

**INTERNATIONAL COURT OF JUSTICE**

***CERTAIN IRANIAN ASSETS***

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

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**COUNTER-MEMORIAL**

**SUBMITTED BY**

**THE UNITED STATES OF AMERICA**

**October 14, 2019**

**ANNEXES**

**VOLUME XI**

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# ANNEX 235





YEARBOOK  
OF THE  
INTERNATIONAL  
LAW COMMISSION  
1953

*Volume II*

*Documents of the fifth session  
including the report of the Commission  
to the General Assembly*

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UNITED NATIONS



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UNITED NATIONS  
New York, 1959



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### Article 2

**In any area situated within one hundred miles from the territorial sea, the coastal State or States are entitled to take part on an equal footing in any system of regulation, even though their nationals do not carry on fishing in the area.**

### Article 3

**States shall be under a duty to accept, as binding upon their nationals, any system of regulation of fisheries in any area of the high seas which an international authority, to be created within the framework of the United Nations, shall prescribe as being essential for the purpose of protecting the fishing resources of that area against waste or extermination. Such international authority shall act at the request of any interested State.**

95. In adopting these articles the Commission adhered in substance to the provisional draft of the articles formulated at its third session in 1951. In their main aspect both drafts go beyond the existing law and must be regarded to a large extent as falling within the category of progressive development of international law. The existing position of international law is, in general, that regulations issued by a State for the conservation of fisheries in any area of the high seas outside its territorial waters are binding only upon the nationals of that State. Secondly, if two or more States agree upon regulations affecting a particular area, the regulations are binding only upon the nationals of the States concerned. Thirdly, in treaties concluded by States for the joint regulation of fisheries for the purpose of their protection against waste and extermination, the authority created for the purpose has been, as a rule, entrusted merely with the power to make recommendations, as distinguished from the power to issue regulations binding upon the contracting parties and their nationals.

96. It is generally recognized that the existing law on the subject, including the existing international agreements, provides no adequate protection of marine fauna against extermination. The resulting position constitutes, in the first instance, a danger to the food supply of the world. Also, in so far as it renders the coastal State or the States directly interested helpless against wasteful and predatory exploitation of fisheries by foreign nationals, it is productive of friction and constitutes an inducement to States to take unilateral action, which at present is probably illegal, of self-protection. Such inducement is particularly strong in the case of the coastal State. Once such measures of self-protection, in disregard of the law as it stands at present, have been resorted to, there is a tendency to aggravate the position by measures aiming at or resulting in the total exclusion of foreign nationals.

97. The articles as now adopted by the Commission are intended to provide the basis for a solution of the difficulties inherent in the existing situation. Article 3 imposes upon States the "duty to accept, as binding upon their nationals, any system of regulation of fisheries in any area of the high seas which an international authority, to be created within the framework

of the United Nations, shall prescribe as being essential for the purpose of protecting the fishing resources of that area against waste or extermination". Moreover, it is provided there that "such international authority shall act at the request of any interested State", i.e., whether a coastal or any other State. Certain members of the Commission were opposed to the adoption of the text of article 3, on the ground that there was no real need for the creation of an international authority, since fisheries could be regulated, as in the past, by means of agreements between States. They contended that the proposal to give an international authority power to issue regulations binding on the nationals of States was in conflict with the basic principles of international law.

98. The system proposed by the Commission protects in the first instance, the interest of the coastal State which is often most directly concerned in the preservation of the marine resources in the areas of the sea contiguous to its coast. Obviously, if only the nationals of that State are engaged in fishing in these areas, it can fully achieve the desired object by legislating in respect of its nationals and enforcing the legislation thus enacted. If nationals of other States are engaged in fishing in a given area — whether coastal or otherwise — it is clear that the concurrence of those States is essential for the effective adoption and enforcement of the regulations in question. Article 1 provides therefore that in such cases "the States concerned shall prescribe the necessary measures by agreement". Article 3 is intended to provide effectively for the contingency of the interested States being unable to reach agreement. In such cases, the regulations are to be issued, with binding effect, by the international authority envisaged in that article. Similarly, if subsequent to the adoption of measures of protection by the agreement of the interested States, nationals of other States engage in fishing in the area in question and if their States are unwilling to accept or respect the regulations thus issued, the international authority provided for in article 3 is empowered to declare the regulations to be binding upon the States in question and upon their nationals.

99. As stated, the system thus formulated by the Commission does not differ substantially from that provisionally adopted by the Commission at its third session. Thus, it was laid down, in article 2, that a permanent international body competent to conduct investigations of the world's fisheries and the methods employed in exploiting them "should also be empowered to make regulations for conservatory measures to be applied by the States whose nationals are engaged in fishing in any particular area where the States concerned are unable to agree among themselves". It is significant of the present state of opinion and of the widely felt need for the removal of what is considered by many to be a condition approaching anarchy that, in the replies sent by governments, no opposition was voiced against the proposal then advanced by the Commission.

100. The Commission, in adopting the articles, was influenced by the view that the prohibition of abuse of rights is supported by judicial and other authority and is germane to the situation covered by the articles. A



State which arbitrarily and without good reason, in rigid reliance upon the principle of the freedom of the seas, declines to play its part in measures reasonably necessary for the preservation of valuable, or often essential, resources from waste and exploitation, abuses a right conferred upon it by international law. The prohibition of abuse of rights, in so far as it constitutes a general principle of law recognized by civilized States, provides to a considerable extent a satisfactory legal basis for the general rule as formulated in article 3. To that extent it may be held that that article is not altogether in the nature of a drastic departure from the principles of international law. In fact, the Commission deems it desirable that, pending the general acceptance of the system proposed in article 3, enlightened States should consider themselves bound, even if by way of a mere imperfect legal obligation, to act on the view that it may be contrary to the very principle of the freedom of the seas to encourage or permit action which amounts to an abuse of a right and which is apt to destroy the natural resources whose preservation and common use have been one of the main objects of the doctrine of the freedom of the sea. This is so although the Commission is of the opinion that the articles adopted fall generally within the category of development of international law.

101. Reference may be made in this connexion to article 2, which lays down that, in any area situated within one hundred miles from the territorial sea, the coastal State or States are entitled to take part on an equal footing in any system of regulation, even though their nationals do not carry on fishing in the area. This provision is considered to safeguard sufficiently the position of the coastal State. Such protection of its interests is equitable and necessary even if, for the time being, its nationals do not engage in fishing in the area. On the other hand, the right to participate, on a footing of equality, in any system of regulation agreed upon by other States does not imply a right to prevent or hinder its operation. The same applies to any system of regulation which may be decided upon by the international authority in conformity with article 3. In view of the wide powers conferred upon the latter, the Commission considered it unnecessary to entertain in detail the proposal, put forward at its third session and advanced once more at its present session, to entrust the coastal State itself with the right to issue regulations of a non-discriminatory character binding upon foreign nationals in areas contiguous to its coast.

102. With respect to the action which may appropriately be taken by the General Assembly in the matter of the part of the present report incorporating the final draft of articles on fisheries, the Commission recommends: (a) that the General Assembly should by resolution adopt that part of the report and the draft articles; and (b) that it should enter into consultation with the United Nations Food and Agriculture Organization with a view to the preparation of a draft convention incorporating the principles adopted by the Commission.

103. The Commission believes that the general importance and the recognized urgency of the subject matter of the articles in question warrant their endorse-

ment by a formal act of approval on the part of the General Assembly. Considerable time must elapse before a convention on the lines here proposed can be adopted and widely ratified. In the meantime, it seems advisable that the General Assembly should lend its authority to the principles underlying the articles. In particular, endorsement should be given to the view that, where a number of interested States have agreed on a system of protection of fisheries, any regulations thus agreed upon should not, without good reason, be rendered nugatory by the action or inaction of a single State. The problem underlying the articles is one of general interest and the Commission believes that an authoritative statement of the legal position on the subject, both *de lege lata* and *de lege ferenda*, by the General Assembly is indicated as a basis of any future regulations which may be adopted.

104. While the articles adopted by the Commission contain the general principles for the protection of fisheries, it is clear that only a detailed convention or conventions can translate these principles into a system of working rules. It is probable that that object may be achieved on a regional basis rather than by way of a general convention. Conventions concluded in the past for the protection of fisheries have been, as a rule, on a regional basis. The International Convention for the North West Atlantic Fisheries of 6 February 1949, which establishes an International Commission for the North Atlantic Fisheries assisted by panels for sub-areas and national advisory committees, and the proposed International Convention for the High Sea Fisheries of the North Pacific Ocean, approved in draft by the Tripartite Fisheries Conference at Tokyo on 14 December 1951, provide recent instructive examples of such regulations. Account would also have to be taken of the existence and experience of regional bodies such as the Indo-Pacific Fisheries Council, the General Fisheries Council for the Mediterranean and the Latin-American Fisheries Council. The matter is of a technical character; as such it is outside the competence of the Commission. A specialized body, such as the United Nations Food and Agriculture Organization would seem to be most suitable for the purpose. Accordingly, the Commission recommends that, concurrently with its approval of the articles on fisheries, the General Assembly should enter into consultation with FAO with a view to investigating the matter and preparing drafts of a convention or conventions on the subject in conformity with the general principles embodied in the articles.

#### IV. CONTIGUOUS ZONE

105. As part of the work on the régime of the high seas the Commission adopted, at its 210th meeting, the following single article on contiguous zone:

**On the high seas adjacent to its territorial sea, the coastal State may exercise the control necessary to prevent and punish the infringement, within its territory or territorial sea, of its customs, immigration, fiscal or sanitary regulations. Such control may not be exercised at a distance beyond twelve miles from the base line from which the width of the territorial sea is measured.**



# ANNEX 236





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State's "breach of an engagement", that is, of an international obligation.<sup>64</sup> This rigid—or at least apparently rigid—concept of responsibility has not prevented other more flexible interpretations from also being accepted in international jurisprudence, as will be seen further on, but the vast majority of international decisions has clearly endorsed it. The same trend is evident in doctrine, where the existence of responsibility is generally contingent upon the non-performance of an international obligation.<sup>65</sup>

69. Even if the other features or constituent elements of international responsibility are present, it is not always possible to impute to the State the non-performance of an "obligation" which is both clearly defined and specific. The question therefore arises whether, from a strictly legal point of view, when injury has been caused as the result of an unjustified act or omission on the part of the State, responsibility can be deemed to have been incurred although there are no grounds for imputing the violation or non-observance of a rule of international law establishing a sufficiently precise and unequivocal prohibition concerning the act or omission in question. In the theory and practice of international law situations of this type may, in fact, be quite frequent, on account of the lacunae and uncertainties which are still to be found within its complex of rules, including the sphere of conventional or written law. Even in municipal law, in spite of its considerably greater normative development, gaps and uncertainties are far from being entirely overcome. In order to meet the various situations arising as a result, recourse is had, particularly in a municipal juridical system, to general principles of law, to analogy, to interpretation of the applicable standard, to equity, etc. But in the matter of responsibility, in which the first requirement is to determine whether or not the act or omission which has occasioned the injury is contrary to a juridical precept, recourse is mainly had to the principle which forbids the "abuse of rights". This is easily explained if account is taken of the reasons underlying this prohibition and the central part it plays with regard to the exercise of subjective rights.

## 2. THE DOCTRINE OF "ABUSE OF RIGHTS": OPINIONS OF AUTHORS

70. Relatively few authors have troubled to study the applicability of the doctrine of "abuse of rights" in international relations. The majority of those who have done so, however, have not only reached the conclusion that the doctrine can and should be applied in order to solve particular problems, but also contend that its applicability has already been adequately

demonstrated in practice. The question was first raised officially in the proceedings of the Advisory Committee of Jurists which drafted the Statute of the former Permanent Court. In discussing the provisions concerning sources (art. 38), the Italian member, Ricci-Busatti, referred to the principle "which forbids the abuse of rights" as one of the "general principles of law recognized by civilized nations" which the Court would apply when deciding, in accordance with international law, disputes submitted to it. By way of illustration, he mentioned the disputes which might arise concerning the exercise of the right of the coastal State to fix the breadth of its territorial sea. Assuming that there was no rule of international law in existence which defined the outer limit of this sea area, he suggested that the Court should admit the rulings of each country in this regard, as "equally legitimate in so far as they do not encroach on other principles, such as for instance, that of the freedom of the seas".<sup>66</sup>

71. Since then, a number of authors have emphasized the extent to which the doctrine of abuse of rights has been recognized in international practice, particularly in the jurisprudence of international tribunals and claims commissions, and advocated its progressive application as one of the "general principles of law" referred to in paragraph 1 (c) of article 38 of the Statute of the International Court of Justice. As a source of international law of this kind, Politis considered it of particular importance for the development of the law of nations, especially in regard to the principles governing State responsibility.<sup>67</sup> Some years later Lauterpacht also remarked that in international law—where, in contrast to municipal law, the process of express or judicial law-making is still in a rudimentary stage—the law of torts is confined to very general principles, and the part which the doctrine of abuse of rights is called upon to play is therefore particularly important. It is one of the basic elements of the international law of torts.<sup>68</sup> In a more recent monograph, Kiss expresses the view that the prohibition of the abuse of rights is rather a general principle of international law, deriving from the very structure of this legal system, and promoting its development in three distinct ways: by creating a new rule of customary law, by its impact on systems of municipal law, and by contributing to the creation of conventional rules, or rather by originating a new principle.<sup>69</sup> Cheng considers the doctrine of abuse of rights to be merely an application of the principle of good faith to the exercise of rights. Any violation of the requirements of this principle (that is, when a right is exercised for the purpose of causing injury, in order to evade obligations, in a manner incompatible with the principles of the

<sup>64</sup> Cf. *Yearbook of the International Law Commission, 1956*, vol. II (United Nations publications, Sales No.: 56.V.3, Vol. II), document A/CN.4/96, chap. III, sect. 6. This concept is so firmly established in the jurisprudence of the Hague Court that it may be said to regard an "international illegal act" and a "breach of international obligations" as synonymous terms. Cf. Schwarzenberger, *International Law*, vol. I (3rd ed., 1957), p. 571.

<sup>65</sup> See Bustamante and authors cited by him, *Derecho Internacional Público* (1936), vol. III, pp. 474, 481.

<sup>66</sup> *Proceedings of the Advisory Committee of Jurists (June 16th–July 24th 1920)*, pp. 315 and 316.

<sup>67</sup> "Le problème des limitations de la souveraineté et la théorie de l'abus des droits dans les rapports internationaux", *Recueil des cours de l'Académie de droit international* (1925–I), vol. 6, p. 108.

<sup>68</sup> *The Function of Law in the International Community* (1933), p. 298.

<sup>69</sup> *L'abus de droit en droit international* (1953), pp. 193–196.



legal order, or against the interests of others etc.), constitutes an abuse of rights, prohibited by law.<sup>70</sup>

72. The authors who dispute the applicability of the doctrine of abuse of rights in international relations do not always do so on the same grounds. Scerni, for instance, contends that the only theoretical basis on which the doctrine could be founded would be the social and solidaristic conception of subjective rights, a conception which is out of the question on account of the highly individualistic character of international law.<sup>71</sup> In another elaborate study, of more recent publication, J. D. Roulet considers that the doctrine is useless; he points out the primitive and often imprecise nature of the rules of international law and argues that to seek to remedy the situation by means of a doctrine which is similarly characterized by a marked flexibility and lack of precision can produce no positive results.<sup>72</sup> Viewing the question from another angle, Schwarzenberger maintains that in the cases and situations usually mentioned in support of the recognition and applicability of the doctrine in international law, there have been no real "abuses of rights" but breaches of a prohibitory rule of international law.<sup>73</sup>

### 3. RECOGNITION AND APPLICATION OF THE DOCTRINE IN PRACTICE

73. A survey of international practice, particularly in the jurisprudence of the courts and claims commissions, clearly shows that at least the basic principle of the prohibition of abuse of rights is applicable in international relations. This is apparent from the decisions of the Hague Court itself. In the case concerning *Certain German Interests in Polish Upper Silesia* (1926), the former Permanent Court admitted that, in contractual matters, the misuse of a right or the violation of the principle of good faith have the character of a breach of the treaty. The Court further stated that the misuse of the right could not be presumed, and that it rested with the party who stated that there had been such misuse to prove his allegation.<sup>74</sup> In a later decision, the Court pointed out that a State is guilty of an abuse of rights when it seeks to evade its contractual obligations by resorting to measures which have the same effects as acts specifically prohibited by

an agreement.<sup>75</sup> Likewise the new International Court of Justice, dealing with the right to draw straight baselines for the purpose of delimiting the territorial sea, mentioned the "case of manifest abuse" of this right by the coastal State.<sup>76</sup>

74. Commenting on the arbitral decision in the *Boffolo* case and similar cases, Judge Lauterpacht observes: "The conspicuous feature of these awards is the view that the undoubted right of expulsion degenerates into an abuse of rights whenever an alien who has been allowed to take up residence in the country, to establish his business and set up a home, is expelled without just reason, and that such an abuse of rights constitutes a wrong involving the duty of reparation."<sup>77</sup> The doctrine of the abuse of rights has been applied in various other matters. For example, in a well-known case, the General Claims Commission (United States-Mexico) referred to "world-wide abuses either of the right of national protection or of the right of national jurisdiction", stating in that connexion that "no international tribunal should or may evade the task of finding such limitations of both rights as will render them compatible with the general rules and principles of international law".<sup>78</sup> The problem was also raised in the *Trail Smelter* arbitration (1938-1941) between the United States and Canada, although no explicit reference was made to the prohibition of the abuse of rights: "... under the principles of international law", the Court stated, "... no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence".<sup>79</sup>

75. The basic concept of the "abuse of rights" also appears in certain international treaties and conventions. For example, in the Inter-American Convention on Rights and Duties of States (Montevideo, 1933), it is stipulated that "the exercise of these rights has no other limitation than the exercise of the rights of other States according to international law." Although expressed differently, the same idea was embodied in the Convention on the High Seas, adopted by the Geneva Conference of 1958. Under its article 2, "... Freedom of the high seas is exercised under the conditions laid down by these articles and by the other rules of international law" and similarly, "these freedoms [of navigation, of fishing, etc.], ... shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas". The text of these provisions and their legislative history clearly show the purpose they serve, namely,

<sup>70</sup> *General Principles of Law as applied by International Courts and Tribunals* (1953), pp. 121 and 136.

<sup>71</sup> *L'Abuso di Diritto nei Rapporti Internazionali* (1930), p. 80. See in the same sense Cavaglieri, *Corso di Diritto Internazionale* (3rd ed., 1934), p. 508.

<sup>72</sup> *Le caractère artificiel de la théorie de l'abus de droit en droit international public* (1958), p. 150.

<sup>73</sup> "The Fundamental Principles of International Law", *Recueil des cours de l'Académie de droit international* (1955-1), vol. 87, pp. 309 et seq. In a later publication Professor Schwarzenberger seems to have altered his position concerning the "arbitrary or unreasonable exercise of absolute rights", that is, of "rights or discretion within the exclusive jurisdiction of States". Cf. "Uses and Abuses of the 'Abuse of Rights' in International Law", *Transactions of the Grotius Society of International Law* (1956), vol. 42, p. 167.

<sup>74</sup> Publications of the Permanent Court of International Justice, *Series A, No. 7*, pp. 30-37.

<sup>75</sup> *Case of the Free Zones of Upper Savoy and the District of Gex* (1932), *Ibid.*, *Series A/B, No. 46*, p. 167.

<sup>76</sup> *Fisheries case, Judgment of December 18th, 1951: I. C. J. Reports 1951*, p. 142.

<sup>77</sup> Lauterpacht, *Op. cit.*, p. 289.

<sup>78</sup> Cf. General Claims Commission (United States-Mexico), *Opinions of Commissioners* (1927), p. 23.

<sup>79</sup> *Reports of International Arbitral Awards* (United Nations publication, Sales No.: 49.V.2), vol. III, p. 1965.

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# THE CONTENT OF THE RULE AGAINST ABUSE OF RIGHTS IN INTERNATIONAL LAW\*

By G. D. S. TAYLOR, LL.M., PH.D.

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THAT no person may abuse his rights has long been accepted in theory as a principle of international law. Sir Hersch Lauterpacht was one of the earlier writers to accept it. In *The Function of Law in the International Community*<sup>1</sup> he saw 'abuse of rights' as a general means of bringing every action of State sovereignty under international law, though as a matter of policy he was prepared to see some areas of action left untouched.<sup>2</sup> But for him, abuse of right was more than a general principle of law, it was one of the two prime means of effecting peaceful change in the international community. To say that the abuse of rights was prohibited was not enough. Content must be given to the principle. Those who denied the practical validity of the principle did so because they saw no sufficiently defined content capable of application.

## A KEY TO THE CONTENT

If one starts from the premiss that State sovereignty dictates that a State may do what it will, an immediate qualification is necessary. A State cannot act in the territory of another without permission.<sup>3</sup> One may, perhaps, go a stage further and say that a State cannot act in a way which prevents another State from doing what *it* wills. Alternatively, one can refuse to take that step—English municipal law does not in general take it.<sup>4</sup> One can let the burden of a person's action lie where it falls. But State sovereignty does not permit this.<sup>5</sup> At the same time, the proposition that a State cannot act in a way which prevents another State from acting as it will cannot stand without qualification. There must be occasions where a State can lawfully act even though it prevents another State from acting. What, then, are the limits to a State's right to act as it will?

States possess powers to act for which international law does not dictate a manner of use. In *The Lotus*,<sup>6</sup> the Permanent Court of International

\* © Dr. G. D. S. Taylor, 1974.

<sup>1</sup> (1933), Chap. 14.

<sup>2</sup> *Ibid.*, pp. 304-6.

<sup>3</sup> *The Lotus*, P.C.I.J., 1927, Ser. A, No. 10.

<sup>4</sup> *Bradford Corporation v. Pickles*, [1895] A.C. 587 (H.L.).

<sup>5</sup> See F. de Castro, 'La Nationalité, la Double Nationalité et la Supra-Nationalité', *Recueil des cours*, 102 (1961), p. 515, at pp. 579-80.

<sup>6</sup> P.C.I.J., 1927, Ser. A, No. 10, at p. 19.



Justice described the greatest of such areas—that of domestic jurisdiction—as a ‘discretion’ (a term used more recently by Sir Humphrey Waldock in the same connection)<sup>1</sup> and as a matter of ‘politics’. It is easy to think of such areas of State power as areas of ‘no law’; yet they are this only in a sense. The word ‘discretion’ provides a clue, seen by Judge Azevedo in *Conditions of Admission of a State to the United Nations* (Advisory Opinion):<sup>2</sup>

Objection to the political aspect of a case is familiar to domestic tribunals in cases arising from the discretionary action of governments, but the Courts always have a sure means of rejecting the *non liquet* and of acting in the penumbra which separates the legal and the political . . . .

In municipal administrative law discretions are limited but the courts do not exercise a complete control over the very action taken. They leave to the person possessing the discretion a margin of appreciation and examine only such questions of law as may be spelled out from the legislation conferring the discretion. International tribunals may be expected to operate in a similar way. They are in an identical position so far as their composition and procedure are concerned: they are experts in law operating by the adversary system, and not experts in government and politics acting by consultation, advice and other informal means.

