri Lanka (hereinafter called "Sri Lanka" or "the Respondent") under the terms of the ICSID Convention to which Sri Lanka is a contracting Party, and in reliance upon Article 8.(1) of the Agreement between the Government of the United Kingdom of Great Britain and Northern-Ireland and the Government of Sri Lanka for the Promotion and Protection of Investments of February 13, 1980 (hereinafter called "the Bilateral Investment Treaty") which entered into force on December 18, and was extended to Hong Kong by virtue of an Exchange of Notes with effect as of January 14, 1981.

2. Article 8.(1) of the Bilateral Investment Treaty, invoked as expressing Sri Lanka's consent to ICSID Arbitration, reads as follows:

> Each contracting Party hereby consents to submit to the International Centre for the Settlement of Investment Disputes (...) for settlement by conciliation or arbitration under the Convention on the settlement of Investment Dispute between States and Nationals of the Other States opened for signature at Washington on 18 March, 1965 any legal disputes arising between that Contracting Party and national or company of the other Contracting Party concerning an investment of the latter in the territory of the former.

3. The Claimant indicated in the Request for Arbitration that a dispute arose directly out of an officially approved investment by AAPL in Sri Lanka that took place in 1983 under the form of participating in the equity capital of SERENDIB SEAFOODS LTD. (hereinafter called "the Company" or "Serendib") a Sri Lankan public company established for the purpose of undertaking shrimp culture in Sri Lanka.

According to the Claimant, the Company's farm, which was its main producing center, was destroyed on January 28, 1987, during a military operation conducted by the security forces of Sri Lanka against installations reported to be used by local rebels. As a direct consequence of said action, AAPL alleged having suffered a total loss of its investment, and claimed from the Government of Sri Lanka compensation for the damages incurred as a result thereof. The claims submitted on March 9, 1987, remained outstanding without reply for more than the three months period provided for in Article 8.(3) of the Bilateral Investment Treaty to reach an amicable settlement, and hence AAPL became entitled to institute the ICSID arbitration proceedings.

4. On July 9, 1987, the Secretary General of ICSID sent an acknowledgment of the Request to AAPL and transmitted a copy of the Request to Sri Lanka. On July 20, 1987, the Secretary General registered the Request in the Arbitration Register and notified the Parties accordingly.

5. On September 30, 1987, the Centre received a communication from AAPL to the effect that Professor Berthold Goldman has been appointed as member

of the Tribunal in conformity with Rule 5.(1) of the Arbitration Rules. He accepted his appointment as arbitrator on October 8, 1987.

The Republic of Sri Lanka appointed Dr. Samuel K. B. Asante by a letter dated October 20, 1987. He accepted his appointment on October 28, 1987.

Dr. Ahmed S. EL-Kosheri was appointed as the third arbitrator and President of the Tribunal on December 24, 1987, by the Chairman of the Administrative Council of ICSID in consultation with the Parties. He accepted his appointment on January 4, 1988.

Accordingly, the Tribunal became constituted as of January 5, 1988, and the declaration provided for under Arbitration Rule 6 was signed by each arbitrator.

6. At the first session of the Tribunal, held on February 23, 1988 at the Offices of the World Bank in Washington, D.C., the Parties declared that they were satisfied that the Tribunal had been properly constituted in accordance with the provisions of Section 2, Chapter IV of the Convention and of Chapter I of the Arbitration Rules (Minutes of said Session, Item 1,(c)).

The Parties and the Tribunal established the framework within which the pleadings have to take place, comprising two consecutive rounds of written submissions followed by oral hearings to be electronically recorded without requiring the production of verbatim transcripts (Items 10-12 of the Minutes).

It was also agreed upon in that First Session that the Arbitration Rules in effect after September 26, 1984, shall apply (Item 2); that the language of the proceeding would be English (Item 8); and that the place of the proceedings will be Washington, D.C. at the seat of the Centre (Item 9).

7. The Claimant's Memorial, submitted on April 13, 1988, focused mainly on the "bases for the claim", consisting of:

(i) - the unconditional obligation of "full protection and security" provided for in Article 2 of the Bilateral Investment Treaty;

(ii) - the more specific and clearly defined obligation stated in Article 4(2) of that Treaty requiring adequate compensation of the destruction of the Claimant's property under circumstances not justified by combat action or necessities of the situation; and

(iii) - finally, the Claimant indicated that the Government's liability extends to cover "damage caused under customary rules of international law on State responsibility" (lines 9 and 10 on page 6 of the Claimant's Memorial).

The remedy required was expressed by the Claimant in terms of evaluating "the market value of the undertaking on the basis of discounted cash flow (DCF) theory", in order to establish the "going concern value" of Serendib Seafoods Ltd on January 28, 1978, the date of the destruction of its property.

8. The Respondent's Counter-Memorial, submitted on June 18, 1988, placed the emphasis on different aspects; mainly to illustrate that the Serendib venture "was a failure from the outset", and its "fitful efforts to restructure was overtaken in

January 1987, by the civil war between Tamil separatists and the Sri Lankan Government". Thus, the large majority of AAPL' s claimed damages should be denied since they are based on "the illusion of expected profitability."

Moreover, according to the Respondent's account of the facts, the destruction of Serendib's property was due to intense combat action between the Tamil rebels known as the "Tigers", who were allegedly operating out of Serendib's farm and reported by Governmental sources as having violently resisted the counter-insurgency operation conducted by the Special Task Force (STF), and which aimed to drive the Tiger rebels out of the area,

Equally, with regard to the relevant dispositions of the Bilateral Investment Treaty, the Respondent's Counter-Memorial gave the Treaty an interpretation different from that advanced by the Claimant. Particularly, the expression "full protection and security" used in Article 2 has to be construed as simply incorporating the standard which requires "due diligence" on the part of the States, and does not impose strict liability. As to Article 4.(2), the Government's liability thereunder would not arise except in case the Claimant succeeds in providing the proof that the counter-insurgency actions were not reasonably necessary or that the governmental security forces caused excessive destruction during their combat against the Tamil rebels.

9. The Claimant's Reply to the Respondent's Counter-Memorial was duly submitted on August 18, 1988. The first part of the Reply contained an elaboration of the factual aspects of the case from the Claimant's point of view, especially those related to the events of January 28, 1987. According to Claimant, there was no "battle" at the farm site, but rather "a murderous over-reaction by the STF which led to the destruction and civilian deaths".

Furthermore, no access to the farm was permitted before February 10, 1987, either by the Batticaloa Citizens's Committee for National Harmony or by Serendib's staff, in order that "all evidence of the brutal actions in area could be obliterated".

In the second part of the Reply, the Claimant started by indicating that the Sri Lanka/U.K. Bilateral Investment Treaty "should be considered tantamount to" an agreement between the two Parties as to the applicable rules of law, within the context of Article 42 of the ICSID Convention. Nevertheless, it has to be understood that the Treaty itself is not limited to the explicit statement of certain substantive rules, but renders applicable additional rules incorporated therein, either by reference or by implication. Moreover, the Claimant's Reply states that the "rules of customary international law", as well as the "Law of Sri Lanka as the host country", may be regarded as supplementary "alternative source of applicable law" (p. 29 of the Reply).

With regard to the specific issue of the Standard of Liability under the general pattern followed by Bilateral Investment Treaties, the basic argument developed by the Claimant amounts to an assertion that the traditional "due diligence" criterion applicable under the *minimum standard* of customary international law had been replaced by a new type of "strict or absolute liability not mitigated by concepts of due diligence" (p. 54 of the *Claimant's Reply*).

In case the strict liability argument based on Article 2 and on the most-favoured nation clause contained in the Bilateral Investment Treaty, would not be assested by the Tribunal, the Claimant presented "as an *alternative submission* only" another argument based on Article 4.(2) (p. 56 of the *Claimant's Reply*), and ultimately on article 4.(1) "which remains the fall-back provision in cases of war destruction" (*Ibid*, p. 57).

Under this alternative argument, the applicability of Article 4.(2) cannot be avoided except in case Sri Lanka would succeed in carrying out its *onus probandi* by providing convincing proof that the destruction of January 28, 1987 was caused "in combat action", and was required by "the necessity of the situation".

At the end of the Claimant's reply, AAPL's submissions were formulated as requesting the Tribunal to:

> 1. Determine the liability of the Government of Sri Lanka to compensate AAPL for the unlawful requisition and destruction of its investments;
>
> 2. Award to AAPL restitution or adequate compensation in the amount of freely transferable U.S. Dollars of not less than $ 8,067,368 (eight million sixty-seven thousand three hundred sixty-eight) on account of the requisition and destruction of its investment, increased by the additional costs, including all direct and indirect costs of the present proceedings, as well as interest at commercial rates;
>
> 3. Order the Respondent to assume the guarantee which AAPL had accepted for the loan by EAB/Deutsche Bank to SSL, or to pay in escrow the additional amount of U.S. $ 888,000 (eight hundred-eighty thousand), representing the principal of the outstanding loan amount to be paid by AAPL if and when Deutsche Bank prevails in a call on the guarantor for the guarantee subscribed on September 15, 1984;
>
> 4. Deny the Counter-claim by the Respondent for costs and attorneys-fees.

10. On October 20, 1988 the Government of Sri Lanka submitted its Rejoinder mainly devoted to emphasizing two issues: (i)—on the one hand, the incorrectness of AAPL's construction of the interrelation between Article 2.(2) and Article 4.(2) of the Sri Lanka/U.K. Bilateral Investment Treaty; and (ii)—on the other hand, the refutation of AAPL' s claimed damages.

According to the Respondent's Rejoinder, Article 4.(2) is not an exemption from the rule contained in Article 2.(2), since both articles "share a common standard of liability (that of governmental negligence)", but "the two provisions concern damages arising in distinct situations and caused by distinct parties" (p. 6 of the *Rejoinder*). Moreover, Article 4.(2) could not be considered superseded by operation of Article 3 (the most-favoured-nation clause) as a result of the subsequent conclusion of the Sri Lanka/Switzerland Investment Treaty. In the Respondent's own words, such convention "meets the same problem as AAPL' s absolute liability theory; because Article 4 of the Treaty creates potential liability, and does not limit liability, its exclusion from a subsequent treaty could not increase U.K. investor's rights under the Treaty" (p. 10 of the *Rejoinder*).

The Respondent's propositions concerning the claimed damages are composed of three elements:

(a) - Serendib's desperate financial situation as reflected in the Memorandum of Understanding dated December 22, 1986 could hardly become reversed to evidence future expected profitability;

(b) - the inclusion of assets and other elements which were never touched by the destruction, such as the hatchery on the west coast;

(c) - the speculative nature of the projections concerning any possible future profitability.

The Respondent's position on the various legal and factual issues led to the following conclusions:

(i) - that the STF operation on January 28, 1987, was a legitimate exercise of sovereignty;

(ii) - that any damage which occurred at the Serendib shrimp farm on that date was either necessary under the circumstances or not caused by the Government;

(iii) - that AAPL's financial loss due to destruction of assets remains unproven; and

(iv) - that AAPL suffered *no* loss of any reasonably foreseeable future profits (p. 39 of the *Rejoinder*).

11. The oral phase of the proceedings took place from April 17 to April 20, 1989 at the seat of the Centre in Washington, D.C.

As indicated in the Summary Minutes of the Hearing of the Arbitral Tribunal, oral presentations were made by counsels to both Parties, and counsel to each party was given the opportunity to respond to the presentation made by the other.

The Tribunal heard also an oral presentation from Mr. Deva Rodrigo, advisor to the Claimant, and Mr. Victor Santiapillai, Managing Director of Serendib Seafoods Ltd., appeared before the Tribunal as witness called by AAPL. After giving his evidence, he was examined, and cross-examined by Counsel to each Party, and responded to the questions put to him by the members of the Arbitral Tribunal.

Before declaring the hearing adjourned on April 20, 1989, the Tribunal requested the Parties to submit certain additional documents and information, together with their respective comments thereon.

12. In compliance with the Tribunal's oral order fixing the dates for filing the requested submissions, the first exchange took place on May 22, 1989, and the second exchange on May 29, 1989.

13. The Arbitral Tribunal having met for deliberation in Paris on Monday 26 and Tuesday 27 June 1989, and having considered the various issues pending before it, felt necessary to request further clarifications from both Parties about certain important points deemed not sufficiently pleaded during the previous hearing. A procedural Order was issued consequently on June 27, 1989, inviting both Parties to provide the Arbitral Tribunal with their considered points of view, together with all supporting documents, on the following:

(A) - Within the context of Article 4.1 of the Sri Lanka/United Kingdom Bilateral Agreement of February 13th, 1980, for the Promotion and Protection of Investments, is there any existing precedent or established practice concerning restitution, indemnification, compensation or other settlement allocated to Sri Lanka nationals and companies, or to nationals and companies of any Third State in the circumstances specified in said Article 4.(1)? If so how was the quantum calculated?

(B) - Even if there is no precedent or established practice what are the applicable rules and standards under the Sri Lanka domestic legal system with regard to investment losses suffered by private persons owing to any of the circumstances mentioned in the said Article 4.(1)?

(c) - What are the legal obligations of Sri Lanka under international law with regard to investment losses suffered owing to any of the circumstances mentioned in Article 4.(1) by nationals of companies of Third States, whether these States have or have not concluded Bilateral Investment Agreements with Sri Lanka?.

14. In compliance with the Tribunal's Order of June 27, 1989, both Parties submitted their answers to the above-stated questions by September 15, 1989, and Claimant commented on the Memorandum of the Respondent on October 27, 1989.

15. At a later stage, and as a result of consultations undertaken between the members of the Tribunal, a new invitation was addressed on December 26, 1989, to Counsel to both Parties in the following terms:

> Taking into consideration that the members of the Tribunal deem appropriate receiving from Counsels of both Parties their reflections and comments about the Decision rendered in July 1989 by the International Court of Justice in the case between the U.S.A. and Italy related to the scope of protection extended to a foreign investor under bilateral treaty;
>
> Therefore, both Counsels are kindly invited to submit within the coming four weeks their comments about the legal reasoning stated in said Decision and the what extent they deem said reasoning relevant in adjudicating the pending Arbitration Case.

Counsel to the Respondent dispatched his comments in a letter dated January 26, 1990, and Counsel to the Claimant expressed his comments in a faxed letter dated January 29, 1990.

16. Subsequent consultations undertaken between the members of the Tribunal indicated that there was no need to convene a new oral hearing, and the Tribunal held its final meeting on March 26-27, 1990.

* *
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17. As a result of said deliberations, the Tribunal is of the opinion that the pending arbitration has to be adjudicated taking into account the following:

I - *Concerning the Applicable Law*

18. The present case is the first instance in which the Centre has been seized by an arbitration request exclusively based on a treaty provision and not in implementation of a freely negotiated arbitration agreement directly concluded between the Parties among whom the dispute has arisen.

19. Consequently, the Parties in dispute have had no opportunity to exercise their right to choose in advance the applicable law determining the rules governing the various aspects of their eventual disputes.

In more concrete terms, the prior choice-of-law referred to in the first part of Article 42 of the ICSID Convention could hardly be envisaged in the context of an arbitration case directly instituted in implementation of an international obligation undertaken between two States in favour of their respective nationals investing within the territory of the other Contracting State.

20. Under these special circumstances, the choice-of-law process would normally materialize after the emergence of the dispute, by observing and construing the conduct of the Parties throughout the arbitration proceedings.

Effectively, in the present case, both Parties acted in a manner that demonstrates their mutual agreement to consider the provisions of the Sri Lanka/U.K. Bilateral Investment Treaty as being the primary source of the applicable legal rules.

This basic premise relied upon heavily by the Claimant acquired full acceptance from the Respondent, who, not only based his main arguments on the provisions of the Treaty in question, but also invoked Article 157 of the Constitution of Sri Lanka emphasizing that the Treaty became applicable as part of the Sri Lankan Law.

21. Furthermore, it should be noted that the Bilateral Investment Treaty is not a self-contained closed legal system limited to provide for substantive material rules of direct applicability, but it has to be envisaged within a wider juridical context in which rules from other sources are integrated through implied incorporation methods, or by direct reference to certain supplementary rules, whether of international law character or of domestic law nature. Such extension of the applicable legal system resorts clearly from Article 3.(1), Article 3.(2), and Article 4 of the Sri Lanka/U.K. Bilateral Investment Treaty.

22. In fact, the submissions of both Parties (*supra*, § 7, iii, § 10) clearly demonstrate that they are in agreement about admitting the supplementary role of the recourse—regarding certain issues—to general customary international law, other specific international rules rendered applicable in implementation of the most-favored-nation clause, as well as to Sri Lankan domestic legal rules.

23. In spite of the Claimant's hostility to the general applicability of customary international law rules and his reluctance to admit Sri Lankan domestic law as the basic governing law under the last part of Article 42 of the ICSID Convention covering the absence of choice of law by the Parties, AAPL arrived from a practical point of view to a position similar to that adopted by the Respondent throughout the arbitral pro-

(*Ibid.*, p. 52). Thus, a deliberate choice is reflected to follow a new pattern in matters of protection different from that which prevailed under traditional International Law.

(D) - In implementation of the most-favoured-nation clause contained in Article 3 of the Sri Lanka/U.K. Bilateral Investment Treaty, and in the light of the fact that the Treaty concluded between Sri Lanka and Switzerland does not provide for a "war clause" or "civil disturbance" exemption from the protection and security standard, the Claimant asserts that: "the standard of treatment under the Swiss Treaty, which is obviously more favourable than the provision of the SL/UK Treaty, applies to British investments. This means that a standard of unmitigated strict liability has to be assured by Sri Lanka in favour of British Investments" (*Ibid.*, P. 56).

27. As an "alternative submission only", the Claimant envisaged a supplementary argument based on Article 4.(2) of the Sri Lanka/U.K. Bilateral Investment Treaty which could be relied upon in case the Tribunal "unexpectedly" would deem that Article applicable.

The Claimant's position in this respect was clearly stated at page 57 of his *Reply to the Respondent's Counter-Memorial*, which reads as follows:

> As stated above, Article 4(2) of the SL/UK Treaty provides for an exemption from the strict liability rule of Article 2(2). Article 4(2) provides for restitution and freely transferable compensation if the destruction of property in situation of war or civil disturbances was *not* required by the necessity of the situation. This standard of compensation goes beyond the duty of granting "restitution", "indemnification", or "compensation" or "other settlement" provided for by Art 4(1) of the Treaty, which remains the fall-back provision in cases of war destruction.

It is clear from the above quotation that the Claimant invokes Article 4 of the Treaty in its entirety, but considers the present case falling within the scope of the specific rule contained in Article 4.(2), which evidently provides a better type of remedy that due under Article 4.(1).

28. The reasons sustaining that alternative as to the applicability of Article 4.(2) are explained as follows:

(A) - The act complained of was "not caused in combat action", but amounts to what the Claimant describes as "the wanton destruction of AAPL' s property and the cold-blooded killing of the farm manager and the permanent staff members" which was "clearly not planned pursuant to any combat action" (page 8 of the *Claimant's Memorial*);

(B) - The property was "requisitioned" by Sri Lankan forces and was "destroyed by those same forces" under circumstances suggesting that the wanton use of force was "not required by the exigencies of the situation" (*Ibid.*, same page 8);

(C) - Moreover, the Claimant ascertains that: "the complete destruction and cold-blooded killings by the Government's security forces were completely out of proportion to what was necessary to meet the specific exigencies of the situation which actually existed at the SSL facility" (*Ibid.*, p. 9); and

ceedings. This is particularly seen from what has been quoted in § 7, iii and § 9 herein-above.

24. Accordingly, the Tribunal is of the opinion that the "false problem" related to the preliminary determination in principle of the applicable law has no relevance within the context of the present arbitration, since both Parties agreed during their respective pleading to invoke primarily the Sri Lanka/U.K. Bilateral Investment Treaty as *lex specialis*, and to apply, within the limits required, the international or domestic legal relevant rules referred to as a supplementary source by virtue of Articles 3 and 4 of the Treaty itself.

II – *The legal grounds on which the Respondent's responsibility could be sustained*

25. As indicated herein-above, both Parties invoked the Sri Lanka/U.K. Bilateral Investment Treaty as the primary applicable law. However, each Party construed the Treaty's relevant provisions in a manner which led to basically different conclusions.

(I). *The Claimant's Case*

26. The main point of view relied upon by AAPL to substantiate its submissions can be summarized as follows:

(A) - By providing that the investments of one contracting Party "shall enjoy full protection and security in the territory of the other Contracting Party", Article 2 of the Treaty went beyond the *minimum standard* of customary international law through the creation of an unconditional obligation to be borne by the host country. According to the Claimant, "the ordinary meaning of the words 'full protection and security' points to an acceptance by the host State of strict or absolute liability" (*Reply of Claimant to Respondent's counter-Memorial, op. cit.*, p. 46);

(B) - Within the "context" of the entire Treaty's "object and purpose", and taking into account the "identical or very similar" language used in most of the Bilateral Investment Treaties concluded between Sri Lanka, and Third States, the comparative analysis with the different other patterns followed elsewhere indicates that the term "full protection and security" has to be considered "autonomous in character and independent of any link to customary international law" (*Ibid.*, p. 49);

(C) - By abandoning the "diplomatic protection" theory largely based on the United States' "Friendship, Commerce and Navigation" (FCN) pattern of indirect protection, the foreign investor "enjoys" under the "Bilateral Investment Treaties" (BIT's) a different method of direct protection.

According to the Claimant, "the right to protection is vested in the holder of the investment with immediate effect upon the simple coming into force of the treaty"

(D) - In reliance upon the language of Article 4.(2), the Claimant is of the opinion that said language: "places the burden on the Respondent to demonstrate that the destruction of Claimant's property was required by the necessity of the situation" (*Ibid.*, p. 11).

Invoking what is considered "a general principle of international judicial and arbitral practice" the Claimant submitted at a later stage that:

> the burden of proof shifts from the claimant to the defendant if the former has advanced same evidence which *prima facie* supports his allegation. This is particularly appropriate if the defendant wishes to derive a benefit from an interpretation or rule operating in his favor as does Sri Lanka in this case. It is submitted that rules justifying conduct which would otherwise be unlawful (such as military necessity) fall into the category of norms operating in favor of the defendant for which the defendant carries the *onus probandi* (*Reply to Respondent's Counter-claim*, at p. 58).

29. During the written phase of the procedures, the Claimant deemed sufficient to formulate his claims for "adequate compensation" on the basis of said Article 4.(2) without suggesting what could be the ultimate remedy available if the Tribunal—contrary to his submissions—would arrive to the conclusion that conditions required for the applicability of the paragraph in question are missing in the present case, and accordingly the rules referred to in paragraph (1) of Article 4 constitute the proper legal framework within which the pending issues have to be adjudicated.