Today, English administrative law presents the most highly developed law relating to the abuse of discretion—not because English administrative law is a highly developed system. Rather it is a sign of underdevelopment. Where there is a full and adequate review for errors of fact and law there is seldom need to challenge governmental action for incompetence or abuse of discretion. French law on *détournement de pouvoir* is dying,<sup>3</sup> and that of the United States is moribund. Since there is one thing of which no one would accuse the international judicial process—that is of being developed—perhaps the content of abuse of discretion in English administrative law may provide the content of international abuse of rights. Professor de Smith<sup>4</sup> lists six grounds upon which a governmental body will be held to have abused its discretion: acting under another’s dictation, acting under an over-riding rule of policy, acting in bad faith, acting for an improper purpose, taking account of irrelevant factors or failing to take account of relevant ones, and acting unreasonably. The first two are rather specialized and do not fit into any general picture, although both appear in international jurisprudence where appropriate.<sup>5</sup> All of them relate to the reasons

<sup>1</sup> ‘General Course on Public International Law’, *Recueil des cours*, 106 (1962), p. 1, at p. 174

<sup>2</sup> *I.C.J. Reports*, 1948, p. 57, at p. 75.

<sup>3</sup> J. M. Auby and R. Drago, *Traité de contentieux administratif* (1962 and supp. 1970), para. 1198.

<sup>4</sup> *Judicial Review of Administrative Action* (2nd ed., 1968), p. 271.

<sup>5</sup> *Brown’s case, R.I.A.A.*, 1923, vol. 6, p. 120 (*U.S. v. British Arbitral Tribunal*) and *Pouros v. Food and Agriculture Organization*, Judgment No. 138, *I.L.O. Official Bulletin*, 53 (1969), p. 150 respectively.



for a decision-maker's reaching a particular conclusion and assume that the conclusion reached is *intra vires*. That is, they are grounds for *détournement de pouvoir*.

Does the practice of international tribunals follow this municipal situation? It seems to be accepted that the International Court of Justice will intervene against abuses of discretion by international organizations, though not those by the General Assembly or the Security Council which can be reviewed only for incompetence.<sup>1</sup> This does not mean that actions of States members of the United Nations acting in their capacity as members cannot be subjected to review for abuse of discretion. Thus, in *Certain Expenses* (Advisory Opinion)<sup>2</sup> the Court excluded from its consideration any issues but those relating to whether the resolutions were ones which could legitimately be passed, while in *Conditions of Admission of a State to the United Nations* (Advisory Opinion)<sup>3</sup> the question canvassed was whether the reason which actuated a State in voting on membership was a legitimate one or not. However, a similar review of State actions is not obviously permissible. This is because of two factors: first, the use of the phrase 'abuse of right' and, secondly, uncertainty as to what form application of the principle will take. The first factor is eliminated by avoiding the word 'right' with its immediate association with Hohfeldian 'rights' and the substitution of 'discretion' which more accurately describes the real nature of the State powers concerned. The second factor is eliminated by reference to municipal administrative law. If the English classification is used as a framework a developed practice in international litigation emerges at once. The analogy supplies the content. The 'abuse of right' which is prohibited emerges not as an international tort,<sup>4</sup> but as an omnibus term to describe certain ways of exercising a power which are legally reprehensible.

This article accordingly uses the English administrative law classification as a framework and as an indication of what to look for in international adjudication. It first examines certain areas where there is no review for abuse of right, showing in the process the background theory governing the extent of review. Then it discusses the administrative law categories in turn. Finally, it uses the *South-West Africa* cases to draw the categories together in a single factual context.

#### DEGREES OF CONTROL IN ABUSE OF RIGHT

Every discretionary power, no matter how restricted, contains a degree of margin of appreciation in the person possessing the power. Every

<sup>1</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (Advisory Opinion), *I.C.J. Reports*, 1971, p. 16.

<sup>2</sup> *Ibid.*, 1962, p. 151.

<sup>3</sup> *Ibid.*, 1948, p. 59.

<sup>4</sup> *Barcelona Traction, Light and Power Co. Ltd.* (Second Phase), *ibid.*, 1970, p. 3, at p. 324.



discretionary power, no matter how wide, 'doit être exercé en accord avec les devoirs du sujet considéré et ne doit jamais être arbitraire'.<sup>1</sup> There may, however, be powers—even narrow ones—which are totally unreviewable for abuse, not as a matter of law, but because there is no body with practical power to review or because there is no person with *jus standi* to bring an application for review.<sup>2</sup> In addition, 'les devoirs du sujet' may be so vague that a Court cannot judge whether the power has been exercised in accordance with them. Between these extremes may be found many different degrees of control. English administrative law jurisprudence shows a rough hierarchy from minimum to maximum review: bad faith, improper purpose, relevant and irrelevant factors, and unreasonableness. The cases show certain factors which bear upon the degree of review which the courts will be willing to undertake in a given case. The operation of these factors may be seen by considering three situations in international law.

#### *Plenary governmental power*

Power of this nature is power to act in such a way as is thought to be in the interest of the relevant community. The appropriate international attitude is best expressed in the *Lighthouses* case.<sup>3</sup> In that case the Permanent Court was concerned, *inter alia*, with the question whether the approval of a decree law given by the Ottoman Parliament did or did not comply with the requirement in Ottoman constitutional law that such a law be 'expedient'. The Court said:<sup>4</sup>

. . . any grant of legislative powers generally implies the grant of a discretionary right to judge how far their exercise may be necessary or urgent; . . . It is a question of appreciating political considerations and conditions of fact, a task which the Government, as the body possessing the requisite knowledge of the political situation, is alone qualified to undertake. It follows from the foregoing that the Ottoman Government, in the first instance, and, subsequently, the Turkish Parliament, were alone qualified to decide whether a given decree law should, or should not, be issued. The Court is, therefore, not called upon to consider whether the Decree Law [in question] . . . complied with the conditions rendering its issue expedient according to the terms of the Ottoman Constitution.

The Court went on to say that even if it could look at the question of expediency, it could do no more than see whether the subject-matter was an unusual one to be dealt with by decree law having regard to past practice.

This is a straightforward application of principles of justiciability and arrives at a result similar to that found in municipal cases on the grant of

<sup>1</sup> R. L. Bindschedler, 'La delimitation des compétences des Nations Unies', *Recueil des cours* (1963), vol. 108, p. 307, at p. 315.

<sup>2</sup> See *Rights of Minorities in Upper Silesia (Minority Schools)*, *P.C.I.J.*, 1928, Ser. A, No. 15.

<sup>3</sup> *Ibid.*, 1934, Ser. A/B, No. 62.

<sup>4</sup> *Ibid.*, at p. 22.



plenary legislative power to a governmental officer.<sup>1</sup> The general legislative power, unrestricted by international obligations, is too great to be reviewed. Its appearance is similar to that of domestic jurisdiction in its narrowest sense, that is, to those matters '[qui] comprennent tout d'abord celles dont le droit des gens abandonne le règlement à la compétence exclusive des États'.<sup>2</sup> The situation is the same in areas of domestic jurisdiction where a treaty applies but only with respect to certain aspects.<sup>3</sup> Such areas of State action as are left unregulated in these ways will tend to be those which are highly political and important to a State's interests. Courts tend to 'sit out' such disputes, even municipally.<sup>4</sup>

### *State espousal of nationals' claims*

In the exercise of its discretion [a State] . . . may espouse a claim or decline to do so. It may press a claim before this Commission or not as it sees fit. . . . In exercising such control, it is governed not only by the interest of the particular claimant but by the larger interests of the whole people of the nation, and must exercise an untrammelled discretion in determining when and how a claim will be presented and pressed, or withdrawn or compromised, and the private owner will be bound by the action taken. But the private nature of the claim inheres in it and is not lost or destroyed so as to make it the property of the nation, although it becomes a national claim in the sense that it is subject to the absolute control of the nation espousing it.<sup>5</sup>

This does not appear at first sight to be a case of a *legally* unreviewable discretion. Normally there is no person who has standing to complain internationally about his State's handling of his claim.<sup>6</sup> Certainly, an individual has no State to which he can appeal and, for a corporation, the *Barcelona Traction* decision<sup>7</sup> provides a remedy only where the corporation has become defunct and so notionally ceased to be a national of the State concerned.<sup>8</sup>

The reality behind this is the combination of the existence of a rule of procedural law and the absence of a rule of substantive law. The procedural rule is that dual nationality does not give rise to parallel claims to espouse a person's cause of action. Either one of the States will be selected as the one with power to espouse the dual national's claim<sup>9</sup> or the rule which prohibits one State from bringing a claim against the other State will be

<sup>1</sup> e.g., *Reference, Re Chemicals Regulations*, [1943] S.C.R. 1.

<sup>2</sup> R. L. Bindschedler, loc. cit. (above, p. 326 n. 1), at p. 393.

<sup>3</sup> See Sir Humphrey Waldock, loc. cit. (above, p. 324 n. 1), p. 184.

<sup>4</sup> See L. Henkin, 'Vietnam in the Courts of the United States: "Political Questions"', *American Journal of International Law*, 63 (1969), p. 284.

<sup>5</sup> *Parker v. United Mexican States (U.S. v. Mexican General Claims Commission)*, R.I.A.A., 1926, vol. 35, p. 37.

<sup>6</sup> *Barcelona Traction, Light and Power Co. Ltd. (Second Phase)*, I.C.J. Reports, 1970, at p. 44 (the Court) and p. 77 (Judge Fitzmaurice).

<sup>7</sup> Full reference to the case as a whole in the preceding note.

<sup>8</sup> *Delagoa Bay Railway Company* (1897), 2 I.A. 1865.

<sup>9</sup> See *Canevaro's case*, R.I.A.A., 1912, vol. 11, p. 397, and *Mergé's case*, ibid., 1955, vol. 14, p. 236 (*U.S. v. Italian Conciliation Commission*) for two solutions.



applied.<sup>1</sup> There is a total absence of substantive law on the subject. Indeed, international tribunals have been careful to keep the law away from this area. The reason for this lies in the general theory of State litigation. Only States have international standing; for a State to have standing it must have sufficient interest in the matter; the injury is to a person who is a member of the State; such an injury affects the body politic in some way; such an injury *is itself* an injury to the State; that is sufficient interest. So long as the first step of this chain is accepted there can be no limit on this State power. The power is not a derived one but an inherent one. It has no object but the good of the State itself. There are no matters which are irrelevant to the State's decision how to deal with a national's claim. There are no reasons which would be legally improper. There can be no review for abuse of right.

*Self-judging reservations to the International Court's compulsory jurisdiction*

The prototype of such clauses is that of the United States of America which provides that 'this declaration shall not apply to . . . (b) disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America'. In 1970 only five States retained this type of clause.<sup>2</sup> Of these Malawi (1966) and the Sudan (1957) use the above formulation, while Liberia (1952) speaks of disputes which the State 'considers' to be domestic, and Mexico uses the phrase 'in the opinion of' Mexico.

The validity of the reservation and the effect which its invalidity may have upon a State's acceptance of the Court's compulsory jurisdiction does not concern us here. The issue is whether invocation of the reservation is susceptible of any degree of judicial review.

Only Judges Read and Basdevant in *Certain Norwegian Loans* case<sup>3</sup> have accepted that the Court has any power of review. Judge Read's analysis took its origin from the word 'understanding' which appeared in the French reservation under consideration. Before there could be an understanding, he said, it must (a) be reasonably possible to reach an understanding that the matter was within domestic jurisdiction, and (b) have been considered to be within domestic jurisdiction in good faith.<sup>4</sup> The first element relates to competence and the second to abuse of right. Judge Basdevant went no further than to state that Norway's invocation of the reservation could be

<sup>1</sup> *Salem's case*, *ibid.*, 1932, vol. 2, p. 1163; *Reparations for Injuries Suffered in the Service of the United Nations* (Advisory Opinion), *I.C.J. Reports*, 1949, p. 174, at p. 186.

<sup>2</sup> *I.C.J. Yearbook 1970-71* (1971). D. P. O'Connell, *International Law* (2nd ed., 1970), vol. 2, pp. 1082-3 is in error. He erroneously places Sudan in the list of States with objective clauses, states that Pakistan has a subjective one (it was amended in 1960), and includes South Africa in the list though that State withdrew from the optional clause in 1967.

<sup>3</sup> *I.C.J. Reports*, 1957, p. 9.

<sup>4</sup> *Ibid.*, at p. 94.



reviewed for abuse of right,<sup>1</sup> which is merely what Norway, which was reluctant to use the reservation in the first place, had already conceded.<sup>2</sup> In the course of argument, Norway had illustrated its understanding of abuse of right in this area by reference to the sort of case where the subject-matter was manifestly not within domestic jurisdiction: this is simply Judge Read's first element—*excès de pouvoir*.

In his characteristically scholarly opinion, Judge Lauterpacht analysed the scope for reviewing a State's invocation of the reservation. He gave four reasons for rejecting the possibility of judicial review:<sup>3</sup> the absolute way in which the reservation was formulated; the unjudicial nature of the inquiry; the offensive character of an opinion that a State had acted unreasonably or in bad faith;<sup>4</sup> and the character of domestic jurisdiction as 'elastic, indefinable, and potentially all-comprehensive'. In dealing with the fourth reason he compared a reservation of domestic jurisdiction with one of 'matters arising in the course of hostilities' which he saw as a more precise concept. This lack of precision was increased in its effect by the phrase 'essentially within domestic jurisdiction' rather than 'solely' or 'exclusively' within domestic jurisdiction.<sup>5</sup> He said of his second reason:

I find it juridically repugnant to acquiesce in the suggestion that in deciding whether a matter is essentially within the domestic jurisdiction of a State the Court must be guided not by the substance of the issue involved in a particular case but by a presumption—by a leaning—in favour of the rightfulness of the determination made by the Government responsible for the automatic reservation. Any such suggestion conveys a maxim of policy, not of law.

Above all, he was impressed by the apparent intention of the reserving State to exclude review—an opinion borne out by the *Aerial Incident* case between Bulgaria and the United States where the latter withdrew its argument on reviewability in the light of its own invocation of the automatic reservation in the *Interhandel* case.<sup>6</sup>

The logical core of these reasons, and the pivot of judicial review in this context, is the word 'essentially'. Had the reservation referred to matters 'solely' within domestic jurisdiction, then judicial review would have been readily available—the subject-matter would not be within the reservation

<sup>1</sup> *Ibid.*, at p. 73.

<sup>2</sup> *I.C.J. Pleadings*, vol. 1, at p. 131.

<sup>3</sup> *Interhandel* case (Preliminary Objections), *I.C.J. Reports*, 1959, p. 6, at pp. 112–13.

<sup>4</sup> This does not seem to square with his attitude expressed in *Voting Procedure on Questions Relating to Reports and Petitions Concerning South West Africa* (Advisory Opinion), *I.C.J.*, 1955, p. 67. See G. G. Fitzmaurice, 'Hersch Lauterpacht—the Scholar as Judge', *this Year Book*, 37 (1961), p. 1, at p. 36, and S. Rosenne, 'Sir Hersch Lauterpacht's Concept of the Task of the International Judge', *American Journal of International Law*, 55 (1961), p. 825, at pp. 831–2.

<sup>5</sup> *Certain Norwegian Loans*, *I.C.J.*, 1957, p. 9, at p. 42. Cf. Judge Krylov in *Interpretation of Peace Treaties* (Advisory Opinion), *ibid.*, 1950, p. 65, at p. 112, and L. Gross, 'Bulgaria Invokes the Connally Amendment', *American Journal of International Law*, 56 (1962), p. 357, at p. 378.

<sup>6</sup> See L. Gross, *ibid.*, *passim*.



where there was any rule of international law applicable.<sup>1</sup> 'Essentially', as a matter of degree, changed that. How much is 'essentially'? How is it to be judged? Who is to judge it?

However, judicial review is never eliminated by posing an issue of degree. The subjective phrasing of the reservation indicates no more than that the decision at first instance at least is to be made by the State, though the reserving State no doubt intended more. In this, the International Court is placed in the same position as a municipal court reviewing a ministerial decision that a factual situation does or does not come within a statutory description. The decision is reviewable where the relationship of facts and law is clearly other than that claimed by a minister, or a State, as the case may be. An international tribunal may approach the question with greater restraint than a municipal court, but the analogy remains. Secondly, essentiality indicates substantiality. In general the invocation may be regarded as unlawful where international law regulates every aspect of every issue in the case or where the matters not regulated are few or minor or peripheral. Such an evaluation is not juridically difficult, let alone improper. It is an inquiry as to competence (*excès de pouvoir*)—the first half of Judge Read's review.

Finally, the correct approach may be ascertained also by considering why Judge Lauterpacht thought that a self-judging reservation as to hostilities would be reviewable.<sup>2</sup> Two differences between the two reservations appear. First, an hostilities reservation involves no basic issue which is a matter of degree. Secondly, 'hostilities' may be defined precisely, though there would be dispute as to any particular definition. But these affect only the scope of review and are not in fact decisive of the existence of review. Given that the Court may legitimately exercise powers of judicial review—and Judge Lauterpacht's second reason denies this—both differences are of degree rather than of kind.

On the basis of this theoretical structure, it is possible to outline the logical scope for reviewing an invocation of a self-judging reservation. In the first place, the International Court could overrule such an invocation where it was only a few minor or peripheral issues in the dispute that were not regulated by international law. In such circumstances the invoking State would be acting in *excès de pouvoir*. But there is probably no room for review upon grounds of abuse of right. If a State declares that it is acting for one reason when in fact it is acting for another, there will be an abuse of right only if the undisclosed reason is a legally improper one, for otherwise the 'fraud' is legally irrelevant. The crucial question is, therefore:

<sup>1</sup> *Tunis and Morocco Decrees on the Nationality of British Subjects* (Advisory Opinion), *P.C.I.J.*, 1923, Ser. B, No. 4.

<sup>2</sup> Cf. *Conditions of Admission of a State to the United Nations* (Advisory Opinion), *I.C.J. Reports*, 1948, p. 57, at p. 65.



what reasons would be improper? Obviously, the avoidance of litigation on the dispute is a proper reason, as would be the reason that the dispute related to the State's vital interests. If one assumes that invocation as part of a 'deal' with a third State would be improper, this must be because invocation for reasons unrelated to the dispute concerned would be improper.<sup>1</sup> Such a proposition is at least doubtful, but it—or some other proposition regarding certain reasons as irrelevant—is a necessary basis for review on grounds of abuse of right. In the writer's view it cannot be maintained that a State is restricted as to the reasons which prompt it to raise a legally relevant defence—either to the merits or to the Court's jurisdiction. That being so, neither bad faith nor any other ground of abuse of right is available to overrule a State's invocation of its self-judging reservation. Only the review for *excès de pouvoir* remains.

### Conclusion

Thus it may be seen that actions in each of these three areas of law are free from review for abuse of right. They have in common the characteristic of leaving the State free to decide *why* it will act or not act. There is nothing in the context or conditions of the power which makes any reason or factor necessarily relevant or irrelevant, and therefore there *can* be no review.

### EVIDENCE OF ABUSE OF RIGHT

Bad faith, improper purpose, taking account of irrelevant factors, and unreasonableness are all errors in the mind of the decision-maker.

Problems of proof in this area revolve around causality. That a person is tempted to act in bad faith or otherwise abuse his rights does not invalidate the action taken. The action is invalid only if the abuse was integral to the action taken and led to it in some way. The *reasons* for the action must be bad. In each of the grounds of abuse of right the impermissible reason operates in a different way. The ways are related but are not identical; they cannot all be reduced to that of bad faith.<sup>2</sup>

The necessary first step is to ascertain the decision-maker's reasons. He may actually state them, or, alternatively, his failure to state them may be an abuse of right.<sup>3</sup> Where the reasons are stated, a court will usually restrict itself to them.<sup>4</sup> Stated reasons which are defective are decisive; the decision-maker cannot later claim that they were not his reasons at all.

<sup>1</sup> For the context of these see below, pp. 333-42.

<sup>2</sup> This was the essence of South Africa's argument in the *South West Africa* cases, *I.C.J. Reports*, 1962, p. 319, and *ibid.*, 1966, p. 4.

<sup>3</sup> *Robinson v. United Nations*, (1952) Judgment No. 15; *McIntire v. Food and Agriculture Organization*, Judgment No. 13, *I.L.O. Official Bulletin*, 37 (1954), p. 273, at p. 276.

<sup>4</sup> e.g., *Conditions of Admission of a State to the United Nations* (Advisory Opinion), *I.C.J. Reports*, 1948, p. 57.



Where the reasons are not stated they must be inferred from the surrounding facts. Three cases provide good illustrations of the ways in which such 'implied' abuse of right may be established. The first is the *Electricity Company of Sofia and Bulgaria* (Preliminary Objection).<sup>1</sup> The issue in that case was whether a denounced convention for the peaceful settlement of disputes could be invoked to bring the case before the Permanent Court. It was argued, *inter alia*, that Bulgaria had abused its rights in denouncing the treaty at the moment it did. Judge Anzilotti's dissenting opinion dealt with this. There was no evidence of an *ex facie* nature—there had been no announcement that the denunciation was made to avoid litigating the dispute before the Court. Abuse of right could be found only by deduction from the date and the background. Judge Anzilotti relied upon the maxim *qui iure suo utitur neminem laedit*, held that there was no abuse of right, and continued:<sup>2</sup>

The situation might be somewhat different if the Bulgarian Government . . . had chosen the particular moment at which it had been informed of the Belgian Government's intention to apply to the Court. But that is not the case.

The test at which Judge Anzilotti points is: were the circumstances such that no reasonable State would have renounced the treaty at that moment if it had not had as one of its objects the avoidance of litigating the dispute in question? He used this very approach in ascertaining whether the customs union proposed between Austria and Germany was calculated to alienate Austria's independence.<sup>3</sup>

This process of inferring an abuse of right is seen also in the rather extreme case of *Smith*.<sup>4</sup> Smith's land had been compulsorily acquired by the Cuban government. It was alleged that the government had abused its rights, and this claim was upheld by the arbitral tribunal. The day after a municipal court had issued the 'preliminary' order, 150 men arrived on the property and tore down all the buildings. The authorities promptly handed the land to a local who was on good terms with them for him to use as an amusement park for his own profit. Arbitrator Hale laconically remarked that the facts 'do not present the features of an orderly attempt by officers of the law to carry out a formal order of condemnation'.<sup>5</sup>

*Chuinard v. European Organization for Nuclear Research*<sup>6</sup> illustrates both the finding of the reasons and the examination of whether they caused the action taken. Chuinard was a satisfactory worker but he could not get on with his superiors or subordinates. Over a period parts of his job were

<sup>1</sup> *P.C.I.J.*, 1939, Ser. A/B, No. 77.

<sup>2</sup> *Ibid.*, at p. 38.

<sup>3</sup> *Customs Regime between Germany and Austria* (Advisory Opinion), *P.C.I.J.*, 1931, Ser. A/B, No. 41.

<sup>4</sup> *R.I.A.A.*, 1929, vol. 2, p. 913.

<sup>5</sup> *Ibid.*, at p. 917.

<sup>6</sup> Judgment No. 139, *I.L.O. Official Bulletin*, 53 (1969), p. 153.



allocated to other employees and finally his post was suppressed. He was offered an alternative though lower position which he refused and was then dismissed. The Tribunal first defined the objects of the power to suppress posts—the permanent reduction of staff and expenses. It pointed out that a post could not be suppressed as a way of dismissing an employee, though the fact that the holder of the suppressed post was unsatisfactory did not automatically render the suppression bad. On the facts it was plain that there had been a permanent reduction of staff, but the gradual taking away of jobs from Chuinard and his constant disputes with others showed a pattern of attempted dismissal. The suppression would not have taken place had the Director not desired to dismiss Chuinard. But was this abuse a causal factor in Chuinard's dismissal? Here the Tribunal found for the Organization. The alternative post offered was an appropriate one which a reasonable employee would have accepted. The chain of causation was broken and dismissal could not be seen as a consequence of the suppression which was an abuse of right.

The natural reluctance of international tribunals to find that a State has acted unreasonably or in bad faith led one tribunal to see this implied abuse of right as the only appropriate inquiry. The object is to find whether the facts indicate a defective reason without attempting to find that the State had that reason actually in mind. Thus, the Tribunal in the *Martini* case said:<sup>1</sup>

Le Tribunal n'est pas en mesure de se former une opinion sur les motifs qui peuvent avoir inspiré les juges vénézuéliens à l'époque de l'affaire Martini. Si la sentence de la Cour Vénézuélienne est fondée en droit, les motifs psychologiques des juges ne jouent aucun rôle. D'autre part, la défectuosité de la sentence peut être telle qu'il y a lieu de supposer la mauvaise foi des juges, mais également dans ce cas c'est le caractère objectif de la sentence qui est décisif.

Perhaps Judge Lauterpacht's concern not to offend States by holding them to have acted unreasonably stemmed from a belief that the defective reason had to be a real psychological one.<sup>2</sup> It is not so invidious to say that a State has abused its rights where the tribunal is concerned only with the objective correlation of power and effect.

#### BAD FAITH

A State or person acts in bad faith where it abuses its rights—by pursuing an improper purpose, taking account of an irrelevant factor, or acting unreasonably—and does so knowing that it is abusing its rights. It is this last factor which makes bad faith what it is and which leads to the judicial

<sup>1</sup> *R.I.A.A.*, 1930, vol. 2, p. 975, at p. 987.

<sup>2</sup> *Interhandel* case (Preliminary Objections), *I.C.J. Reports*, 1959, pp. 111-13.



reluctance to find that a State or person has so acted. Internationally, good faith is presumed and a State is entitled to rely on the word of another State.<sup>1</sup> Without such a presumption, international intercourse could not continue. The essence of bad faith, then, is the discordance between stated reason and actual reason.<sup>2</sup> It derives from the principle that one cannot be allowed to say one thing at one moment and another at the next,<sup>3</sup> and from the narrower principle that the law can allow no man to 'invoke one reason for exercising his powers when in reality his action is based on another'.<sup>4</sup>

### *Denial of justice and bad faith*

If a municipal court acts in bad faith then there is a denial of justice for international legal purposes. But there is denial of justice also where the court has made a gross error of municipal law. It has often been suggested that this aspect of denial of justice may be summed up by 'bad faith' or, as Presiding Commissioner van Vollenhoven said in *Chattin v. United Mexican States*:<sup>5</sup>

Acts of the *judiciary* . . . are not considered insufficient [in international law] unless the wrong committed amounts to an outrage, bad faith, wilful neglect of duty, or insufficiency of action apparent to any unbiassed man.

But one cannot say that bad faith lies at the heart of this branch of denial of justice unless it is understood to mean bad faith inferred from the circumstances. The applicable test found in the cases may be summed up thus: rendering a decision which no reasonable judge, properly instructed as to the law, could have rendered. Sir Gerald Fitzmaurice has put it this way:<sup>6</sup>

[Mistake of municipal law does not give rise to an international claim] *provided* that no denial of justice, in the proper acceptance of that term in relation to a judicial decision, is involved—i.e. provided the decision, though *mistaken*, was given honestly and in good faith by a properly constituted and normally competent court. Of course, the nature and degree of the error in question may, on a basis of *res ipsa loquitur*, afford in itself evidence that the court cannot have been acting honestly, or else lacked the standards of competence required of the courts of civilized countries; . . .

But it is neither helpful nor necessary to see this as part of bad faith. The 'reasonable judge' formulation is in itself sufficient.

<sup>1</sup> *Lake Lanoux* case, I.L.R. 24 (1957), p. 101, at p. 126.

<sup>2</sup> C. Chaumont, 'Cours Général de Droit International Public', *Recueil des cours*, 129 (1970), p. 333, at p. 382.

<sup>3</sup> *Ibid.*, at p. 381.

<sup>4</sup> *McIntire v. Food and Agriculture Organization*, Judgment No. 13, I.L.O. *Official Bulletin*, 37 (1954), p. 273, at p. 276.

<sup>5</sup> *U.S. v. Mexican General Claims Commission*, R.I.A.A., 1927, vol. 4, p. 282, at pp. 286-7.

<sup>6</sup> G. G. Fitzmaurice, *loc. cit.* (above, p. 329 n. 4), at p. 57.



*Unratified treaties and bad faith*

Article 18 of the Vienna Convention on the Law of Treaties<sup>1</sup> provides:

A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

- (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty: or
- (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided such entry into force is not unduly delayed.

The draft provision (Article 17) approved by the International Law Commission in 1965 differed from the above in its introductory statement which provided that: 'A State is obliged to refrain from acts calculated to frustrate the object of a proposed treaty when . . .' The final Commission draft article (Article 15) substituted 'tending' for 'calculated' in the 1965 version.

In his discussion of the final Commission draft, W. Morvay thought that the article raised a test of bad faith.<sup>2</sup> The law prior to the treaty was not, however, very clear. What material there is suggests that the law required no more than that a State should refrain from deliberately seeking to subvert the objects of a treaty. This is an obligation to act in good faith. The 1965 draft's use of 'calculated' is very close to this, and shows the influence of Sir Hersch Lauterpacht and Sir Gerald Fitzmaurice who had been previous rapporteurs. The changed wording in the final draft and the Convention move away from any requirement which is one of good faith. Both formulations raise objective tests. The change was proposed in the Commission by some of the foremost international lawyers present (MM. Ago, Bartos, Castreñ, Rosenne, Reuter and Yaseen) and they saw it as a move away from subjectivity and the test of bad faith.<sup>3</sup> The final change represented another step away. State action is therefore to be judged by the relationship of fact (the action taken) to law (the object of the treaty) without more. It goes without saying that a deliberate frustration of the treaty is prohibited, but the prohibition is wider than this. It is not limited to bad faith.

*The Tacna-Arica question<sup>4</sup>*

Tacna-Arica was a tract of land within Peru but claimed by Chile. By treaty the two States agreed that Chile should administer it for a period at the end of which there should be a plebiscite to determine whether the inhabitants wished to be Peruvian or Chilean. It was alleged that Chile was

<sup>1</sup> (1969), Cmnd. 4140.

<sup>2</sup> 'The Obligation of a State not to Frustrate the Object of a Treaty Prior to its Entry into Force', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 27 (1967), p. 451, at p. 461.

<sup>3</sup> *Ibid.*, at pp. 456-7.

<sup>4</sup> *R.I.A.A.*, 1925, vol. 2, p. 921.



seeking to frustrate the plebiscite by forcing Peruvians out of the area and inducing an influx of Chileans. The Tribunal found bad faith in only one respect—the discriminatory conscription of Peruvians into the Chilean armed forces.<sup>1</sup> The Tribunal was overtly concerned with ascertaining the intention of the Chilean officials. It examined both their stated intent (*ex facie* bad faith) and the effect of the conscription decisions made (implied bad faith). On the facts it was apparent that conscription of Peruvian youths was initiated as a matter of course in circumstances which forced Peruvians to leave. An inference of bad faith was made from this. On the issue of artificially stimulated immigration the Tribunal could see no measures inconsistent with 'the legitimate and normal development of the provinces'.<sup>2</sup> No inference of bad faith was made, but the structure of the opinion on this issue shows that the investigation was to find bad faith.

#### IMPROPER PURPOSES

##### *What purposes are improper?*

In municipal law most powers are granted in terms which indicate their ambit and objective. But where no ambit or objective is indicated then a preliminary question arises in filling this blank. Relatively few powers in international law contain such an express 'purpose'.

The process of deducing the 'purpose' of a State power is well shown in the *Right of Passage over Indian Territory* (Merits) case.<sup>3</sup> Having held that Portugal had a right to send civilians over Indian territory between her various colonial enclaves in the West of the Indian sub-continent, and having recognized India's right to regulate that traffic, the International Court had to consider the balance between these conflicting rights. The core of the Portuguese argument is contained in these two quotations:

La question qui se pose n'est pas, en effet, de savoir si la compétence de l'Inde est exclusive, en ce sens qu'elle seule est qualifiée pour l'exercer. La question est de savoir si cette compétence est discrétionnaire ou si elle est soumise à l'obligation de ne pas faire obstacle au transit nécessaire pour que le Portugal puisse exercer effectivement sa souveraineté sur les enclaves.<sup>4</sup>

Droit de passage, oui, mais droit sans immunité. C'est à l'Union indienne, en tant que Puissance souveraine du territoire par lequel s'effectue le passage, qu'il appartient de réglementer et de contrôler celui-ci à tous les points de vue. Une seule chose lui est juridiquement impossible, son obligation vis-à-vis du Portugal s'y opposant: c'est d'interdire le passage ou de l'empêcher dans la pratique, au moyen de cette réglementation et de ce contrôle; car, le faisant, elle viole cette obligation et en encourt la responsabilité.<sup>5</sup>

<sup>1</sup> *R.I.A.A.*, 1925, vol. 2, p. 921, at p. 941.

<sup>2</sup> *Ibid.*, at p. 936.

<sup>3</sup> *I.C.J. Reports*, 1960, p. 6.

<sup>4</sup> *I.C.J. Pleadings*, 1960, vol. 2, p. 409 (Reply).

<sup>5</sup> *Ibid.*, vol. 4, pp. 294-5 (M. Telles, in argument).



Only Judge Spender discussed the theoretical aspects of Indian regulation of transit. The other Judges dealt with the facts in a way consistent with Judge Spender's theory that:<sup>1</sup>

If India had in fact purported to regulate and control Portugal's right of passage, it would have been relevant to enquire whether the action taken by India was in reality a regulation or control of the right of passage, or was directed to another and different purpose. It would have been relevant to enquire whether it was in fact directed to the right of passage as such so as to render it nugatory.

Judge Spender found on the facts that there was no purported regulation at all. The theory, however, makes the inquiry whether a particular refusal of transit was made for the reason, *inter alia*, that India disliked any right of passage rather than that the particular transit was unnecessary or undesirable given the special facts relating to it.

In the *Right of Passage* case the presence of two conflicting rights made the derivation of some improper purposes necessary. These purposes were deduced from the natures and incidences of the rights involved. Where there is an empowering provision which deals with the power in any detail, this process is short-circuited. The purposes which are improper are derived by the usual rules of Treaty or Statutory Interpretation.<sup>2</sup>

#### *Proof of an improper purpose*

The existence of an improper purpose may appear either *ex facie* (on the 'face' of the action or decision) or impliedly (from the way the action or decision operates). There need be no abuse of right in either word or effect. Of the minority protection provisions in the First World War Peace Treaties, the Permanent Court said: 'There must be equality in fact as well as ostensible legal equality in the sense of the absence of discrimination in the words of the law.'<sup>3</sup> This approach has been used by the European Commission of Human Rights when ascertaining whether a particular extradition is vitiated by abuse of right. The Commission will interfere<sup>4</sup>

. . . where a person is extradited to a particular country in which, due to the very nature of the régime of that country or to a particular situation in that country, basic human rights, such as are guaranteed by the Convention, might be either grossly violated or entirely suppressed, . . .

Many similar illustrations may be drawn from the jurisprudence of the United Nations and the International Labour Organization Administrative Tribunals.<sup>5</sup>

<sup>1</sup> *Ibid.*, p. 114.

<sup>2</sup> These two processes in administrative law are illustrated respectively by *Roberts v. Hopwood*, [1925] A.C. 578 (H.L.) and *Padfield v. Minister of Agriculture, Fisheries and Food*, [1968] A.C. 997 (H.L.).

<sup>3</sup> *German Settlers in Territory Ceded to Poland* (Advisory Opinion), *P.C.I.J.*, 1923, Ser. B, No. 6, at p. 24.

<sup>4</sup> *X. v. Federal Republic of Germany* (Req. No. 1802/62), *Yearbook of the E.C. on Human Rights* (1963), p. 462, at p. 480.

<sup>5</sup> *Chuinard v. European Organization for Nuclear Research*, Judgment No. 139, *I.L.O. Official*



The requirement that there be no abuse of right in effect as well as word has not always been adhered to strictly. The case of *Oscar Chinn*<sup>1</sup> is a good example of such a failure. Belgium was required by Treaty to administer the Congo river so as to preserve 'complete commercial equality' among users. The Belgian Government held a majority of the shares in a company which competed with Chinn for transport on the river. When the great depression came, the Belgian Government ordered the reduction of its company's charges to an uneconomical level and promised to reimburse the loss made. Chinn went out of business. The Court held that there had been no violation of the equality provision. It was held that the instruction did not benefit Belgians as such or hinder foreigners as such in its wording. Judge Hurst, in a strong dissent, stated the general principle clearly and correctly:<sup>2</sup>

... the basis of the British case must be that the measures taken by the Belgian Government were in themselves unlawful, either by reason of the intention with which they were taken, or by reason of the consequences which they were bound to entail and which should have been foreseen by the Belgian Government. In this latter, the element of intention would be immaterial.

In terms of this dissent, the rationale of the majority's position 'would be that the effect was insufficiently convincing and severe to condemn the action by relation back from its effects'. The majority felt, incorrectly, that they were obliged to make a finding close to one of bad faith so that they required a greater clarity of effect before inferring an improper intent.

This emphasis on *ex facie* improper purpose may be present quite correctly in other contexts. The less justiciable is the question whether the power was properly exercised, and the vaguer are the criteria by which the power was to be exercised, the less scope is there for review for more than incompetence and bad faith. This is because the courts become more reluctant to hold that there has been a misuse of competence without some element of bad faith. That reluctance added strength to South African arguments in the *South-West Africa* cases.<sup>3</sup> But there is no inherent need to see the object of the inquiry as a finding of intent; where the necessary effect of a law or action is inconsistent with international law in the manner discussed in this section, an abuse of right has been established.<sup>4</sup>

*Bulletin*, 53 (1969), p. 153. *Duberg v. U.N.E.S.C.O.*, Judgment No. 17, *ibid.*, 38 (1955), p. 251, at p. 254; *Crawford v. United Nations* (1953), Judgment No. 18, para. 7; *Howrani v. United Nations* (1951), Judgment No. 5.

<sup>1</sup> *P.C.I.J.* 1934, Ser. A/B, No. 63.

<sup>2</sup> *Ibid.*, at p. 54.

<sup>3</sup> *I.C.J. Reports*, 1962, p. 319 and *ibid.*, 1966, p. 4.

<sup>4</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (Advisory Opinion), *ibid.*, 1971, p. 16, at p. 57.



*Improper purposes for expropriation*

International law makes the vague and ethereal demand of States that they expropriate aliens' property only for 'reasons of public utility'. It would be attractive to derive from that the general proposition that the only proper purpose for expropriation is to benefit the public. Professor O'Connell appears to take this view.<sup>1</sup> He derives it from *Czechoslovakian Posts and Telegraphs Administrator v. Radio Corporation of America*.<sup>2</sup>

The parties in that case had entered into an agreement whereby R.C.A. was given exclusive rights to telegraph traffic between the United States of America and Czechoslovakia. Czechoslovakia claimed that R.C.A. was breaking the agreement by failing to 'secure the successful and remunerative working of the line' because Czech-bound traffic was very much less than United States bound traffic. The State, therefore, entered into an agreement with another corporation to run a service parallel to that of R.C.A. The case was arbitrated at R.C.A.'s instance. It was held that the contract was a private law one so that it was irrelevant that one of the parties was a State. However, as *obiter dictum*, the tribunal stated the law upon the assumption that it was a public law agreement. If so, then, it was said, Czechoslovakia could only repudiate the agreement if otherwise 'public interests of vital importance would suffer'.<sup>3</sup> This does not support the general proposition that any expropriation must be for reasons of 'public interest'. Professor O'Connell goes further, however, and states that the proposition just quoted was given content by the later statement that:<sup>4</sup>

When a public institution enters into an agreement with a private person or a private company, it must be assumed that the institution has intended by this agreement to benefit its citizens. But that this expectation sometimes proves to fail in not giving the country as large a profit as was expected, cannot be considered sufficient reason for releasing that public institution from its obligations as signatory of said agreement.

Both statements deal with public benefit, but the two propositions have nothing else in common. The second was made with reference to an argument that the agreement created a 'company of mutual profit' under the Czech Civil Code because a State, it was argued, is 'exclusively directed by the considerations of commercial advantages for its citizens'.<sup>4</sup> The quotation set out was inserted by the Tribunal as part of a refutation of that argument.

Administrative law, too, has been faced with the task of restricting powers which are to be exercised for the 'public interest'. They have been unable

<sup>1</sup> D. P. O'Connell, *op. cit.* (above, p. 328 n. 2), p. 778.

<sup>2</sup> *American Journal of International Law*, 30 (1932), p. 523.

<sup>3</sup> *Ibid.*, p. 531.

<sup>4</sup> *Ibid.*, p. 534.



to prescribe any general limitation of object. Instead, the courts have worked from the other end: it is an abuse of discretion to act for the purpose of lining private pockets<sup>1</sup> or to attack an individual or group of individuals<sup>2</sup> where this is intended almost to the exclusion of 'public' purposes. These two restrictions are to be found also in international expropriation cases. *Smith*<sup>3</sup> exemplifies the former and *Deutsche Amerikanische Petroleum Gesellschaft Oil Tankers*<sup>4</sup> is an apt example of the latter.

This, it is submitted, is the correct approach. The right to expropriate is discretionary. General international law does not confine that power in the way in which a municipal statute might do so. The only possible limit is that spelled out from the general nature of government—that expropriation must be for the public interest. This is too vague to be defined other than negatively. The highest point at which a readily justiciable issue can be stated is that the expropriation must not be for private benefit or be discriminatory to the almost complete exclusion of reasons relating to the needs of the community.

### *Discrimination*

Something rather exceptional must be proved before an action will be held to be wrongfully discriminatory. An action is not wrongful merely because it helps some considerably and acts to the detriment of others. Most State actions are unequal in their operation, and every State or international organization possesses a discretion in assessing whether the action serves the community despite this inequality. Thus, in *El Triunfo* case<sup>5</sup> the tribunal was willing to find that the expropriation there involved was discriminatory because (a) the only property taken was that of a United States national and (b) relations with the United States at the time indicated that that property had been taken *because* it belonged to a person of that nationality. This is a high standard of proof. It may be that the majority in *Oscar Chinn*<sup>6</sup> took the view they did because the benefit of keeping at least one river transport service in operation was sufficient to lay on the credit side against the discriminatory effect of the subsidy.

In the jurisprudence of the European Commission and Court of Human Rights there is no discrimination where the benefiting of some and harming of others is explicable to some extent by a proper reason. In *Church of Scientology v. United Kingdom* (Req. No. 3798/68)<sup>7</sup> the Commission noted that:

<sup>1</sup> e.g. *United Buildings Corp. Ltd. v. Vancouver Corp.*, [1915] A.C. 345 (J.C.) at pp. 353-4.

<sup>2</sup> The French case of *Ribotti* 1956 C.E. 609 (political and religious discrimination) provides a very apt example here.

<sup>3</sup> *R.I.A.A.*, 1929, vol. 2, p. 913.

<sup>4</sup> *Ibid.*, 1926, vol. 2, p. 777, at p. 794.

<sup>5</sup> [1902] U.S. For. Rel. 838.

<sup>6</sup> *P.C.I.J.*, 1934, Ser. A/B, No. 63.

<sup>7</sup> *Yearbook of the E.C. on Human Rights* (1969), p. 306, at p. 322.



. . . in deciding whether to recognise an institution as an educational establishment, [the State] is entitled to have regard to certain minimum educational standards, . . . therefore, any governmental measures which are taken to differentiate between institutions on such a basis do not constitute discrimination . . .

The point is clearer in the Court's decision in *Certain Aspects of the Laws on the Use of Languages in Education in Belgium* (Merits).<sup>1</sup> Complete equality as a Conventional requirement was rejected at the outset:<sup>2</sup>

The competent national authorities are frequently confronted with situations and problems which, on account of differences inherent therein, call for different legal solutions; moreover, certain legal inequalities tend only to correct factual inequalities.

The key was stated to be the existence of an 'objective and reasonable justification' for the distinction:<sup>3</sup>

The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies. A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: . . . [the Convention] is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised.

Only one of the measures attacked was held to be discriminatory, and that because it was 'not imposed in the interest of schools, for administrative and financial reasons: it proceeds solely . . . from considerations relating to language'.<sup>4</sup> This is a classical exposition of the role of review for improper purpose in international adjudication.

### Conclusions

Does international law contain a general prohibition wider than that of discrimination or private gain? Dr. A. C. Kiss, in his most thorough investigation of abuse of right,<sup>5</sup> arrived at three headings of abuses of right. First, use of a State power which interferes with another State's use of a power which it possesses;<sup>6</sup> secondly, use of a power for a reason which was not one for which the power was conferred ('un but autre que celui en vue duquel les compétences étaient attribuées aux autorités étatiques');<sup>7</sup> thirdly, use of a power in an unjustifiable ('injustifié et injustifiable') or arbitrary ('l'exercice arbitraire des pouvoirs discrétionnaires') manner.<sup>8</sup>

The first heading represents the ultimate basis of abuse of right.<sup>9</sup> In practice it appears as bad faith. The third heading emerges from general international law. Both 'injustifiable' and 'arbitraire' point to discrimination and the absence of connection with matters which should be relevant to a

<sup>1</sup> Ibid. (1968), p. 832.

<sup>2</sup> Ibid., p. 864.

<sup>3</sup> Ibid., p. 866.

<sup>4</sup> Ibid., p. 942.

<sup>5</sup> *L'Abus de droit en droit international* (1953).

<sup>6</sup> Ibid., p. 184.

<sup>7</sup> Ibid., p. 186.

<sup>8</sup> Ibid., p. 187.

<sup>9</sup> See the first section of this article.



State's decision upon an international matter, for instance, the private gain object. It is the second heading which reaches furthest and possesses the greatest scope for growth, but it has no general field of operation in State action. For it to operate there must be a conferred power set out with some measure of precision. Few State powers are conferred. Even the powers of international organizations are expressed with too great a generality for review for improper purpose to bite. At a lower level there is such scope, and the jurisprudence of the United Nations and the International Labour Organization Administrative Tribunals show considerable development in this area. There is, however, little reason to expect State powers or those of international organizations to follow suit.