The only indications provided for in the Claimant's written pleadings with regard to such alternative are limited to what was previously mentioned in two reported passages:

(i) - the short reference on page 6 of the Claimant's Memorial to the Government's liability "under customary rules of international law on State responsibility" (*supra*, § 7, (iii);

and

(ii) - the closing sentence on page 57 of the Reply to the Respondent's Counter-Memorial containing a precise reference to the remedies "provided for by Article 4.(1) of the Treaty, which remains the fall-back provision in cases of war destruction" (*supra*, § 27 at the end of the quotation).

30. In order to obtain certain necessary clarifications about the Claimant's position a question was put to the Claimant's Counsel by the President of the Tribunal at the Oral Hearing held in Washington D.C. from April 17 to April 20, 1989. According to the transcript of the tape containing Dr. Golsong's Closing Statement on April 20, 1989, the latter responded by saying:

> we were told that we had not based our claim on 4(1) which therefore has to be deleted from the discussions. We have in our Memorial and in our Reply generally based our contention on the Bilateral Investment Treaty of the United Kingdom extended to Hong Kong and improved eventually by way of incorporation by reference of most-favoured-nation provisions deriving from other Investment Treaties. And we maintain this position. We have started by saying that 2. paragraph 2 enshrines an absolute or strict standard of liability and certainly more than due diligence. And that there are some exceptions in the UK Treaty, namely the specific war situation in Article 4 in general, without making a distinction between 4(1) and 4(2). And in any way, if I refer to 4(2), I have implicitly to bring into discussion 4(1). (*Text provided by ICSID's Secretariat, as enclosure to a letter dated April 10, 1990, in response to an earlier request from the President of the Arbitral Tribunal to check the electronically recorded tapes of the hearing*).

31. At a later stage of the proceedings, the Arbitral Tribunal issued the abovementioned Order of June 27, 1989 (*supra*, § 130), which invited both Parties to provide the Tribunal with their considered points of view about certain aspects related to Article 4.(1) and the results that could be obtained through its implementation.

By his letter dated September 14, 1989, the Claimant's Counsel provided the Tribunal with answers to the questions put to both Parties without raising any objection to the eventual adjudication of the case under Article 4.(1). Moreover, the last sentence of said letter explicitly emphasized that:

> ...there can be no doubt that in the present case the provisions of Article 4(1) of the Sri Lanka/UK Agreement are applicable, and being *lex specialis*, supersede any general principle of International Law which otherwise may govern the issues at stake.

(II). *The Respondent's Case*

32. In Sri Lanka's Counter-Memorial, the Respondent adopted arguments aimed to contradict the Claimant's initial submissions. The Government's main arguments at that phase of the proceedings can be summarized as follows:

(A) - "The language 'full protection and security' is common in bilateral investment treaties, and it incorporates, rather than overrides, the customary international legal standard of responsibility. This international legal standard requires due diligence on the part of the States and reasonable justification for any destruction of property, but does not impose strict liability" (*Government's Counter-Memorial*, p. 27);

(B) - The "standards for liability under Articles 2.(2) and 4.(2) are essentially identical. In both instances, a requirement of reasonableness is imposed on Government action. Under the international law standard embodied in Article 2.(2), the Government incurs liability if it fails to act with due diligence. Under Article 4.(2), the Government incurs liability if its actions are not reasonably necessary" (*Ibid.*, p. 28);

(C) - "Article 4.(2) sets forth the standard for compensation in the event the Government is found to have violated its obligations under Article 2.(2). That is, if the Government could have prevented the destruction of the farm through due diligence". In case it has been proven that the Government's lack of due diligence caused "unnecessary destruction, then the Government would both have violated its obligation under 2.(2) and owe restitution or compensation under Article 4.(2)" (*Ibid*, p. 28-29);

(D) - The burden of proof has to be assumed by the Claimant, by proving "that through due diligence, the Government could have prevented Batticaloa from

falling under terrorist control, thus obviating the need for counter-insurgency action. If AAPL fails to prove that the security action itself was avoidable, then its burden is to prove that the Government caused excessive destruction during the operation of January 28, 1987" (*Ibid.*, p. 29);

(E) - "To the extent there was excessive destruction, the Government of Sri Lanka is ready to compensate AAPL for its proportionate ownership". But, it is questionable "whether the Tribunal may determine that there was excessive destruction, without second-guessing tactical decisions made by commanders during the heat of combat" (*ibid.*, p. 41).

(F) - "By investing in an area which it knew contained a vehement, and potentially violent, separatist presence, AAPL assumed the risk that its investment would be caught up in the sri Lankan civil war" (*Ibid.*, p. 41).

33. The Government 's Rejoinder focused essentially on the arguments developed in the Claimant's Reply, by ascertaining that:

(A) - AAPL' s alleged "absolute liability theory" based on Article 2.(2) concerns damages arising in situations and caused by parties other than those concerned by Article 4.(2). In essence, according to the Respondent, Article 2.(2) "establishes the general standard of protection owed to foreign investors against damage caused by third parties"; but Article 4.(2) "applies to damages caused by the Government itself" (*Respondent's Rejoinder*, p. 6);

(B) - Contrary to the Claimant's assertion that Article 4.(2) establishes an "exemption" to the strict liability standard of Article 2.(2), Article 4.(2) "creates rather than limits liability" (*Ibid.*, p. 8);

(C) - There are no "authorities" suggesting that "full protection and security" clauses are "among the innovative provisions of modern BIT's", and there is "no historical support for AAPL' s absolute liability theory" (*Ibid.*, p. 8-9); and

(D) - "The absence of liability-creating provisions analogous to Article 4 of the Treaty in other Sri Lanka BITs, such as the treaty with Switzerland, means only that under those treaties investment losses due to destruction caused by *the Government* in response to civil strife, whether necessary or not, are covered by the general "fair and equitable treatment" standard found in virtually every BIT, or that investors are left to their traditional remedies under customary international law" (*Ibid.*, p. 10-11).

34. Finally, it has to be noted that throughout the arbitration proceedings, the Government of Sri Lanka maintained that:

(i) - the destruction was not attributable to the governmental security forces but caused by the rebels;

(ii) - there was effectively a "combat" between the Government's Special Task Force (STF) and the Tigers insurgents; and

(iii) - there is no proof that the destruction of the property was "not required by the necessity of the situation".

Therefore, from the Respondent's point of view the liability provided for in Article 4.(2) can not be sustained due to the absence of all three of its *sine qua non* conditions. Hence, the applicability of Article 4.(1) could have been logically envisaged.

Nevertheless, the Government of Sri Lanka refrained from dwelling upon its interpretation of said Article 4.(1), its scope of application, as well as the extent of the responsibility that may emerge thereunder.

The reasons for such silence became perfectly clear during the oral phase of the arbitral proceedings, since Mr. Hornick, Counsel of the Respondent, indicated during his oral argument on April 19, 1989, that there was no need to elaborate upon Article 4.(1), since in his understanding "AAPL is not claiming" thereunder (*Transcript of the electronic taping provided on April 12, 1990 by ICSID Secretariat upon request from the Tribunal's President*).

35. Only at a later stage, and in response to the Tribunal's Order of June 27th, 1989, the Respondent expressed the Government of Sri Lanka's views on the three issues related to the remedies that could be available under Article 4.(1) of the Sri Lanka/U.K. Bilateral Investment Treaty.

36. With regard to the "applicable rules and standards under the Sri Lankan domestic legal system", the letter dated September 13, 1989, addressed by the Respondent's Counsel in response to the Tribunal's Order stated the following:

> 1. If a Sri Lankan individual or company wished to make a claim against the Sri Lankan Government for any losses suffered owing to the war, *etc.*, it may file an action in a district court in Sri Lanka for compensation. The action will have to be based on a cause of action arising in delict (tort). The law relating to delict is based on Roman Dutch Law which provides a remedy under lex aquilian principles, namely, for intentional or negligent wrongdoing. There is no special legislation or other basis whereby liability is incurred in the absence of fault. Any person making a claim against the Government would have to file an action in the district court. The prescription ordinance of Sri Lanka, which may be availed of by the Government as any other defendant, states (Sections 9):
>
> > No action shall be maintainable for any losses, injury or damage, unless the same shall be commenced within two years from the time when the cause of action shall have arisen.
>
> 2. It may also be relevant to note that the State (Liability in Delict) Act of 1969 based on the English Crown Liability in Delict Act permits an individual to file an action against the Government in respect of delicts committed by its officers or agents, Under this Act, vicarious liability attaches to the State for the wrongful acts of its servants.

37. Regarding Sri Lanka's legal obligations under international law, the last part of the Respondent's letter dated September 13, 1989 emphasized that:

> with regard to investment losses suffered owing to any of the circumstances mentioned in said Article 4.1 by nationals or companies of third States, whether these States have or have not concluded bilateral investment agreements with Sri Lanka, the government refers to Appendix A of its Counter-Memorial (at 7-8) in which it is explained that Government's obligation in such circumstances un-

der customary international law is to exercise due diligence to protect alien individuals or companies from investment losses (references deleted).

Thus, the mere occurrence of investment losses by an alien, such as AAPL, does not render the Government responsible to compensate the alien for the losses. Rather, the Government is obliged to compensate the alien only in the event the alien demonstrates that the Government failed to act reasonably under the circumstances.

III. *The Tribunal's Findings*

38. From the above-stated summary of the arguments advanced by each of the two Parties to sustain his position, it becomes clear that the only point on which they agree is the applicability of the Sri Lanka/U.K. Bilateral Investment Treaty as the primary source of law. Beyond that preliminary point, the two Parties are in disagreement, since each Party construes the relevant provisions of the Treaty in a manner fundamentally in conflict with the interpretation given by the other Party to the same provisions.

Therefore, the first task of the Tribunal is to rule on the controversies existing in this respect by indicating what constitutes the true construction of the Treaty's relevant provisions in conformity with the sound universally accepted rules of treaty interpretation as established in practice, adequately formulated by *l'Institut de Droit International* in its General Session in 1956, and as codified in Article 31 of the Vienna Convention on the Law of Treaties.

39. The basic rule to be followed by the Tribunal in undertaking its task with regard to the pending controversial interpretation issue has been formulated since 1888 in the Award rendered in the *Van Bokkelen* case (Haiti/USA), where it was stated that:

> for the interpretation of treaty language and intention, whenever controversy arises, reference must be made to the law of nations and to international jurisprudence (*Repertory of International Arbitral Jurisprudence*, Volume I: 1794-1918, Edited by; Vincent COUSSIRAT-COUSTERE and Pierre Michel EISEMANN, *Nijhoff, Dordrecht/Boston/London*, 1989, § 1015, p. 13).

In essence, the requirement that treaty provisions "must be interpreted according to the Law of Nations, and not according to any municipal code", emerges from the basic premise expressed by Mr. WEBSTER in the following terms:

> When two nations speak to each other, they use the language of nations (Quoted by the Germany/Venezuela Mixed Claims Commission in the *Christern Case*, as reproduced in the *Repertory* referred to herein-above, § 1017, p. 27).

40. The other rules that should guide the Tribunal in adjudicating the interpretation issues raised in the present arbitration case may be formulated as follows:

Rule (A) - "The first general maxim of interpretation is that it is not allowed to interpret what has no need of interpretation. When a deed is worded in a clear and precise terms, when its meaning is evident and leads to no absurd conclusion, there can be no reason for refusing to admit the meaning which such deed naturally presents" (passage from VATTEL'S Chapter on Interpretation of Treaties—Book 2, chapter 17, relied upon in 1890 as expressing "universally recognized law" by the U.S.A./Venezuela Mixed Commission in the *Howland* case, *Repertory, op. cit.*, § 1016, p. 16), and the Mixed Commission did not hesitate in declaring: "to attempt interpretation of plain words.... would be violative of Vattel's first rule" (*Ibid., p. 26*). *-cf.* A. Ch. KISS, *Répertoire de la Pratique Française en Matière de Droit International Public*, Tome I, 1962, p. 399, on p. 402 § 810-Text of Prof. GROS's Pleading in the ICJ on July 15-16, 1952 in the *Morocco* case, and § 811-Text of Prof. BASDEVANT's Pleading in of the PICJ on July 5, 1923 in the *Wimbledon* case; S.BASTID, *Les Traités Dans la Vie Internationale*, 1985, p. 129, footnote no. 1—reproducing the text of the Résolution adopted by *l'Institut de Droit International*, Grenada Session, *Annuaire de l'Institut*, vol. 46, 1956, underlining that the rules adopted are only applicable "lorsqu'il y a lieu d'interpréter un traité" -; and I.M. SINCLAIR, "The Principles of Treaty Interpretation and Their Application By the English Courts", *International and Comparative Law Quarterly*, vol. 12, (1963), p. 536—referring to the decisions pronouncing that if the meaning intended to be expressed is clear the Courts are "not at liberty to go further").

Rule (B) - "In the interpretation of treaties... we ought not to deviate from the common use of the language unless we have very strong reasons for it (...) words are only designed to express the thoughts; thus the true signification of an expression in common use is the idea which custom has affixed to that expression" (another passage from VATTEL relied upon by the U.S.A./Venezuela Mixed Commission in the *Howland* case, *op.cit.*, p. 16—*cf.* Award of the Mexico/U.S.A. Mixed Commission of 1871 in the *William Barron* case, *Ibid.*, § 1023, p. 30, emphasizing that: "interpretation means finding in good faith that meaning of certain words, if they are doubtful, which those who used the words must have desired to convey, according to the usage of speech (*usus loquendi*)"; ALEXANDER's award of 1899 in the *Treaty of Limits* case between Costa Rica and Nicaragua *Ibid.*, § 1025, p. 31, declaring that : "words are to be taken as far as possible in their first and simplest meanings" ,"in their natural and obvious sense, according to the general use of the same words", "in the usual sense, and not in any extraordinary or unused acceptation"; S. BASTID, *op.cit.*, p. 129, reproducing the Resolution adopted in 1956 by l'*Institut de droit International* according to which: "L'accord des parties s'étant réalisé sur le texte, il y a lieu de prendre le sens naturel et ordinaire de ce texte comme base d'interprétation"; and I.M. SINCLAIR, *op. cit.*, p. 537, reporting that: "the Court .... is bound to construe them (the words) according to their natural and fair meaning").

Rule (C) - In cases where the linguistic interpretation of a given text seems inadequate or the wording thereof is ambiguous, there should be recourse to the integral context of the Treaty in order to provide an interpretation that takes into consideration what is normally called: "le sens général, l'esprit du Traité", or "son écon-

omie générale" (Award rendered in 1914 by the Permanent Court of Arbitration in the *Timor Island* case between the Netherlands and Portugal, *Repertory, op. cit.*, § 1019, p. 28; decision of the Bulgarian/Greek Mixed Arbitration Tribunal rendered in 1927 in the *Sarrapoulos* case, *Repertory*, vol. II: 1919-1945, § 2020, p. 21-22; The 1926 *Paula Mendel* case where the Germany/U.S.A. Mixed Claims Commission disregarded "a literal construction of the language" since it "finds no support in the other provisions of the Treaty as a whole". Hence, "it cannot stand alone and must fall" *Repertory* vol. II, § 2025, p. 25; and the Decision of the Germany/Venezuela Mixed Claims Commission of 1903 in the *Kummerow* case which stated that: "it is a uniform rule of construction that effect should be given to every clause and sentence of an agreement", *Repertory, op. cit*, vol. I, § 1031, p. 38).

Rule (D) - In addition to the "integral context", "object and intent", "spirit", "objectives", "comprehensive construction of the treaty as a whole", recourse to the rules and principles of international law has to be considered a necessary factor providing guidance within the process of treaty interpretation. (Resolution of *l'Institut de Droit International, op. cit.*, Article 1.(2) which stipulates: "les termes des dispositions du traité doivent être interprêtés dans le contexte entier, selon la bonne foi et à la lumière des principes du droit international"; Paragraph 3.(c), of Article 31 of Vienna convention on the Law of Treaties, containing reference to: "all relevant rule of international law applicable in the relations between the parties", and the Award rendered in 1928 by the France/Mexico Claims Commission in the *Georges Pinson* case, which stated among "les principes généraux d'interprétation": "Toute convention internationale doit être réputée s'en référer tacitement au droit international commun, pour toutes les questions qu'elle ne résout pas elle-même en termes exprès et d'une façon différente" *Repertory, op. cit.*, vol. II, § 2023, p. 24).

Rule (E) - Nothing is better settled, as a canon of interpretation in all systems of law, than that a clause must be so interpreted as to give it a meaning rather than so as to deprive it of meaning (Award of the UK/USA Arbitral Tribunal of 1926 in the *Cayuga Indians* case, *Repertory*, vol. II, § 2036, p. 35-36). This is simply an application of the more wider legal principle of "*effectiveness*" which requires favouring the interpretation that gives to each treaty provision "effet utile".

Rule (F) - When there is need of interpretation of a treaty it is proper to consider stipulations of earlier or later treaties in relation to subjects similar to those treated in the treaty under consideration" (Award of the Mexico/USA General Claims Commission of 1929 rendered in the *Elton* case, *Repertory*, vol. II, § 2033, p. 35). Thus, establishing the practice followed through comparative law survey of all relevant precedents becomes an extremely useful tool to provide an authoritative interpretation.

41. In the light of the above mentioned canons of interpretation, the relevant provisions of the Sri Lanka/U.K. Bilateral Investment Treaty have to be identified, each provision construed separately, examined within the global context of the Treaty, in order to determine the proper interpretation of each text, as well as its scope of application in relation to the other treaty provisions and with regard to the various general rules and principles of international law not specifically referred to in the Treaty itself.

In more precise terms, all appropriate measures should be undertaken in view of establishing the legal regime created by the Treaty for the protection of those investors covered by the Sri Lanka/U.K. Bilateral Investment Treaty in case their investments suffer destruction owing to activities related to the Government's counter-insurgency actions.

42. The construction of the Treaty's comprehensive system governing all aspects related to the extent of the special protection conferred upon the investors in question would permit the evaluation of the Treaty's effective contribution in this respect; *i.e.* in view of determining with regard to each issue whether the Sri Lanka/U.K. Treaty intended, merely, to consolidate the pre-existing rules of international law, or, on the contrary, it tended to innovate by imposing on the host state a higher standard of international responsibility.

Essentially, said evaluation is required, not as a conceptual doctrinal exercise, but for a practical reason related to the adjudication of the case, since in accordance therewith the following question could be adequately answered: what are the limits within which the classical international law based on the judicial and arbitral precedents could be of relevance in adjudicating the present case?

43. Taking the above-mentioned remarks into consideration, the Tribunal agrees with the Parties in considering that there are four fundamental texts in the Sri Lanka/U.K. Bilateral Investment Treaty that should be carefully considered for the purpose of determining the host State's responsibility for investment losses suffered as a result of property destruction:

First: The general obligation imposed by virtue of Article 2.(2), by which the host State undertook that foreign investments "shall enjoy full protection and security in the territory", since violation thereof entails a certain degree of international responsibility;
Second: The most-favoured-nation provision contained in Article 3, which may be invoked to increase the host State's liability in case a higher standard of international protection becomes granted to investments pertaining to nationals of a Third State;
Third: The special provision of Article 4.(1) which envisages the legal consequences of losses suffered by foreign investments "owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot" in the territory of the host State; and
Fourth: "without prejudice to" the rules applicable under the previous text (Article 4.(1), the Treaty introduced a more specific rule tailored particularly to cover two

types of "losses", which are "suffered" in any of the situations enumerated in Article 4.(1). These two categories are:

(a) requisitioning of their property by its forces or authorities; or

(b) destruction of their property by its forces or authorities which was not caused in combat action or was not required by the necessity of the situation.

Whenever either case is established, the Treaty provided in the concluding sentence of Article 4.(2) for a certain remedy: "restitution or adequate compensation", and that the "resulting payments shall be freely transferable".

44. Accordingly, the treaty envisaged different situations under which protection could be invoked in case of destruction of investments, and different remedies are provided for in order to meet the particularity of each situation.

The various categories of such situations that could be encountered may be classified as follows:

(i) - Situations in which the foreign investor claims that the destruction of the property was unnecessarily caused by the governmental security forces acting out of combat, and in such case the Treaty provides for a special rule in Article 4.(2), which was tailored particularly to fit the requirements of such serious wrongful action directly attributable to the State organs;

(ii) - In case the foreign investor fails to establish that the destruction was attributable to the governmental security forces, or in case there was effectively a "combat" during which the property was destroyed under conditions that could hardly permit assessing the unnecessary character of the destruction in a convincing manner, the type of remedy envisaged under Article 4.(2) of the Sri Lanka /U.K. Bilateral Investment Treaty has to be considered excluded. Consequently, the other provisions of the treaty become relevant;

(iii) - In presence of such situation not possibly governed by Article 4.(2), the search has to be first directed towards investigating the existence of certain rules more favourable to the foreign investor than those provided for under Articles 2.(2) and 4.(1), since the better treatment accorded to investors of the Third State could be extended to apply by virtue of the most-favoured-nation clause stipulated in Article 3 of the Sri Lanka/U.K. Treaty;

(iv) - In the absence of a more favourable system applicable by virtue of Article 3, the applicable rules become necessarily those governing the liability of the Host State under Article 4.(1) and Article 2.(2), whether taken together or separately as the case may be.

45. The Claimant's primary submission—as previously explained (*supra*, § 26) -is based on the assumption that the "full protection and security" provision of Article 2.(2) created a "strict liability" which renders the Sri Lankan Government liable for

any destruction of the investment even if caused by persons whose acts are not attributable to the Government and under circumstances beyond the State's control.

For sustaining said construction introducing a new type of objective absolute responsibility called "without fault", the Claimant's main argument relies on the existence in the text of the Treaty of two terms: "enjoy" and "full", a combination which sustains, according to the Claimant, that the Parties intended to provide the investor with a "guarantee" against all losses suffered due to the destruction of the investment for whatever reason and without any need to establish who was the person that caused said damage. In other words, the Parties substituted the "due diligence" standard of general international law by a new obligation creating an obligation to achieve a result ("obligation de résultat") providing the foreign investor with a sort of "insurance" against the risk of having his investment destroyed under whatever circumstances.

46. The Tribunal is of the opinion that the Claimant's construction of Article 2.(2) as explained herein-above cannot be justified under any of the canons of interpretation previously stated (*supra*, § 40).

47. In conformity with Rule (B), the words "shall enjoy full protection and security" have to be construed according to the "common use which custom has affixed" to them, their "*usus loquendi*", "natural and obvious sense", and "fair meaning."