#### TAKING ACCOUNT OF IRRELEVANT CONSIDERATIONS AND FAILING TO TAKE ACCOUNT OF RELEVANT ONES

English and Commonwealth courts have always found this ground of abuse of discretion more manageable than that of improper purposes. It presents none of the justiciability-oriented difficulties found in the case of improper purpose. Here the empowering provision contains a list of the matters which must be considered in arriving at a decision. This leaves the courts with the relatively easy task of ascertaining whether those reasons have been considered or omitted and whether any other reasons have been drawn upon. If one of the listed matters has not been considered, there has been an abuse of discretion (abuse of right). If a matter other than those listed has been considered then (a) if the list is exclusive, there has been an abuse of discretion, but (b) if the list is not exclusive, the State decision-maker has a discretion as to the other matters he will consider and there is an abuse of discretion only if the matter is unauthorized in the sense of being an 'improper purpose'. When one speaks of a decision-maker's taking account of an irrelevant consideration one means that the decision-maker has considered a matter which bears such a relationship to the listed ones that a reasonable decision-maker could not have interpreted a listed matter to include it. When one speaks of a decision-maker's failing to take account of a relevant consideration one does not mean that the decision-maker misconstrued the list so that he looked at the wrong thing, but that he did not direct his mind to the listed matter at all.<sup>1</sup> That, at any rate, is the correct analysis of the administrative law cases.

International adjudication contains few examples of this ground, but then the enumeration of matters to be considered by a State organ is rare. One example of this ground of abuse of right is the *Martini* case.<sup>2</sup> There

<sup>1</sup> See, especially, *Anisminic Ltd. v. Foreign Compensation Commission*, [1969] 2 A.C. 147 (H.L.) at 174 (Lord Reid), 201 (Lord Pearce), and 214 (Lord Wilberforce).

<sup>2</sup> *R.I.A.A.*, 1930, vol. 2, p. 975, at p. 995.



the tribunal held that the Venezuelan court had made a reviewable error when it took account of a head of damages which was not one listed in the arbitral award that gave rise to the municipal court's jurisdiction. Further, the administrative tribunals use it in respect of the Secretary-General's powers over employment.<sup>1</sup> However, there is one case where this ground of review was the appropriate one, was the one used, and was used in a manner identical to the municipal law approach.

In *Conditions of Admission of a State to the United Nations* (Advisory Opinion)<sup>2</sup> the International Court was called upon to decide whether the conditions listed in Article 4 (1) of the Charter of the United Nations were exhaustive and whether a certain matter was a relevant one for States to take into account. Article 4 (1) provided that:

Membership of the United Nations is open to all other peace-loving States which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.

The allegedly improper matter was that if State *A* would vote for the admission of State *B*'s protégé, *X*, then State *B* would vote for State *A*'s protégé, *Y*.

Article 4 (1) enumerated four reasons to which all voters had to advert. Analysis with respect to them was that of relevant and irrelevant considerations. No Judge dissented from this proposition. The issues were whether there was a residual discretion into which the matter in issue could fall and, if not, whether the enumerated matters could encompass the one in issue.

The majority held that the enumeration was exhaustive. Passing on to consider whether the matter came within those enumerated, the Court noted:<sup>3</sup>

Article 4 does not forbid the taking into account of any factor which it is possible reasonably and in good faith to connect with the conditions laid down in that Article. The taking into account of such factors is implied in the very wide and very elastic nature of the prescribed conditions, . . .

This indicated the view that a considerable margin of appreciation had been left to the voting States. The allegedly irrelevant matter was then considered and held to be bad:<sup>4</sup>

. . . [it] clearly constitutes a new condition, since it is entirely unconnected with those prescribed in Article 4. It is also in an entirely different category . . . since it makes admission dependent . . . on an extraneous consideration concerning States other than the applicant State.

This makes two points. First, that the matter was incapable of being subsumed to one of those stated—it was an irrelevant consideration. Secondly,

<sup>1</sup> *Julhiard v. United Nations* (1955) Judgment No. 62; *Giuffrida Food and Agriculture Organization* (1960) Judgment No. 47, *I.L.O. Official Bulletin*, 43 (1960), p. 479.

<sup>2</sup> *I.C.J. Reports*, 1948, p. 57.

<sup>3</sup> *Ibid.*, p. 63.

<sup>4</sup> *Ibid.*, p. 65.



it implies that the matter was foreign to the general tenor and aim of Article 4 (1)—it was an improper purpose.

The dissentients held that there was a residual discretion in States to consider matters other than those enumerated. Their approach was therefore one of improper purposes. First, they looked for the aims and objects of the Article but could find only a reference to the aims and objects of the Organization itself. Hence, they differed from the majority and were led to the conclusion that:<sup>1</sup>

In the exercise of this power the Member is legally bound to have regard to the principle of good faith, to give effect to the Purposes and Principles of the United Nations and to act in such a manner as not to involve any breach of the Charter.

This is a correct conclusion given their proposition that the aim and object of the Article could be found only in the aim and object of the Organization. But the control is in fact no control, for the Organization's aims and objects are so vague and general that precise evaluation of any given matter is impossible.

#### UNREASONABLENESS

There is a real danger of losing oneself among the shifting meanings of unreasonableness. If to act unreasonably means to act in a way in which a reasonable man would not act, then virtually every ground of judicial review is encompassed in 'unreasonableness'. Administrative law cases show four distinct meanings of unreasonableness: (a) lack of a sufficient connection between a factual situation and a legal proposition,<sup>2</sup> (b) an absurd, irrational, or arbitrary action,<sup>3</sup> (c) an action which is thoroughly bad and should certainly not have been done,<sup>4</sup> (d) an action which seriously violates the basic principles behind a body.<sup>5</sup> It is therefore essential to isolate the usage of the word in each case.

A study of administrative law shows that most of the times an action is described as 'unreasonable' the judge is using the word to describe an error which comes under another ground for review. Perhaps the most frequent use of 'unreasonableness' is to describe the lack of connection between a factual situation and a legal proposition. This is certainly true of its use in international adjudication. For instance, in *Lawless v. Ireland (Merits)*<sup>6</sup> the test of 'reasonableness' (reasonable connection) was used to determine whether a particular emergency was capable of being regarded as one

<sup>1</sup> *I.C.J. Reports*, 1948, p. 92, *per* Judges Basdevant, Winiarski, McNair and Read.

<sup>2</sup> e.g. *Edwards v. Bairstow*, [1956] A.C. 14 (H.L.).

<sup>3</sup> e.g. *Kruse v. Johnson*, [1898] 2 Q.B. 91 (D.C.).

<sup>4</sup> e.g. *Associated Provincial Picture Houses Ltd. v. Wednesbury Corp.*, [1948] 1 K.B. 223 (C.A.).

<sup>5</sup> e.g. *Roberts v. Hopwood*, [1925] A.C. 578 (H.L.).

<sup>6</sup> *Yearbook of the E.C. on Human Rights* (1961), p. 438, at pp. 474-80 (the Court).



threatening the life of the State. The use in *Hochbaum*<sup>1</sup> was similar. Again, in *Interhandel* (Preliminary Objections)<sup>2</sup> Judge Lauterpacht,<sup>3</sup> and in *Application of the Convention of 1902 Governing the Guardianship of Infants*<sup>4</sup> the Dutch argument,<sup>5</sup> used reasonableness in this way to determine whether a matter came within a treaty description. Finally, the European Court of Human Rights has adopted reasonableness in this sense as the appropriate description of the scope of their inquiry into the propriety of pre-trial detention.<sup>6</sup>

In what sense is unreasonableness a unique concept? Two cases from administrative law provide two illustrations. In *Kruse v. Johnson*<sup>7</sup> Lord Russell C.J. said bylaws would be unreasonable if they were:<sup>8</sup>

. . . partial and unequal in their operation as between different classes; if they were manifestly unjust; . . . if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, . . .

The second case is *Roberts v. Hopwood*.<sup>9</sup> There five Law Lords gave fifteen different reasons for their decision. A synthesis, in so far as one can be drawn from the opinions, is that an action is unreasonable if it lacks logic either by being faulty in its logical processes or by the invalidity of one of its premisses—in the opinion of the judges.

The reluctance of courts to find that a body has acted unreasonably is fully understandable. True unreasonableness is one of the few areas of judicial review where the court must substitute its own ideas of what is right without leaving a margin of appreciation to the decision-maker. True unreasonableness is a residual power of review. It has not appeared in interstate adjudications; it would be surprising to find it used. However, it is to be found in the jurisprudence of the Administrative Tribunals.<sup>10</sup>

#### REVIEW FOR ABUSE OF RIGHT, AND ITS ABUSE: THE SOUTH-WEST AFRICA CASES

These claims<sup>11</sup> raised in a very fundamental way the problems of international judicial review of discretionary State action. The way the case was argued and the way in which the Judges dealt with the submissions on the

<sup>1</sup> *Annual Digest* (1933-34), Case No. 134 (Upper Silesian Arbitral Tribunal).

<sup>2</sup> *I.C.J. Reports*, 1959, p. 6.

<sup>3</sup> *Ibid.*, p. 111.

<sup>4</sup> *Ibid.*, 1958, p. 55.

<sup>5</sup> *I.C.J. Pleadings* (1958), pp. 101-5 (Reply) and pp. 149-55 (Professor Kisch, in argument).

<sup>6</sup> See *Wenhoff v. Federal Republic of Germany*, *Yearbook of the E.C. on Human Rights* (1968), p. 796, and *Stögmüller v. Austria*, *ibid.* (1969), p. 364, at p. 394.

<sup>7</sup> [1898] 2 Q.B. 91 (D.C.).

<sup>8</sup> *Ibid.*, at pp. 99-100.

<sup>9</sup> [1925] A.C. 578 (H.L.).

<sup>10</sup> e.g. *Howrani v. United Nations* (1951), Judgment No. 4.

<sup>11</sup> (Preliminary Objections), *I.C.J. Reports*, 1962, p. 319; (Second Phase), *ibid.* (1966), p. 4.



merits indicate that neither counsel nor Judges really understood the role which they were required to play.

### *The facts*

It was alleged that South Africa had violated its Mandate to govern South-West Africa by misusing its governmental competence. South Africa had allegedly failed in its obligation to promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory under Article 2 (2) of the Mandate. There were other allegations of breach, for instance, in militarizing the territory. While Ethiopia and Liberia commenced by alleging abuse of discretion, a very able (though misconceived) argument by Mr. de Villiers for South Africa drove them back to abandoning this in favour of deducing abuse by the legal fiction that racial discrimination could never be for the well-being of the inhabitants. In the event the Court did not find it necessary to adjudicate upon the argument about abuse of discretion. Few judges did so and only Judge *ad hoc* van Wyk did so in depth.

### *The issues*

Does the International Court of Justice have a power of judicial review? South Africa did not concede this, and the discussion of judicial review arose only as an alternative submission.<sup>1</sup> It was not until South Africa's rejoinder that the argument on this matter was joined in earnest.<sup>2</sup> It is believed that the power of judicial review is inherent in a court such as the World Court. If there are rules of law limiting the power of a State in any respect then a court to which the parties are subject has power to determine whether those rules have been breached. The *South-West Africa* cases were instances of just this.

The keystone to the question was the wide phrasing of Article 2 (2) of the Mandate, made all the wider by the narrow phrasing of its Articles 3 to 5.<sup>3</sup> This had two consequences. First, there was inevitably a wide discretion conferred by Article 2 (2), and this discretion had necessarily to be wider than those under the other provisions. Article 2 (2) contained only one criterion—the requirement that South Africa promote the well-being of the inhabitants to the 'utmost'. It was at one stage of the proceedings argued that without the norm of non-discrimination there could be no review at all.<sup>4</sup> This would have been an accurate observation only if the criterion did not give rise to anything capable of objective evaluation. This was not so. Article 2 (2) conferred a near-governmental power—a plenary power—but it remained a conferred power and showed on its face a purpose

<sup>1</sup> *I.C.J. Pleadings* (1966), vol. 5, p. 157.

<sup>3</sup> *Ibid.*, vol. 8, p. 629.

<sup>2</sup> *Ibid.*, vol. 9, pp. 491 et seq.

<sup>4</sup> *Ibid.*, vol. 5, p. 164 (Rejoinder).



for conferral. Therefore, it had to be used positively for that purpose. This distinguishes the power from those which give rise only to negative restrictions.

### *The judicial opinions*

The judges who did discuss abuse of discretion recognized that they were acting as a review authority of sorts. But what sort? Judge Forster, for instance, spoke of the power to review for *détournement de pouvoir*<sup>1</sup> but did not expand on this. Judge *ad hoc* van Wyk mentioned, as grounds for review, all those discussed in this article, though he gave no clear indication that he saw them as separate grounds.<sup>2</sup> Judge Tanaka first took the position that the only ground was bad faith<sup>3</sup> though he subsequently stated that:<sup>4</sup>

If any legal norm exists which is applicable to the exercise of the discretionary power of the Mandatory, then it will present itself as a limitation of this power, and the possible violation of this norm would result in a breach of the Mandate and hence the justiciability of this matter.

This statement was made apropos of the applicants' submission that the norm of non-discrimination imposed a limit upon South Africa's exercise of power but it also implies a thorough-going review for abuse of discretion. Indeed, Judge Tanaka later referred to 'the general rules which prohibit the Mandatory from abusing its power and *mala fides* in performing its obligations'.<sup>5</sup> Judge Jessup alone developed the obvious analogy of municipal administrative law which was, in fact, given some discussion in the course of the argument.<sup>6</sup> He rejected South Africa's final submission that all review is in essence based on the finding of bad faith.<sup>7</sup> He concluded that there was scope for review for improper purposes.<sup>8</sup> These were the only judges who discussed the place of international judicial review.

### *South Africa's arguments*

South Africa's argument developed as follows. First, it was propounded that State actions are restricted only by positive provisions of international law—*The Lotus*<sup>9</sup> theorem—so that in order to base the Court's review those positive restrictions had to be found in the Mandate.<sup>10</sup> The only restriction in Article 2 (2) was that South Africa must act for the moral and material well-being of the inhabitants. Finding that there was no more specific direction as to how South Africa was to administer the territory, South Africa concluded that there could be no control over the actual exercise of

<sup>1</sup> *I.C.J. Reports*, 1966, p. 481.

<sup>2</sup> *Ibid.*, pp. 150-3.

<sup>3</sup> *Ibid.*, p. 283.

<sup>4</sup> *Ibid.*, p. 284.

<sup>5</sup> *Ibid.*, p. 301.

<sup>6</sup> *I.C.J. Pleadings* (1966), vol. 2, p. 392 (Counter-Memorial); vol. 8, pp. 158 et seq. (Rejoinder); *ibid.*, pp. 275-6 (Mr. de Villiers, in argument).

<sup>7</sup> *I.C.J. Reports*, 1966, pp. 434-5.

<sup>8</sup> *Ibid.*, pp. 435-8.

<sup>9</sup> *P.C.I.J.*, 1927, Ser. A, No. 10.

<sup>10</sup> *I.C.J. Pleadings* (1966), vol. 5, pp. 157-60 (Rejoinder).



the power to administer.<sup>1</sup> It was deduced from this that the Court could concern itself only with errors of procedure,<sup>2</sup> competence,<sup>3</sup> essential prerequisites for acting in a particular way,<sup>4</sup> and bad faith.

South Africa's alternative contention was that, even if the Court could review for improper purposes, the argument necessarily failed. In the first place, it was said, the applicants had made their case in terms of bad faith—that South Africa knew it was doing wrong.<sup>5</sup> Secondly, in South Africa's view it was extremely unlikely that a State could pursue an improper purpose in relation to Article 2 (2) without doing so knowingly,<sup>6</sup> that is, without bad faith. All possible grounds for misuse were the same—bad faith. Improper purpose differed from bad faith only in knowledge, and unreasonableness came down to bad faith because the proper test was that the action taken was so bad that it must have been in bad faith.<sup>7</sup> These propositions were stated repeatedly<sup>8</sup> and only weakly rebutted.<sup>9</sup>

While Judge *ad hoc* van Wyk agreed that an improper purpose could be either *ex facie* or implied,<sup>10</sup> Mr. de Villiers made the requirement for evidence of implied improper purpose so strict as to negative its existence. First he argued that the Court must look to all the evidence, both that showing *ex facie* improper purpose and that showing implied improper purpose. But, he continued, it was the *ex facie* side—the evidence which showed the decision-maker's subjective intent—which was the heart of the matter. Should there be no evidence of subjective intent, he propounded, then the evidence of implied improper purpose must be overwhelming—such that there remained no room for 'honest difference of opinion'—and to the effect that the decision-maker must have intended to achieve an unauthorized purpose.<sup>11</sup> In support of this Mr. de Villiers made use of administrative law material, but took the dicta one step further than was warranted. The courts do not *have* to infer bad faith from the operation of the action and the background facts before holding it to be an abuse of discretion.

### *The correct analysis*

The essential starting-point for discussion of judicial review of the Mandate is Article 2 (2) itself. This Article requires that South Africa's

<sup>1</sup> *I.C.J. Pleadings*, vol. 8, p. 619; Judge *ad hoc* van Wyk, *I.C.J. Reports*, 1966, pp. 150-1.

<sup>2</sup> *I.C.J. Pleadings* (1966), vol. 8, p. 621; vol. 9, p. 494; Judge *ad hoc* van Wyk, *I.C.J. Reports*, 1966, p. 151.

<sup>3</sup> *I.C.J. Pleadings* (1966), vol. 8, p. 621; Judge *ad hoc* van Wyk, *I.C.J. Reports*, 1966, p. 151.

<sup>4</sup> *I.C.J. Pleadings* (1966), vol. 9, p. 500.

<sup>5</sup> *I.C.J. Reports*, 1966, pp. 153-4.

<sup>6</sup> *Ibid.*, p. 152; *I.C.J. Pleadings* (1966), vol. 9, pp. 503-4.

<sup>7</sup> *Ibid.*, p. 500.

<sup>8</sup> *Ibid.*, vol. 2, p. 392 (Counter-Memorial); vol. 5, pp. 161 and 171 (Rejoinder); vol. 8, pp. 275 and 621 (Mr. de Villiers, in argument).

<sup>9</sup> *Ibid.*, pp. 244-5; vol. 9, pp. 38-41.

<sup>10</sup> *I.C.J. Reports*, 1966, p. 152.

<sup>11</sup> *I.C.J. Pleadings* (1966), vol. 5, pp. 158-9 and 172 (Rejoinder); vol. 8, pp. 690-2.



power of administration be exercised so as to promote the well-being of the inhabitants of the territory. This sets up a positive criterion of State action, albeit a vague one. Coupled with this is the direction that such promotion be to the 'utmost'. Therefore, there may be situations where South Africa's actions promote well-being but not to the utmost. For instance, if an increasing proportion of African children are being educated then the well-being of the inhabitants is being promoted. But if only ten per cent of the education budget for South-West Africa is being spent upon the education of African children then it could not be said that the well-being of the inhabitants was being promoted to the 'utmost'. This does not involve any allegation of bad faith.

The situation may usefully be compared with that under the self-judging reservations to the compulsory jurisdiction of the International Court. In both cases there is a very vague concept—domestic jurisdiction and well-being—coupled with a requirement which is a matter of degree—essentiality and utmost. The difference is that essentiality is descriptive of an area which is less than total, while the direction to promote well-being to the utmost is a hundred per cent proposition. Before the Court can say that a matter is not essentially within domestic jurisdiction there must be little or no element of domestic jurisdiction. This is not true of promotion to the utmost. Thus, while the self-judging reservation does not leave scope for judicial review for misuse of competence beyond the minimum of good faith, Article 2 (2) does.

The mere fact that the Court in *South-West Africa* was not concerned with an inherent State power but with a conferred power takes the matter beyond the first and third classes of abuse of right found by Dr. Kiss.<sup>1</sup> Hence, reasons which South Africa may use in deciding whether to take a particular action in South-West Africa may be impugned, not for irrelevant considerations (for there is no enumeration), but for improper purposes and unreasonableness. The latter (lack of a valid logical reason for the action) need be considered no further. It did not arise in the cases and is largely self-explanatory. The structure of the Mandate and especially of Article 2 (2) point to two categories of reasons which are outside the Mandate and are therefore improper. These are reasons which discriminate positively against the interests of the inhabitants and reasons which prefer the interests of non-natives to those of the natives. The first class relates to non-promotion of the well-being of the inhabitants while the second refers to the 'utmost' directive. In particular, reasons directed towards the factual annexation of the territory by South Africa will be improper.

These improper reasons may appear either *ex facie* or by implication. In the case of the latter there is no need to infer that South Africa has been

<sup>1</sup> *Op. cit.* (above, p. 341 n. 5), pp. 184-8.



acting in bad faith. It is sufficient to look at the action taken and to look at the background—which will include facts about South Africa and the international community as well as about the territory—and ask whether the action would have been taken unless one of those improper reasons had been in the mind of the decision-maker. For instance, in the example of ten per cent of the education budget's being spent upon native education, it could reasonably be said that the percentage would have been much higher had not South Africa been concerned as a priority to keep European education at a standard of international excellence. It may be that the native educational standards are higher than anywhere else in Africa. That is irrelevant. It may be that South Africa is very concerned to raise native standards to those of the Europeans in the territory. That is irrelevant. The inquiry is simply to assess the action taken in the light of the Mandate and Article 2 (2). The concern with European education is outside the scope of the Mandate. It is a legally improper reason or purpose. It has had a determinative effect upon the action taken. It would arguably constitute an abuse of right by South Africa which breaches the Mandate.

#### CONCLUSIONS

The view of abuse of rights which appears from this study is different from that adopted by some. Certainly, it is not what Sir Hersch Lauterpacht described. It is, however, a systematization and extrapolation of the common concept of abuse of rights.

Any rule against the abuse of rights is based upon, and cannot exist apart from, the existence of a discretion in some person. The English law of nuisance provides some prohibition akin to the abuse of rights when it prohibits *A* from using his land in such a way as unreasonably to deprive *B* of the enjoyment of his (*B*'s) land.<sup>1</sup> *A*'s discretion as to how he uses the land is limited to this extent. English law, however, stops short of a general concept limiting the land-owner's discretion.<sup>2</sup> The law in the Occupier's Liability Act 1957 remains a category and not merely part of a general principle of occupiers' responsibility. Both deal with the effect of an act with no relation back to the reasons for acting.

English administrative law represents a considerable advance in this context, but it is an advance which flows from the nature of a discretion in law. It subjects a discretion to review for abuse if and only if the discretion itself, its context and conditions, can be found to contain some limitation of the reasons for which it is to be used. Not every discretion displays such

<sup>1</sup> An example showing the relation of intention here is *Hollywood Silver Fox Farm Ltd. v. Emmett*, [1936] 2 K.B. 468.