In fact, similar expressions, or even stronger wordings like the "most constant protection", were utilized since last century in a number of bilateral treaties concluded to encourage the flow of international economic exchanges and to provide the citizens and national companies established on the territory of the other Contracting Party with adequate treatment for them as well as to their property ("Traité d'Amitié, de Commerce et Navigation", concluded between France and Mexico on November 27, 1886—*cf.* A Ch.KISS, *Répertoire de la Pratique Française* ..., *op. cit.*, Tome III, 1965 § 1002, p. 637; The Treaty concluded in 1861 between Italy and Venezuela, the interpretation of which became the central issue in the *Sambiaggio* case adjudicated in 1903 by the Italy/Venezuela Mixed Claims Commission—*U.N. Reports of International Arbitral Awards*, vol. X, p. 512 *ss.*).

48. The arbitral Tribunal is not aware of any case in which the obligation assumed by the host State to provide the nationals of the other Contracting State with "full protection and security" was construed as absolute obligation which guarantees that no damages will be suffered, in the sense that any violation thereof creates automatically a "strict liability" on behalf of the host State.

Sambiaggio case seems to be the only reported case in which such argument was voiced, but without success. The Italian Commissioner AGNOLI, referred in his Report to:

> The protection and security...which the Venezuelan Government explicitly *guarantees* by Article 4 of the Treaty of 1861 to Italians residing in Venezuela (*U.N. Reports, op.cit.*, p. 502—underlining added).

The Venezuelan Commissioner ZULOAGA responded by indicating that:

Governments are constituted to *afford* protection, not to *guarantee* it (*Ibid.*, p. 511).

The Umpire RALSTON put an end to the italian allegation by emphasizing that:

> If it had been the contract between Italy and Venezuela, understood and consented by both, that the latter should be held liable for the acts of revolutionists—something in derogation of the general principles of international law—this agreement would naturally have found direct expression in the protocol itself and would not have been left to doubtful interpretation (*Ibid.*, p. 521).

49. In the recent case concerning *Elettronica Sicula S.P.A.(ELSI)* between the U.S.A. and Italy adjudicated by a Chamber of the International Court of Justice, the U.S.A. Government invoked Article V.(1) of the Bilateral Treaty which established an obligation to provide "the most constant protection and security", but without claiming that this obligation constitutes a "guarantee" involving the emergence of a "strict liability" (Section 2—Chapter V of the *U.S.A. Memorial* dated May 15, 1987, where reference is made, on the contrary at page 135 to the : "One well-established aspect of the international standard of treatment... that States must use "due diligence" to prevent wrongful injuries to the person or property of aliens within their territory").

In its Judgment of July 20, 1989, the ICJ Chamber clearly stated that:

> The reference in Article V to the provision of "constant protection and security" cannot be construed as the giving of a warranty that property shall never in any circumstances be occupied or disturbed (*C.I.J., Recueil*, 1989, § 108, p. 65).

Consequently, both the oldest reported arbitral precedent and the latest I.C.J. ruling confirms that the language imposing on the host State an obligation to provide "protection and security" or "full protection and security required by international law" (the other expression included in the same Article V) could not be construed according to the natural and ordinary sense of the words as creating a "strict liability". The rule remains that:

> The State into which an alien has entered ... is not an insurer or a guarantor of his security... It does not, and could hardly be asked to, accept an absolute responsibility for all injuries to foreigners (Alwyn V. FREEMAN, *Responsibility of States for Unlawful Acts of Their Armed Forces*, Sijthoff, Leiden, 1957, p. 14).

This conclusion, arrived at more than three decades ago, still reflects—in the Tribunal's opinion—the present status of International Law Investment Standards as reflected in "the worldwide BIT network" (*cf.* K.S. GUDGEON, "Valuation of Nationalized Property Under United States and other Bilateral Investment Treaties". Chapter III, in the *Valuation of Nationalized Property in International Law*, Ed. by Richard B. LILLICH, vol. IV , (1987), p. 120).

50. In the opinion of the present Arbitral Tribunal, the addition of words like "constant" or "full" to strengthen the required standards of "protection and security" could justifiably indicate the Parties' intention to require within their treaty relationship a standard of "due diligence" higher than the "minimum standard" of general international law,. But, the nature of both the obligation and ensuing responsibility remain unchanged, since the added words "constant" or "full" are by themselves not sufficient to establish that the Parties intended to transform their mutual obligation into a "strict liability".

51. The Tribunal's opinion arrived at in applying the established rule, according to which the words contained in a treaty provision have to be given the natural and fair meaning affixed to them by the common usage, is further supported by recourse to the other canons of interpretation.

According to *Rule (C)* (*supra*, § 40), proper interpretation has to take into account the realization of the Treaty's general spirit and objectives, which is clearly in the present case the encouragement of investments through securing an adequate environment of legal protection. But, in the absence of *travaux préparatoires* in the proper sense, it would be almost impossible to ascertain whether Sri Lanka and the United Kingdom had contemplated during their negotiations the necessity of disregarding the common habitual pattern adopted by the previous treaties, and to establish a "strict liability" in favour of the foreign investor as one of the objectives of their treaty protection. Equally, none among the authors referred to by the Parties claimed in his commentary that the Sri Lanka/U.K. Treaty or similar Bilateral Investment Treaties had the effect of increasing the customary international law standards of protection to the extent of imposing "strict liability" on the host State in cases where the investment suffers losses due to property destruction.

Accordingly, recourse to the spirit of the Treaty and its objectives would not alter the conclusion arrived at by the Tribunal in refusing to consider that the Sri Lanka/U.K. Treaty imposed by Article 2.(2) a "strict liability" in the event of failure to provide "full protection and security".

52. Moreover, both *Rules (D) and (E)* confirm the Tribunal's opinion, as Article 2.(2) should not be taken separately out of the Treaty's global context.

The Claimant's contention that Article 2.(2) adopted a standard of "strict liability" would lead logically to the inevitable conclusion that Article 4 in its entirety becomes superfluous, in the sense that according to the Claimant's interpretation the Parties were not serious in adding to their Treaty two provisions which are not susceptible of getting any application in practice. Such an interpretation has to be rejected in application of *Rule (E)* which requires that Article 2.(2) be interpreted in a manner that does not deprive Article 4 from having any meaning or scope of applicability.

Such an unaccepted result could have been easily avoided if the Claimant had not disregarded *Rule (D)* according to which the rules of general international law have to be taken into consideration by necessary implication, and not to be deemed totally excluded as alleged by the Claimant.

In the Tribunal's opinion the non-reference to international law in Article 2.(2) of the Sri Lanka/U.K. Treaty should not be taken as implying the Parties' intention to avoid its application under any aspect, including its role as supplementary source providing guidance in the process of interpretation.

The Tribunal's conclusion in this respect, is not only based on *Rule (D)* as previously indicated, but it is supported furthermore by what was expressed by an informed author who stated that:

> the U.K. BIT's normally make no international law reference... This drafting device could be argued to cloud reliance on external sources of law and precedent during the life of the treaty, although this is undoubtedly not the intent. (K. Scott GUDGEON, "Valuation of Nationalized Property...." *op.cit.*, at p. 119-120).

53. Finally, it has to be recalled that in reliance upon *Rule (F)* the precedents established by the Arbitral Tribunal in the *Sambiaggio* case (1903) and by the ICJ Chamber in the *Elettronica Sicula* case (1989), both previously referred to (*supra*, § 48-49), are categoric in supporting the Tribunal's refusal to construe the words "full protection and security" as imposing a "strict liability" on the host State for whatever losses suffered due to the destruction of the investment protected under the treaty.

Therefore, and taking into consideration all the reasons stated in the previous paragraphs (*supra*, § 45-52), the Tribunal declares unfounded the Claimant's main plea aiming to consider the Government of Sri Lanka assuming strict liability under Article 2.(2) of the Bilateral Investment Treaty, without any need to prove that the damages suffered were attributable to the State or its agents, and to establish the State's responsibility for not acting with "due diligence".

54. For the same reasons, the Tribunal rejects the Claimant's argument based on the most-favoured-nation clause contained in Article 3 of the Sri Lanka/U.K. Bilateral Investment Treaty.

By invoking the absence in the Sri Lanka/Switzerland Treaty of a text similar to Article 4 providing for a "war clause" or "civil disturbance" exemption form the full protection and security standard, the Claimant based his argument on two implicit assumptions:

(i) - that the Sri Lanka/Switzerland Treaty provides equally for a "strict liability" standard of protection in case of losses suffered due to property destruction; and

(ii) - that the rules of general international law are totally excluded and replaced exclusively by the Treaty's "strict liability" standard.

Both assumptions are unfounded, as the Tribunal has no reasons to believe that the Sri Lanka/Switzerland Treaty adopted a "strict liability" standard, and the Tribunal is convinced that, in the absence of a specific rule provided for in the Treaty itself as *lex specialis*, the general international law rules have to assume their role as *lex generalis*.

Accordingly, it is not proven that the Sri Lanka/Switzerland Treaty contains rules more favourable than those provided for under the Sri Lanka/U.K. Treaty, and hence, Article 3 of the latter Treaty cannot be justifiably invoked in the present case.

55. Faced with the task of adjudicating the Claimant's "alternative submission", the Tribunal has to provide an answer to the various arguments raised by both Parties with regard to the interpretation of Article 4, the inter-relation between 4.(1) and 4.(2), their respective scope of application, as well as the burden of proof assumed

by each Party in evidencing the existence or non-existence of the conditions required for the applicability of the rules and standards referred to in both paragraphs of Article 4.

56. In determining the applicability of either paragraph of Article 4, the Tribunal shall be guided by the same rules of interpretation previously prescribed from (A) to (F) (*supra*, § 40).

Nevertheless, in order to handle the legal issues related to evidence, the above-stated canons have to be complemented by taking into consideration the following established international law rules:

Rule (G)- "There exists a general principle of law placing the burden of proof upon the claimant" (Bin CHENG, *General Principles of Law as Applied by International Courts and Tribunals*, Grotius Publications, Cambridge, (1987), p. 327, and the supporting authorities referred to therein).

Rule (H)- "The term *actor* in the principle *onus probandi actori incumbit* is not to be taken to mean the plaintiff from the procedural standpoint, but the real claimant in view of the issues involved" (*Ibid.*, p. 332). Hence, with regard to "proof of individual allegations advanced by the parties in the course of proceedings, the burden of proof rests upon the party alleging the fact" (*Ibid.*, p. 334; and Durward V. SANDIFER, *Evidence before International Tribunals*, University Press of Virginia, Charlottesville, (1975), p. 127, footnote 101).

Rule (I)- "A Party having the burden of proof must not only bring evidence in support of his allegations, but must also convince the Tribunal of their truth, lest they be disregarded for want, or insufficiency, of proof" (CHENG, *op.cit.*, p. 329- 331, with quotations from the supporting authorities).

Rule (J)- "The international responsibility of the State is not to be presumed. The party alleging a violation of international law giving rise to international responsibility has the burden of proving the assertion" (*The Tanger Horses* case (1924); the *Corfu Channel* case (1949), and the *Belgium Claims* case (1930) referred to by CHENG, at p. 305-306).

Rule (K)- "International tribunals are "not bound to adhere to strict judicial rules of evidence". As a general principle "the probative force of the evidence presented is for the Tribunal to determine" (SANDIFER, *op. cit. pp. 9 and 17*; *Award of 1896* rendered in the *Fabiani* case between France and Venezuela, *Repertory, op. cit.*, Vol; I, p. 412-413; and the 1903 Award rendered in the *Franqui* case by the Spain/Venezuela Mixed Claims Commission, which considered this rule as expressing "the unanimous conviction of the most conspicuous writers upon international law" and relying *inter alia* on Article 15 of the Rules for Arbitration between Nations adopted in 1875 by *l'Institut de Droit International*, and what

MÉRIGNHAC wrote at p. 269 of his *Traité de l'Arbitrage International—U.N. Reports, op.cit.*, Vol. X, p. 751-753).

Rule (L)- In exercizing the "free evaluation of evidence" provided for under the previous Rule, the international tribunals "decided the case on the strength of the evidence produced by both parties", and in case a party "adduces some evidence which *prima facie* supports his allegation, the burden of proof shifts to his opponent (SANDIFER, *op. cit.*, pp. 125, 129, 130, 170-173, relying upon the *Parker* case of 1962 adjudicated by the Mexico/U.S.A. General Claims Commission, *U.N. Reports, op.cit.*, Vol. IV, p. 36–41; the ICJ's *Ambatielos* and *Asylum* cases).

Rule (M)- Finally, "In cases where proof of a fact presents extreme difficulty, a tribunal may thus be satisfied with less conclusive proof, i.e., *prima facie* evidence" (CHENG, *op.cit.*,p. 323-325, with quotations from the supporting authorities and cited with approval by SANDIFER, at p. 173).

57. In the light of all the legal Rules from (A) to (M) stated herein above (§ 40 and 56), it becomes clear that Article 4.(2) regulated a specific situation by adopting a standard of responsibility representing a certain degree of particularity, and which becomes applicable only in cases characterized by the cumulative existence of three factors:

(a) - that the destruction of property not only occurred during hostilities, but more precisely such destruction has been proven to be committed by the governmental forces or authorities themselves;
(b) - that the destruction was not caused in combat action, since the higher standard of liability ("adequate compensation" payable in "freely transferable" currency) is linked with the assumption of unjustified destruction committed out of combat; and
(c) - that the destruction was not required by the necessity of the situation, as the existence of a combat would not be sufficient *per se* to alleviate the responsibility of the governmental forces and authorities, once it has been proven that the security forces bypassed the reasonable limits by undertaking unnecessary destruction.

58. Moreover, it has to be noted that the foreign investor who invokes the applicability of said Article 4.(2) assumes a heavy burden of proof, since he has, in conformity with *Rules (C) and (J)*, to establish:

(i) - that the governmental forces and not the rebels caused the destruction;
(ii) - that this destruction occurred out of "combat";
(iii) - that there was no "necessity", in the sense that the destruction could have been reasonably avoided due to its unnecessary character under the prevailing circumstances.

59. Exercizing its discretionary power in evaluating the evidence produced by both Parties during the proceedings of the present case in conformity with the above-stated *Rules (K) and (I)*, the Arbitral Tribunal considers that:

(a) - There is no doubt that the destruction of the premises which existed in Serendib's Farm took place during the hostilities of January 28, 1987, and the loss of the shrimps harvest occurred during the period in which the governmental security forces occupied the Farm's fields;
(b) - Nevertheless, there is no convincing evidence produced which sufficiently sustains the Claimant's allegation that the firing which caused the property destruction came from the governmental troops, and no reliable evidence was adduced to prove that the shrimps were lost due to acts committed by the security forces;
(c) - Equally, no convincing evidence was produced which sufficiently sustains the Respondent' s allegation that the firing which caused the destruction of the property came from the insurgents resisting the security forces.

60. Therefore, the Arbitral Tribunal finds that the first condition required under Article 4.(2) cannot be considered fulfilled in the present case, due to the lack of convincing evidence proving that the losses were incurred due to acts committed by the governmental forces.

At the same time, the Tribunal cannot proceed in this respect on the basis of *prima facie* evidence adduced in function of *Rules (H) or (M)* since the existence of a legal condition as important as the attributability of the damage should, in the Tribunal's opinion, be proven in a conclusive manner.

61. Regarding the second condition which excluded from the scope of Article 4.(2) the losses suffered "in combat action", it requires first the determination of what is meant by "combat action" and subsequently whether the investment losses were effectively caused in "combat action".

In implementation of the above-stated *Rule (B)* (*supra*, § 40), the term "combat action" has to be understood according to its natural and fair meaning as commonly used under prevailing circumstances, *i.e.* within the context of guerrilla warfare which characterizes the modern civil wars conducted by insurgents.

Rarely, in contemporary history actions undertaken during civil wars would take the classical form of a regular military confrontation between two opposing armed groups on a battle field where the adversaries engage simultaneously in fighting each other on the spot. In most cases, the opponents in current civil war situations would resort to sporadic surprise attacks as far as possible from their home bases, trying to avoid direct military confrontation through retreat to places where pursuit could be extremely difficult.

Hence, a "combat action" undertaken against insurgents could be envisaged comprising vast areas extending over the several square miles covering all the localities

in which the hit and run operations as well as the governmental counter-insurgency activities could take place.

62. In the light of the fore-mentioned remarks, and taking into consideration the evidence submitted by both Parties throughout the arbitration proceedings, the Tribunal is of the opinion that the operation "Day Break" undertaken on January 28, 1987, against the "Tiger" fighters belonging to the movement known as LLTE, in order to regain control of the Manmunai area, qualifies as "combat action".

Accordingly, the losses caused as a result of said "combat action" are not covered by Article 4.(2) of the Sri Lanka/U.K. Bilateral Investment Treaty, since they fall within the explicitly excluded category.

63. The third and final condition provided for in Article 4.(2) relates to the "necessity of the situation", in the sense that the State responsibilty under said disposition can only be engaged if it has been proven that the losses incurred were not due to "the necessity of the situation".

The term in question follows a pattern long established in practice, as a number of arbitral precedents refused to allocate compensation for destructions that took place during hostilities on the assumption that these destructions "were compelled by the imperious necessity of war" (*cf.* the 1903 Award rendered by the Netherlands/Venezuela Mixed Claims Commission in the *Dania Bembelish* case, *Repertory...op.cit.*, vol. I, § 297-280; and the Special *Ad Hoc* Arbitral Tribunal adjudicating the *Hardman* case between the U.K. and the U.S.A.). The doctrinal authorities approved that reasoning mainly justified by the extreme difficulty, described as "next to impossible", of obtaining the reconstruction in front of the arbitral tribunal of all the conditions under which the "combat action" took place with an adequate reporting of all the accompanying circumstances (*cf.* RALSTON, *The Law and Procedure of International Tribunals*, (1926), p. 391; and C. EAGLETON, *The Responsibility of States in International Law*, (1928), p. 155).

64. In the present case, neither Party was able to provide reliable evidence explaining with precision the conditions under which the destructions and other losses, mainly of the shrimps crop, took place. Under these circumstances, it would be extremely difficult to determine whether the destruction and losses were caused as an inevitable result of the "necessity of the situation", or, on the contrary, were avoidable if the governmental security forces would have been keen to act with due diligence.

Therefore, the Tribunal deems appropriate to rely on the above-stated *Rule (J)*, according to which "the international responsibility of the State is not to be presumed" (*supra*, § 56).

Consequently, all three conditions necessary for the applicability of Article 4.(2) are proven to be non-existent in the present case, and Article 4.(1) becomes the only part of Article 4 providing remedy that could be available for the Claimant to base his claims thereunder.

65. For the applicability of Article 4.(1), the only condition required is the presence of "losses suffered".

These two key words are so clear that they do not call for interpretation in conformity with VATTEL's *Rule (A)* which renders any attempted departure from the plain meaning of the words a violation of international law rules on treaty interpretation.

Undoubtedly, the term "losses suffered" includes all property destruction which materializes due to any type of hostilities enumerated in the text ("owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot in the territory").

Equally, the mere fact that such "losses suffered" do exist is by itself sufficient to render the provision of Article 4.(1) applicable, without any need to prove which side was responsible for said destruction, or to question whether the destruction was necessary or not.

In essence, the scope of applicability of Article 4.(1) is not subject to any legal restrictions. Hence, it extends as *lex generalis* to all situations not covered by the special rule of Article 4.(2), including necessarily cases where no proof has been established to determine whether the governmental forces or the insurgents caused the property destruction.

66. The only difficulty encountered under Article 4.(1) does not relate to its interpretation or conditions of applicability, but to the type of remedy provided for thereunder.

Precisely, Article 4.(1) does not include any substantive rules establishing direct solutions; *i.e.* material rules providing remedies expressed in fixed and definitive terms. Like conflict-of-law rules, Article 4.(1) contains simply an indirect rule whose function is limited to effecting a reference (*renvoi*) towards other sources which indicate the solution to be followed.

According to the undisputed plain language of Article 4.(1), the investor—already enjoying the "full security" under Article 2.(2) of the Sri Lanka/U.K. Treaty—has to be accorded treatment no less favourable than:

(i) - that which the host State accords to its own nationals and companies; or

(ii) - that accorded to nationals and companies of any Third State.

Taking into account the absence of restrictions, whether explicit or implied, and the generality of the text, the "no less favourable treatment" granted thereunder covers all possible cases in which the investments suffer losses owing to events identified as including "a state of national emergency, revolt, insurrection, or riot", with regard to remedies enumerated in the text itself: "restitution, indemnification, compensation or other settlement".

67. Consequently, it could be safely ascertained that the Bilateral Investment Treaty, through the above-stated *renvoi* technique, had not left the host State totally immune from any responsibility in case the foreign investor suffers losses due to the destruction of his investment which occurs during a counter-insurgency action undertaken by the governmental security forces.

In implementation of Article 4.(1), the host State could find itself in such a situation bound to bear a certain degree of responsibility to be determined in implementation of the *renvoi* contained in that Article 4.(1).

Once failure to provide "full protection and security" has been proven (under Article 2.(2) of the Sri Lanka/U.K. Treaty or under a similar provision existing in other bilateral Investment Treaties extending the same standard to nationals of a third State), the host State's responsibility is established, and compensation is due according to the general international law rules and standards previously developed with regard to the State's failure to comply with its "due diligence" obligation under the *minumum standard* of customary international law.

68. It should be noted in this respect that in the Government of Sri Lanka's own words, its international responsibility could be engaged "if it fails to act with due diligence" (*Respondent's Counter—Memorial*, at p. 28, second paragraph).

In the sentence starting at the end of the same page and continued on the following page, it was clearly stated that:

> If the government's lack of due diligence caused otherwise unnecessary destruction, then the government would ... have violated its obligation under Article 2.(2)....

The reference to the "lack of due diligence" emerges from the Government's basic assumption, according to which:

> the language "full protection and security" is common in bilateral investment treaties, and it incorporates rather than overrides, the customary international legal standard of responsibility. This international legal standard requires due diligence on the part of the states, and reasonable justification for any destruction of property (*Respondent's Counter-Memorial*, at p. 27).

69. Hence, any foreign investor, even if his national State has not concluded with Sri Lanka a Bilateral Investment Treaty containing a provision similar to that of Article 2.(2), would be entitled to a protection which requires "due diligence" from the host State, *i.e.* Sri Lanka. Failure to comply with this obligation imposed by customary international law entails the host State's responsibility.

The Letter of September 13, 1989, containing the Government of Sri Lanka's response to the Tribunal's Order dated June 27, 1989, confirmed that:

> The Government's obligation in such circumstances under customary international law is to exercise due diligence to protect alien individuals or companies from investment losses (paragraph (c) of said letter, with reference to authorities stating that: "A state on whose territory an insurrection occurs is not responsible for loss or damage sustained by an alien to his person or property unless it can be shown that the government of this state was negligent in the use of, or in the failure to use, the forces at its disposal for the prevention or suppression of the insurrection".

The Respondent's submission as expressed in the Letter's final paragraph reads as follows:

> Thus, the mere occurrence of investment losses by an alien, such as AAPL, does not render the Government responsible to compensate the alien for the losses. Rather, the Government is obliged to compensate the alien only in the event the alien demonstrates that the Government failed to act reasonably under the circumstances.

70. Within the context of the latter alternative, the Tribunal has to envisage whether effectively Sri Lanka's responsibility could be sustained under international law which has to be considered applicable by virtue of the *renvoi* provided for in Article 4.(1), combined with the conventional standard of "full protection and security" stipulated in Article 2.(2), as well as in other Bilateral Investment Treaties concluded by Sri Lanka.

71. But, before turning to undertake that task, the Tribunal has to emphasize that the Respondent referred in the september 13, 1989 Letter to another legal ground available by virtue of the *renvoi* contained in Article 4.(1), which is the State's responsibility under the rules of the domestic legal system.

As indicated in paragraph (B) of said letter, previously quoted in its entirety (*supra*, § 36), the Sri Lankan Law provides, for the person who suffered losses owing to armed hostilities, "a remedy under *lex aquilian* principles, namely, for intentional or negligent wrongdoing".

Nevertheless, the Tribunal deems appropriate, for procedural considerations, not to delve into the domestic law responsibility, since the Sri Lankan Law was not fully pleaded during the present arbitration proceedings.

III—*The Legal and Factual Considerations on which the Respondent's Responsibility is Established*

72. It is a generally accepted rule of International Law, clearly stated in international arbitral awards and in the writings of the doctrinal authorities, that :

(i) - A State on whose territory an insurrection occurs is not responsible for loss or damage sustained by foreign investors unless it can be shown that the Government of that state failed to provide the standard of protection required, either by treaty, or under general customary law, as the case may be; and

(ii) - Failure to provide the standard of protection required entails the state's international responsibility for losses suffered, regardless of whether the damages occurred during an insurgents' offensive act or resulting from governmental counter-insurgency activities.

73. The long established arbitral case-law was adequately expressed by Max HUBER, the *Rapporteur* in the *Spanish Zone of Morocco* claims (1923), in the following terms:

> The principle of non-responsibility in no way excludes the duty to exercise a certain degree of vigilance. If a state is not responsible for the revolutionary events

> themselves, it may nevertheless be responsible, for what its authorities do or not to do to ward the consequence, within the limits of possibility. (Translation from the French original text reported by CHENG, in his *general principles..., op.cit.*, at p. 229).

Furthemore, the famous arbitrator indicated that the "degree of vigilance" required in proving the necessary protection and security would differ according to the circumstances.

In the absence of any higher standard provided for by Treaty, the general international law standard was stated to reflect the "degree of security reasonably expected". Max HUBER indicated in this respect:

> Du moment que la vigilance exercée tombe manifestement au-dessous de ce niveau par rapport aux ressortissants d'un Etat étranger déterminé, ce dernier est en droit de se considérer comme lésé dans des intérêts qui doivent jouir de la protection du droit international (*Rapport, U.N. Recueil des Sentences Arbitrales*, vol. II, p. 634; and in *Repertory ..., op.cit.*, p. 426).

In implementation of said standard of vigilance "qu'au point de vue du droit international l'Etat est tenu de garantir", HUBER arrived in his award rendered on May 1, 1925 (*Britanic Property* case between Spain and the U.K.) to hold Spain responsible for: "manque de diligence dans la prévention des actes dommageables" (*U.N. Recueil des Sentences.., op.cit.*, p. 645), and in the *Melillea-Ziat, Ben Kiran* case he went as far as to declare the authorities responsible for: "négligence qui friserait la complicité" (*Ibid.*, p. 731).

74. Another reputed arbitrator and author, RALSTON acting as Umpire in the *Sambiggo* case between Italy and Venezuela, did not hesitate to declare:

> The umpire .... accepts the rule that if in any case of reclamation submitted to him it is alleged and proved that Venezuelan authorities failed to exercise due diligence to prevent damages from being inflicted by revolutionists, that country should be held responsible (*U.N. Recueil des Sentences Arbitrales*, Vol. X, p.534).

75. On various other occasions, the State Responsibility had been admitted for failure to provide the required protection, as witnessed by the following examples:

- In the *1903 Kummerow* case, the Germany/Venezuela Mixed Claims Commission declared:

> substantially all the authorities on international law agree that a nation is responsible for acts of revolutionists under certain conditions such as lack of diligence, or negligence in failing to prevent such acts, when possible, or as far as possible to punish the wrongdoer and make reparation for the injuring (*Repertory, op. cit.*, Vol I, p. 37);

- In Max HUBER's Report of 1925 on "the Individual Claims" (*Spanish Zone of Morocco* cases), he treated the failure to provide the necessary protection and security as an omission or inaction, and considered that:

> l'on est fondé à envisager cette inaction comme un manquement à une obligation internationale (*Repertory*, vol. II, p. 430);

- In the 1926 *Home Insurance Company* case, the Mexico/USA General Claim Commission emphasized the importance of the "duty to protect", which required undertaking all "means reasonably necessary to accomplish that end" (*Ibid.*, p. 433).

- In three successive years (1927, 1928, and 1929), the Mexico/USA General Claims Commission declared that the Mexican Government is to be responsible for what could be characterized as "lack of protection" in case this has been proven (the *David Richards* case (1927), the *Oriental Navigation Co.* case (1928), and the *F.M. Smith* case (1929), *Repertory*, vol. II, p. 435-437).

- In the *Victor A. Ermerins* case (1929), the Presiding Commissioner, Dr. SINDBALLE, in response to the claim tht the Mexican authorities failed "to afford protection to the interest of Ermerins", arrived at the conclusion that in the circumstances of that case:

> a crime of this nature could not have taken place, if the authorities of the town had properly fulfilled their duty to afford protection to the property of Ermerins (*U.N. reports of International Arbitral Awards*, vol. IV, p. 476-477);

- In both the *Chapman* case and the Mrs. *Mead* case, adjudicated in 1930 by Mexico/USA General Claims Commission, in spite of the insufficiency of the records submitted, the Commission, relied on sworn affidavits and non-official reports introduced as evidence in order "to sustain the charge of lack of protection" (*U.N. Reports, op.cit.*, Vol. IV, p. 639 and p. 656-657);

In the *Dexter Baluin* case (1933), the Panama/USA General Claims commission, condemned the local authorities's failure "to afford protection" (*Repertory*, vol. II, p. 442);

- In the 1937 two cases concerning *Mr. Braumann* and *Frances Healey* against the Republic of Turkey, the Government was declared responsible according to NIELSON's ruling on the basis that "reasonable care to prevent injuries" was not afforded (*Ibid*, p. 443-444).

76. In the light of all the above-mentioned arbitral precedents, it would be appropriate to consider that adequate protection afforded by the host State authorities constitutes a primary obligation, the failure to comply with which creates international responsibility. Furthermore, "there is an extensive and consistent state practice supporting the duty to exercise due diligence" (BROWNLIE, *System of the Law of Nations, State Responsibility—Part I*, Oxford, 1986, p. 162).

As a doctrinal authority, relied upon by both Parties during the various stages of their respective pleadings in the present case, Professor BROWNLIE stated categorically that:

> There is general agreement among writers that the rule of non-responsibility cannot apply where the government concerned has failed to show due diligence (*Principles of Public International Law*, Third Edition, Oxford, 1979, P. 453).

After reviewing all categories of precedents, including more recent international judicial case-law, the learned Oxford University Professor arrived, not only to confirm that international responsibility arises from the mere "failure to exercise due diligence"

in providing the required protection, but also to note "a sliding scale of liability related to the standard of due diligence" (*State Responsibility, op. cit.* p. 162 and p. 168).

In addition, special attention has to be given to the following passages of BROWNLIE's writings which seem to be of particular relevance to the present case:

> - "Unreasonable acts of violence by police officers ... also give rise to responsibility" (*Principles, op. cit.*, p. 447);
>
> - "Substantial negligence to take reasonable precautionary and preventive action" is deemed sufficient ground to create "responsibility for damage to foreign public and private property in the area" (*Ibid.*, p. 452);
>
> - In commenting the ICJ Judgment rendered in the *Corfu* case (1949), the fact that "nothing was attempted to prevent the disaster" was qualified as "grave omission" which involved the international responsibility of Albania (*State Responsibility, op. cit.*, p. 154);
>
> - With regard to the ICJ Judgment rendered in the *Hostages* case (1980), Professor BROWNLIE emphasizes Iran's failure "to take appropriate steps to ensure the protection" required under the "full protection and security" provision of the Iran/U.S.A. Amity, Navigation and Commerce Treaty (*Ibid.*, p. 157).

77. A number of other contemporary international law authorities noticed the "sliding scale", from the old "subjective" criteria that takes into consideration the relatively limited existing possibilities of local authorities in a given context, towards an "objective" standard of vigilance in assessing the required degree of protection and security with regard to what should be legitimately expected to be secured for foreign investors by a reasonably well organized modern State.

As expressed by Professor FREEMAN, in his 1957 Lectures at the Hague Academy of International Law:

> The "due diligence" is nothing more nor less than the reasonable measures of prevention which a well-administered government could be expected to exercise under similar circumstances (*Responsibility of States..., op. cit.*, p. 15-16).

According to modern doctrine, the violation of international law entailing the State's responsibility has to be considered constituted by "the mere lack or want of diligence", without any need to establish malice or negligence (*cf.* C.F. AMERASINGHE, *State Responsibility for Injuries to Aliens*, Oxford, (1967), p. 281-282; F.V. GARCIA-AMADOR, *The Changing Law of International Claims*, vol. I, (1987), p. 115,118; M. BEDJAOUI, "Responsibility of States: Fault and Strict Liability", *Encyclopedia of Public International Law*, vol. 10, (1987), p. 359; and K. ZEMANEK, "Responsibility of States: General Principles", *Ibid.*, p. 365).

78. In the light of the above-stated international law precedents and authorities, the arbitral Tribunal has to review the evidence submitted by both Parties in the present case in order to establish the proven facts, and to determine whether these facts sustain the Claimant's allegation that the Respondent Government failed to comply with its obligation under the Sri Lanka/U.K. Bilateral Investment Treaty (particularly the standard provided for in Article 2.(2), as well as by virtue of the rules governing

State responsibility under general international law (which becomes necessarily applicable by virtue of the *renvoi* contained in Article 4.(1) of the Treaty)).

79. The Claimant's case on the facts surrounding the events of January 28, 1987, as initially submitted can be summarized as follows:

(a) - "During the later part of 1986 and into 1987, the Government of Sri Lanka was faced with grave difficulties because of terrorist activities, including terrorist activities in that part of the country which is near Serendib Seafoods, Ltd. farm" (*Claimant's Memorial*, P. 7);

(b) - The management of Serendib company had been closely cooperating "with the security authorities in the region", and " was ready and willing to cooperate with the Government" (*Ibid.*, p. 8-9);

(c) - The destruction and killing which took place on January 28, 1987 "was caused by special security forces", under circumstances which "strongly suggest that this incident was a wanton use of force not required by the exigencies of the situation and not planned pursuant to any combat action" (*ibid.*, p. 8);

(d) - The burning of Serendib's "office structure, repair shed, store and dormitory", the opening of the sluice gates to the grow-out ponds, thus destroying the shrimp crop, as well as the execution of "21 staff members of Serendib Staff", was not needed since "less destructive action—short of wholesale destruction and murder- could surely have been taken by the Sri Lankan special security forces" (*Ibid.*, p. 9 and 10).

In order to substantiate the Claimant's version of the January 28th, 1987 events, a number of sworn affidavits were submitted with the Claimant's Memorial, all emanating from the former Serendib employees or relatives of dead former employees, together with copies of two letters addressed by Serendib's Managing Director to the President of the Republic on February 2, and February 9, 1987 (Exhibits form (F) to (P)).

80. In the Claimant's Reply to Respondent's Counter-Memorial, special additional emphasis was put on reiterating that "the destruction and the killings on January 28, 1987 were caused by the STF", and the following supplemental points were particularly stressed:

> - "the Serendib farm was not a terrorist facility";
>
> - "the STF did not meet with violent resistance from the farm on January 28, 1987";
>
> - "extensive combat action did not occur at the farm between terrorists and the STF"; and
>
> - "that Respondent has admitted its liability by offering compensation payments to families of the staff members killed by the STF" (*Claimant's Reply*, p. 72).

Among the documents attached to Claimant's Reply to the Respondent's Counter-Memorial, only one Exhibit related to the factual aspects of the events that took place on January 28, 1987, and during the following days was submitted as

"Exhibit 00". The document in question contains a letter addressed to the Managing Director of Serendib Company by the Batticaloa District Citizen's Committee about the results of the visit of the farm that took place on February 10, 1987.

81. Furthermore, the only person who gave testimony in front of the Tribunal during the oral phase of the arbitration proceedings was the Managing Director of Serendib Company, Mr. Victor Santiapillai, whose two letters to the President of the Republic were submitted as evidence by the Claimant according to what has been previously indicated (Claimant's Exhibits (M) and (P)).

Mr. Santiapillai was examined by the Claimant's Counsel and cross-examined by the Respondent's Counsel.

82. The Respondent's case provided a different version of the facts, which can be summarized as follows:

(a) - "The Government of Sri Lanka was seeking ways to prevent the spread of terrorism and the erosion of Government control in the towns surrounding the shrimp farm" (*Government's Counter-Memorial*, p. 3);

(b) - "that the Serendib farm was, in the months preceding the operation (of January 28, 1987), used by Tiger rebels as a base of operations and support" (*Ibid.*, p. 4);

(c) - "That the farm's management cooperated with the Tigers (*Ibid.*, p. 4)

(d) - "That operating out of the farm (and the surrounding area) the Tigers violently resisted the Special Task Force raid", and "intense combat action occurred at the farm between the Tigers and the special Task Force during the raid" (*Ibid.*, p. 4);

(e) - "Any destruction of the farm which occurred was caused directly by terrorist action (in particular, mortar fire), and not by the Special Task force" (*ibid.*, p. 41).

83. During the first exchange of the written pleadings, the Respondent's case on the facts concerning the events of January 28, 1987 relied exclusively on three Exhibits submitted with the Counter-Memorial, which contain:

(i) - Document containing the Report of Assistant Superintendent Nimal Lewke, dated February 2, 1987, and addressed to his superior, Superintendent Karunasena, Commander of the Special Task Force (Exhibit No. 34);

(ii) - Document dated February 1, 1987, by virtue of which the Operation's Commander Superintendent Karunasena addressed his Report to his superior, Superintendent Sumith Silva, the Coordinating Officer of Batticaloa (Exhibit No. 35); and

(iii) - Three internal correspondence within the General Intelligence & Security Department of the Ministry of Defense, dated successively February 3, 1987, February 9, 1987, and March 18, 1987, all related to the fate of Serendib's prawns which were in the farm ponds and disappeared after the farm's destruction on January 28, 1987 (Exhibit No. 36).

84. The text of the Respondent's Rejoinder contained no new elaboration on the facts, but its enclosures comprised two additional Exhibits related to the events of January 28, 1987, which are:

(i) - A sworn affidavit dated October 17, 1988 (Exhibit No. 38) emanating from the same Mr. Karunasena, the author of the report previously submitted as Exhibit No. 35; and

(ii) - A sworn affidavit dated also October 17, 1988 (Exhibit No. 39), emanating from Mr. Sumith Silva, the area Coordinating Officer to whom Mr. Karunasena's Report has been previously submitted.

85. Exercising its recognized prerogatives with regard to the evaluation of the entire evidence submitted by both Parties taken as a whole, and after careful consideration of all arguments raised during the proceedings related to the factual aspects of the case, the Arbitral Tribunal came to the following conclusions:

(A) - Both Parties are in agreement about one fact; that the infiltration by the rebels of the area in which Serendib's farm was located took such magnitude that the entire district had been for several months before January 1987 practically out of the Government's control.

Though such admitted situation would have raised logically the question of whether there was during that period failure from the Government's part to provide "full protection and security" according to the objective standard suggested to be applicable, said question remains theoretical since there were no claimed "losses suffered" due to the lack of governmental protection throughout that period.

(B) - The Respondent never contested the evidence given by Mr. Santiapillai, neither during the written phase of the proceedings, nor when he gave his testimony at the Oral Hearing, about what he expressed in his letter of February 2, 1987, addressed the Sri Lankan President of the Republic by stating:

> we maintained very cordial relationship with the senior officers of the security forces in Batticaloa, repeatedly told them that, if they had the slightest reservation about any of our Batticaloa staff they should let us know quietly and we would take action directly to get such persons out of the company.

More importantly, Mr. Santiapillai, indicated that:

> On last visit to Batticaloa, (he) met Sumith de Silva, Coordinating Officer for the area, on January 17, 1987, (and) introduced (to him) the new Farm Manager (Mr. Karunargy), who was appointed on 1 January 1987 Farm Manager, after having worked for the Company since its inception.

He added, that during that visit to Mr. Sumith de Silva on January 17, 1987, the latter:

> assured me ... that he had no such reservation.

In his Affidavit prepared and sworn in October 1988; *i.e.* after Mr. Santiapilla's letter was produced as evidence by the Claimant in the present case, the same Mr. Sumith de Silva did not contest that the meeting in question took place at the

indicated date (just 10 days before the January 28, 1987 operation), he did not contradict the substance of the reported discussion, and he did not deny the existence of "cordial relationship" as manifested by making "enquiries from government officials" before recruiting staff and readiness to dismiss whoever the authorities have "the slightest reservation" about him.

In the light of said uncontested evidence, the Tribunal is of the opinion that reasonably the Government should have at least tried to use such peaceful available high level channel of communication in order to get any suspect elements excluded from the farm's staff. This would have been essential to minimize the risks of killings and destruction when planning to undertake a vast military counter-insurgency operation in that area for regaining lost control.

The Tribunal notes in this respect that the failure to resort to such precautionary measures acquires more significance when taking into consideration that such measures fall within the normal exercise of governmental inherent powers—as a public authority -entitled to order undesirable persons out from security sensitive areas. The failure became particularly serious when the highest executive officer of the Company reconfirmed just ten days before his willingness to comply with any governmental requests in this respect.

Accordingly, the Tribunal considers that the Respondent through said inaction and omission violated its due diligence obligation which requires undertaking all possible measures that could be reasonably expected to prevent the eventual occurrence of killings and property destructions.

(c)- There are no reasons to doubt the Respondent's submission regarding the long planned character of the January 28, 1987 operation given the code-name "Day Break" which obtained prior high level clearance. But the Tribunal does not consider the military reports prepared at a later date conclusive evidence with regard the alleged heavy firing coming "from the direction of the Prawn Farm", or that "the enemy hold up in the Farm" and resisted the security forces during a period over two hours.

The reports of the two officers are contradicted on these specific points by the information contained in the affidavits sworn by Mr. Kirupakara, the casual worker at Serendib farm (Exhibit F), and by Mr. Selbatnamby, the tractor driver at Serendib farm. Both provide more detailed account as eye-witnesses about what effectively happened on the spot with extreme rapidity between 7.45 in the morning, when gunfire came "in the direction of the office" causing the employees to "rush into the Farm office for shelter", and 8.00, when "three officers attached to the STF entered the office". The taking-over of the Farm by the security forces faced no resistance according to these two eye-witnesses, and there were no destructions at that time, as witnessed by the fact that the tractor driver returned later in the day to the Farm with four members of the security forces to take certain equipments from the Farm Office, which implies that it remained non-destroyed till then.

Moreover, it has to be noted that of the officers' reports raise certain issue of credibility with regard to their chronological order, since unexpectedly the commander of the operation, Mr. Karunasena who was observing from a helicopter reported to his superior the Area Coordinating Officer Sumith de Silva on February 1, 1987, before receiving any report from his assistant Mr. Lewke who effectively conducted on the ground the operation of taking over the farm facilities (the latter's report is dated February 2, 1987).

Therefore, the Respondent's version of the events has to be considered lacking convincing evidence with regard to the allegation that the farm became a "terrorist facility" which "violently resisted the Special Task Force" through an "intense combat action" that "occurred at the Farm".

Apparently, the officers' version of the events, which are not substantiated with any credible evidence, and which are contradicted by the Affidavits submitted by eye-witnesses, were intended to cover up their inability to prevent the destruction of the farm.

(d) - Neither Party succeded in providing the Tribunal with convincing evidence about: (i)—the circumstances under which the destruction of the premises took place after they came under the control of the governmental forces; (ii)—who are the persons responsible for the effective destruction of the farm premises; (iii)—how was the destruction committed; and (iv)—how the subsequent acts causing the loss of the prawns in ponds took place.

The Respondent could have at least provided the results of investigations conducted in this respect by the competent Sri Lankan authorities, particularly since all the events in question took place during the two weeks period when the farm was under the exclusive control of the security forces.

In final analysis, no conclusive evidence exists sustaining the Claimant's allegation that the special security forces were themselves the actors of said destruction causing the losses suffered.

At the same time no conclusive evidence sustains the Respondent's allegation that the destruction were "caused directly by the terrorist action".

Hence, the adjudication of the State's responsibility has to be undertaken by determining whether the governmental forces were capable, under the prevailing circumstances, to provide adequate protection that could have prevented the destructions from taking place totally or partially.

In this respect, it has been already indicated that the governmental authorities should have undertaken important precautionary measures to get peacefully all suspected persons out of Serendib's farm before launching the attack, either through voluntary cooperation with the Management of the company or by ordering the Company to expel the suspected persons.

The reports of Messrs. Lewke, Karumasena, and Silva, as well as the sworn affidavits of the last two senior officers, provide certain indications that the governmental authorities failed to undertake such measures because they were

considering as suspected guerrilla supporters the entire Management of Serendib Company, starting from the newly appointed farm manager Mr. Karunargy, up to the american Manager, Mr. Bruce Cyr. Even Mr. Santiapillai the Managing Director was accused of "complicity with LLTE as far as the management of the Prawn Farm is concerned" (Paragraph 8, of the Report of the Commandant/ STF dated March 18, 1987, *Respondent's Exhibit* No. 37, which referred to "evidence" against the Managing Director to that effect).