<sup>2</sup> *Bradford Corporation v. Pickles*, [1895] A.C. 587.



a limitation. Three such discretions in international law have been discussed above. Once a limitation of the reasons for which a discretion is to be used has been established, further analysis presents a number of distinct ways in which the discretion can be abused. But, while they are distinct ways, they maintain a strong inner coherence. No apology is made for reproducing the following long passage from the judgment of Lord Greene M.R. in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*:<sup>1</sup>

When an executive discretion is entrusted by Parliament to a body such as the local authority in this case, what appears to be an exercise of that discretion can only be challenged in the courts in a strictly limited class of case . . . . When discretion of this kind is granted the law recognizes certain principles upon which that discretion must be exercised, but within the four corners of those principles, the discretion, in my opinion, is an absolute one and cannot be questioned in any court of law. What then are those principles? They are well understood. They are principles which the court looks to in considering any question of discretion of this kind. The exercise of such a discretion must be a real exercise of the discretion. If, in the statute conferring the discretion, there are to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters. Conversely, if the nature of the subject-matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, the authority must disregard those irrelevant collateral matters . . . . I am not sure myself whether the permissible grounds of attack cannot be defined under a single head. It has been perhaps a little bit confusing to find a series of grounds set out. Bad faith, dishonesty—those of course, stand by themselves—unreasonableness, attention given to extraneous circumstances, disregard of public policy and things like that have all been referred to, according to the facts of individual cases, as being matters which are relevant to the question. If they cannot all be confined under one head, they at any rate, I think, overlap to a very great extent. For instance, we have heard in this case a great deal about the meaning of the word 'unreasonable'.

It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phrasology commonly used in relation to exercise of statutory discretions often use the word 'unreasonable' in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'. Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington L.J. in *Short v. Poole Corporation*, gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another.

<sup>1</sup> [1948] 1 K.B. 223 at 228-9.



In outline, this structure parallels that of *abus de droit* in French private law. It is not every 'right' which is reviewable for abuse but only those which are susceptible of limitation by reference to the reason for exercising them.<sup>1</sup> Whether one adopts the wide approach of Jossierand<sup>2</sup> and judges the propriety of the actor's reasons by *le but social des droits*, or uses Mazeaud's own test of *l'individu avisé*,<sup>3</sup> the orientation is unmistakably related to Lord Greene's formulation.

Upon translation into international adjudication, the jurisprudence shows sufficient coherence to posit a general principle prohibiting abuse of right in international law. English administrative law categories provide a content from which a general principle may be arrived at inductively: no person may, under international law, exercise a power for a reason, actual or inferred, which is contrary to the purpose or purposes for which international law contemplates the power will be used. The *Trail Smelter* case<sup>4</sup> is, therefore, not an instance of abuse of right but of a 'tort' similar to the English law of nuisance: it is based on the effect of an action and does not refer back to the actor's reasons for acting. Prohibition of abuse of right may now be seen as a precise concept of definite content and common application. It may not be a prime instrument of peaceful change in the way Sir Hersch Lauterpacht envisaged it, but it is a potent rule of international law none the less.

<sup>1</sup> H. L. and J. Mazeaud, *Leçons de droit civil* (4th ed., by M. de Juglart, 1969), vol. 2, paras. 455-61.

<sup>2</sup> L. Jossierand, *De l'esprit des droits et de leur relativité* (2nd ed., 1939).

<sup>3</sup> Mazeaud, *op. cit.* (above, n. 1 on this page), para. 458.

<sup>4</sup> *R.I.A.A.* 3 (1938 and 1941), p. 1905.



# ANNEX 238





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# *Abuse of Rights: An Old Principle, A New Age*

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**Michael Byers\***

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One of several meanings of the term “abuse of rights” provides that there is an abuse of right when the exploitation of an individual right injuriously affects the interests of the community. The concept of abuse of rights derives from national legal systems notwithstanding that its content may vary among states. Abuse of rights has influenced international law in areas where it is widely considered to be a part of international law, whether as a general principle of law or as part of customary international law.

In examining these origins and the historical applications and contemporary limitations of abuse of rights, the author contends that although it may not be relevant to a number of areas of international law, abuse of rights retains an important role with respect to various international legal issues. These issues include the resolution of certain types of normative conflicts, the protection of “common spaces” and “matters of common concern”, and the promotion of normative change. Abuse of rights, the author demonstrates, may be a deft instrument, and one not to be forgotten, in dealing with issues such as transboundary pollution, declining fishstocks and whale populations, and the protection of areas such as the Antarctic and space.

Une des significations de l’expression «abus de droit» prévoit qu’il y a abus de droit si l’exploitation d’un droit individuel a pour conséquence d’entraîner un préjudice à une communauté. Bien que son contenu puisse être différent selon les états, le concept d’abus de droit provient de systèmes juridiques nationaux. L’abus de droit a influencé le droit international dans des régions où le concept est compris comme faisant partie du droit international, soit comme un principe général de droit, soit comme faisant partie du droit international coutumier.

En examinant les origines, les applications historiques et les limitations contemporaines de la notion d’abus de droit, l’auteur soutient que, alors que le concept n’est peut-être pas applicable à tous les domaines du droit international, il conserve un rôle important en ce qui concerne plusieurs questions juridiques internationales. Ces questions comprennent la résolution de certains conflits normatifs, la protection des «espaces communs» et des «questions d’intérêt général» et la promotion des changements normatifs. L’auteur nous démontre que l’abus de droit peut être un instrument ingénieux, qu’il ne faut pas oublier, particulièrement lorsque l’on doit traiter des questions telles que la pollution transnationale, le déclin de la population des poissons et des baleines et la protection de l’Antarctique et de l’espace.

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## **Introduction**

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*In international law, abuse of rights refers to a State exercising a right either in a way which impedes the enjoyment by other States of their own rights or for an end different from that for which the right was created, to the injury of another State ...*<sup>1</sup>

## Introduction

International lawyers trained in the common law tradition will have heard of, but probably paid little attention to, the principle of abuse of rights (*abus de droit*).<sup>2</sup> In an age of limited sovereignty, abuse of rights seems a dated concept which is of little contemporary interest or value. The principle retains little scope for application in most areas of international law, areas that in recent decades have developed considerably in both depth and specificity. Yet abuse of rights continues to play an important role in those few areas where the rights of states are still conceived of as general or primordial, by mediating between or otherwise limiting the exercise of rights. This article examines the origins, historical applications, and contemporary limitations of abuse of rights before demonstrating how the principle remains relevant in resolving certain kinds of normative conflicts, protecting “common spaces” and “matters of common concern”, and promoting normative change.

## I. Abuse of Rights in National Legal Systems

The historical influence of abuse of rights in international law derives substantially from the principle's existence in a large number of national legal systems.<sup>3</sup> It has

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<sup>1</sup> A. Kiss, “Abuse of Rights” in R. Bernhardt, ed., *Encyclopedia of Public International Law*, vol. 1 (Amsterdam: North-Holland, 1992) at 4 [hereinafter Kiss, “Abuse of Rights”].

<sup>2</sup> See H. Lauterpacht, *The Function of Law in the International Community* (Hamden, Conn.: Archon Books, 1966) at 286 [hereinafter Lauterpacht, *Function of Law*]: “The essence of the doctrine is that, as legal rights are conferred by the community, the latter cannot countenance their anti-social use by individuals; that the exercise of a hitherto legal right becomes unlawful when it degenerates into an abuse of rights; and that there is such an abuse of rights each time the general interest of the community is injuriously affected as the result of the sacrifice of an important social or individual interest to a less important, though hitherto legally recognized, individual right.” A Council of Europe study defined abuse of rights as a “legal mechanism designed to ease the inflexibility of the legal relationships derived from statutory, judicial or treaty rules.” See J. Voyame, B. Cottier & B. Rocha, “Abuse of Right in Comparative Law” in *Abuse of Rights and Equivalent Concepts: The Principle and Its Present Day Application (Proceedings of the 19<sup>th</sup> Colloquy on European Law, Luxembourg, 6-9 November 1989)* (Strasbourg: Council of Europe, 1990) 23 at 23 [hereinafter *Abuse of Rights and Equivalent Concepts*].

<sup>3</sup> The origins of the principle would, however, seem to lie in Roman law. See Kiss, “Abuse of Rights”, *supra* note 1 at 5; J. Willisch, *State Responsibility for Technological Damage in International Law* (Berlin: Duncker & Humblot, 1987) at 180-81. See also A. Rodger, *Owners and Neighbours in*



long been accepted that general principles common to most national legal systems constitute a primary source of international law, albeit one that provides considerably fewer rules than treaties or customary international law.<sup>4</sup> However, the content and application of the principle of abuse of rights vary significantly among national legal systems, making it difficult to identify a common principle except in the most general of terms.

### A. Civil Law Systems

In some systems, abuse of rights is given a wide compass. For example, article 2 of the *Titre préliminaire* to the Swiss Civil Code states: "Chacun est tenu d'exercer ses droits et d'exécuter ses obligations selon les règles de la bonne foi. L'abus manifeste d'un droit n'est pas protégé par la loi."<sup>5</sup> And in France, the courts have interpreted articles 1382 and 1383 of the *Code civil*, which fix responsibility on the author of any harm, so as to limit the abusive exercise of rights or powers in property law, labour law, contractual obligations, and legal proceedings.<sup>6</sup>

*Roman Law* (Oxford: Clarendon Press, 1972); D. Johnston, *Roman Law in Context* (Cambridge: Cambridge University Press, 1999) at 71-76; P.G. Stein, "'Equitable' Remedies for the Protection of Property" in P. Birks, ed., *New Perspectives in the Roman Law of Property: Essays for Barry Nicholas* (Oxford: Clarendon Press, 1989) 185.

<sup>4</sup> See *Statute of the International Court of Justice*, art. 38(1)(c), online: International Court of Justice <<http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm>> (date accessed: 6 May 2002), which reads: "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"; B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (London: Stevens & Sons, 1953); A. Pellet, *Recherches sur les principes généraux de droit en droit international* (Thesis, Université de Paris, 1974); G. Battaghiui, "Il riconoscimento internazionale dei principi generali del diritto" in *Le droit international à l'heure de sa codification: études en l'honneur de Roberto Ago*, vol. 1 (Milan: Giuffrè, 1987) 97.

<sup>5</sup> G. Scyboz & P.-R. Gilliéron, *Code civil suisse et Code des obligations annotés* (Lausanne: Éditions Payot, 1999). When Turkey adopted the main provisions of the Swiss Civil Code in 1926, this included article 2, although the Turkish version emphasizes that there is an abuse of rights only "if the abuse harms another person." See M. Zwahlen, "Les écarts législatifs entre le droit civil turc et le droit civil suisse" [1973] *Revue de droit suisse* 141.

<sup>6</sup> Art. 1382 C. civ. reads: "Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer." Art. 1383 C. civ. reads: "Chacun est responsable du dommage qu'il a causé non seulement par son fait, mais encore par sa négligence ou par son imprudence." See L. Josserand, *De l'abus des droits* (Paris: Rousseau, 1905); L. Josserand, *De l'esprit des droits et de leur relativité*, 2d ed. (Paris: Dalloz, 1939); H.C. Gutteridge, "Abuse of Rights" (1935) 5 *Cambridge L.J.* 22 at 31-35; P. Catala & J.A. Weir, "Delict and Torts: A Study in Parallel, Part II" (1964) 38 *Tul. L. Rev.* 221 at 221-36; V. Bolgár, "Abuse of Rights in France, Germany, and Switzerland: A Survey of a Recent Chapter in Legal Doctrine" (1975) 35 *La. L. Rev.* 1015 at 1015-23. A well-known application of abuse of rights in France is the *Affaire Clément-Bayard*, where the Cour de



Some national legal systems, while giving the principle of abuse of rights broad effect, have linked it to social or economic interests. For example, the Soviet Code of 1923 was prefaced by the following clause paramount: “Civil rights are protected by the law except in those cases in which they are exercised in a sense contrary to their economic and social purpose.”<sup>7</sup> Similarly, article 7 of the Czechoslovak Civil Code of 1964 stated that no one was allowed to misuse his or her rights against the interests of society.<sup>8</sup> And in the 1972 case of *Mitamura v. Suzuki*, the Japanese Supreme Court articulated a reasonableness element to abuse of rights, with reasonableness being cast in terms of social interests:

In all cases a right must be exercised in such a fashion that the result of the exercise remains within a scope judged reasonable in the light of the prevailing social conscience. When a conduct by one who purports to have a right to do so fails to show reasonableness and when the consequential damages to others exceed the limit which is generally supposed to be borne in the social life, we must say that the exercise of the right is no longer within its permissible scope. Thus, the person who exercises his right in such a fashion shall be held liable because his conduct constitutes *an abuse of right*.<sup>9</sup>

In other national legal systems the principle of abuse of rights is narrowly conceived. For example, article 226 (the famous *Schikaneverbot*) of the German Civil Code states: “The exercise of a right is unlawful, if its purpose can only be to cause damage to another.”<sup>10</sup> An element of intent is also part of the principle as it appears in article 833 of the Italian Civil Code, which forbids the exercise of property rights

Cassation enjoined the construction of a large wooden structure topped with spikes that had been designed to prevent the use of a nearby airport, despite the landowner’s right under Art. 552 C. civ. to plant or build whatever he wished on his property. See Cass. Req., 3 August 1915, D.P. 1917.I.79. See also Trib. civ. Compiègne, 19 February 1913, D.P. 1913.II.177 at 181 for the Tribunal’s decision (to similar effect) in the same case.

<sup>7</sup> See V.E. Greaves, “The Social-Economic Purpose of Private Rights: Section 1 of the Soviet Civil Code. A Comparative Study of Soviet and Non-communist Law” (1934) 12 N.Y.U. L. Rev. 165; Gutteridge, *ibid.* at 41-42. Article 5 of the 1964 Civil Code of the Russian Federation was to similar effect. See V. Paul, “The Abuse of Rights and Bona Fides in International Law” (1977) 28 *Österreichische Zeitschrift für öffentliches Recht und Völkerrecht* 107 at 119.

<sup>8</sup> See Paul, *ibid.* at 119.

<sup>9</sup> 26 Saiko Saibansho minji hanreishu. 1067 (Sup. Ct., 27 June 1972), translated in K. Sono & Y. Fujioka, “The Role of the Abuse of Right Doctrine in Japan” (1975) 35 *La. L. Rev.* 1037 at 1037 [emphasis in original].

<sup>10</sup> *The German Civil Code*, trans. S. Goren (Littleton, Colo.: Fred B. Rothman, 1994). Although the *Bürgerliches Gesetzbuch* never uses the term *Rechtsmißbrauch*, the principle of abuse of rights is an important part of German law. See generally Gutteridge, *supra* note 6 at 36-39; G. Eörsi, “Rechtsmißbrauch und funktionsmäßige Rechtsausübung im Westen und Osten” (1965) 6 *Zeitschrift für Rechtsvergleichung* 30; Bolgár, *supra* note 6 at 1023-30; G.P. Fletcher, “The Right and the Reasonable” (1985) 98 *Harv. L. Rev.* 949.



purely for the purpose of harming others,<sup>11</sup> and in article 1295(2) of the Austrian Civil Code, which is framed in similar terms.<sup>12</sup>

In other jurisdictions, the element of intent has explicitly been rejected. For example, in *Morse v. J. Ray McDermott & Co.*, the Supreme Court of Louisiana held: "The exercise of a right [...] without legitimate and serious interest, even where there is neither alleged nor proved an intent to harm, constitutes an abuse of right which courts should not countenance."<sup>13</sup>

Some national legal systems have combined several of these different elements. For example, article 7 of the Spanish Civil Code provides that an abuse of right may result from a deliberate intention, the aim pursued, or the circumstances of the harm caused.<sup>14</sup> Similarly, article 13(2) of the 1992 Civil Code of the Netherlands reads:

<sup>11</sup> "The owner cannot perform acts that have no other purpose than that of harming or causing annoyance to others." *The Italian Civil Code*, trans. M. Beltramo, G.E. Longo & J.H. Merryman (Dobbs Ferry, N.Y.: Oceana Publications, 1991). Italian courts, however, have held that article 833 is inoperative if the property owner derives any advantage from the exercise of a right. See e.g. Cass. civ., 7 March 1986, No. 1509, in *Giust. civ.*, 1986, I, 434; Cass. civ., 29 July 1963, No. 2139 in *Giust. civ.*, 1963, II; Cass. civ., 23 February 1963, No. 448 in *Giust. civ.*, 1963, I, 1053. See generally A. di Francia, "L'abuso di diritto nella legislazione, nella dottrina e nella giurisprudenza italiana" in M. Rotondi, ed., *L'abus de droit* (Padua: CEDAM, 1979) 115.

<sup>12</sup> "A person who intentionally injures another in a manner in violation of public morals is liable therefor; however, if the injury was caused in the exercise of legal rights, the person causing it shall be liable therefor only when the exercise of this right obviously has the purpose to cause damage to the other." *The General Civil Code of Austria*, trans. P.L. Baeck (Dobbs Ferry, N.Y.: Oceana Publications, 1972). See also T. Mayer-Maly & H. Böhm, "Die Behandlung des Rechtsmissbrauchs im Österreichischen Privatrecht," in Rotondi, ed., *ibid.* at 221.

<sup>13</sup> 344 So.2d 1353 at 1369 (La. 1977) (on rehearing). See also *Hero Lands Co. v. Texaco, Inc.*, 310 So.2d 93 at 99 (La. 1975). On abuse of rights in Louisiana, see generally A.N. Yiannopoulos, "Civil Liability for Abuse of Right: Something Old, Something New..." (1994) 54 La. L. Rev. 1173; A.N. Yiannopoulos, "Abuse of Right in Louisiana Civil Law" in A.M. Rabello, ed., *Aequitas and Equity: Equity in Civil Law and Mixed Jurisdictions* (Jerusalem: Harry & Michael Sacher Institute for Legislative Research and Comparative Law, Hebrew University of Jerusalem, 1997) 690.

<sup>14</sup> The article reads:

7.1 Rights must be exercised in accordance with the requirements of good faith.

.2 The law does not protect abuse of rights or the antisocial exercise of rights. Every act or omission that, by virtue of the intention of the actor, the object thereof, or the circumstances in which it is undertaken manifestly surpasses the normal limits of exercise of a right, causing damage to a third party, shall give rise to liability in damages and to the adoption of judicial or administrative measures that will prevent persistence in the abuse.

*Civil Code of Spain*, trans. J. Romanach, Jr. (Baton Rouge, La.: Lawrence, 1994). See also F.F. de Villavicencio, "El abuso del derecho en la doctrina y en la jurisprudencia españolas" in Rotondi, ed., *supra* note 11 at 75. See also article 6(1) of the 1987 Civil Code of Luxembourg: "Any deliberate act



Instances of abuse of right are the exercise of a right with the sole intention of harming another or for a purpose other than that for which it was granted; or the exercise of a right where its holder could not reasonably have decided to exercise it, given the disproportion between the interest to exercise the right and the harm caused thereby.<sup>15</sup>

As this brief review makes clear, even if abuse of rights means somewhat different things in different civil law systems, it remains an enduring element of the civil law.<sup>16</sup>

### B. Common Law Systems

The principle of abuse of rights is not so readily apparent in common law systems, yet some authors argue that it is the basis upon which tort law developed. Joseph Perillo has claimed that abuse of rights exists in United States law, where it is “employed under such labels as nuisance, duress, good faith, economic waste, public policy, misuse of copyright and patent rights, lack of business purpose in tax law, extortion, and others.”<sup>17</sup> In Australia, John Fleming holds the view that the tort of abuse

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which manifestly exceeds, by its purpose or by the circumstances in which it is carried out, the normal exercise of a right, shall not be protected by the law, shall incur the liability of the person responsible and may constitute grounds for action to restrain him from persisting in the said abuse.” Translated in G. Margue, “Abuse of Rights and Luxembourg Law” in *Abuse of Rights and Equivalent Concepts*, *supra* note 2, 56.

<sup>15</sup> *New Netherlands Civil Code: Patrimonial Law (Property, Obligations and Special Contracts)*, trans. P.P.C. Haanappel & E. MacKaay (Deventer: Kluwer Law and Taxation, 1990) [hereinafter *New Netherlands Civil Code*]. Prior to the adoption of the new code in 1992, the Dutch courts had long applied abuse of rights. See C.J.H. Brunner, “Abuse of Rights in Dutch Law” (1977) 37 *La. L. Rev.* 729. See also *Civil Code of Québec*, art. 7: “No right may be exercised with the intent of injuring another or in an excessive and unreasonable manner which is contrary to the requirements of good faith.” Prior to 1994, the principle of abuse of rights had long been applied in Quebec. See P.B. Mignault, “L’abus des droits” (1939-40) 3 *U.T.L.J.* 360 at 365. For the similarly multifaceted provisions of the Mexican Civil Code, see *Código Civil para el Distrito Federal en Materia Común y para toda la República en Materia Federal* (Mexico City: Ediciones Delma, 1995) arts. 840, 1912.

<sup>16</sup> As Joseph Voyame, Bertil Cottier, and Bolivar Rocha write at the conclusion of a Council of Europe study in 1990: “Abuse of rights is an institution which can be expected to endure. Its origin lies in the Roman rules forbidding acts of nuisance, but it has developed over the centuries into a cardinal principle of private law. Moreover, in those European countries which place this institution at the centre of their legal system, voices are no longer raised to demand its abolition, or even simply to cast doubt on its necessity. On the contrary, the great majority of commentators agree on the usefulness of the remedial function of the rules forbidding abuse of rights. Indeed, the legislator is no more infallible today than he was in the past. While the rules he promulgates are becoming increasingly precise and detailed, he cannot foresee every eventuality. Only the proscription of abuse of rights makes it possible to establish the connection between the justice ostensibly guaranteed by positive law and genuine justice.” Voyame, Cottier & Rocha, *supra* note 2 at 48.

<sup>17</sup> J.M. Perillo, “Abuse of Rights: A Pervasive Legal Concept” (1995) 27 *Pac. L.J.* 37 at 40.



of process is “probably the clearest illustration in our law of what civilians call an ‘abuse of right’.”<sup>18</sup> But note that, from this perspective, the principle of abuse of rights as such is not directly employed; it instead serves as a matrix from which more specific legal principles grow.

Some common law cases call even this limited role into question. For example, in the 1895 case of *Mayor of Bradford v. Pickles*, Lord Halsbury famously stated: “If it was a lawful act, however ill the motive, he had a right to do it.”<sup>19</sup> However, as Pierre Catala and Tony Weir have explained:

A doctrine of abuse of rights is necessary only if the rights are proclaimed in generous terms; if they are initially hedged with qualifications, it may not be required at all. The former is the French legislative method; the latter is peculiar to the common-law tradition of England, which affects the style of legislation as well as its construction. If a right arises at common law, the authority for it will be a judicial decision in typically narrow terms, *obiter* and unauthoritative in so far as it goes beyond the facts under review; English statutes also make every effort to avoid appearing to grant a broadly stated right, and even when a right is indubitably conferred, the judges are there to state that the legislature has at the same time impliedly restricted it.<sup>20</sup>

Indeed, a closer examination of the decision reveals that the motive for the defendant’s actions was, in fact, monetary gain, which has enabled Catala and Weir and others to distinguish the case from the typical abuse of rights situation.<sup>21</sup>

Other common law nuisance cases provide some support for an underlying principle of abuse of rights. For example, in *Hollywood Silver Fox Farm v. Emmett*, another English court considered the utility of the defendant’s conduct before holding that the firing of guns on his property with the sole aim of frightening his neighbour’s foxes constituted a tort.<sup>22</sup> Similarly, William Prosser wrote of American law that “[i]n all but a few jurisdictions, it is now settled that where the defendant acts out of pure malice or spite, as by erecting a fence for the sole purpose of shutting off the plaintiff’s view, or drilling a well to cut off the plaintiff’s underground water [...] such conduct is indefensible from a social point of view, and there is liability for nuisance.”<sup>23</sup>

Regardless of the label used, it appears that the same general principle is at work. As Hersch Lauterpacht explained: “The law of torts as crystallized in various systems

<sup>18</sup> J.G. Fleming, *The Law of Torts*, 8th ed. (Sydney: The Law Book Company, 1992) at 623.

<sup>19</sup> [1895] A.C. 587 at 594 (H.L.), aff’g [1895] 1 Ch. 145 (C.A.). See also *Allen v. Flood*, [1898] A.C. 1 (H.L.).

<sup>20</sup> *Supra* note 6 at 237-38.

<sup>21</sup> See *ibid.* at 247; W. Friedmann, “Social Security and Some Recent Developments in the Common Law” (1943) 21 Can. Bar Rev. 369 at 372-73.

<sup>22</sup> [1936] 2 K.B. 468. See also *Christie v. Davey*, [1893] 1 Ch. 316.

<sup>23</sup> W.L. Prosser, *Law of Torts*, 3d ed. (St. Paul, Minn.: West, 1964) at 618-19.



of law in judicial decisions or legislative enactment is to a large extent a list of wrongs arising out of what society considers to be an abuse of rights.”<sup>24</sup> Yet this general principle is impossible to define in precise terms such that it would encompass all of its various manifestations. A definition such as “The excessive or abusive exercise of rights as limited by the rights and interests of others” is about the best that one can do. Moreover, the above review suggests that abuse of rights is of limited utility in those legal systems and those areas of law in which the rights themselves have been framed in precise or qualified terms.

## II. Abuse of Rights as Applied in International Law

As a result, due largely to its widespread existence in national legal systems, many states, judges, arbiters, and authors have considered abuse of rights to be part of international law, whether as a general principle of law or as part of customary international law.<sup>25</sup>

A number of states have argued for the applicability of abuse of rights in state-to-state litigation and arbitration, including the United Kingdom in the *Fisheries Jurisdiction Cases*,<sup>26</sup> Liechtenstein in the *Nottebohm Case*,<sup>27</sup> Norway in the *Norwegian Loans Case*,<sup>28</sup> Liberia and Ethiopia in the *South West Africa Cases*,<sup>29</sup> Belgium in the *Barcelona Traction Case*,<sup>30</sup> and Australia in the *Nuclear Tests Case*.<sup>31</sup> Greece made an

<sup>24</sup> Lauterpacht, *Function of Law*, *supra* note 2 at 297.

<sup>25</sup> See generally M. Whiteman, *Digest of International Law*, vol. 5 (Washington, D.C.: Government Printing Office, 1965) at 224-30; Kiss, “Abuse of Rights”, *supra* note 1 at 4-8.

<sup>26</sup> (*United Kingdom v. Iceland*), “Memorial of the Merits of the Dispute Submitted by the Government of the United Kingdom” (14 April 1972), [1975] I.C.J. Pleadings (Vol. 1) 265 at paras. 153-54. The UK argued that the right to delimit exclusive fisheries zones is balanced by the duty to respect the rights of other states. To ground the point, the memorial quoted Alvarez J.’s separate opinion in the *Fisheries Case (United Kingdom v. Norway)*, [1951] I.C.J. Rep. 116 at 150-51 [hereinafter *Fisheries Case*], where he wrote, *inter alia*, that states demarcating their territorial seas must do so in a way that does not constitute an abuse of rights.

<sup>27</sup> (*Liechtenstein v. Guatemala*), “Memorial Submitted by the Government of the Principality of Liechtenstein” (26 January 1952), [1955] I.C.J. Pleadings (Vol. 1) 21 at para. 51 [hereinafter *Nottebohm Case*]. See below, text accompanying note 144.

<sup>28</sup> *Case of Certain Norwegian Loans (France v. Norway)*, [1957] I.C.J. Rep. 9 at 73, Basdevant J. [hereinafter *Norwegian Loans Case*]. Norway argued that the Court should assert jurisdiction whenever claims as to the applicability of a domestic jurisdiction reservation constitute an abuse of rights.

<sup>29</sup> (*Ethiopia v. South Africa; Liberia v. South Africa (Second Phase)*), [1966] I.C.J. Rep. 6 at 10, 480-83. Liberia and Ethiopia argued that South Africa had, without obtaining the consent of the United Nations, “substantially modified the terms” of the agreement to manage the territory that would later become Namibia, and that this constituted an abuse of rights.

<sup>30</sup> *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (Second Phase)*, [1970] I.C.J. Rep. (Vol. 1) 3 at 17 [hereinafter *Barcelona Traction Case*]. Under the



abuse of rights argument in *The Ambatielos Claim*,<sup>32</sup> as did Nauru in the *Nauru Case*<sup>33</sup> and the Federal Republic of Yugoslavia in the *Genocide Case*.<sup>34</sup>

Some treaties contain provisions that expressly relate to abuse of rights. For example, article 300 of the 1982 *United Nations Convention on the Law of the Sea* reads:

States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right.<sup>35</sup>

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leading "Abuse of Rights, Arbitrary and Discriminatory Attitude of Certain Administrative Authorities," Belgium argued that Spain had frustrated the implementation of an agreement and "made improper use of an international enquiry."

<sup>31</sup> *Nuclear Tests Case (Australia v. France)*, [1974] I.C.J. Rep. 253 at 362. Australia argued that, in the event that France was determined to have a right to conduct atmospheric nuclear tests, its exercise of that right would have constituted an abuse of rights.

<sup>32</sup> (*Greece, United Kingdom of Great Britain and Northern Ireland*) (1956), 12 R.I.A.A. 83 at 94 (Commission of Arbitration, Arbitrators: R.J. Alfaro *et al.*). Greece argued that the withholding of evidence by the British government in national court proceedings in England constituted "an abuse of right which amounted to a denial of justice."

<sup>33</sup> Memorial of the Republic of Nauru, Part III, Chapter 5, 163 ("Abuse of Rights and Acts of Maladministration"), online: International Court of Justice <<http://www.icj-cij.org/icjwww/ficases/inaus/inausframe.htm>> (date accessed: 6 May 2002); *Case Concerning Certain Phosphate Lands in Nauru (Preliminary Objections)*, [1992] I.C.J. Rep. 240 at 244. Nauru argued that Australia exercised its powers of administration over that island nation, particularly with regard to the extraction of phosphates, in a manner that amounted to an abuse of rights.

<sup>34</sup> *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Provisional Measures)*, Order of 13 September 1993, [1993] I.C.J. Rep. 325 at para. 19. The Federal Republic of Yugoslavia argued that Bosnia-Herzegovina's request for provisional measures constituted an abuse of rights.

<sup>35</sup> *United Nations Convention on the Law of the Sea*, 10 December 1982, UN Doc. A/CONF.62/122, 21 I.L.M. 1261, online: United Nations <[http://www.un.org/Depts/los/convention\\_agreements/texts/unclos/closindx.htm](http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm)> (date accessed: 6 May 2002) [hereinafter *UNCLOS* cited to I.L.M.]. When President Clinton transmitted *UNCLOS* to the United States Senate in 1995 for its advice and consent to ratification, he explained, "This article restates existing customary law." See *United States: President's Transmittal of the United Nations Convention on the Law of the Sea and the Agreement relating to the Implementation of Part XI to the U.S. Senate with Commentary*, 7 October 1994, 34 I.L.M. 1393 at 1446. Art. 34 of the *United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks: Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982, relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, 4 December 1995, UN GA, 6th Sess., UN Doc. A/CONF.164/37 (1995), 34 I.L.M. 1542, reads: "States Parties shall fulfil in good faith the obligations assumed under this Agreement and shall exercise the rights recognized in this Agreement in a manner which would not constitute an abuse of right." Additionally, subsequent to the coming into force of the amending *Protocol No. 11* in 1998, art. 17 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 222, Eur. T.S. 5, now carries the heading



The principle also appears in the case law of the International Court of Justice (“ICJ”) and the Permanent Court of International Justice (“PCIJ”). In the *Case concerning certain German interests in Polish Upper Silesia (The Merits)*, the PCIJ held:

Germany undoubtedly retained until the actual transfer of sovereignty the right to dispose of her property, and only a misuse of this right could endow an act of alienation with the character of a breach of the Treaty; such misuse cannot be presumed, and it rests with the party who states that there has been such misuse to prove his statement.<sup>36</sup>

In the *Case of the Free Zones of Upper Savoy and the District of Gex*, the same court suggested that if a state attempted to avoid its contractual obligations by resorting to measures having the same effect as the specifically prohibited acts, an abuse of rights would result.<sup>37</sup> And the ICJ, when dealing with the right to draw straight baselines in a territorial sea delimitation in the *Anglo-Norwegian Fisheries Case*, wrote:

The base-line has been challenged on the ground that it does not respect the general direction of the coast. It should be observed that, however justified the rule in question may be, it is devoid of any mathematical precision. In order properly to apply the rule, regard must be had for the relation between the deviation complained of and what, according to the terms of the rule, must be regarded as the *general* direction of the coast. Therefore, one cannot confine oneself to examining one sector of the coast alone, *except in a case of manifest abuse*; nor can one rely on the impression that may be gathered from a large scale chart of this sector alone.<sup>38</sup>

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“Prohibition of abuse of rights.” Art. 17 itself reads: “Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.” Art. 35(3) on “Admissibility Criteria” states: “The Court shall declare inadmissible any individual application submitted under Art. 34 which it considers incompatible with the provisions of the Convention or the protocols thereto, manifestly ill-founded, or an abuse of the right of application.” For other treaty provisions on abuse of rights, see *Convention on Rights and Duties of States*, 26 December 1933, 165 L.N.T.S. 19 at art. 3 (“Montevideo Convention”); *Convention on the High Seas*, 29 April 1958, 450 U.N.T.S. 11, 13 U.S.T. 2312 at art. 2.

<sup>36</sup> (*Germany v. Poland*) (1926), P.C.I.J. (Ser. A) No. 7 at 30. The decision concerned Germany’s powers in Upper Silesia during the period between the coming into force of the Treaty of Versailles and the transfer of sovereignty to Poland.

<sup>37</sup> (*France v. Switzerland*) (1932), P.C.I.J. (Ser. A/B) No. 46 at 167. The court wrote: “A reservation must be made as regards the case of abuses of a right, since it is certain that France must not evade the obligation to maintain the zones by erecting a customs barrier under the guise of a control cordon. But an abuse cannot be presumed by the Court.” See also the Order of 6 December 1930 in the same case: (1930), P.C.I.J. (Ser. A) No. 24 at 12.

<sup>38</sup> *Fisheries Case*, *supra* note 26 at 141-42 [second emphasis added].



The principle has also received support in separate and dissenting opinions. For example, in *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South-West Africa*, Judge Hersch Lauterpacht wrote:

[A]n Administering State which consistently sets itself above the solemnly and repeatedly expressed judgment of the Organization [*i.e.* the United Nations], in particular in proportion as that judgement approximates to unanimity, may find that it has overstepped the imperceptible line between impropriety and illegality, between discretion and arbitrariness, between the exercise of the legal right to disregard the recommendation and the abuse of that right, and that it has exposed itself to consequences legitimately following as a legal sanction.<sup>39</sup>

More recently, Judge Weeramantry referred to abuse of rights as a “well-established area of international law” when discussing sustainable development in the *Gabcikovo-Nagymaros Case*, where Slovakia’s treaty rights were pitted against Hungary’s environmental concerns.<sup>40</sup> Judge Parra-Aranguren, in the same case, held that “Slovakia shall not compensate Hungary ... unless a manifest abuse of rights on its part is clearly evidenced.”<sup>41</sup> And, although the ICJ itself has never endorsed the principle unequivocally, neither it, nor any of its members, has ever rejected the place of abuse of rights in international law.

Some additional support for the principle may be found in international arbitral decisions. For instance, the tribunal in the 1986 *La Bretagne Arbitration* held that treaty rights could not be exercised in an abusive manner:

<sup>39</sup> Advisory Opinion, [1955] I.C.J. Rep. 67 at 120 (separate opinion).

<sup>40</sup> *Case Concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*, [1997] I.C.J. Rep. 7 at para. 22 [hereinafter *Gabcikovo-Nagymaros Case*]. Weeramantry J. also refers to abuse of rights in the *Case concerning Maritime Delimitation in the Area Between Greenland and Jan Mayen (Denmark v. Norway)*, [1993] I.C.J. Rep. 38 at para. 110, where he cites with approval Schachter’s analysis on the five uses of equity. Schachter identifies one use as offering “certain specific principles of legal reasoning associated with fairness and reasonableness, to wit, estoppel, unjust enrichment and abuse of rights.” See O. Schachter, “International Law in Theory and Practice: General Course in Public International Law” (1982) 178 *Rec. des Cours* 1 at 82, reprinted as *International Law in Theory and Practice* (Dordrecht: Martinus Nijhoff, 1991) at 56 [hereinafter Schachter, *International Law*].

<sup>41</sup> *Gabcikovo-Nagymaros Case*, *ibid.* 227 at para. 22. See also *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, [1948] I.C.J. Rep. 73 at 80, 93 [hereinafter *Admission Case*]; *The Corfu Channel Case (United Kingdom v. Albania) (Merits)*, [1949] I.C.J. Rep. 4 at 47-48, 75, 129 [hereinafter *Corfu Channel Case*]; *Competence of the General Assembly for the Admission of a State to the United Nations*, [1950] I.C.J. Rep. 4 at 15; *Anglo-Iranian Oil Co. Case (United Kingdom v. Iran)*, [1952] I.C.J. Rep. 93 at 133 [hereinafter *Anglo-Iranian Oil Case*]; *Fisheries Case*, *supra* note 26 at 150, 152, 153; *The Electricity Company of Sofia and Bulgaria (Preliminary Objections) (Belgium v. Bulgaria)* (1939), P.C.I.J. (Ser. A/B) No. 77 at 88; *Nottebohm Case*, *supra* note 27 at 37; *Norwegian Loans Case*, *supra* note 28; *South West Africa Cases*, *supra* note 29 at 480-83.



[A] *voisinage* arrangement of the type set forth in Article 4 of the Agreement involves, for the benefit of the Contracting Parties, recognition of rights that may be exercised concurrently in the same geographical sector, and by virtue of that fact, requires restraint and moderation from the holders of these rights in exercising them and in co-operating in the settlement of any disputes arising out of their exercise.<sup>42</sup>

Most recently, the Appellate Body of the World Trade Organization (“WTO”) relied on abuse of rights in the 1998 *Shrimp-Turtle Case*.<sup>43</sup> In applying article XX of the *General Agreement on Tariffs and Trade*<sup>44</sup> (“GATT”) to the United States’ claim that its efforts to change foreign fishing practices fell within the article XX(g) exception “relating to the conservation of exhaustible natural resources,” it wrote:

The chapeau of Article XX is, in fact, but one expression of the principle of good faith. This principle, at once a general principle of law and a general principle of international law, controls the exercise of rights by states. One application of this general principle, the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state’s rights and enjoins that whenever the assertion of a right “impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably.” An abusive exercise by a Member of its own treaty right thus results in a breach of the treaty rights of the other Members and, as well, a violation of the treaty obligation of the Member so acting.<sup>45</sup>

Abuse of rights also found some support when, in 1920, the Advisory Committee of Jurists was crafting article 38 of the *Statute of the Permanent Court of Interna-*

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<sup>42</sup> (*Canada v. France*) (1986), 82 I.L.R. 590 at para. 28 (Arbitral Tribunal, Arbitrators: De Visscher, Pharand, Quéneudec). The tribunal was referring to the Agreement of 27 March 1972 between Canada and France on their mutual fishing relations. For the full text of the agreement, see 82 I.L.R. 590 at 600. For other arbitral decisions concerning abuse of rights, see *North American Dredging Co. of Texas Case*, opinion rendered 31 March 1926, General Claims Commission (U.S.-Mexico), *Opinion of Commissioners 1927*, 21 at 23; *Trail Smelter Case (United States v. Canada)* (1938-41), 3 R.I.A.A. 1905 (Arbitrators: C. Warren, R.A.E. Greenshields, J.F. Hostie) [hereinafter *Trail Smelter Case*]; *Boffolo Case*, in J. Ralston, ed., *Venezuelan Arbitrations of 1903* (Washington, D.C.: Government Printing Office, 1904) 696 at 705; *In the Claim of Walter Fletcher Smith v. The Compañía Urbanizadora del Parque y Playa de Marianao (Cuba v. United States)* (1929), 2 R.I.A.A. 915. In addition, a German national court has held that the principle of proportionality exists in international law as part of the general principle of abuse of rights. See *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (1972), 11 C.M.L.R. 177 at 186.

<sup>43</sup> *United States—Import Prohibition of Certain Shrimp and Shrimp Products (Complaint by the United States)* (1998), WTO Doc. WT/DS58/AB/R (Appellate Body Report), online: WTO <[http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_status\\_e.htm#1998](http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm#1998)> (date accessed: 6 May 2002) [footnote omitted, hereinafter *Shrimp-Turtle Case*].

<sup>44</sup> 30 October 1947, 58 U.N.T.S. 187, Can. T.S. 1947 No. 27.

<sup>45</sup> *Supra* note 43 at para. 158. The Appellate Body was quoting from Cheng, *supra* note 4 at 125. For a further discussion of this case, see below, Part V.



*tional Justice*, which identifies sources of international law and which later became article 38 of the *Statute of the International Court of Justice*.<sup>46</sup> Arturo Ricci-Busatti, the Italian member of the Committee, referred to the principle “which forbids the abuse of rights” as one of the “general principles of law”.<sup>47</sup> He gave as an example disputes concerning the right of a coastal state to fix the breadth of its territorial sea. Assuming that there was, at that time, no international rule defining the outer limit of the territorial sea, he suggested that the court be permitted to admit the rules of each state in this respect as “equally legitimate in so far as they do not encroach on other principles, such for instance, as that of the freedom of the seas.”<sup>48</sup>

Within the work of the United Nations International Law Commission (“ILC”), one of the more detailed references to abuse of rights is found in the 1953 Report to the United Nations General Assembly. The report includes the following comment on the Draft Articles on the International Regulation of Fisheries:

The Commission, in adopting the articles, was influenced by the view that the prohibition of abuse of rights is supported by judicial and other authority and is germane to the situation covered by the articles. A State which arbitrarily and without good reason, in rigid reliance upon the principle of the freedom of the seas, declines to play its part in measures reasonably necessary for the preservation of valuable, or often essential, resources from waste and exploitation, abuses a right conferred upon it by international law. The prohibition of abuse of rights, in so far as it constitutes a general principle of law recognized by civilized States, provides to a considerable extent a satisfactory legal basis for the general rule as formulated in article 3.<sup>49</sup>

In 1960, Francisco García-Amador wrote in his fifth report as Special Rapporteur on State Responsibility:

Relatively few authors have troubled to study the applicability of the doctrine of “abuse of rights” in international relations. The majority of those who have done so, however, have not only reached the conclusion that the doctrine can and should be applied in order to solve particular problems, but also contend that its applicability has already been adequately demonstrated in practice.

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<sup>46</sup> *Supra* note 4.

<sup>47</sup> *Procès-verbaux des séances du comité* (The Hague: Van Langenhuisen Brothers, 1920) at 314-15, see also 335.

<sup>48</sup> *Ibid.* at 315.

<sup>49</sup> “Report of the International Law Commission Covering the Work of Its Fifth Session” (UN Doc. A/2456) in *Yearbook of the International Law Commission 1953*, vol. 2 (New York: United Nations, 1959) 200 at 218-19. Article 3 provides for the acceptance by states of a system of regulations for protecting the fishing resources of specific areas against waste or extermination.



A survey of international practice, particularly in the jurisprudence of the courts and claims commissions, clearly shows that at least the basic principle of the prohibition of abuse of rights is applicable in international relations.<sup>50</sup>

García-Amador went on to explain that the principle's purpose was one of "limiting the exercise of rights which are not always well-defined and precise rules in general international law or in the particular instruments which recognize them."<sup>51</sup>

In 1970 Roberto Ago, García-Amador's successor as Special Rapporteur, posited that states were required "not to exercise a right beyond the limits of what was reasonable."<sup>52</sup> Endre Ustor expressed a view held by many members of the ILC "that the question of abuse of rights warranted further study and should not be excluded from the Commission's codification work."<sup>53</sup> A.J.P. Tammes' comments during the same session are especially interesting:

[I]n certain legal situations there was no clearly defined interaction of rights and obligations and the rights remained undivided in law. Disputes in such cases could only be decided on the basis of a reasonable balance between the interests of the parties. State responsibility did not then arise from the violation of a primary rule of international law, but was determined, in the absence of such a rule, by the parties themselves or by an impartial authority on the basis of general rules providing for the settlement of disputes with "due regard for" or "reasonable regard for" the mutual interests of the parties concerned. International instruments dealing with such matters as freedom of the seas, lunar exploration and activities which could threaten mankind or its environment were cases in point.<sup>54</sup>

Tammes thus made two points that will be analyzed at greater length below: first, that abuse of rights is most needed in those areas of international law where rights remain undivided, that is, where the limits of those rights have not yet been defined; and second, that abuse of rights, while only a general principle of law, can itself give rise to state responsibility.<sup>55</sup>

In its work on state responsibility since the early 1970s, the ILC has focused on secondary obligations, more particularly, those general rules that define the param-

<sup>50</sup> F.V. García-Amador, "International responsibility", 5th report (UN Doc. A/CN.4/125) in *Yearbook of the International Law Commission 1960*, vol. 2 (New York: United Nations, 1961) 41 at paras. 70, 73.

<sup>51</sup> *Ibid.* at para. 75.

<sup>52</sup> "1081st Meeting" (2 July 1970) in *Yearbook of the International Law Commission 1970*, vol. 1 (New York: United Nations, 1971) 222 at para. 31.

<sup>53</sup> "1079th Meeting" (29 June 1970) in *Yearbook of the International Law Commission 1970*, vol. 1 (New York: United Nations, 1971) 181 at para. 29.

<sup>54</sup> "1975th Meeting" (23 June 1970) in *Yearbook of the International Law Commission 1970*, vol. 1 (New York: United Nations, 1971) 209 at para. 40.

<sup>55</sup> See below, note 133 and accompanying text.



ters and procedures of state responsibility but do not themselves give rise to it. This explains why the *Draft Articles on State Responsibility* make no reference to abuse of rights.<sup>56</sup> And while one might expect the principle to appear in the *Draft Articles on Injurious Consequences*, those articles focus entirely on harm caused across international borders, where the more specific neighbour principle of *sic utere tuo ut alienum non lædas* prohibits states from using their territory or allowing it to be used in a manner that causes injury to other states.<sup>57</sup> The principle of abuse of rights has not yet been studied and codified by the ILC; its content and scope of application remain unresolved.