If this had been effectively the case, in the opinion of the Tribunal, the legitimate expected course of action against those suspected persons would have been either to institute judicial investigations against them to prove their culpability or innocence, or to undertake the necessary measures in order to get them off the Company's farm. But, as previously explained, nothing of the sort took place. On the contrary, only ten days before the January 28, 1987, operation no complaints were voiced against any of them, including the newly appointed farm manager Mr. Karunargy, during the meeting of Mr. Santiapillai with the Area Coordinating Officer Mr. Sumith de Silva. The mere fact that Mr. Karunargy had been the first person who lost his life during the first hours of the operation "Day Break", under the circumstances described by Mr. Kirupakara in his Affidavit (*Claimant's Exhibit F*) and Mr. Selbathnamny in his Affidavit (*Claimant's Exhibit G*), casts serious doubts about the ability of the security forces which took control over Serendib's farm to provide the required standard of protection in preventing human losses, or a *fortiori* of property destruction, which is by far a less imperative objective.

Therefore, and faced with the impossibility of obtaining conclusive evidence about what effectively caused the destruction of the farm premises during the period in which the entire area was out of bounds under the exclusive control of the governmental security force, the Tribunal considers the State's responsibility established in conformity with the previously stated international law rules of evidence (especially *Rules (L) and (M), supra* § 56).

86. For all the legal and factual considerations contained in the present section of the award, the Tribunal came to the conclusion that the Respondent's responsibility is established under international law.

IV—*The Legal Consequences of the Respondent's International Responsibility*

(A)—*Quantum of the compensation*

87. Both Parties are in agreement that whenever the State's responsibility is established, due to failure of its authorities to provide foreign investors with the full protection and security required under the relevant international law rules and standards, the interested party becomes entitled to claim the type of remedy deemed appropriate,

which takes in the present case the form of monetary compensation (*Respondent's Counter-Memorial*, p. 28-29, p. 39, p. 40, p. 42 ss; and *Government's Rejoinder*, p. 11 ss).

88. Both Parties are equally in agreement about the principle, according to which, in case of property destruction, the amount of the compensation due has to be calculated in a manner that adequately reflects the full value of the investment lost as a result of said destruction and the damages incurred as a result thereof.

The basic rule long established in this respect was clearly formulated by Max Huber in the 1925 *Melilla-Ziat, Ben Kimn* case in the following words:

> Le dommage éventuellement remboursable ne pourrait être que le dommage direct, à savoir la valeur de marchandises détruites ou disparues (*U.N. Reports of International Arbitration Awards*, vol. II, p. 732).

Thus, the task of the Tribunal in the present case has to focus on the determination of the "value" of the Claimant's right which suffered losses due to the destruction that took place on January 28, 1987, and throughout the following days during which Serendib's farm remained under governmental temporary occupation (unjustifiably characterized by the Claimant as *de facto* "requisition", since it has not been proven that the Government used the farm to promote its own military interests and to benefit thereof).

89. Disagreement among the two Parties to the present arbitration emerges only with regard to the following two major points:

(i) - Which elements have to be taken into consideration in calculating the Claimant's property rights to be compensated; and

(ii) - What quantum reflects the full value of the elements constituting the Claimant's property right to be compensated.

90. With regard to the first point, the elements enumerated in the Claimant's Memorial included the following:

(A) - 50% of the physical direct losses sustained by Serendib Company on January 28, 1987, which comprise:
- (1) - loss of revenue from stocks of shrimp existing by then in the ponds;
- (2) - value of farm structure and equipment destroyed, damaged or missing;
- (3) - loss of investment in technical staff training at the farm;
- (4) - compensation payable to dependents of dead staff members;
- (5) - pond rehabilitation to resume operations.

(B) - The "going concern value" of the Claimant's 50% share-holding percentage in Serendib Company on January 28, 1987.

(C) - 50% of the projected lost profits for a reasonable period of 18 months (*Claimant's Memorial*, p. 14-16).

91. According to the final form submitted by the end of the oral hearing on April 19, 1989, expressing the Claimant's conclusions, the Tribunal was requested to award AAPL compensation that includes the following elements:

(A) - 48.2% of the value of assests destroyed, comprising

(1) - physical assets;
(2) - financial assets;
(3) - intangible assets.

(B) - 48.2% of Serendib's net projected future earnings.

92. The Respondent's Counter-Memorial, emphasized the following important aspects:

(i) - AAPL's Claims is "largely based on the illusion of expected profitability" (*Government's Counter-Memorial*, p. 42);

(ii) - AAPL's claim "is based on blatant double (or triple) counting. AAPL claims entitlement not only to its share of "going concern value" of Serendib, but also to indemnification for physical losses and lost prospective profits. Yet AAPL cannot be entitled to both, because any measurement of the "going concern value" of Serendib on January 28, 1987, includes a valuation of the net book value of both Serendib's assets and its future profitability" (*Ibid.*, p. 43);

(iii) - "In the event the Tribunal finds the Government liable to AAPL for damage sustained by Serendib, the Tribunal must chose *either* to undertake a going concern valuation *or* to determine damages for "physical loss" and lost prospective profits, but cannot logically award both" (*Ibid.*, p. 43).

93. During the course of the proceedings, the Respondent added another basic objection according to which the percentage of AAPL' s share-holding in Serendib is neither 50% as initially claimed, nor 48.2% as subsequently admitted, but a far lesser percentage, since the "preference shares" of the Export Development Board should be taken into consideration as an integral part of Serendib's equity capital.

94. The Parties were invited by the Tribunal to express their considered opinions and conclusions on that issue, by virtue of the Order of April 20, 1989, rendered at the end of the oral hearing, and lengthy exchanges took place in this respect on May 22, and May 29, 1989 as previously indicated (*supra*, § 12).

95. In deciding on the issues under consideration which are subject to disagreement among the Parties, the Tribunal has primarily to indicate that AAPL is entitled in the present arbitration case to claim compensation under the Sri Lanka/U.K. Bilateral Investment Treaty, on the legal grounds previously described in Part II of this award due to the fact that the Claimant's "investments" in Sri Lanka "suffered losses" owing to events falling under one or more of the circumstances enumerated by Article 4.(1) of the Treaty ("revolution, state of national emergence, revolt, insurrection", etc....).

The undisputed "investments" effected since 1985 by AAPL in Sri Lanka are in the form of acquiring shares in Serendib Company, which has been incorporated in Sri Lanka under the domestic Companies Law.

Accordingly, the Treaty protection provides no direct coverage with regard to Serendib's physical assets as such ("farm structures and equipment", "shrimp stock in ponds", cost of "training the technical staff", etc.), or to the intangible assets of Serendib if any ("good will", "future profitability", etc...). The scope of the international law protection granted to the foreign investor in the present case is limited to a single item: the value of his share-holding in the joint-venture entity (Serendib Company).

96. In the absence of a stock market at which the price for Serendib's shares were quoted on January 27, 1987 (the day preceding the events which led to the destruction of the value of AAPL' s investment in Serendib's capital), the evaluation of the shares owned by AAPL in Serendib has to be established by the alternative method of determining what was the reasonable price a willing purchaser would have offered to AAPL to acquire its share holding in Serendib.

97. Certainly, all the physical assets of Serendib, as well as its intangible assets, have to be taken into consideration in establishing the reasonable value of what the potential purchaser could have been willing to offer on January 27, 1987 for acquiring AAPL' s shares in Serendib. But the reasonable price should have reflected also Serendib's global liability at that date; *i.e.* the aggregate amount of the current debts, loans, interests, etc... due to Serendib's creditors.

98. Consequently, the Tribunal is of the opinion that the determination of the percentage of AAPL's share-holding in Serendib's capital is a false problem, since the relevant factor is to establish a comprehensive balance sheet which reflects the result of assessing the global assets of Serendib in comparison with all the outstanding indebtedness thereof at the relevant time.

For the purpose of evaluating the market price of AAPL' s shares on January 27, 1987, the result would be ultimately the same whether or not the "preference shares"of Sri Lanka's Export Development Board technically qualify under the domestic companies law as part of Serendib's capital. Assuming that the correct legal interpretation of the Sri Lankan Law would lead to include among Serendib's capital assets the value of the "preference shares" issued in favour of the Export Development Board as a security for the cash money funds already supplied to the Company, Serendib's capital assets would have on one hand, to be considered increased. But on the other hand, the global amount of the Development Board's disbursements together with the accruing interests due on January 27, 1987, should be taken into consideration in reflecting Serendib's global indebtedness.

In other words, in case the "preference shares" of Export Development Board decrease AAPL's percentage of share-holding in Serendib's equity capital, this would not ultimately affect the value of AAPL's share-holding.

In the language of figures, a 48% ordinary share-holding is an equity capital amounting to 21,464,241 Sri Lankan Rupees (*S-L.Rs*) equals 37% share- holding in an entity having a total capital of *S-L.Rs* 28,184,241 (*i.e.* by adding the value of the preferences shares).

At the other side of the equation, assuming 48% of loan liabilities totalling *S-L.Rs* 70,024,000, is the same as acquiring 37% of the global indebtedness amounting to *S-L.Rs* 76,744,000.

99. Taking into consideration the above stated preliminary remarks of general character, the Tribunal is faced with no legal objections in allocating to the Claimant compensation for the damages which were effectively incurred due to the destruction of a substantial part of Serendib's physical assets, thus rendering the legal entity in which AAPL invested out of business since January 28, 1987. In essence, Serendib ceased as of that date to be a "going concern" capable of realizing profits, thus causing AAPL' s investment therein to become a total loss.

100. In the light of all the elements of evidence provided by both Parties, including the evaluation Report of *Coopers & Lybrand*, the additional explanation pertaining thereto (filed by AAPL as *Exhibit BB*), the Respondent's objections raised in the *Government's Rejoinder* (p. 17ss), as well as those other issues raised during the Oral Hearing, particularly in cross-examination of the Claimant's advisor Mr. Deva Rodrigo which led to revised evaluation figures submitted by the Claimant before the end of the Oral hearing, the Tribunal considers that the fair evaluation exclusively based on Serendib's tangible assets leads to value AAPL' s investment in that company at a total amount of 460,000 U.S. Dollars.

101. Nevertheless, the major part of the Claimant's pleas were directed towards obtaining 5,703,667 U.S. dollars as compensation for a variety of other claimed damages, which include intangible assets, mainly "goodwill", and loss of future profits.

The admissibility of such claims raised serious legal objections from the Respondent, which are expressed in the following two quotations:

(a) - "International arbitral tribunals are bound to project future on the basis of the past, Serendib's history offers no sound basis for projecting any future profitability" (*Counter-Memorial of the Government*, p. 49);

(b) - "The loss of crops to be harvested in the future has usually been considered to be too speculative and indefinite to be included as a proper element of damage under international law" (*Ibid.*, p. 50).

102. In the Tribunal's view, it is clearly understood that the evaluation of the "going concern" which is Serendib Company in the present case, has for unique objective the determination of what could be the reasonable market value of the Company's shares under the circumstances prevailing on January 27, 1987. Hence, as a general rule all elements related to subsequent developments should not be taken as such into consideration, and *lucrum cessans* in the proper sense could not be allocated in the present case for which the precedents concerning unlawful expropriation claims or liability for unilateral termination of a State contract are of no relevance.

The only pertinent question in the present case would be to establish whether Serendib have had by then developed a "good will" and a standard of "profitability"that renders a prospective purchaser prepared to pay a certain premium over the value of the tangible assets for the benefit of the Company's "intangible" assets.

Consequently, the projection of future profits in function of the "Discounted Cash Flow Method" (DCF) has to be envisaged simply as a tool to assess the level of

Serendib's future profitability under all relevant circumstances prevailing at the beginning of 1987.

103. In this respect, it would be appropriate to ascertain that "goodwill" requires the prior presence on the market for at least two or three years, which is the minimum period needed in order to establish continuing business connections, and during that period substantial expenses are incurred in supporting the management efforts devoted to create and develop the marketing network of the company's products, particularly in cases like the present one where the Company relies exclusively on one product (shrimps) exportable to a single market (Japan).

The possible existence of a valuable "goodwill" becomes even more difficult to sustain with regard to a company, not only newly formed and with no records of profits, but also incurring losses and under-capitalized.

A reasonable prospective purchaser would, under these circumstances, be at least doubtful about the ability of the Company's balance sheet to cease being in the red, in the sense that the future earnings become effectively sufficient to off-set the past losses as well as to service the loans which exceed in their magnitude the Company's capital assets.

104. Furthermore, according to a well established rule of international law, the assessment of prospective profits requires the proof that:

> "they were *reasonably* anticipated; and that the profits anticipated were probable and not merely possible" (Marjorie M. WHITEMAN, *Damages in International Law*, vol. II, (1937), p. 1837, with reference to extensive supporting precedents disallowing "uncertain" or "speculative" future profits, p. 1836-1849; The 1902 Award rendered in *EL Triumfo* case (EL Salvador/U.S.A.), *Repertory, op.cit.*, vol. I, § 1350, p. 324; The 1903 Award rendered by the Italy/Venezuela Mixed Commission in the *Poggidi* case, *Ibid.* § 1358, p. 328-329; Ignaz SEIDEL-HOHENVELDOERN, "L'Evaluation des Dommages dans les Arbitrages Transnationaux", *Annuaire Français de Droit International*, vol.XXXIII, (1987), p. 17 ss. with ample reference to the numerous decisions rendered by the Iran/USA Claims Tribunal to that effect, and interestingly the Author's reference to the DCF calculations provided by the Expert Accountants of the Parties which contain "élément de conjecture" looking: "guère moins spéculatifs et tout aussi obscurs que les prophéties de Nostradamus" P. 24).

105. The Claimant itself, in the *Reply to the Respondent's Counter-Memorial* (p. 64-68), reproduced a long quotation from the Award rendered on July 14, 1987, by the Chamber presided by the late Michel VIRALLY, in the case *AMOCO International Finance Corporation v. Iran*, which after clearly distinguishing the *lucrum cessans* from the "future prospects" of profitability that constitutes an element to be taken into consideration in evaluating the "going concern", find necessary to emphasize the need to prove that:

> the undertaking was a "going concern" which had demonstrated a certain ability to earn revenues and was, therefore to be considered as keeping such ability for the future (§ 203 of the Award as quoted on p. 67 of the *Claimant's Reply*).

The fact that Serendib exported for the first time two shipments to Japan during the same month of January 1987 when its farm was destroyed, does not sufficiently demonstrate in the Tribunal's opinion "a certain ability to earn revenues" in a manner that would justify considering Serendib—by exporting for the first time in its short life—able to keep itself commercially viable as a source of reliable supply on the japanese market.

106. In the light of the above-stated considerations, and taking into account all the evidence introduced by both Parties with regard to the existence or non-existence of "intangible assets" capable of being evaluated for the purpose of establishing the total appropriate value of Serendib on January 27, 1987, the Tribunal comes to the conclusion that neither the "goodwill" nor the "future profitability" of Serendib could be reasonably established with a sufficient degree of certainty.

107. Without putting into doubt the binding force of the rules requiring that the intangible assets including "goodwill" and "future profitability" of an enterprise have to be reflected in the evaluation of a "going concern", the Tribunal's opinion is established on considering the assumptions upon which the Claimant's projection were based in the present case insufficient in evidencing that Serendib was effectively by January 27, 1987, a "going concern" that acquired a valuable "goodwill" and enjoying a proven "future profitability", particularly in the light of the fact that Serendib had no previous record in conducting business for even one year of production.

108. Therefore, all the amounts of claimed compensation for "intangible assets", as well as for "future earnings" are rejected.

(B)—*The issue of AAPL's Guarantee to the European Asian Bank*

109. Evidently, the present Arbitral Tribunal does not have jurisdiction to adjudicate any controversy or dispute related to the interpretation of AAPL' s Guarantee given for the benefit of Serendib in AAPL' s capacity as share-holder in Serendib Company, in order to determine whether said Guarantee came to an end or is still operative and capable of creating potential liability on AAPL.

110. Nevertheless, the Tribunal takes into consideration that AAPL as Claimant in the present Arbitration has considered its investment in Serendib a total loss, and submitted in its final conclusions dated April 19, 1989, that:

> ... AAPL is willing to give up its shares of Serendib Seafoods Ltd, should the Respondent pay adequate compensation.

The Tribunal equally notes that the Respondent Government did not raise any objection, with regard to said offer.

111. Accordingly, the Tribunal deems appropriate to invite the two Parties to envisage, upon reception of the amounts becoming due to the Claimant by virtue of the present Award, to conclude an agreement according to which AAPL undertakes all the necessay steps in order to transfer free of charge all its shares in Serendib

Company to the Government of Sri Lanka or to any other entity the Government may nominate, with the understanding that said transfer of title on the shares entails in exchange the passing of any potential liability under the European Asian Bank Guarantee from AAPL to the new owner of the shares.

(C)—*The allocation Of Interest*

112. The Claimant requested interest at the rate of 10% per annum as of the date of the losses incurred (January 28, 1987), and the Respondent did not raise any objection with regard to, either the principle of entitlement to interests in case the Government's responsibility is sustained by the Tribunal, or to the suggested rate of 10% per annum.

113. In accordance with a long established rule of international law expressed since 1872 by the Arbitral Tribunal which adjudicated the *Alabama* case between the U.K. and U.S.A., "it is just and reasonable to allow interest at a reasonable rate" (*Repertory, op.cit.*, vol. I, § 1382, p. 343).

In implementation of the above-stated rule, and in view of the Parties' attitude indicated herein-above, the present Tribunal deems appropriate to allocate interest on the amount of U.S. $460,000 granted to the Claimant as previously stipulated (§ 100), at the rate of 10% per annum.

114. The only pending issue in this respect relates to the date from which that interest starts accruing.

The survey of the literature reveals that, in spite of the persisting controversies with regard to cases involving moratory interests, the case-law elaborated by international arbitral tribunals strongly suggests that in assessing the liability due for losses incurred the interest becomes an integral part of the compensation itself, and should run consequently from the date when the State's international responsibility became engaged (*cf.* R. LILLICH, "Interest in the Law of International Claims", *Essays in Honor of Vade Saario and Toivo Sainio*, (1983), P. 55-56).

115. Therefore, and taking into account that Article 8.(3) of the Sri Lanka/U.K. Bilateral Investment Treaty provides that the foreign investor becomes entitled to file a recourse in front of the Centre only in case agreement with the Host State "cannot be reached within three months", and since the claimant in the present case effectively submitted his Request of Arbitration on the 8th of July, 1987, the Tribunal rules that the 10% per annum rate of interest adopted starts accruing as of July 9th, 1987, and continues to run as a part of the compensation allocated to the Claimant up to the date of the payment of the sum awarded.

(D)—Costs

116. In implementation of Article 61.(2) of ICSID Convention, the Tribunal exercises the discretionary power accorded thereto in the following manner:

(i) - in assessing the fees and expenses incurred by the Claimant in preparation and presentation of its case, all the amounts figuring in AAPL' s final Statement of May 7, 1990 under *Items 1, 4, 5 and 6* in the Section entitled "Statement of expenditure incurred by AAPL and its officers" have to be excluded, since they are not proven necessary "in connection with the proceedings", and the rest which is totalling U.S. $164,917.20 (One Hundred, Sixty Four Thousands, Nine hundred Seventeen, and Twenty Cents) has to be shared on the basis of two thirds by the Claimant and one third by the Respondent;

(ii) - the Respondent has to bear all the fees and expenses incurred in preparation and presentation of its case;

(iii) - the costs of the arbitration, including the arbitrators' fees and the administrative charges of the Centre, have to be shared on the basis of 40% by the Claimant and 60% by the Respondent.

For the above-stated reasons:

THE TRIBUNAL DECIDES AS FOLLOWS:

1. The Republic of Sri Lanka shall pay to Asian Agricultural Products Ltd., the sum of U.S. Dollars FOUR HUNDRED AND SIXTY THOUSAND (U.S. $ 460,000) with interest on this amount at the rate of ten percent (10%) per annum from July 9, 1987 to the date of effective payment.

2. The Two Parties are invited to envisage adopting a solution that would permit, upon reception of the payment due under the preceding paragraph, to conclude an agreement according to which Asian Agricultural Products Ltd. undertakes all the steps required in order to transfer free of charge all its shares in Serendib SEA-FOODS LTD. to the Government of Sri Lanka or any other entity the Government may nominate, provided that in exchange the new owner of the shares assumes any potential liability under the European Asian Bank Guarantee previously granted by AAPL as shareholder to the benefit of Serendib Company.

3. All other submissions of the Parties are rejected.

4. The Republic of Sri Lanka shall bear the amount of U.S. $54,972.40 (Fifty Four Thousands Nine Hundred Seventy Two, and Forty Cents) which represents one third of the relevant fees and expenses incurred by Asian Agricultural Products Ltd. for the preparation and presentation of its case.

5. The Republic of Sri Lanka shall bear the fees and expenses it incurred for the preparation and presentation of its case.

6. The Republic of Sri Lanka shall bear sixty percent (60%) of the arbitrators' fees and expenses and the charges of use of the facilities of the Centre, and the remaining forty percent (40%) shall be borne by Asian Agricultural Products Ltd.

Ahmed S. EL-KOSHERI *Berthold GOLDMAN*

Signed by both arbitrators forming the majority of the Arbitral Tribunal on 21 June 1990, after taking notice of Dr. ASANTE's Dissenting Opinion dated 15 June 1990.

ANNEX 202

UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

UNCTAD

EXPROPRIATION

UNCTAD Series on Issues in International Investment Agreements II

A sequel

Annex 202

UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

EXPROPRIATION

UNCTAD Series on Issues in International Investment Agreements II

UNITED NATIONS
New York and Geneva, 2012

Annex 202

II. ESTABLISHING AN INDIRECT EXPROPRIATION AND DISTINGUISHING IT FROM NON-COMPENSABLE REGULATION

The matter of establishing an indirect expropriation without impeding the right of States to regulate in the public interest has been one of the more challenging problems in recent years. This section aims to review the relevant treaty and arbitral practice and contribute to the development of an appropriate analytical framework.

Section A examines the factors used to evaluate whether an indirect expropriation has occurred. These include assessing the impact on the investment, interference with investor's legitimate expectations and the characteristics of the measure at stake.

Section B discusses how IIAs have singled out non-compensable regulatory measures and distinguishes them from cases of indirect expropriation. Such measures do not require compensation even where they produce a significant negative effect on an investment.

Section C concludes the preceding discussion by providing a framework for analysis of whether a certain governmental measure constitutes an indirect expropriation.

A. Establishing an indirect expropriation

The most important development in treaty practice as regards expropriation is the inclusion of detailed provisions concerning indirect expropriation. Many recent treaties have taken this approach to clarify the relevant factors since there is no uniform definition of what measure constitutes an indirect expropriation. They generally require a case-by-case, fact-based inquiry and list several relevant factors that need to be considered in order to decide whether or not a measure constitutes an indirect expropriation.

In 2004, Canada and the United States became the first countries to incorporate a relevant Annex in their model BITs (see box 6).

Box 6. United States and Canadian model provisions on indirect expropriation

United States Model BIT (2004) Annex B Expropriation	**Canadian Model BIT (2004)** Annex B.13(1) Expropriation
"*The Parties confirm their shared understanding that:* *1. Article 6 (1) [Expropriation and Compensation] is intended to reflect customary international law concerning the obligation of States with respect to expropriation.* *2. An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.* *3. Article 6 (1) addresses two situations. The first is direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.* *4. The second situation addressed by Article 6 (1) is indirect expropriation, where an action or series of actions by a Party has an*	"*The Parties confirm their shared understanding that:* *a) Indirect expropriation results from a measure or series of measures of a Party that have an effect equivalent to direct expropriation without formal transfer of title or outright seizure;* *b) The determination of whether a measure or series of measures of a Party constitute an indirect expropriation requires a case-by-case, fact-based inquiry that considers, among other factors:* *(i) The economic impact of the measure or series of measures, although the sole fact that a measure or series of measures of a Party has an adverse effect on the economic* */…*

Box 6. (concluded)

effect equivalent to direct expropriation without formal transfer of title or outright seizure.

(a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:

(i) The economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;

(ii) The extent to which the government action interferes with distinct, reasonable investment-backed expectations; and

(iii) The character of the government action.

(b) Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations."

value of an investment does not establish that an indirect expropriation has occurred;

(ii) The extent to which the measure or series of measures interfere with distinct, reasonable investment-backed expectations; and

(iii) The character of the measure or series of measures;

c) Except in rare circumstances, such as when a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation."

Since 2004, both the United States and Canada have been including such an annex in their FTAs and BITs – see, for example, the United States' FTAs with Australia (2004), CAFTA-DR (2004), Morocco (2004) and Peru (2006); the Rwanda-United States BIT (2008); and Canada's BITs with Peru (2007), Romania (2009), Latvia (2009), Jordan (2009) and the Czech Republic (2009). Similar rules (in the form of an annex or incorporated into the expropriation provision itself) can be found in IIAs entered into by other countries, for instance, Australia-Chile (2008), India-Republic of Korea (2009), China-New Zealand (2008), Japan-Peru (2008), Belgium/Luxembourg-Colombia (2009) and Singapore-Peru (2009).

Most provisions on indirect expropriation found in recent FTAs and BITs are based on the United States and Canadian BIT models of 2004. There are however variations. For instance, the Annex on Expropriation in the China-New Zealand FTA (2008), includes additional criteria for assessing State conduct, including proportionality, discrimination and breach of the State's previous written commitments to the investor (see box 7).

Box 7. China-New Zealand FTA (2008)

Annex 13: Expropriation

"*1. An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.*

2. Expropriation may be either direct or indirect:

(a) Direct expropriation occurs when a State takes an investor's property outright, including by nationalisation, compulsion of law or seizure;

(b) Indirect expropriation occurs when a State takes an investor's property in a manner equivalent to direct expropriation, in that it deprives the investor in substance of the use of the investor's property, although the means used fall short of those specified in subparagraph (a) above.

3. In order to constitute indirect expropriation, the State's deprivation of the investor's property must be:

(a) Either severe or for an indefinite period; and

(b) Disproportionate to the public purpose.

4. A deprivation of property shall be particularly likely to constitute indirect expropriation where it is either:

(a) Discriminatory in its effect, either as against the particular investor or against a class of which the investor forms part; or

(b) In breach of the State's prior binding written commitment to the investor, whether by contract, licence, or other legal document.

5. Except in rare circumstances to which paragraph 4 applies, such measures taken in the exercise of a State's regulatory powers as may be reasonably justified in the protection of the public welfare, including public health, safety and the environment, shall not constitute an indirect expropriation." (Emphasis added.)

The relevant provisions typically:

(a) Define the concepts of direct and indirect expropriation;
(b) Clarify that expropriation occurs with respect to tangible or intangible property rights and property rights in an investment, which is a somewhat narrower notion than the term investments;
(c) Clarify that an assessment of indirect expropriation involves a case-by-case factual inquiry which involves a balancing of factors, such as:
    (i) Economic impact of the measure;
    (ii) Interference with distinct and reasonable investment-backed expectations; and
    (iii) Nature and characteristics of the measure;
(d) Establish a presumption of the non-expropriatory nature with respect to non-discriminatory measures of general application designed and applied to protect public welfare objectives.

Additional elements or concepts used in some IIAs as criteria to distinguish between indirect expropriation and non-compensable regulation are the notions of proportionality and breach of previous commitments to the investor. Importantly, even if a particular treaty does not contain special provisions on indirect expropriation, tribunals may draw upon the criteria identified above as an expression of the views of a growing number of States.

This section will first look at the three main elements to assess an indirect expropriation, including the relevant arbitral practice:

(a) The economic impact of the measure;

(b) The extent to which the measure interferes with distinct, reasonable investment-backed expectations;
(c) The nature, purpose and character of the measure.

1. Factor 1: impact of the measure

To be considered expropriatory, a measure or a series of measures must have a destructive and long-lasting effect on the economic value of the investment and its benefit to the investor. The arbitral tribunal in *Telenor v. Hungary* pointed out that the determinative factors for establishing an expropriation were the intensity and duration of the economic deprivation suffered by the investor.[1]

It is a debated issue whether an effective deprivation alone automatically constitutes an expropriation (the "sole effects" doctrine, for details see section II.A.1(iv)). The clear trend in IIAs is to explicitly state the contrary: the mere fact that a measure or a series of measures have an adverse effect on the economic value of the investment does not necessarily imply that an indirect expropriation has occurred (see treaty examples in box 6). An effective deprivation is a necessary and an important condition, but not a sufficient one.

As discussed above, an indirect expropriation must be equivalent in its effects to a direct expropriation. The impact of the measure or degree of interference must be such as to render the property rights useless, i.e. to deprive the owner of the benefit and economic use of the investment. Arbitral tribunals have overwhelmingly accepted this general notion. For example, the tribunal in *CME v. Czech Republic* stated that a deprivation occurs whenever a State takes steps "*that effectively neutralize the benefit of the property for the foreign owner*".[2]

Various formulations that have been used to describe the required type of deprivation – an interference that "*deprives the owner of fundamental rights of ownership*"; "*makes rights practically useless*"; "*is sufficiently restrictive to warrant a conclusion that the property has been taken*"; "*deprives, in whole or in significant part, the use or reasonably-to-be-expected economic benefit of the property*"; "*radically deprives the economical use and enjoyment of an investment, as if the rights related thereto had ceased to exist*"; "*makes any form of exploitation of the property disappear*" and "*the property can no longer be put to reasonable use"* (Fortier and Drymer 2004, p. 305). The sense conveyed by these various formulations is that interference must be equal to or approach total impairment and not simply be significant or substantial, as some tribunals have suggested. In other words, "*the affected property must be impaired to such an extent that it must be seen as 'taken'*".[3]

In the majority of cases to date, claims of indirect expropriation have been dismissed because the negative impact of the measure did not rise to the level of a taking. It has been noted that "*although regulatory measures designed to protect the environment, health and safety or ensure fair competition frequently impose regulatory and compliance costs on an investment, these will not normally reach the threshold of a substantial deprivation*". (Newcombe and Paradell, 2009, p. 357).

For the correct analysis of a claim, it is important to identify correctly the object of expropriation, i.e. the investment in respect of which the expropriation is alleged (see also section I.E). For instance, in the *Waste Management v. Mexico* case, which involved breaches of contractual obligations by the Mexican city of Acapulco, the tribunal analysed whether these breaches resulted in the expropriation of the claimant's enterprise (investment). It agreed with the claimant that "*the City's breaches … had the effect of depriving Acaverde [the claimant's enterprise] of 'the reasonably-*

to-be-expected economic benefit' of the project".[4] However, it declined to find that an expropriation of the enterprise had occurred, given that there was no expropriation of the enterprise's physical assets which had been "*sold off in apparently orderly way*" and that the enterprise had never been seized or its activity blocked.[5] The tribunal concluded that "*the loss of benefits or expectations [under a contract] is not a sufficient criterion for an expropriation [of an enterprise]*".[6]

In considering whether a deprivation has occurred, the following questions need to be answered:

(a) Has the measure resulted in a total or near-total destruction of the investment's economic value?
(b) Has the investor been deprived of the control over the investment? and
(c) Are the effects of the measure permanent? The following sections consider these three questions in turn, followed by a separate discussion of the sole effects doctrine.

1.1 Decrease in value

Destruction of the economic value of the investment must be total or close to total. In *Pope & Talbot v. Canada*, the test used by the arbitral tribunal to establish indirect expropriation was "*whether the interference is sufficiently restrictive to support a conclusion that the property has been taken from the owner*".[7] This approach has been followed in other cases. In *Vivendi v. Argentina II*, the tribunal observed that the "*weight of authority … appears to draw a distinction between only a partial deprivation of value (not an expropriation) and a complete or near complete deprivation of value (expropriation)*".[8] The *LG&E v. Argentina* tribunal recalled that "*in many arbitral decisions, compensation has been denied when it [the State's measure] has not affected all or almost all the investment's economic value*".[9] In *Sempra v. Argentina*, the tribunal

explained that the value of the business had to be "*virtually annihilated*".[10] In *CMS v. Argentina*, the tribunal opined that the relevant test was "*whether the enjoyment of the property has been effectively neutralized*".[11]

In *Glamis Gold v. United States*, the claimant alleged that the United States, through federal and State measures designed to protect Native American lands, expropriated its rights to mine for gold in south-eastern California. Given that the claimant remained formally in possession of its rights and title, the critical point for the tribunal was to determine whether the mining rights had lost economic value. The tribunal concluded that after the alleged expropriatory measures the project retained a value in excess of $20 million (claimant submitted that the project had had a value of $49.1 million immediately prior to the alleged expropriation). The tribunal thus dismissed the expropriation claim, having concluded that "*the first factor in any expropriation analysis is not met: The complained measures did not cause a sufficient economic impact to the Imperial Project to effect an expropriation of the Claimant's investment*".[12] Similarly, in *Total v. Argentina*, the tribunal rejected the expropriation claim on the ground that the claimant "*has not shown that the negative economic … impact of the Measures has been such as to deprive its investment of all or substantially all its value*".[13]

The income-producing nature of investments may pose a challenging problem when a State measure extinguishes the ability to generate profits but leaves an investor's physical assets intact. The question is whether the loss of income can be viewed as a separate investment or whether the impact should be assessed by reference to the overall investment that includes physical assets. As a general matter, it would seem that the future income is not an asset capable of separate economic exploitation (see section I.E.2) and the assessment of the impact that the measure has on the value of investment must take into account the residual value of physical

assets as well as other expenditures made as part of the investment.[14] This would mean that the requisite level of near-total deprivation would need to be reached with respect to the investment as a whole.

1.2 Loss of control over the investment

It has been held that an expropriation claim may be accepted not because of a decrease in value of investment, but because of a loss of control, which prevents the investor from using or disposing of its investment. An investor may lose control of the investment by losing rights of ownership or management, even if the legal title is not affected.

Loss of control is thus a factor that is alternative to destruction of value. It is particularly relevant in situations where the investment is a company or a shareholding in a company. The tribunal noted in *Sempra v. Argentina* that "*a finding of indirect expropriation would require … that the investor no longer be in control of its business operation, or that the value of the business has been virtually annihilated*".[15] A valuable investment would be useless to the owner if he cannot use, enjoy or dispose of such an investment.

In the practice of the Iran-United States Claims Tribunal, there were a number of cases where the usurpation of management by a State, or the substitution by a State of the foreign investor's management with its own, were analysed as an expropriation. In *Sedco v. National Iranian Oil Co.*,[16] the Tribunal found that an expropriation of the claimant's investment occurred when Iran appointed temporary directors to control and manage the claimant's company and prevented the claimant from accessing the company's funds or participating in its control or management. In *ITT Industries v. Iran*[17] and *Starrett Housing*[18]the Tribunal held that the assumption of control over the claimant's assets by government-appointed managers, which rendered the claimant's rights of ownership meaningless, amounted to an effective expropriation.

Expulsion from the host State of an enterprise's key officers may also be seen as an expropriatory act that leads to the loss of control over the investment. In *Biloune v. Ghana*,[19] the expulsion of Mr. Biloune, who played a critical role in promoting, financing and managing a company engaged in a restaurant/resort project, effectively prevented the company from pursuing the project. The tribunal viewed this act as the culmination of a creeping expropriation.

The tribunal in *Pope & Talbot v. Canada* compiled a list of examples of undue interference with the control over a business: interference with the day-to-day operations of the investment, detention of employees or officers of the investment or supervision of their work, taking of the proceeds of company sales, interference with management or shareholders' activities, preventing a company from paying dividends to its shareholders and interference with the appointment of directors or management of the company.[20] This list simply provides some indications, and it would need to be established in each case whether the relevant State conduct has resulted in the loss of control over the investment.

Several claims have been rejected on the grounds that the clamant retained control over its investment. For instance, in *Feldman v. Mexico*, an exporter of cigarettes from Mexico was allegedly denied tax refund benefits. The tribunal found that there was no expropriation (although it found a breach of the national treatment provision) since "*the regulatory action has not deprived the claimant of control of his company, interfered directly in the internal operations of the company or displaced the Claimant as the controlling shareholder*".[21] In *CMS v. Argentina*, the investment (shareholding in a gas transportation company) suffered from a significant decrease in value, but the tribunal dismissed the expropriation claim in light of the fact that the investor retained full ownership and control of the shareholding. [22] In *Methanex v. USA*,[23] the tribunal found that there was no expropriation because the

investor retained control of its subsidiaries and remained able to sell gasoline additive outside the state of California. Tribunals in *Azurix v. Argentina*,[24] *LG&E v. Argentina*[25] and *AES v. Hungary*[26] rejected expropriation claims on similar grounds.

1.3 Duration of the measure

In order to constitute an expropriation, the measure should be definitive and permanent. A measure that leads to a temporary diminution in value or loss of control would normally not be viewed as expropriatory. As noted by the *Tecmed v. Mexico* tribunal, "*it is understood that the measures adopted by a State, whether regulatory or not, are an indirect de facto expropriation if they are irreversible and permanent …*".[27]

In *SD Myers v. Canada*, the investor claimed that a ban on the export of a chemical substance (polychlorinated biphenyls, PCB) from Canadian territory constituted an indirect expropriation, as the claimant's business (PCB disposal in the United States) rested precisely on such exports. Although the tribunal found a breach of the national treatment and fair and equitable treatment provisions, it dismissed the expropriation claim because the measure was temporary in its effect:

> "*In this case, the Interim Order and the Final Order were designed to, and did, curb SDMI's initiative,* ***but only for a time****. … An opportunity was delayed. The Tribunal concludes that this is not an expropriation case.*" [28] (Emphasis added.)

Equally, in *Suez v. Argentina*, the tribunal found that the measures taken by Argentina to cope with the financial crisis "*did not constitute a permanent and substantial deprivation*" of the investments.[29]

However, some of the de jure temporary measures may also be considered expropriatory depending on the specific circumstances of the case. As noted in the explanatory note to Article 10(3) of the Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens (1961), whether an interference might amount to indirect expropriation will depend on its extent and duration, but "*there obviously comes a stage at which an objective observer would conclude that there is no immediate prospect that the owner will be able to resume the enjoyment of his property*". It was on these grounds that the Iran-United States Claims Tribunals found in a number of cases that the appointment of "temporary" managers constituted a taking, particularly because the surrounding circumstances after the Islamic revolution gave no realistic prospect that the investors could resume their business activity.

1.4 Explicitly rejecting the "sole effects" doctrine

According to an approach taken by some tribunals and known as the "sole effects" doctrine, the effect of the governmental action on the investment is the only factor to be considered when determining whether an indirect expropriation has occurred. The motivation behind the measures is irrelevant.

The *Nykomb Synergetics v. Latvia* tribunal described this approach as follows:

> "*The Tribunal finds that 'regulatory takings' may under the circumstances amount to expropriation or the equivalent of an expropriation.* ***The decisive factor for drawing the border line towards expropriation must primarily be the degree of possession taking or control over the enterprise the disputed measures entail***."[30] (Emphasis added.)

The tribunal in *Fireman's Fund v. Mexico*, when summarizing its understanding of current law of expropriation under

NAFTA, stated that "*[t]he effects of the host State's measures are dispositive, not the underlying intent, for determining whether there is expropriation*".[31]

While it is not clear whether these tribunals actually endorsed a plain "sole effects" doctrine, they did emphasize the importance of the decisive role of the impact of the measure on the investment.

In a move preventing the spread of the "sole effects" approach, the Canada and United States model BITs of 2004 were the first ones to include a provision that explicitly rejected this doctrine with respect to indirect expropriations. Other countries have followed suit by adopting an identical or very similar language in their recent IIAs (see examples in box 8).

Indeed, while the severity of the impact and the degree of interference will be a central factor in determining whether a measure is tantamount to a taking, it is not the decisive or exclusive one. As discussed in section II.A.3, the nature and character of the measure are equally important.

The *SD Myers v. Canada* tribunal noted that "*[t]he general body of precedent usually does not treat regulatory action as amounting to expropriation*" and added that a finding of expropriation requires a look "*at the real interests involved and the purpose and effect of the government measure*".[32] More recently, in *LG&E v. Argentina*, the tribunal held as follows:

> "*The question remains as to whether one should only take into account the effects produced by the measure* ***or if one should consider also the context within which a measure was adopted and the host State's purpose.*** *It is this Tribunal's opinion that there must be a balance in the analysis both of the causes and the effects of a measure in*

order that one may qualify a measure as being of an expropriatory nature."[33] (Emphasis added.)

Box 8. Rejection of the "sole effects" doctrine

Colombia-India BIT (2009)

Article 6
"[…]
b. The determination of whether a measure or series of measures of a Contracting Party constitute indirect expropriation requires a case-by-case, fact-based inquiry considering:

(i) the economic impact of the measure or series of measures; however, ***the sole fact of a measure or series of measures having adverse effects on the economic value of an investment does not imply that an indirect expropriation has occurred****;* […]" (Emphasis added.)

ASEAN Comprehensive Investment Agreement (2009)
Annex 2

"[…]
3. The determination of whether an action or series of actions by a Members State, in a specific fact situation, constitutes an expropriation … requires a case-by-case, fact-based inquiry that considers, among other factors:

a) the economic impact of the government action, ***although the fact that an action or series of actions by a Member State has an adverse effect on the economic value of an investment, standing alone, does not establish that such an expropriation has occurred****;* […]" (Emphasis added.)

There are State acts which – even if they reach the level of total deprivation – do not constitute expropriation under international law and are therefore non-compensable. International law draws a line, albeit not a clear and precise one, between

expropriations on the one hand, and legitimate non-compensable measures on the other. This issue is further discussed in section II.B.

2. Factor 2: interference with investor's expectations

Another relevant factor used in IIAs to guide the determination of whether a measure or series of measures amounts to an indirect expropriation relates to the existence of expectations on the part of the investor that a certain type of act or measure will not be taken by the host State. It requires an evaluation of whether the measure interferes with an investor's reasonable investment-backed expectations, particularly where they are created by assurances given by the State.

In IIA arbitrations, the notion of legitimate expectations has gained particular prominence in the context of the fair and equitable treatment standard (see UNCTAD, 2012). However, this concept has a role to play when considering expropriation claims too – both on the national and international level. Recent research, which focused on a number of national jurisdictions and on experiences of the European Court of Human Rights and the EU, has concluded that "*one important factor for the court's assessment [of an expropriation claim] is whether the individual has some form of legitimate expectation that his or her rights will not be regulated or restricted in a certain way*" (Perkams, 2010, p. 149). A number of recent investment treaties mention legitimate expectations as a factor that must be considered when deciding a claim of indirect expropriation (box 9).

Box 9. References to investor's expectations

China-Colombia BIT (2008)

Article 4
"[…]
b) The determination of whether a measure or series of measures of a Contracting Party constitute indirect expropriation requires a case-by-case, fact-based inquiry considering:
[…]
ii) The scope of the measure or series of measures ***and their interference on the reasonable and distinguishable expectations concerning the investment****;* […]" (Emphasis added.)

ASEAN Comprehensive Investment Agreement (2009)
Annex 2

"[…]
3. The determination of whether an action or series of actions by a Members State, in a specific fact situation, constitutes an expropriation … requires a case-by-case, fact-based inquiry that considers, among other factors:
[…]
(b) Whether the government action breaches the government's ***prior binding written commitment to the investor*** *whether by contract, license or other legal document*; […]" (Emphasis added.)

Australia-Chile FTA (2008)
Annex 10-B: Expropriation
"[…]
3(a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:
[…]
(ii) ***The extent to which the measure or series of measures interfere with distinct, reasonable, investment-backed expectations****;* […]" (Emphasis added.)

A core part of the analysis regarding any alleged legitimate expectations is to identify their basis. For some tribunals, legitimate expectations need not to be based on specific and explicit undertakings or representations of the host State; implicit assurances, coupled with the investor's assumptions would be sufficient under this view.[34] By contrast, other tribunals require "***specific commitments*** *given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation*".[35] (Emphasis added.) The latter approach is to be preferred; implicit assurances in most circumstances would not provide a sufficient basis for legitimate expectations, especially if the assurances are unofficial or unspecific. Generally, for purposes of expropriation claims, investment tribunals have used a high threshold concerning investor expectations (Reinisch, 2008, p. 448). This means that a legitimate expectation may arise primarily from a State's specific representations or commitments made to the investor concerned, on which the latter has relied.[36]

Investors – be they foreign or domestic – remain exposed to the variety of risks in the country they operate, including the risk of changes in the regulatory environment. As the *Waste Management v. Mexico* tribunal put it, "***it is not the function of the international law of expropriation to eliminate the normal commercial risks of a foreign investor***".[37] (Emphasis added.) Or as noted in the *Continental Casualty v. Argentina* decision, any reliance by a foreign investor that the legislation is not to be changed would be misplaced.[38] When refusing the expropriation claim arising out of a regulatory measure, the *Methanex v. United States* tribunal emphasized that:

> "*Methanex entered a political economy in which it was widely known, if not notorious, that governmental environmental and health protection institutions at the federal and state level … continuously monitored the use*

and impact of chemical compounds and commonly prohibited or restricted the use of some of those compounds for environmental and/or health reasons."[39]

The degree of risk to which investor continues to be exposed depends on the type of investment, the regulatory context, the characteristics and institutional particularities of the host country and other relevant factors – political, economic and social, as well as the level of development.

Assessment of legitimate expectations is by no means an exclusive test to be applied to an alleged indirect expropriation (Paulsson and Douglas, 2004, p. 157). In particular, legitimate expectations cannot be assessed in isolation from the character of the governmental action or its economic impact (Newcombe, 2005, p. 38).