### III. Abuse of Rights and Its Academic Supporters

Numerous authors have argued that abuse of rights is part of international law. Nicolas-Socrate Politis, writing in 1925, defined abuse of rights as follows: “[I]l y a abus si l’intérêt général est lésé par le sacrifice d’un intérêt individuel très fort à un autre intérêt individuel plus faible.”<sup>58</sup> Noting that the Advisory Committee of Jurists

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<sup>56</sup> *Draft articles on Responsibility of States for internationally wrongful acts*, adopted by the International Law Commission at its fifty-third session (2001), online: ILC <[http://www.un.org/law/ilc/texts/State\\_responsibility/responsibility\\_articles\(e\).pdf](http://www.un.org/law/ilc/texts/State_responsibility/responsibility_articles(e).pdf)> (date accessed: 6 May 2002), extracted from International Law Commission, *Report of the International Law Commission on the work of its Fifty-third session*, UN GAOR, 56th Sess., Supp. No. 10, UN Doc. A/56/10 (November 2001), c. IVE.1, online: ILC <<http://www.un.org/law/ilc/reports/2001/2001report.htm>> (date accessed: 6 May 2002) [hereinafter *Draft Articles on State Responsibility*].

<sup>57</sup> ILC, “Text of the Draft Articles on International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law (Prevention of Transboundary Damage for Hazardous Activities) Provisionally Adopted by the Commission on First Reading” in *Report of the International Law Commission on the work of its fiftieth session*, UN GAOR, 53d Sess., Supp. No. 10, UN Doc. A/53/10 (1998), online: United Nations <<http://www.un.org/law/ilc/reports/1998/98repfra.htm>> (date accessed: 6 May 2002) [hereinafter *Draft Articles on Injurious Consequences*]. This restrictive focus was not envisaged when the topic of injurious consequences was included on the ILC’s agenda in 1978; see *Yearbook of the International Law Commission 1978*, vol. 2, part 2 (New York: United Nations, 1979) at 149ff. For a concise review of how the topic was progressively narrowed, see A.E. Boyle, “State Responsibility and International Liability for Injurious Consequences of Acts not Prohibited by International Law: A Necessary Distinction?” (1990) 39 I.C.L.Q. 1 at 1-8 [hereinafter Boyle, “State Responsibility”]. On the neighbour principle, see *Trail Smelter Case*, *supra* note 42 at 1965; *Corfu Channel Case*, *supra* note 41 at 22; Principle 21 of the *Stockholm Declaration on the Human Environment*, 16 June 1972, UN Doc. A/CONF.48/14/Rev.1, 11 I.L.M. 1416 [hereinafter *Stockholm Declaration*]; Principle 2 of the *Rio Declaration on Environment and Development*, 14 June 1992, UN Doc. A/CONF.151/5/Rev. 1, 31 I.L.M. 874 [hereinafter *Rio Declaration*]; J. Ballenegger, *La Pollution en droit international* (Geneva: Librairie Droz, 1975) at 66; P. Birnie & A.E. Boyle, *International Law and the Environment* (Oxford: Clarendon Press, 1992) at 89ff.

<sup>58</sup> N.-S. Politis, “Le problème des limitations de la souveraineté et la théorie de l’abus des droits dans les rapports internationaux” (1925) 1 Rec. des Cours 1 at 81 [footnote omitted].



had recently identified abuse of rights as a general principle of law,<sup>59</sup> he argued that the principle is well-suited to situations where a right is exercised in an anti-social manner giving rise to an unjust injury.<sup>60</sup> Such situations would include certain closures of international ports<sup>61</sup> and expulsions of foreign nationals.<sup>62</sup> In a work devoted to analyzing the concept of sovereignty, Politis concluded that “les libertés non réglementées doivent en subir le contrôle grâce à la théorie de l’abus du droit.”<sup>63</sup>

Hans-Jürgen Schlochauer, writing in 1933, engaged in a review of the literature and practice concerning abuse of rights before concluding that, although the principle had achieved far less scope of application in international law than in civil law systems, its future was closely linked to the increasing interdependence of states:

Ultimately the pre-judicial prohibition on arbitrariness, in its most comprehensive meaning, simultaneously found a place and recognition in the international legal system in the norm of “pacta sunt servanda”. Its specific development in the sense of the emergence of norms characterized as abuse of rights has, however, in international law only hesitantly been achieved and is in fact only a concomitant to recent developments. The tighter their multi-meshed international relations are tied, the less free and unchecked are States in exercising their “rights” according to subjective discretion. It is a necessary consequence of the move from the “indépendance des états” to “interdépendence”, to the construction of the “communauté internationale”, that the originally purely individualistic character of the international legal order changes to a social character and that international law, which is above all trade and commercial law, constructs its norms from the point of view of social goals. This leads to a progressive widening of state responsibility, whereby it deals above all with the imposition of restrictions on the degree to which a subject of international law has a claim vis-à-vis another, without the powers of the first state being extended, in other words with certain restrictions on the free discretions of states.<sup>64</sup>

<sup>59</sup> *Ibid.* at 91. See also *Procès-verbaux des séances du comité*, *supra* note 47 at 314-16, 335.

<sup>60</sup> Politis, *ibid.* at 92.

<sup>61</sup> See *ibid.* at 94-101, and specifically *Affaire de Portendick (France v. United Kingdom)* (1843), 1 *Recueil des arbitrages internationaux* 512. Compare *Affaire de la fermeture de Buenos-Ayres (Argentine v. United Kingdom)* (1870), 2 *Recueil des arbitrages internationaux* 637, and the discussion in Politis, *ibid.* at 98-101.

<sup>62</sup> Politis, *ibid.* at 101-09.

<sup>63</sup> *Ibid.* at 116.

<sup>64</sup> H.-J. Schlochauer, “Die Theorie des abus de droit im Völkerrecht” (1933) 17 *Zeitschrift für Völkerrecht* 373 at 378-79 [footnotes omitted, translated by author]:

In der letzten Endes dem präjuridischen Willkürverbot entstammenden Norm des “pacta sunt servanda” hat gleichzeitig dieses in seiner umfassendsten Bedeutung Stellung und Anerkenntnis im Völkerrechtssysteme gefunden. Seine spezielle Ausbildung im Sinne der eingangs als Rechtsmißbrauchverbot charakterisierten Normen aber ist im Völkerrecht nur zögernd erfolgt und ei-



F.A. Mann approached abuse of rights in the context of international currency law. He argued that “exchange control is abusive if in substance it is an instrument of economic warfare or a measure preparatory to war or ‘an instrument of oppression and discrimination’.”<sup>65</sup> He also recognized that abuse of rights, like other international law principles, rests upon the requirement of good faith by which every state is bound. A state that acts in good faith is unlikely to abuse its rights:

It is the lack of fair and equitable treatment, or of good faith, that is the real and fundamental and, at the same time, the most comprehensive cause of action of which all other aspects of State responsibility [...] are mere illustrations. The difficulties lie in the application rather than the existence of a doctrine the substance of which it is hard to deny.<sup>66</sup>

The best known proponent of abuse of rights has been Hersch Lauterpacht, who argued for a broad interpretation and application of the principle. He asserted that only the most primitive of societies could allow the unchecked exercise of rights without regard to their societal consequences, and that the determination of when the exercise of a right becomes abusive must depend on the specific facts of each case, rather than the application of an abstract legislative standard. Lauterpacht’s abuse of rights occurs “when a State avails itself of its right in an arbitrary manner in such a way as to inflict upon another State an injury which cannot be justified by a legitimate consideration of its own advantage.”<sup>67</sup> Lauterpacht thus regarded abuse of rights as the

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gentlich erst Begleiterscheinung der neueren Entwicklung. Je enger sich die vielmaschigen internationalen Beziehungen knüpfen, desto weniger frei und ungehemmt werden die Staaten ihre “Rechte” nach subjektivem Ermessen ausüben können. Es ist eine notwendige Folge der Entwicklung von der “indépendence des états” zur “interdépendence”, zum Ausbau der “communauté internationale”, daß sich der ursprünglich rein individualistische Charakter der Völkerrechtsordnung zu einem sozialen wandelt und auch das Völkerrecht, das ja in erster Linie Verkehrs- und Wirtschaftsrecht ist, seine Normen unter dem Gesichtspunkt sozialer Zielsetzung ausbildet. Es führt dies zu einer fortschreitenden Erweiterung der staatlichen Verantwortlichkeit, wobei es sich in erster Linie um Aufrichtung von Schranken handelt, auf deren Innehaltung ein Völkerrechtssubjekt gegenüber einem anderen Anspruch hat, ohne daß dadurch gleichzeitig die Kompetenz des ersteren erweitert würde, mit anderen Worten also um gewisse Einschränkungen des freien Ermessens der Staaten.

<sup>65</sup> F.A. Mann, “Money in Public International Law” (1959) 96 Rec. des Cours 1 at 98, citing *Re Helbert Wagg & Co. Ltd.*, [1956] Ch. 323 at 352.

<sup>66</sup> F.A. Mann, *The Legal Aspects of Money*, 5th ed. (Oxford: Clarendon Press, 1992) at 476.

<sup>67</sup> L. Oppenheim, *International Law: A Treatise*, 8th ed., ed. by H. Lauterpacht (London: Longmans, Green & Co., 1955) at 345.



source of the duty not to interfere with the flow of a river to the detriment of other riparian states, and of the neighbour principle.<sup>68</sup>

Lauterpacht acknowledged that his was a relatively ambiguous definition that would, if put to the test before international courts and tribunals, result in a great deal of discretionary power being granted to judges and arbiters. He therefore promoted caution in applying the principle:

There is no legal right, however well established, which could not, in some circumstances, be refused recognition on the ground that it has been abused. The doctrine of abuse of rights is therefore an instrument which, apart from other reasons calling for caution in the administration of international justice, must be wielded with studied restraint.<sup>69</sup>

At the same time, however, he argued that the ability of judges to develop the law is “particularly important in the international society in which the legislative process by regular organs is practically non-existent.”<sup>70</sup>

Paul Guggenheim, commenting on abuse of rights, wrote:

En principe, le droit international, comme tout droit primitif, est un droit simple, rigide. Dans son application, on se contente généralement d'examiner si le sujet de droit a agi dans les limites objectives de la règle de droit. Lorsque celui-ci est un entité collective, un Etat, une organisation internationale, un belligérant, on ne tient pas compte de sa volonté subjective, bien qu'une théorie opposée, confirmée par quelques décisions arbitrales isolées, prétende le contraire. Toutefois, dans l'application de certaines règles d'un caractère très général et abstrait, on étudie de plus près la manière dont ces normes ont été exécutées et on admet une application plus souple, plus nuancée. Une règle comme celle qui confère la souveraineté à l'Etat indépendant donne lieu à un abus lorsqu'elle est appliquée dans le but de nuire à autrui ou dans un autre but que celui pour lequel le droit international a établi cette règle. L'exercice du pouvoir discrétionnaire qu'implique l'application du droit à la souveraineté n'a alors que l'apparence de la légalité, de la conformité au droit.<sup>71</sup>

Guggenheim gave two examples of abuse of rights: first, where a state exercises in bad faith its right to designate the members of a diplomatic mission, for example, by designating an individual wanted on criminal charges in the host state; and second,

<sup>68</sup> *Ibid.* at 346-47. On the neighbour principle, see *infra* note 86. On the relationship between the neighbour principle and abuse of rights, see the discussion below, Part V.

<sup>69</sup> H. Lauterpacht, *The Development of International Law by the International Court* (London: Stevens & Sons, 1958) at 164 [hereinafter Lauterpacht, *Development*]; see also H. Lauterpacht, “Droit de la paix” (1937) 62 *Rec. des Cours* 95 at 342.

<sup>70</sup> Lauterpacht, *Development*, *ibid.* at 162.

<sup>71</sup> P. Guggenheim, “La validité et la nullité des actes juridiques internationaux” (1949) 74 *Rec. des Cours* 195 at 250 [footnotes omitted].



where a state engages in the economic exploitation of an international river in a manner harmful to a down-river state. The two acts would, however, be dealt with in different ways. The receiving state would have no obligation to recognize the designation of the member of the diplomatic mission, for the act would simply be void. In contrast, some of the economic exploitation of the river would already have occurred, with damage being caused, giving it the character of an illegal act and thus engaging the normal rules of state responsibility.<sup>72</sup>

Gerald Fitzmaurice referred to abuse of rights when commenting on a passage in the *United States Nationals in Morocco Case*, where the ICJ held: "The power of making the valuation rests with the Customs authorities, but it is a power which must be exercised reasonably and in good faith."<sup>73</sup> He wrote:

There is little legal content in the obligation to exercise a right in good faith unless failure to do so would, in general, constitute an abuse of rights. Here therefore the Court may be said to have taken a step towards the recognition of the doctrine propounded in earlier cases by Judge Alvarez.<sup>74</sup>

The most rigorous study of abuse of rights is that produced by Alexandre Kiss in 1952.<sup>75</sup> Drawing upon an extensive compilation of judicial and arbitral decisions,<sup>76</sup> as well as state practice,<sup>77</sup> Kiss concluded that the principle was an important part of international law and could be an important factor in the ongoing evolution of the international legal system. Thirty-seven years later, Kiss' view had not changed:

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<sup>72</sup> Guggenheim, *ibid.* at 250-54. Today, the latter situation would be governed by the more specific—and more recently developed—principle of equitable utilization. See generally *Convention on the Law of the Non-navigational Uses of International Watercourses*, 21 May 1997, UN Doc. A/51/869, online: ILC <<http://www.un.org/law/ilc/texts/nnavfra.htm>> (date accessed: 6 May 2002); X. Fuentes, "The Criteria for the Equitable Utilization of International Rivers" (1996) 67 *Brit. Y.B. Int'l L.* 337.

<sup>73</sup> *Case Concerning Rights of Nationals of the United States of America in Morocco (France v. United States)*, [1952] I.C.J. Rep. 176 at 212 [hereinafter *United States Nationals in Morocco Case*].

<sup>74</sup> G. Fitzmaurice, "The Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of Law" (1953) 30 *Brit. Y.B. Int'l L.* 1 at 53. See also G. Fitzmaurice, "The Law and Procedure of the International Court of Justice: General Principles and Substantive Law" (1950) 27 *Brit. Y.B. Int'l L.* 1 at 12ff. For the relevant separate and dissenting opinions by Alvarez J., see *Admission Case*, *supra* note 41; *Anglo-Iranian Oil Case*, *supra* note 41; *Fisheries Case*, *supra* note 26.

<sup>75</sup> A.-C. Kiss, *L'abus de droit en droit international* (Paris: Librairie générale de droit et de jurisprudence, 1952).

<sup>76</sup> See especially Kiss' discussion of *The Great Lakes Diversion Case (Canada v. United States)*, *ibid.* at 32-33, and *State of New Jersey v. New York City*, *ibid.* at 35.

<sup>77</sup> See especially Kiss' discussion of the *Boundary Waters Protection Treaty (Canada & United States)* (1909), *ibid.* at 32-36.



L'abus peut être l'exercice arbitraire du droit, c'est-à-dire l'absence de motivation acceptable, alors que cet exercice porte préjudice à un autre Etat. Il peut aussi résulter d'actes dont les bénéfices pour l'Etat territorial sont négligeables lorsqu'ils sont comparés aux conséquences produites sur le territoire de l'autre Etat.<sup>78</sup>

Kiss saw great possibilities for the principle with respect to transboundary pollution, both in and of itself and as a general principle of law which “peut donner naissance à une nouvelle règle spécifique du droit international interdisant directement de telles pollutions, sans recourir encore au support de la théorie de l'abus de droit.”<sup>79</sup>

In 1972, Michael Akehurst argued “that legislative jurisdiction ... can give rise to genuine examples of abuse of rights—the State has a right to legislate and acts illegally only because it abuses that right.”<sup>80</sup> This would occur “if the legislation is designed to produce mischief in another country without advancing any legitimate interest of the legislating State,” or “if legislation is aimed at advancing the interests of the legislating State illegitimately at the expense of other States.”<sup>81</sup> Akehurst provided the following example of the latter scenario:

[D]uring the 1920s proposals were made in the United States Congress to alter United States law in order to give foreign seamen (serving on foreign ships) a contractual right to demand half their wages when the ship arrived in a United States port, even though the law of the flag State postponed the time for payment; in calculating the wages due to the seamen, advances paid in foreign countries were to be disregarded (i.e. the employer would have to pay again). Wages on United States ships were higher than wages on foreign ships, and the purpose of the proposed legislation (which was never passed) was to encourage foreign seamen to desert from foreign ships and to take up work on United States ships, thereby reducing labour costs and rectifying a shortage of labour on United States ships and increasing labour costs and causing general inconvenience on foreign ships. It is not surprising that foreign States protested that the proposed legislation was contrary to international law.<sup>82</sup>

More recent references in the literature include a call “to apply the international law principles of good faith and abuse of rights in determining the legality of dis-

<sup>78</sup> A. Kiss, *Droit international de l'environnement* (Paris: Pedone, 1989) at 72 [hereinafter Kiss, *Droit international de l'environnement*]. See also Kiss, “Abuse of Rights,” *supra* note 1 at 4-8.

<sup>79</sup> Kiss, *Droit international de l'environnement*, *ibid.* at 72.

<sup>80</sup> M. Akehurst, “Jurisdiction in International Law” (1974) 46 *Brit. Y.B. Int'l L.* 145 at 189, n. 3.

<sup>81</sup> *Ibid.* at 189.

<sup>82</sup> *Ibid.* at 189-90, citing “The British Embassy to the Department of State: Memorandum” in *Papers Relating to the Foreign Relations of the United States 1931*, vol. 1 (Washington, D.C.: United States Government Printing Office, 1946) at 811-14. See also H. Briggs, *The Law of Nations*, 2d ed. (New York: Appleton-Century-Crofts, 1952) at 353.



crimination in the matter of expropriation of alien property”<sup>83</sup> and a suggestion that the principle be used to encourage the resolution of trade disputes concerning the protection of marine living resources under the dispute settlement system established by the 1982 *UNCLOS* rather than that of the WTO.<sup>84</sup> Abuse of rights has also been mentioned in the context of the law governing the transboundary movement of hazardous waste from developed to developing countries.<sup>85</sup>

#### IV. The Contemporary Relevance of Abuse of Rights

Although abuse of rights finds a significant degree of support in state practice, the judgments of international courts and tribunals, and academic writing, some authors contest whether it still has a useful role to play.

Some argue that abuse of rights and the neighbour principle are one and the same thing, with the neighbour principle being a specific development of abuse of rights for situations involving the territories of two or more states.<sup>86</sup> This argument has significant implications because until recently at least, most situations where one state’s rights were infringed by the exercise of another state’s rights involved the territories of two or more states. Even when states ventured beyond their borders, they did so carrying attributes of territorial sovereignty, for instance, through the flagging of vessels and aircraft.<sup>87</sup> Now that more specific principles have evolved for these transboundary situations, abuse of rights, it is argued, can be placed on the back shelf of international law, not because the principle has become invalid, but because it is redundant. Yet while this argument is compelling to a certain extent, there remain a few

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<sup>83</sup> A.F.M. Maniruzzaman, “Expropriation of Alien Property and the Principle of Non-Discrimination in International Law of Foreign Investment: An Overview” (1998) 8 *J. Transnat’l L. Pol’y* 57 at 68 [footnotes omitted].

<sup>84</sup> R.J. McLaughlin, “Settling Trade-Related Disputes over the Protection of Marine Living Resources: *UNCLOS* or the WTO?” (1997) 10 *Geo. Int’l Envtl. L. Rev.* 29 at 66-69.

<sup>85</sup> R. Park, “An Examination of International Environmental Racism Through the Lens of Transboundary Movement of Hazardous Wastes” (1998) 5 *Indiana J. Global Leg. Stud.* 659 at 680, citing A. Kiss & D. Shelton, *International Environmental Law* (New York: Transnational, 1991).

<sup>86</sup> Gunther Handl explains that the neighbour principle is “but the factual background against which the exercise of territorial rights must be seen. It does not constitute an independently existing body of specific legal rules imposing restraints on the exercise of territorial rights but merely represents an expression of the principle of abuse of rights.” G. Handl, “Territorial Sovereignty and the Problem of Transnational Pollution” (1975) 69 *A.J.I.L.* 50 at 56. See also Birnie & Boyle, *supra* note 57 at 126; R. Jennings & A. Watts, eds., *Oppenheim’s International Law*, 9th ed., vol. 1 (London: Longman, 1992) at 408. For discussion of the *Draft Articles on Injurious Consequences*, see below, Part VI.

<sup>87</sup> See e.g. *UNCLOS*, *supra* note 35 at 1287, arts. 90-94; *Convention on Offences and Certain Other Acts Committed on Board Aircraft*, 14 September 1963, I.C.A.O. Doc. 8364, 2 *I.L.M.* 1042, arts. 3, 16; *The Case of the S.S. “Lotus” (France v. Turkey)* (1927), P.C.I.J. (Ser. A) No. 9 [hereinafter *Lotus Case*]. See also discussion of the *Draft Articles on Injurious Consequences*, below, Part VI.



areas and issues where the territorial model is inapplicable and specific principles have yet to evolve. And, as discussed below in Part VI, the number and importance of these areas and issues may in fact be growing.

It is also possible to argue that abuse of rights is redundant because it is itself only a more specific expression of a broader principle, namely that of good faith.<sup>88</sup> For example, Patricia Birnie and Alan Boyle argue that abuse of rights is merely a method of interpreting rules concerning matters such as the duty to negotiate and consult in good faith, or another way of formulating a doctrine of reasonableness or a balancing of interests, and neither approach, they conclude, “adds anything useful.”<sup>89</sup> Bin Cheng similarly writes: “The theory of abuse of rights ... is merely an application of this principle [of good faith] to the exercise of rights.”<sup>90</sup> But Cheng goes on to elaborate in considerable detail the history and content of abuse of rights at the international level, concluding:

Good faith in the exercise of rights ... means that a State’s rights must be exercised in a manner compatible with its various obligations arising either from treaties or from the general law. It follows from this interdependence of rights and obligations that rights must be reasonably exercised. The reasonable and bona fide exercise of a right implies an exercise which is genuinely in pursuit of those interests which the right is destined to protect and which is not calculated to cause any unfair prejudice to the legitimate interests of another State, whether these interests be secured by treaty or by general international law. The exact line dividing the right from the obligation, or, in other words, the line delimiting the rights of both parties is traced at a point where there is a reasonable balance between the conflicting interests involved. This becomes the limit between the right and the obligation, and constitutes, in effect, the limit between the respective rights of the parties. The protection of the law extends as far as this limit, which is the more often undefined save by the principle of good faith. Any violation of this limit constitutes an abuse of right and a breach of the obligation—an unlawful act.<sup>91</sup>

From this perspective, the principle of abuse of rights is not redundant. Instead it is, in one small but important respect, supplemental to the principle of good faith: it provides the threshold at which a lack of good faith gives rise to a violation of international law, with all the attendant consequences.

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<sup>88</sup> On good faith, see generally R. Kolb, *La bonne foi en droit international public* (Paris: Presses Universitaires de France, 2000); A. D’Amato, “Good Faith” in R. Bernhardt, ed., *Encyclopedia of Public International Law*, vol. 2 (Amsterdam: North-Holland, 1995) at 599; Cheng, *supra* note 4 at 105-60.