3. Factor 3: nature, purpose and character of the measure

The nature, purpose and character of a measure at issue are also relevant elements to be taken into account in considering whether an indirect expropriation has occurred. They are particularly important in distinguishing between an indirect expropriation and a valid regulatory act, which is not subject to compensation.

Many recent treaties have explicitly introduced these criteria (although the wording may differ) in the assessment of State conduct that is challenged as constituting an indirect expropriation (box 10).

Box 10. Nature, objectives and characteristics of the measure

Canada-Romania BIT (2009)

Annex B: Clarification of indirect expropriation
"[…]
(b) The determination of whether a measure or series of measures of a Contracting Party constitute an indirect expropriation requires a case-by-case, fact-based inquiry that considers, among other factors:
[…]
(iii) ***The character of the measure or series of measures, including their purpose and rationale****;* […]" (Emphasis added.)

Colombia-India BIT (2009)

Article 6
"[…]
The determination of whether a measure or series of measures of a Contracting Party constitute indirect expropriation requires a case-by-case, fact-based inquiry considering:
[…]
the character and intent of the measures or series of measures, whether they are for bona fide public interest purposes or not and whether there is a reasonable nexus between them and the intention to expropriate." (Emphasis added.)

ASEAN Comprehensive Investment Agreement (2009)

Annex 2
"[…]
3. The determination of whether an action or series of actions by a Members State, in a specific fact situation, constitutes an expropriation … requires a case-by-case, fact-based inquiry that considers, among other factors:
[…]
(c) ***The character of the government action, including its objective and whether the action is disproportionate to the public purpose referred to in Article 14(1)***." (Emphasis added.)

The nature of the measure refers to whether it is a bona fide regulatory act. The purpose focuses on whether the measure genuinely pursues a legitimate public-policy objective. The character of a measure includes features such as non-discrimination, due process and proportionality.

In performing this analysis, different questions may need to be answered: What is the intent of the measure? Does it pursue a genuine public purpose? Is there a reasonable nexus between the purpose and the effect of the measure, i.e. is the measure proportionate? Has it been implemented in a non-discriminatory manner and in compliance with due-process principles? In the end, it needs to be decided whether the measure at issue is targeted and irregular or a common and normal exercise of regulatory powers of the State.

Some tribunals have mentioned that the lack of intent to expropriate is not a key factor in determining whether a measure constitutes an indirect expropriation.[40] However, intent forms part of the analysis regarding the nature, purpose and character of the measure. An explicit reference to those elements in a treaty requires arbitral tribunals to pay close attention, inter alia, to the issue of intent.

B. Asserting the State's right to regulate in the public interest

The task of distinguishing between non-compensable regulation, on the one hand, and indirect expropriation, on the other, is one of the key issues in modern international investment law. It has long been accepted in international law that State acts are in principle not subject to compensation when they are an expression of the police powers of the State. This section first discusses the doctrine of police powers. It then reviews the relevant recent treaty

practice and discusses factors that point to the expropriatory character of a prima facie non-compensable measure.

1. The police powers doctrine in its contemporary meaning

According to the doctrine of police powers, certain acts of States are not subject to compensation under the international law of expropriation. Although there is no universally accepted definition, in a narrow sense, this doctrine covers State acts such as (a) forfeiture or a fine to punish or suppress crime; (b) seizure of property by way of taxation; (c) legislation restricting the use of property, including planning, environment, safety, health and the concomitant restrictions to property rights; and (d) defence against external threats, destruction of property of neutrals as a consequence of military operations and the taking of enemy property as part payment of reparation for the consequences of an illegal war (Brownlie, 2008, p. 532; Wortley, 1959, p. 39). For example, if confiscation of property is effected as a sanction for a violation of domestic law by the property owner, this would not be an expropriation. The same would be the case if an establishment is shut down for violations of environmental or health regulations.

In present times, the police powers must be understood as encompassing a State's full regulatory dimension. Modern States go well beyond the fundamental functions of custody, security and protection. They intervene in the economy through regulation in a variety of ways: preventing and prosecuting monopolistic and anticompetitive practices; protecting the rights of consumers; implementing control regimes through licences, concessions, registers, permits and authorizations; protecting the environment and public health; regulating the conduct of corporations; and others. An exercise of police powers by a State may manifest itself in adopting new regulations or enforcing existing regulations in relation to a particular investor.

The regulatory role of States in the modern economy is vital. Indeed,

"*[r]etreating as an actor in the management of economic activities, [the State's] role needs to be affirmed as a regulator in order to provide an equitable and stable framework within which markets can develop in a competitive manner. The regulatory authority of governments needs to be safeguarded if the State is to continue to fulfil its essential functions to protect the public interest in areas like the environment, health and safety, market integrity and social policies*" (Geiger, 2002, p. 108).

Extensive State practice as well as arbitral awards and academic literature all acknowledge the right of States to engage in regulatory activity, which should not be undermined or restricted by investment treaties. According to the overwhelming majority of doctrinal opinions, the regulatory conduct of States must carry a presumption of validity. The following excerpts are illustrative:

- "*The persistence of the regulatory powers of the host State … is an essential element of the permanent sovereignty of each State over its economy…**Nothing in the language of bilateral investment treaties purports to undermine the permanent sovereignty of States over their economies.***" (Lowe, 2004, p. 4, emphasis added.)

- "***State measures, prima facie a lawful exercise of powers of governments, may affect foreign interests considerably without amounting to expropriation**. Thus foreign assets and their use may be subjected to taxation, trade restrictions involving licences and quotas, or measures of devaluation. While special facts may alter cases, in principle such measures are not unlawful and do not constitute expropriation.*" (Brownlie, 2008, p. 532; emphasis added.)

- "*It has always been recognized that ordinary measures of taxation, or the imposition of criminal penalties or export controls do not constitute taking that is compensable. Legislation creating regulatory regimes in areas such as antitrust, consumer protection, securities, environmental protection, planning and land use are more common in developed States.* ***It is well recognised that interference on the basis of such legislation does not constitute compensable taking in situations in which public harm has already resulted or is anticipated****…These regulatory takings are regarded as essential to the efficient functioning of the State…* ***Regulatory functions are a matter of sovereign right of the host State and there could be no right in international law to compensation or diplomatic protection in respect of such interference***." (Sornarajah, 2004, p. 357; emphasis added.)

- "***International authorities have regularly concluded that no right to compensate arises for reasonable necessary regulations passed for the protection of public health, safety, morals or welfare***" (Newcombe, 2005, p. 23; emphasis added.)

- "…*It is serious business to dispute a State's claim to regulation. International law traditionally has granted States broad competence in the definition and management of their economies.*…" (Weston, 1976, p. 121).

As regards State practice, numerous international texts and instruments can be referred to.

- In the context of the negotiations on the draft Multilateral Agreement on Investment (MAI), the OECD Ministers issued the following Statement: "*Ministers confirm that the MAI must be consistent with the sovereign responsibility of*

governments to conduct domestic policies. ***The MAI would establish mutually beneficial international rules which would not inhibit the normal non-discriminatory exercise of regulatory powers by governments and such exercise of regulatory powers would not amount to expropriation.*****"**[41] (Emphasis added.)

- "*...**A State is not responsible for the loss of property or for other economic disadvantages resulting from bona fide taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police power of State**, if it is not discriminatory, and is not designed to cause the alien to abandon the property to the State or sell it at a distress price*." (Restatement (Third) of Foreign Relations of the United States, section 712, Comment (g); emphasis added.)

- "*An uncompensated taking of a property of an alien or a deprivation of the use or enjoyment of property of an alien which results from the execution of tax laws; from a general change in the value of currency; from the action of the competent authorities of the State in the maintenance of public order, health, or morality; or from the valid exercise of belligerent rights or otherwise incidental to the normal operation of the laws of the State shall not be considered wrongful, provided… it is not a clear and discriminatory violation of the law of the State concerned… and it is not an unreasonable departure from the principles of justice recognized by the principal legal systems of the world*." (1961 Harvard Draft Convention on International Responsibility of States for Injuries to Aliens, Article 10(5)).

- "*...the Article on Expropriation and Compensation is intended to incorporate into the MAI existing international*

> *legal norms. The reference… to … 'measures tantamount to expropriation or nationalisation' …* ***does not establish a new requirement that Parties pay compensation for losses which an investor or investment may incur through regulation, revenue raising and other normal activity in the public interest undertaken by governments.***" (Interpretative note to Article 5 of the draft MAI "Expropriation and Compensation"; emphasis added.)

- "*…any legislative action or administrative action or omission attributable to the host government which has the effect of depriving the holder of a guarantee of his ownership or control of, or a substantial benefit from, his investment,* ***with the exception of non-discriminatory measures of general application which the governments normally take for the purpose of regulating economic activity in their territories.***" (Convention Establishing the Multilateral Investment Guarantee Agency, Article 11(a)(ii); emphasis added.)

There are numerous examples in current investment treaty practice that explicitly recognize the special case of non-discriminatory regulatory measures taken in the public interest and that, as a general rule, such measures cannot be viewed as constituting an indirect expropriation (see treaty examples in section II.B.2).

Investment tribunals have also made pronouncements regarding the uninhibited power of States to regulate in the public interest. In *Sedco, Inc. v. National Iranian Oil. Co.,* the Iran-United States Claims Tribunal referred to "*an accepted principle of international law that a State is not liable for economic injury which is a consequence of bona fide 'regulation' within the accepted police power of States*".[42] (In the case, however, a law authorizing the nationalization of companies whose debts to banks exceeded

their net assets was deemed to fall outside of the police powers exception.)

In *Feldman v. Mexico*, the tribunal noted that "*governments must be free to act in the broader public interest through protection of the environment, new or modified tax regimes, the granting or withdrawal of government subsidies, reductions or increases in tariff levels, imposition of zoning restrictions and the like*", adding that "*reasonable governmental regulation of this type cannot be achieved if any business that is adversely affected may seek compensation, and it is safe to say that customary international law recognizes this*".[43]

The regulatory capacity of the State was further reaffirmed in *Methanex v. USA*, where a California ban on a gasoline additive (MTBE) was deemed to be a lawful non-compensable regulation. The tribunal stated that:

> "*…as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and which affects, inter alias, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation...*".[44]

Similarly, in *Saluka v. Czech Republic* the tribunal referred to both the police and regulatory powers of a State:

> "*It is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner bona fide regulations that are aimed at the general welfare*".[45]

> "*The principle that a State does not commit an expropriation and is thus not liable to pay compensation to a dispossessed alien investor when it adopts general regulations that are 'commonly accepted as within the police power of States' forms part of customary international law today*."[46]

In *Suez v. Argentina*, the tribunal also acknowledged that:

> *"…States have a legitimate right to exercise their police powers to protect the public interest and that the doctrine of police powers … has been particularly pertinent in cases of expropriation where tribunals have had to balance an investor's property rights with the legitimate and reasonable need for the State to regulate."*[47]

In *Chemtura v. Canada*, a manufacturer of a lindane-based pesticide challenged the ban on lindane introduced by Canada. The tribunal found – in addition to the fact that the measures did not amount to a substantial deprivation of the claimant's investment – that:

> "*[The relevant State agency] took measures within its mandate, in a non-discriminatory manner, motivated by the increasing awareness of the dangers presented by lindane for human health and the environment. A measure adopted under such circumstances is a* ***valid exercise of the State's police powers and, as a result, does not constitute an expropriation***".[48] (Emphasis added.)

In sum, the support for the police powers doctrine appears to be overwhelming. Expropriation provisions in IIAs may not be read as preventing States from bona fide regulation in the public interest. Indeed, many recent IIAs explicitly recognize that they also set forth certain conditions for a measure to be considered non-expropriatory. However, the absence of explicit language to that end does not

change the underlying principle, which is strongly enshrined in customary international law. Relevant treaty practice is reviewed in the following section.

2. Treaty practice: distinguishing non-compensable regulatory measures from indirect expropriations

As discussed above, the nature, purpose and character of a measure play a decisive role in distinguishing between an indirect expropriation and a regulatory act that is not subject to compensation. Recent treaty practice demonstrates attempts to single out bona fide public-interest measures in order to prevent their challenges by investors. Two main treaty approaches may be distinguished in this regard.

A number of treaties have taken the approach of adding a relevant explanatory clause (in an annex or in the expropriation provision itself). It is often phrased as follows:

> "*Except in rare circumstance, non discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.*"

Such wording is found in the annexes of many IIAs concluded by Canada and the United States, e.g. Canada-Jordan BIT (2009), Canada-Peru BIT (2006), Canada-Slovak Republic BIT (2010), Australia-United States FTA (2004), CAFTA-DR FTA (2004), Chile-United States FTA (2003), Morocco-United States FTA (2004), Rwanda-United States BIT (2008) and others.

Recent treaties concluded by other countries also include similar language. For instance, Belgium/Luxembourg-Colombia BIT (2009) provides in Article IX(3)(c):

> "*Except in rare circumstances, such as when a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Party that are designed and applied for public purposes or with objectives such as public health, safety and environment protection, do not constitute indirect expropriation*".

This formulation requires, inter alia, an assessment of the severity of the measure and its bona fide nature.

Relevant clauses usually describe those measures that do not constitute an indirect expropriation and, therefore, are non-compensable. Some clauses additionally set out conditions or criteria that would render a measure expropriatory that is prima facie non-compensable. The Protocol to the India-Latvia BIT (2010) provides:

> "*(b) Actions by a Government or Government controlled bodies, taken as a part of normal business activities, will not constitute indirect expropriation* ***unless it is prima facie apparent that it was taken with an intent to create an adverse impact on the economic value of an investment***." (Emphasis added.)

Article 6.2(c) of the BIT between Colombia and the United Kingdom (2010) pursues the same objective but adopts a different formulation:

> "*Non-discriminatory measures that the Contracting Parties take for reasons of public purpose or social interest (which shall have a meaning compatible with that of 'public purpose') including for reasons of public health, safety, and environmental protection, which are taken in good faith, which are not arbitrary and which are not disproportionate*

in light of their purpose, shall not constitute indirect expropriation".

This language is characterized by a number of conditions that a measure has to comply with, including non-discrimination, good faith, non-arbitrariness and proportionality.

It should be noted that such clarification clauses do not constitute an exception to the treaty or to the expropriation provision. They are meant to serve merely as guidance in the assessment of whether a measure constitutes indirect expropriation.

Importantly, even though the relevant clarifications are legally confined to those treaties where they are made, the exemption of good faith non-discriminatory regulatory measures exists in general customary international law on the basis on the police powers doctrine (see section II.B.1). Indeed, many treaties specify that the clarifications with respect to indirect expropriations are "*intended to reflect customary international law concerning the obligation of States with respect to expropriation*" (see United States model BIT, annex B, and provisions in other treaties modelled on it). Criteria for the delineation of such measures formulated by investment tribunals are similar to the ones that can be found in recent treaties. In *Fireman's Fund v. Mexico*, the tribunal – summarizing the law of expropriation under NAFTA (which does not have additional clarificatory language on regulatory measures) – stated as follows:

> "*To distinguish between a compensable expropriation and a non-compensable regulation by a host State, the following factors (usually in combination) may be taken into account: whether the measure is within the recognized police powers of the host State; the (public) purpose and effect of the measure; whether the measure is discriminatory; the proportionality between the means employed and the aim*

sought to be realized; and the bona fide nature of the measure."[49]

The second treaty approach has been to introduce so-called general exceptions, which exclude from the scope of the treaty as a whole government measures necessary for, or relating to, certain public policy objectives. Such general exceptions clauses are often modelled on Article XX of the General Agreement on Tariffs and Trade (GATT) and Article XIV of the General Agreement on Trade in Services (GATS). They often include objectives such as the protection of human or animal or plant life or health, the conservation of exhaustible natural resources and the protection of public morals. Relevant examples can be found in the India-Republic of Korea Comprehensive Economic Partnership Agreement (CEPA) (2009, Article 10.18(1)); India-Singapore Comprehensive Economic Cooperation Agreement (2005, Article 6.11); Canada-Jordan BIT (2009, Article 10(1); ASEAN-China Investment Agreement (2009, Article 16(1); Malaysia-Pakistan Comprehensive Economic Partnership (2007, Article 99); Peru-Singapore FTA (2008, Article 18.1(2)); Panama- Taiwan Province of China FTA (2003, Article 20.02(2)); Malaysia-New Zealand FTA (2009, Article 17.1(1); Japan-Switzerland EPA (2009, Article 95) (see box 11).

If a tribunal establishes that the challenged measure falls within one of the exceptions, it appears that the State may not be held liable for violating any of the treaty's other provisions (substantive protections).[50]

General exceptions usually come with safety valves which ensure that the exceptions are not abused by the State. For instance, the Canada model BIT provides in the chapeau of Article 10 that the measures concerned must not be applied "*in a manner that would constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on*

international trade or investment". Other IIAs that incorporate general exceptions include similar provisos.

While being a progressive and balanced solution, the limitation of this approach is that it carves out only measures that relate to public policy objectives specifically mentioned in the general exceptions clause. Potentially, there might be public-interest measures that do not fall within the scope of the listed exceptions but which still must be considered non-expropriatory and non-compensable. Therefore, some countries, such as Canada and India, have combined the two approaches – a clarification clause with respect to indirect expropriation and a general exceptions provision.

Box 11. General exceptions

India-Republic of Korea CEPA (2009)

Article 10.18: Exceptions

"*1. Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between States where like conditions prevail, or a disguised restriction on investors and investments, nothing in this Chapter shall be construed to prevent the adoption or enforcement by any Party of measures:*

(a) Necessary to protect public morals or to maintain public order;

(b) Necessary to protect human, animal or plant life or health, or the environment;

(c) Necessary to secure compliance with laws and regulations which are not inconsistent with the provisions of this Chapter;

(d) Necessary to protect national treasures of artistic, historic or archaeological value; or

(e) Necessary to conserve exhaustible, natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption."

3. Presumption of validity of a regulatory measure

The critical issue, as the *Saluka v. Czech Republic* tribunal put it, lies in identifying "*in a comprehensive and definite fashion precisely what regulations are considered permissible and commonly accepted as falling within the police power or regulatory power of States and thus, non-compensable*".[51] The challenge is old but still unsettled. Even though international law does not offer a

conclusive answer, a general conceptual framework can be advanced based on the elements that have emerged.

It should be noted from the outset that a valid regulatory act is not an exception to international liability. It must be seen as a measure that simply does not trigger international liability.

To assess a particular measure (be it a new regulation or application of an existing one to a specific investor), it is necessary to undertake a broad examination of its nature, purpose and character. The critical issue is to determine whether the measure is part of the normal or common regulatory activity of the State or whether it possesses attributes that turn it into an expropriation.

An act of general application and its individual application enjoys a presumption of validity. Under international law, States are presumed to act in good faith unless shown otherwise. As one commentator put it:

> "*It is serious business to dispute a State's claim to regulation. International law traditionally has granted States broad competence in the definition and management of their economies, and no State, therefore, is likely to take lightly a challenge to what it contends is liability-free behaviour. The venerable innocent-before-proven-guilty presumption is not one that shapes action and reaction only among individuals in the criminal law sphere. It has its equivalents, and rightly so, on the international plane*." (Weston, 1976, p. 121.)

The exercise of the police or regulatory power may be the subject of a legitimate complaint and an international tribunal should be able to make an independent determination, but "*if the reasons given are valid and bear some plausible relationship to the action taken, no attempt may be made to search deeper to see*

whether the State was activated by some illicit motive" (Christie, 1962, p. 338).

In some circumstances, a regulation may constitute a disguised form of a taking. States should not escape responsibility by simply characterizing a measure as a regulation. A way of assessing whether a particular measure departs from the normal activity of the State is to examine it against the indicators that point to its expropriatory nature. Given the presumption of validity, the burden is on the investor to demonstrate that the measure is in fact mala fide, fails to pursue a genuine public purpose, is discriminatory, violates the due-process requirement or is otherwise irregular. Before the burden of proof shifts to the investor, the State must make a prima facie case to show that a measure pursues a public purpose, is non-discriminatory and was implemented in accordance with due process, and thus that it should be non-compensable, despite the destructive impact on the investment. This is reasonable, given that the State should have at its disposal full information about the measure (Newcombe, 2009, p. 366).

Compliance of the measure with domestic law may not necessarily establish the outcome, as "*an act of State must be characterized as internationally wrongful if it constitutes a breach of an international obligation, even if the act does not contravene the State's internal law*". However, compliance with domestic law may provide additional evidence of validity. As the law of expropriation has essentially grown out of, and mirrored, parallel domestic laws, "*it appears plausible that measures that are, under the rules of the main domestic laws, normally considered regulatory without amounting to expropriation, will not require compensation under international law*" (Dolzer and Schreuer, 2008, p. 95).

Some international instruments suggest, albeit in a very general manner, that the liability of a State arises when it misuses or abuses its authority. For instance, the OECD Draft Convention on

the Protection of Foreign Property (1967) states that a taking occurs not as a result of the normal and lawful regulatory conduct, but rather as a result of the misuse of otherwise lawful regulation which deprives an owner of the substance of his rights (Article 3). To a similar effect, the Harvard Draft Convention on the International Responsibility of States for Injury to Aliens (1961) refers, inter alia, to an "*unreasonable departure from the principles of justice*" and "*abuse of powers*" (Article 10(5)).

In these cases, tribunals will have to look for additional factors to establish the illegality and irregularity in the measure. The irregularity may be found in the substance of the measure, in the scope of its application and/or in the way it was adopted. It may also be found in the act of application or individualization of a general regulation, e.g. denials, cancellations or revocations of contracts, licences, permits or concessions with regard to a particular foreign investor.

4. Indicators of the expropriatory nature of a regulatory measure

The list of these indicators that point to the abnormal or irregular nature of a measure is wide. It includes the lack of genuine public purpose, of due process, of proportionality, and of fair and equitable treatment; discrimination, abuse of rights and direct benefit to the State. No one particular indicator should be treated as decisive: a global assessment is necessary in order to see – against the rather high threshold set by international law – whether the State should be held internationally responsible. This is necessarily a very context-specific exercise. As aptly noted by the tribunal in *Saluka v. Czech Republic*:

> "*Faced with the question of* ***when, how and at what point an otherwise valid regulation becomes, in fact and effect, an unlawful expropriation****, international tribunals must consider the circumstances in which the question arises.*

> *The context within which an impugned measure is adopted and applied is critical to the determination of its validity*."[52] (Emphasis in the original)

Public purpose, non-discrimination and due process also serve as conditions for the legality of an expropriation (see section I.F). However, in that context, they were designed for cases of direct expropriation where the taking itself is self-evident. For cases involving alleged regulatory expropriations, the same requirements serve to distinguish compensable expropriation from non-compensable regulation and have been recognized as such in many investment treaties and arbitral awards.

4.1 Lack of public purpose, discrimination and lack of due process

A non-discriminatory measure of general application that seeks to attain a legitimate welfare objective and enacted in accordance with due process is prima facie non-compensable. These considerations served as a basis for the decision of the tribunal in the *Methanex* case:

> "…*the California ban was made for a public purpose, was non-discriminatory and was accomplished with due process. ...* ***From the standpoint of international law, the Californian ban was a lawful regulation and not an expropriation***".[53] (Emphasis added.)

To a similar effect, the *Saluka* tribunal referred to "*non-discriminatory manner bona fide regulations that are aimed at the general welfare*".[54] Multiple recent treaties refer to these factors as relevant in the assessment of regulatory measures (see section II.B.2).

As far as public purpose is concerned, the relevant questions to ask are whether the stated purpose is genuine and whether the

measure concerned is indeed designed to achieve it. Determination of what is in the public interest of a particular State as well as what measures are suitable to achieve the public purpose are matters in which States enjoy considerable latitude. This has been recognized by arbitral tribunals. For example, in *Tecmed v. Mexico*, the tribunal emphasized the "*due deference*" that must be afforded to States in the matter of "*defining the issues that affect its public policy or the interests of society as a whole, as well as the actions that will be implemented to protect such values*".[55]

Regarding the discrimination element, the *Methanex* tribunal stated that "*an intentionally discriminatory regulation against a foreign investor fulfils a key requirement for establishing expropriation*".[56] The non-discrimination requirement implies the diffusiveness of the impact on different actors and constituencies and serves to prevent singling out or targeting a foreign investor. It primarily concerns nationality-based differentiation but it also seems to cover racial, religious, ethnic and other types of discrimination prohibited under customary international law. It appears that a non-discriminatory regulation which is enforced in a discriminatory manner will also fit the description. Where a formally non-discriminatory regulation is designed in a way that it only covers certain foreign investor or investors, other indicators need to be examined to decide whether the measure is bona fide.

The due process requirement – when applied to regulatory measures of general application – is meant to ensure that the measure is not adopted with serious procedural violations, i.e. that it was passed by a competent State body, supported by the requisite number of votes (e.g. if a parliamentary act is at issue) and so forth. Minor procedural irregularities should not affect the non-compensable nature of the measure.

Depending on the context, there might be other indicators of due process. For example, in *Methanex v.USA*, California's decision

to ban MTBE (a gasoline additive) was primarily based on a research report by the University or California, which concluded the use of MTBE presented significant water contamination risks. Relevantly for the question of due process, the tribunal noted that the report was subject to public hearings, testimony and peer review and that its "*emergence as a serious scientific work from such an open and informed debate is the best evidence that it was not the product of a political sham engineered by California*".[57]

In *EDF v. Romania,* the claimant participated in a joint venture formed with a Romanian entity owned by the Government, engaged in commercial and retails outlet activities at the Otopeni Airport. Following the issuance of new duty-free regulations, the licence of the company was revoked. The company was later declared bankrupt after the Financial Guard imposed a fine and ordered the sequestration of enterprise's assets. The tribunal noted that the confiscation sanction was within the legal power of the Financial Guard and that it was applied in good faith. It took into account that due process had been assured to the claimant by Romania and that the sanction applied by the Financial Guard was due to claimant's failure to comply with procedural requirements.[58]

4.2 Lack of proportionality

The principle of proportionality is not universally recognized as relevant in the expropriation context. At the same time, some recent treaties do refer to the proportionality test (see, for example, the ASEAN Comprehensive Investment Agreement (2009), the Colombia-United Kingdom BIT (2010) and the Colombia-India BIT (2009), all quoted above). Some scholars have called for a greater reliance on the proportionality approach (e.g. Kingsbury and Schill, 2010; Kriebaum, 2007b).

The principle of proportionality is one of the pillars of the European Court of Human Rights when it comes to its practice on the dispossession of property. In the leading case *Sporrong and*

Lönnroth, the Court stated that a "*fair balance*" has to be struck "*between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights*".[59] Accordingly, the Court will inquire into the means chosen to achieve the legitimate aim pursued: "*a measure must be both appropriate for achieving its aim and not disproportionate thereto*".[60] The requisite balance will be upset when the person concerned has had to bear "*an individual and excessive burden*"[61] or one that is "*disproportionate*"[62] (Ruiz Fabri, 2002, p. 163). The relevant factors of the assessment include "*the severity of the interference, legitimate expectations of the complainant, the suitability of the interference to reach the public purpose, the priority of the public purpose and a special public interest to pay less than full compensation*" (Kriebaum 2007b, p. 730). It must be kept in mind that international law has traditionally afforded States a wide margin of discretion with respect to questions such as priority of the public purpose or suitability of the measure.

In investor-State arbitration, the *Tecmed v. Mexico* case was the first one where the tribunal relied on the proportionality analysis. The dispute arose out of the decision of the environmental authority to deny renewal of a permit to operate a landfill of hazardous waste. After finding that the deprivation had been total, the tribunal proceeded as follows:

> "...***the Arbitral Tribunal will consider, in order to determine if they are to be characterized as expropriatory, whether such actions or measures are proportional to the public interest presumably protected thereby and to the protection legally granted to investments****, taking into account that the significance of such impact has a key role upon deciding the proportionality. …* ***There must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the***

aim sought to be realized by any expropriatory measure."[63] (Emphasis added.)

For the tribunal, the claimant's breaches on which the State based its denial to renew the permit did not threaten public health or impair the ecological balance. It weighed this fact against the total deprivation of the investment's value and decided that the measure was disproportionate and that, therefore, an indirect expropriation had occurred.

This approach has been followed in some subsequent cases. The *Azurix v. Argentina* tribunal, referring to the practice of the European Court of Human Rights and the *Tecmed* decision, found the proportionality principle to provide "*useful guidance for purposes of determining whether regulatory actions would be expropriatory and give rise to compensation*". [64] In *LG&E v. Argentina*, the tribunal stated that "*it can generally be said that the State has the right to adopt measures having a social or general welfare purpose. In such a case,* ***the measure must be accepted without any imposition of liability, except in cases where the State's action is obviously disproportionate to the need being addressed***".[65] (Emphasis added.) In these two cases, however, the expropriation claim was dismissed.

It is worth noting that these decisions did not discuss the appropriateness of importing the proportionality test from the human-rights regime to investor-State arbitration. The European Court of Human Rights has a somewhat different logic than investment treaties when it comes to the principle of proportionality using it not only to determine whether or not there has been an expropriation but also to estimate the amount of compensation owed. The use of principles from different regimes may be complimentary and mutually enriching; however, transplantation may be effected only after an assessment of the appropriateness thereof. Importantly, the proportionality analysis implies a far-

reaching intrusion into governmental decision-making, including the assessment of such issues as priority of public purpose and suitability of the measure for achieving it. The European Court of Human Rights, as well as national courts would seem to have sufficient legitimacy to undertake a full proportionality analysis. As for ad hoc investor-State tribunals, such legitimacy appears to be lacking, with exception of situations when the applicable IIA specifically instructs them to perform a proportionality assessment or where the proportionality analysis helps to discern a mala fide measure.

4.3 Lack of fair and equitable treatment

When the measure causes total impairment and is found to breach the fair and equitable treatment (FET) provision of the treaty, some tribunals have concluded that the act is expropriatory. In *Vivendi v. Argentina II*, the dispute arouse from a concession agreement that privatized the water and sewage services in the Argentine province of Tucuman. The claimant alleged that an illegitimate campaign, together with a number of provincial measures, made the recovery rate decline dramatically, thus rendering the concession valueless. The tribunal concluded that the claimants had been radically deprived of the economic use and enjoyment of their concessionary rights, namely the right to invoice their customers and pursue payment for the water and sewage services provided under the concession. The determination that the province's measures were unfair and inequitable played a role in the expropriation assessment:

> "*As to this, we find that the Province's unfair and inequitable measures, identified at 7.4 above, which ultimately led to CAA's [Compañía de Aguas del Aconquija S.A., a local affiliate of the investor] notice of rescission of the Concession Agreement on 27 August 1997, struck at the economic heart of, and crippled, Claimants' investment*."[66]

The *Vivendi* case did not concern a regulatory measure; however, this may not change the approach in principle. An FET claim involves an assessment of a given governmental measure against the criteria of due process, interference with legitimate expectations, non-discrimination, arbitrariness and abusiveness towards the investor (UNCTAD, 2012). It is possible that if a regulatory measure is found to be inconsistent with the FET standard, a tribunal will see it as such in the course of the expropriation analysis. However, this approach is questionable. Some tribunals have read the FET standard in an expansive manner and have read additional elements into it (e.g. transparency and consistency); in such cases one may not mechanically import the FET reasoning into the expropriation context.

In practical terms, the qualification of a measure as expropriatory, after it is found to have breached the FET standard, does not alter available remedies. State conduct that is found to be FET-inconsistent becomes internationally unlawful and triggers the obligation of the State to provide reparation. As a general rule, the amount of such reparation will not be different regardless of whether the conduct concerned is held in breach of one or two IIA obligations.

4.4 Abuse of rights (*abus de droit*)

Under the theory of "abuse of rights", the exercise of a right for the sole purpose of causing an injury to another is prohibited. It is a corollary of the principle of good faith which governs the exercise of rights by States (Cheng, 1953, p. 121). Although the principle has been used on several occasions as regards international claims, it is only recently that an investment tribunal relied on it in the expropriation context.

In *Saipem v. Bangladesh*, a dispute arose out of a contract for the construction of a pipeline between Saipem and a public company. The dispute was later settled under an International

Chamber of Commerce (ICC) arbitration in favour of the investor. However, the Supreme Court of Bangladesh declared that the ICC award was "*a nullity on the eye of law*" as it was "*clearly illegal and without jurisdiction*". The International Centre for Settlement of Disputes (ICSID) tribunal considered that the residual contractual rights contained in the ICC award had been expropriated, as the chances of enforcing the award outside Bangladesh were negligible.

The tribunal concluded that the revocation of the arbitrator's authority was contrary to international law, specifically to the principle of the "abuse of rights" and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, as the Bangladeshi courts had abused their supervisory jurisdiction over the arbitration process. The tribunal held that:

> "*It is generally acknowledged in international law that a State exercising a right for a purpose that is different from that for which that right was created commits an abuse of rights*…".[67]

The doctrine that precludes State authorities from exercising their rights for an end different from that for which the right has been created, with the result that injury is caused, is also known in some domestic systems as *détournement de pouvoir*. Its essential element lies in the establishment of the motives or intent behind the State's conduct at issue as well as its practical results. In the context of the police powers, if it is established that the true intention is not consistent with the alleged public purpose, the measure can be found to constitute an "abuse of rights". In this sense, the doctrine of "abuse of rights" is a flipside of the requirement that the police-powers measure must pursue a genuine public purpose (see section II.B.4(i)).

4.5 Direct benefit to the State

In some domestic legal systems, the absence or presence of a benefit to the State is a factor that helps determine whether an indirect expropriation has occurred. Thus, whether a constructive acquisition has occurred (whether the measure resulted in a direct benefit to the State) is given significant weight by Canadian courts. In 2006, the Supreme Court of Canada heard a claim concerning the expropriation of land owned by a railway company. Under the facts of the case, the City of Vancouver had adopted a development plan that restricted the use of the land to non-economic uses and effectively froze the development of a parcel of land by the railway company. The company argued that the city's conduct amounted to an effective taking. The Court rejected the claim on the grounds that city had not acquired a beneficial interest relating to the land in question.[68] (It was also noted that the development plan did not remove all reasonable uses of the property.)

In the IIA context, some tribunals have used this factor. For example, in *Olguín v. Paraguay*, the tribunal stated that "*[f]or an expropriation to occur, there must be actions … depriving the affected party of the property it owns,* ***in such a way that whoever performs those actions will acquire, directly or indirectly, control, or at least the fruits of the expropriated property***"[69] (emphasis added). Other tribunals, by contrast, made statements to the effect that a transfer of assets to the State is not required for an expropriation to be found.[70] This may indeed be so when there are other elements which indicate the irregularity of the measure, like the lack of a genuine public purpose. In other circumstances, the direct-benefit factor may be of relevance. For example, if an economic activity is banned for environmental reasons, this is unlikely to be viewed as a taking; however, if an economic activity is banned for private actors because the government is assuming State monopoly over it, there is direct benefit to the State and,

therefore, there would be stronger arguments for a finding of expropriation.

There can be circumstances when the benefit goes not to the expropriating State but to a private person or company that seeks to neutralize a (foreign) competitor. The *Rumeli* tribunal noted, with respect to judicial expropriation, that "*it is usually instigated by a private party for his own benefit, and not that of the State*".[71] In such cases, the State is used as an instrument for private gain (there is no public purpose) and the question of benefit is irrelevant. Finally, when a certain measure benefits the society as a whole, such as general environmental or public-health legislation, there is no appropriation of assets or benefits by an identifiable entity (it is widely dispersed), and thus no expropriation.

C. Steps to assess a claim of indirect expropriation

The analysis undertaken in this paper suggests that a measure allegedly constituting an indirect expropriation can be assessed by going through a sequence of analytical steps.

As a preliminary matter, one needs to establish whether the measure is attributable to the respondent State and if so, whether the latter acted in its sovereign capacity. Secondly, it is important to correctly identify the investment at issue and, in particular, to understand whether it should be considered as part of the investor's overall investment in the host State or whether it is capable of being expropriated separately.

Moving on to the impact of the measure on investment, it needs to be determined whether the State conduct has resulted in a total or near-total deprivation of the investor's investment (loss of investment's value or of investor's control over the investment) and whether the effect of the measure is permanent. An additional factor to be considered here is whether the investor had a legitimate

expectation (arising from a written commitment of the host State) that the State would not act the way it did.

If a measure is of a regulatory nature or is an enforcement of existing regulation, one would need to ask the following questions: Does the measure contain the characteristics of a bona fide exercise of police powers by the host State? Is it taken in pursuance of a genuine public purpose, in a non-discriminatory manner and in accordance with the due process of law? Was there a transfer of benefit of the investment of the State or any private party? Is there a manifest disproportionality between the aims pursued and the harm inflicted on the investor?

On the basis of the above-mentioned factors, it should be possible to decide whether an indirect expropriation has taken place or whether the conduct qualifies as the State's non-compensable exercise of police powers and regulatory prerogatives. If expropriation is found, the analysis must proceed to the matters of its lawfulness or unlawfulness and the question of compensation or reparation.

This suggested sequence is not meant as a mechanical tool to be applied in every case regardless of its specific circumstances. Neither is it the only possible approach. Rather, it represents one way of dealing with a claim of indirect expropriation that may prove useful to arbitrators, investors and States alike.

Notes

1 *Telenor v. Hungary*, Award, 13 September 2006, para. 70.
2 *CME v. Czech Republic*, Partial Award, 13 September 2001, para. 150.
3 *GAMI Investments v. Mexico*, Final Award, 15 November 2004, para. 126.
4 *Waste Management v. Mexico*, Final Award, 30 April 2004, para. 159.
5 Ibid., paras. 156–157.
6 Ibid., para. 159. The tribunal then proceeded to examine the question of whether the contract rights themselves were expropriated. It dismissed that claim on different grounds.
7 *Pope & Talbot v. Canada*, Interim Award, 26 June 2000, para. 102.
8 *Vivendi v. Argentina II*, Award, 20 August 2007, para. 7.5.11.
9 *LG&E v. Argentina*, Decision on Liability, 3 October 2006, para. 191.
10 *Sempra Energy v. Argentina*, Award, 28 September 2007, para. 285.
11 *CMS v. Argentina*, Award, 12 May 2005, para. 262.
12 *Glamis Gold, Ltd. v. USA*, Award, 8 June 2009, para. 536.
13 *Total v. Argentina*, Decision on Liability, 27 December 2010, para. 196.
14 In *Pope & Talbot v. Canada*, the tribunal found that business income (in that case – based on the ability to sell softwood lumber in the United States market) was an integral part of the value of the enterprise. The tribunal decided that the loss of business income did not result in a "substantial deprivation" of the investor's enterprise as a whole and thus did not constitute an expropriation. (*Pope & Talbot v. Canada*, Interim Award, 26 June 2000, paras. 98 and 102.)
15 *Sempra Energy v. Argentina*, Award, 28 September 2007, para. 285.
16 *Sedco, Inc. v. National Iranian Oil Company*, Interlocutory Award, 28 October 1985, 9 the Iran-United States Claims Tribunal Reports 248, p. 278.
17 *ITT Industries, Inc. v. Iran et al.*, Award, 26 May 1983, 2 Iran-United States Claims Tribunal Reports 348, pp. 351–352.
18 *Starrett Housing v. Iran*, Interlocutory Award No. ITL 32-24-1, 19 December 1983.
19 *Biloune v. Ghana*, Award on Jurisdiction and Liability, 27 October 1989.
20 *Pope & Talbot*, Interim Award, 26 June 2000, para. 100.
21 *Feldman v. Mexico*, Award on Merits, 16 December 2002, para. 41.

22 *CMS v. Argentina*, Award, 12 May 2005, para. 263.
23 *Methanex v. USA*, Final Award, 3 August 2005.
24 *Azurix v. Argentina*, Award, 14 July 2006.
25 *LG&E v. Argentina*, Decision on Liability, 3 October 2006.
26 *AES v. Hungary*, Award, 23 September 2010, paras. 14.2.1–14.3.4.
27 *Tecmed v. Mexico*, Award, 29 May 2003, para. 116.
28 *SD Myers v. Canada*, First Partial Award, 13 November 2000, paras. 287–288.
29 *Suez et al. v. Argentina*, Decision on Liability, 30 July 2010, para. 129.
30 *Nykomb v. Latvia*, Award, 16 December 2003, para. 4.3.1.
31 *Fireman's Fund v. Mexico*, Award, 17 July 2006, para. 176(f).
32 *S.D. Myers v. Canada*, First Partial Award, 13 November 2000, paras. 281 and 285.
33 *LG&E v. Argentina*, Decision on Liability, 3 October 2006, paras. 189 and 194.
34 *Azurix v. Argentina*, Award, 14 July 2006, paras. 316–322.
35 *Methanex v. USA*, Final Award, 3 August 2005, Part IV, Chapter D, para. 7.
36 The tribunal in *Grand River Enterprises v. USA*, when analysing "legitimate expectations" in the expropriation context, stated that "*[o]rdinarily, reasonable or legitimate expectations of the kind protected by NAFTA are those that arise through targeted representations or assurances made explicitly or implicitly by a State party*." (Award, 12 January 2011, para. 141, emphasis added.)
37 *Waste Management v. Mexico*, Final Award, 30 April 2004, para. 159.
38 *Continental Casualty v. Argentina*, Award, 5 September 2008, para. 258.
39 *Methanex v. USA*, Final Award, 3 August 2005, Part IV, Chapter D, para. 9.
40 See, for example, *Chemtura Corporation v. Canada***,** Award, 2 August 2010, para. 242; *Metalclad v. Mexico*, Award, 30 August 2000, para. 103.
41 Ministerial Statement on the Multilateral Agreement on Investment, 28 April 1998, para. 5.
42 *Sedco, Inc. v. National Iranian Oil Co.*, Interlocutory Award No. ITL 55-129-3, 28 October 1985, 9 the Iran-United States Claims Tribunal Reports 248, p. 275.

[43] *Feldman v. Mexico*, Award, 16 December 2002, para. 83.
[44] *Methanex Corporation v. the United States*, Final Award, 3 August 2005, part IV, chapter D, para. 7.
[45] *Saluka v. the Czech Republic*, Partial Award, 17 March 2006, para. 255.
[46] Ibid., para. 262.
[47] *Suez et al. v. Argentina*, Decision on Liability, 30 July 2010, para. 147.
[48] *Chemtura v. Canada*, Award, 2 August 2010, para. 266.
[49] *Fireman's Fund v. Mexico*, Award, 17 July 2006, para. 176(j).
[50] Commentators have pointed out that in case of a direct expropriation (for example, for environmental reasons), existence of a general exception presumably does not exclude payment of compensation (Newcombe and Paradell, 2009, p. 506).
[51] *Saluka v. Czech Republic*, Partial Award, 17 March 2006, para. 263.
[52] *Saluka v. Czech Republic*, Partial Award, 17 March 2006, para. 264.
[53] *Methanex v. USA*, Final Award, 3 August 2005, Part IV, Chapter D, paras. 7 and 15.
[54] *Saluka v. Czech Republic*, Partial Award, 17 March 2006, para. 255.
[55] *Tecmed v. Mexico*, Award, 29 May 2003, para. 122.
[56] *Methanex v. USA*, Final Award, 3 August 2005, Part IV, Chapter D, para. 4.
[57] *Methanex. v. USA*, Final Award, 3 August 2005, Part IV, Chapter D, para. 101.
[58] *EDF v. Romania*, Award, 8 October 2009, para. 313.
[59] *Sporrong and Lönnroth v. Sweden*, European Court of Human Rights, Judgment, 23 September 1982, para. 69.
[60] *James and Others v. United Kingdom*, European Court of Human Rights, Judgment, 21 February 1986, para. 50.
[61] *Sporrong and Lönnroth v. Sweden*, European Court of Human Rights, Judgment, 23 September 1982, para. 73.
[62] *Erkner & Hofauer v. Austria*, European Court of Human Rights, Judgment, 23 April 1987, para. 79.
[63] *Tecmed v. Mexico*, Award, 29 May 2003, para. 122.
[64] *Azurix v. Argentina*, Award, 14 July 2006, para. 312.
[65] *LG&E v. Argentina*, Decision on Liability, 3 October 2006, para. 195.
[66] *Vivendi v. Argentina* II, Award, 20 August 2007, para. 7.5.25. For another example, see *Metalclad v. Mexico*, Award, 30 August 2000,

para. 104; *Gemplus & Talsud v. Mexico*, Award, 16 June 2010, paras. 8–23.

67 *Saipem v. Bangladesh*, Award, 30 June 2009, para. 160.

68 *Canadian Pacific Railway Co. v. Vancouver (City)*, (2006) 1 S.C.R. 227, as discussed in Schwartz and Bueckert, 2006, pp. 489–490.

69 *Olguín v. Paraguay*, Award, 26 July 2001, para. 84.

70 See, for example, *Tecmed v. Mexico*, Award, 29 May 2003, para. 113; *Metalclad v. Mexico*, Award, 30 August 2000, para. 103.

71 *Rumeli v. Kazakhstan*, Award, 29 July 2008, para. 704.