<sup>89</sup> Birnie & Boyle, *supra* note 57 at 126. See similarly quotation from Mann, *supra* note 66; D’Amato, *ibid.* at 600: “Good faith may be said to cover the somewhat narrower doctrine of ‘abuse of rights’ [...] there is no need for an independent, even if subsidiary, concept of abuse of rights.”

<sup>90</sup> Cheng, *supra* note 4 at 121.

<sup>91</sup> *Ibid.* at 131-32 [emphasis added].



Abuse of rights may also provide an advantage over the principle of good faith in that, at least in international law, one need not imply malice in order to establish that an abuse has occurred.<sup>92</sup> International courts and tribunals have to presume that states act in good faith. To do otherwise would call the honour of states into question, risk introducing political and diplomatic factors into the judicial process, impede international relations, and increase the danger of escalation.<sup>93</sup> Moreover, as Lauterpacht explained:

In many cases the use of a right degenerates into a socially reprehensible abuse of right, not because of the sinister intention of the person exercising the right, but owing to the fact that, as the result of social changes unaccompanied by corresponding developments in the law, an assertion of a right grounded in the existing law becomes mischievous and intolerable.<sup>94</sup>

Other authors deny that the principle has any validity in international law because of its imprecise character. Georg Schwarzenberger and E.D. Brown wrote that "it is difficult to establish what is supposed to amount to an abuse, as distinct from a harsh but justified use, of a right under international law."<sup>95</sup> Jean-David Roulet considered that such a flexible and imprecise principle could not hope to remedy the primitive and imprecise character of international law.<sup>96</sup> Gutteridge went so far as to suggest that the principle "may get out of hand and result in serious inroads on individual rights,

<sup>92</sup> See Part II above for more on this issue. Compare Akehurst, *supra* note 80. G.D.S. Taylor comments: "It is not every 'right' which is reviewable for abuse but only those which are susceptible of limitation by reference to the reason for exercising them." G.D.S. Taylor, "The Content of the Rule Against Abuse of Rights in International Law" (1972-73) 46 *Brit. Y.B. Int'l L.* 323 at 352 [footnotes omitted].

<sup>93</sup> See *Lake Lanoux Arbitration (France v. Spain)* (1957), 24 *I.L.R.* 101 at 126 (Arbitral Tribunal, Arbitrators: Petré, Bolla, De Luna, Reuter, De Visscher); Taylor, *ibid.* at 334 writes: "Without such a presumption, international intercourse could not continue."

<sup>94</sup> Lauterpacht, *Function of Law*, *supra* note 2 at 286-87. There are at least two approaches that do not involve implying malice that could be taken to establish that an abuse of rights has occurred. Gutteridge, *supra* note 6 at 32, suggested that an intent to harm be ascertained objectively, so that the test became "whether the defendant in the action has exercised a right in a prudent and reasonable manner." Alternatively, or additionally, one could look to effect rather than intent. The neighbour principle involves this sort of consideration. In the *Corfu Channel Case*, *supra* note 41, for example, the question was not whether Albania intended to harm the United Kingdom, but whether it did cause harm to that country.

<sup>95</sup> G. Schwarzenberger & E.D. Brown, *A Manual of International Law*, 6th ed. (Milton, U.K.: Professional Books, 1976) at 84. They acknowledge, however, that the principle is useful in areas of international law that are regulated by treaties, particularly within the context of international organizations (*ibid.* at 85).

<sup>96</sup> J.-D. Roulet, *Le caractère artificiel de la théorie de l'abus de droit en droit international public* (Neuchâtel: Editions de la Baconnière, 1958) at 150.



thus becoming an instrument of dangerous potency in the hands of the demagogue and the revolutionary.<sup>97</sup>

To some degree, one's response to this argument depends on the view one takes of the judicial function in international law. Lauterpacht, while advocating caution,<sup>98</sup> made his own view clear: "The power to apply some such principle 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."<sup>99</sup> Or, as George Fletcher explained with respect to reasonableness in the common law:

[N]o set of rules can determine what is reasonable in all situations. Nor does reasonableness lend itself to definitive specification on the basis of custom or of market practices. We do not always know what the reasonable requires, but working with this open-ended concept at the core of our legal system saves us from the constricting effects of positivism. Whatever philosophers may argue, we know that the rule of law means more than the law of rules.<sup>100</sup>

Judicial discretion and innovation play an important role in the still relatively under-developed system that is international law. Without judicial innovation, international organizations might not have functional international legal personality,<sup>101</sup> obligations *erga omnes* might not exist,<sup>102</sup> and treaty texts might never be open to change as the result of subsequent practice amongst their parties.<sup>103</sup> Although one might not approve of these developments, that they have occurred demonstrates that judicial innovation constitutes one way in which international law is made and changed. Judges some-

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<sup>97</sup> *Supra* note 6 at 43-44. Gutteridge claimed that this situation exists in Swiss law, writing that the effect of the adoption of the principle in the Swiss Civil Code "is to make the judge the master of the situation, and the selection of a criterion of abuse rests entirely in his hands ... The difference between unconditional and other rights disappears altogether, and there is no right which is not susceptible of abuse in the eye of the Swiss law" (*ibid.* at 40). In response to this concern Taylor argues that an abuse of rights should be considered as an abuse of discretion and subjected to the Wednesbury principles of English administrative law, with the effect that "no person may, under international law, exercise a power for a reason, actual or inferred, which is contrary to the purpose or purposes for which international law contemplates the power will be used." *Supra* note 92 at 352.

<sup>98</sup> See Lauterpacht, *Development*, *supra* note 69 at 164.

<sup>99</sup> *Ibid.* at 165.

<sup>100</sup> Fletcher, *supra* note 10 at 980 [footnotes omitted].

<sup>101</sup> See *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, [1949] I.C.J. Rep. 174.

<sup>102</sup> See *Barcelona Traction Case*, *supra* note 30 at paras. 33-35.

<sup>103</sup> See *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand) (Merits)*, [1962] I.C.J. Rep. 6 at 33-34; *Air Transport Services Agreement Arbitration (United States v. France)* (1969), 38 I.L.R. 182 at 245-46; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, [1971] I.C.J. Rep. 16 at para. 22. See also M. Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge: Cambridge University Press, 1999) at 172-80.



times need to exercise discretion and innovate, in part because of the relative slowness with which treaties and rules of customary international law usually change, and in part because of the longstanding principle of *non liquet* whereby courts and tribunals cannot refuse to render a decision on the basis that there is no law.<sup>104</sup> And judicial innovation could become more prevalent in international law, given the rapid and profound changes occurring as a result of what is colloquially referred to as “globalization”, a process that generates gaps between established law and contemporary problems.

Jerome Elkind has advanced a different critique, that abuse of rights is ill-suited to both the common law and international law, where lengthy codes setting out general principles do not exist. According to Elkind, the question posed in common law cases is not whether a right has been abused, but whether there was a right at all. Even in cases involving statutes,

if a right purportedly granted by a statute is used for purposes other than those for which the right was granted, common-law courts will not say that there has been an abuse of the right. Rather they will seek, through statutory interpretation, to establish whether or not the conduct in question actually falls within the ambit of the right created by the statute. They may decide either that the conduct does not fall within the statute, or they might conclude, albeit reluctantly, that applicable canons of interpretation do not justify its exclusion. In the latter case, the conduct will be permitted whatever the motive although the statute might be acknowledged to be defective. The only remedy would be to amend the statute at that point, for we would have what is called, in common parlance, a loophole.<sup>105</sup>

The same situation, Elkind argues, prevails with regard to treaties and customary international law, making it “seem appropriate to argue that a right does not exist rather than that it has been abused.”<sup>106</sup>

Elkind’s critique falls short in several respects. First, he ignores (or fails to predict) developments in some common law systems that mirror abuse of rights in inter-

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<sup>104</sup> See article 12, “Draft on Arbitral Procedure” (UN Doc. A/CN.4/113) in *Yearbook of the International Law Commission 1958*, vol. 2 (New York: United Nations, 1958) at 8: “the tribunal may not bring in a finding of *non liquet* on the ground of the silence or obscurity of the law to be applied.” See also *Desgranges v. International Labour Organization* (1953), 20 I.L.R. 523 at 530 (Administrative Tribunal of the International Labour Organization); H. Lauterpacht, “Some Observations on the Prohibition of ‘*Non Liquet*’ and the Completeness of the Law” in F.M. Van Asbeck *et al.*, eds., *Symbolæ Verzijl* (The Hague: Martinus Nijhoff, 1958) 196; J. Stone, “*Non liquet* and the Function of Law in the International Community” (1959) 35 Brit. Y.B. Int’l L. 124; P. Weil, “‘The Court Cannot Conclude Definitively ...’ *Non Liquet* Revisited” (1997) 36 Colum. J. Transnat’l L. 109.

<sup>105</sup> J.B. Elkind, “Footnote to the Nuclear Test Cases: Abuse of Right—A Blind Alley for Environmentalists” (1976) 9 Vand. J. Transnat’l L. 57 at 71.

<sup>106</sup> *Ibid.* at 73.



national law.<sup>107</sup> As Kiss explains, the distinction between the existence of an individual right and the exercise of that right “is illustrated by control exercised on the way individuals or authorities make use of their rights or competences, such as property rights or decisions of administrative organs.”<sup>108</sup> More importantly, Elkind mistakenly assumes that the only important difference between civil and common law systems is the presence or absence of codes, and that international law is therefore more like the common law with regard to the treatment of rights. However, international law is actually more like the civil law when it comes to rights, in that both systems tend to characterize some rights as general and primordial.

Rights in civil law systems have traditionally been framed in a general and abstract manner, whereas rights in common law systems are more often based on narrowly focused judicial decisions, sometimes hedged with open-ended modifiers such as “reasonable” or “substantial”, or on relatively precise statutory provisions laced with exceptions and qualifications.<sup>109</sup> As Fletcher has explained, the civil law relies upon a “structured” legal discourse involving two stages: “first, an absolute norm is asserted; and second, qualifications enter to restrict the scope of the supposedly dispositive norm.”<sup>110</sup> In other words, the civil law initially sets out expansive abstract principles which are then, and only then, subject to limitations and exceptions. The common law, in contrast, is based upon a “flat” legal discourse, whereby all of the criteria relevant to the resolution of a dispute are dealt with at a single stage.<sup>111</sup>

Fletcher illustrates the distinction between civil and common law rights with reference to the right to use force to prevent one’s other rights from being encroached upon, and the need to impose limits upon that right:

German law approaches this problem in the style of structured legal discourse. According to the criminal code of 1975 ... everyone who suffers an unjustified invasion of her rights has an absolute privilege to use whatever force is necessary to thwart the invasion. If the only way to stop a fleeing thief, even a child stealing fruit, is to shoot the thief, the courts and the scholars have supported the property owner’s right to use deadly force. Countering this trend, some post-war commentators and courts have invoked the principle of “abuse of

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<sup>107</sup> See discussion above, Part LB.

<sup>108</sup> Kiss, “Abuse of Rights”, *supra* note 1 at 5.

<sup>109</sup> See Catala & Weir, *supra* note 6, as quoted in text accompanying note 20. It is noteworthy in this context that the distinctions between civil and common law approaches are gradually becoming less clear. For instance, modern codes, such as the *Civil Code of Québec* and the *New Netherlands Civil Code*, *supra* note 15, are relatively detailed and contain their own open-ended modifiers. It is also noteworthy that the situation is somewhat reversed in the area of constitutional (as opposed to private) rights. Constitutions in civil law countries often set out numerous exceptions and qualifications to individual rights whereas written constitutions in common law countries do not.

<sup>110</sup> *Supra* note 10 at 951.

<sup>111</sup> *Ibid.* at 951-53.



rights” to limit this right at a second stage of analysis. At the first level, there remains an absolute right to use deadly force when necessary; at the second level, the exercise of that right comes under scrutiny. If the right is exercised at excessive cost, it is thought to be “abused” and therefore inoperative. Nothing in the criminal code supports this restriction. Nonetheless, the method of structured legal thought permits an additional level of argument, a level where extra-statutory considerations can limit the explicit provisions of the code.<sup>112</sup>

International law has traditionally characterized the rights of states as general and primordial, as integral to state sovereignty and subject to restriction only by way of state consent. As the PCIJ stated in the 1927 *Lotus Case*:

International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.<sup>113</sup>

States have traditionally begun most treaty-making exercises from a posture of unlimited sovereignty, to which they then negotiate consensual restrictions and exceptions. Article 2(7) of the *Charter of the United Nations* is a particularly clear expression of this approach, which is usually couched in less explicit terms:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement un-

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<sup>112</sup> *Ibid.* at 951-52 [footnotes omitted]. Fletcher goes on to analyze the distinction between “flat” and “structured” discourse in terms of how the criminal law of civil law systems distinguishes between justification and excuse and how the criminal law of common law systems does not (*ibid.* at 971-78). See also G.P. Fletcher, “Two Modes of Legal Thought” (1981) 90 *Yale L.J.* 970; G.P. Fletcher, “Comparative Law as a Subversive Discipline” (1998) 46 *Am. J. Comp. L.* 683 at 698. It is noteworthy that the similarity between private-law rights in civil law systems and state rights in international law has led to the adoption of a multi-staged analysis in the law of state responsibility, whereby the breach of an international obligation, attributable to the state, must be established prior to the consideration of “circumstances precluding wrongfulness”. See *Draft Articles on State Responsibility*, *supra* note 56, part 1 of which is divided into five chapters: “General principles”, “Attribution of conduct to a State”, “Breach of an international obligation”, “Responsibility of a State in connection of the act of another State”, and “Circumstances precluding wrongfulness”.

<sup>113</sup> *Supra* note 87 at 18. See also *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States) (Merits)*, [1986] *I.C.J. Rep.* 14 at 135 where the ICJ noted: “[I]n international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise.” See also the quotation from A.J.P. Tammes, above in text accompanying note 51.



der the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.<sup>114</sup>

The same approach also colours traditional conceptions of customary international law and general principles of law, though these forms of law-making tend to occur much more gradually, with a greater emphasis on “system-consent” rather than specific consent to individual rules.<sup>115</sup>

Yet the traditional centrality of sovereign consent is but one explanation for why international law has tended to characterize the rights of states as general and primordial; another concerns the difficulty of applying the concept of reasonableness at the international level. Constructing a hypothetical “man on the Clapham omnibus” requires a greater degree of cultural and situational commonality than has traditionally been present among many of the states that make up international society.<sup>116</sup> Although in recent decades a significant degree of commonality has developed in some areas, a limited degree of commonality remains characteristic in others. And, in addition to making it difficult to apply a concept of reasonableness, a lack of commonality makes it unlikely that specific rules will have evolved in the latter areas to limit rights that have traditionally been cast in general and primordial terms. Thus, abuse of rights, as a mediator between otherwise undivided rights, still has a role to play there. As Robert Jennings and Arthur Watts explain:

If a right is formulated in absolute terms (“a State may expel aliens”), arbitrary and precipitate action may involve an abuse of that right; if the right is formulated in qualified terms (“a State may take reasonable measures to expel aliens”), such action would be wrongful not so much as an abuse of right but as being outside the scope of the right claimed. ... The inclusion in a rule of a qualification requiring reasonableness, or something similar, in its application, serves much of the purpose of the doctrine of “abuse of rights”. That doctrine is a useful safeguard in relatively undeveloped or over-inflexible parts of a legal system pending the development of precise and detailed rules.<sup>117</sup>

Moreover, it may be impossible to develop specific rules for every situation in which excessive or abusive exercises of rights might require limitation. Reasons similar to

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<sup>114</sup> 26 June 1945, Can. T.S. 1945 No. 7, online: United Nations <<http://www.un.org/aboutun/charter/index.html>> (date accessed: 6 May 2002).

<sup>115</sup> For further discussion of system consent and customary international law, see V. Lowe, “Do General Rules of International Law Exist?” (1983) 9 *Rev. Int’l Stud.* 207; J. Raz, *Practical Reason and Norms* (Princeton: Princeton University Press, 1990) at 123-29; P. Allott, *Eunomia: New Order for a New World* (New York: Oxford University Press, 1990) at 145-77; S. Sur, *La coutume internationale* (Paris: Librairie Techniques, 1990) at 5, 10.

<sup>116</sup> For the origins of the Clapham omnibus phrase, see *McQuire v. Western Morning News*, [1903] 2 K.B. 100 at 109 (C.A.), Collins M.R.; *Hall v. Brooklands Auto Racing Club*, [1933] 1 K.B. 205 at 224 (C.A.), Greer L.J.; E. Kahn, “A Trimestrial Potpourri” (1985) 102 *S. African L.J.* 184 at 186-87.

<sup>117</sup> Jennings & Watts, *supra* note 86 at 407, n. 1.



these explain why national legal systems have developed concepts such as judicial review, reasonableness, nuisance, legitimate expectation, and abuse of rights. Although not a substitute for constitutionally-entrenched rights and other higher-order rules, such concepts fulfill a unique and sometimes necessary role.

International lawyers have looked to the concepts of *jus cogens*, *erga omnes*, and the related concept of international crimes to impose some limits on otherwise unrestricted state rights. However, the existence, content, and applicability of *jus cogens* not only remain contentious, but the invocation of such rules results in an all-or-nothing approach to normative conflict, there being no possibility for balancing rights and obligations if a peremptory rule will always trump a non-peremptory rule.<sup>118</sup> Rules of an *erga omnes* character have their own limitations, the most important being that their *erga omnes* character does not override other rules, but only gives all states the right to make claims in the event of a violation.<sup>119</sup> The concept of international crimes, for its part, has recently been dropped from the ILC's *Draft Articles on State Responsibility*, in part out of a concern to avoid complicating the rules governing counter-measures.<sup>120</sup>

In any event, these various concepts are inadequate to deal with certain developments that are amenable to the principle of abuse of rights. These developments include the greatly increased number of treaty obligations and dispute settlement mechanisms in international law, which gives rise to a much increased probability of normative and jurisdictional conflicts. They also include the decline of territory as a defining feature of international law, particularly with regard to some forms of pollution, common spaces, and the digital world. Although abuse of rights is no longer of

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<sup>118</sup> For further discussion of *jus cogens*, see generally arts. 53 and 64, *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 [hereinafter *Vienna Convention* cited to I.L.M.]; L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law: Historical, Development, Criteria, Present Status* (Helsinki: Finnish Lawyers' Publishing, 1988); S. Kadelbach, *Zwingendes Völkerrecht* (Berlin: Duncker & Humblot, 1992); M. Byers, "Conceptualising the Relationship between *Jus Cogens* and *Erga Omnes* Rules" (1997) 66 *Nordic J. Int'l L.* 211.

<sup>119</sup> See generally *Barcelona Traction Case*, *supra* note 30 at paras. 33-35; Schachter, *International Law*, *supra* note 40 at 208-13; J. Frowein, "Reactions by Not Directly Affected States to Breaches of Public International Law" (1994) 248 *Rec. des Cours* 345 at 405-22.

<sup>120</sup> See J. Crawford, Special Rapporteur, *First Report on State Responsibility (Addendum)*, UN ILC, 50th Sess., UN Doc. A/CN.4/490/Add.1 (I May 1998) 2, online: ILC <<http://www.un.org/law/ilc/sessions/50/english/n9811945.pdf>> (date accessed: 6 May 2002). For commentary on this decision, see G. Abi-Saab, "The Uses of Article 19" (1999) 10 *Eur. J. Int'l L.* 339; A. Pellet, "Can a State Commit a Crime? Definitely, Yes!" (1999) 10 *Eur. J. Int'l L.* 425. On international crimes, see generally article 19 of the *Draft Articles on State Responsibility* as adopted by the Commission on first reading: ILC, *Report on the Forty-Eighth Session*, UN GAOR, 51st Sess., Supp. No. 10, UN Doc. A/51/10 (1996), online: ILC <<http://www.un.org/law/ilc/reports/1996/96repfra.htm>> (date accessed: 6 May 2002); J. Weiler *et al.*, eds., *International Crimes of State: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility* (Berlin: Walter de Gruyter, 1989).



general application in an increasingly sophisticated and detailed international legal system, it retains considerable relevance in these particular areas.

## V. Abuse of Rights and Normative Conflicts

The *Shrimp-Turtle Case* illustrates that abuse of rights can sometimes play an important role in the resolution of normative conflicts.<sup>121</sup> There, the WTO Appellate Body held that a United States import ban on shrimp harvested without approved “turtle excluder devices” fell within the scope of the article XX(g) exception to the GATT as a measure “relating to the conservation of exhaustible natural resources.”<sup>122</sup> It then turned to the chapeau of article XX, which reads:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures ...<sup>123</sup>

The Appellate Body held that these clauses had to be interpreted and applied against the backdrop of abuse of rights:

To permit one Member to abuse or misuse its right to invoke an exception would be effectively to allow that Member to degrade its own treaty obligations as well as to devalue the treaty rights of other Members. If the abuse or misuse is sufficiently grave or extensive, the Member, in effect, reduces its treaty obligation to a merely facultative one and dissolves its juridical character, and, in so doing, negates altogether the treaty rights of other Members.<sup>124</sup>

The Appellate Body then engaged in what it referred to as the “delicate” task “of locating and marking out a line of equilibrium between the right of a Member to invoke

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<sup>121</sup> *Supra* note 43. In support of its invocation of abuse of rights, the Appellate Body cited Cheng, *supra* note 4 at 125; Jennings & Watts, *supra* note 86 at 407-10; *Case Concerning Border and Transborder Armed Actions (Nicaragua v. Honduras)*, [1988] I.C.J. Rep. 69 at 105; *United States Nationals in Morocco Case*, *supra* note 73; *Fisheries Case*, *supra* note 26 at 142. It is possible that the Appellate Body’s first reference to abuse of rights was in fact in *United States—Standards for Reformulated and Conventional Gasoline (Complaint by the United States)* (1996), WTO Doc. WT/DS2/AB/R (Appellate Body Report), online: WTO <[http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_status\\_e.htm#1996](http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm#1996)> (date accessed: 6 May 2002). But there the reference was to “abuse or illegitimate use of the exceptions to substantive rules available in Article XX” (*ibid.* at para. 27). The term “abuse of rights” or “abus de droit” was not specifically invoked. See J. Waincymer, “Reformulated Gasoline Under Reformulated WTO Dispute Settlement Procedures: Pulling Pandora Out of a Chapeau?” (1996) 18 *Mich. J. Int’l L.* 141.

<sup>122</sup> *Shrimp-Turtle Case*, *supra* note 43 at paras. 125-45.

<sup>123</sup> The chapeau serves as an introductory clause to article XX, see *ibid.* at para. 113.

<sup>124</sup> *Ibid.* at para. 156.



an exception ... and the rights of the other Members under varying substantive provisions.”<sup>125</sup>

At least two subsequent WTO panels have also invoked the principle of abuse of rights more particularly in situations involving a prohibition on asbestos imports and a failure to implement the recommendations of a WTO panel and the Appellate Body within a reasonable period of time.<sup>126</sup> Abuse of rights is thus helping to resolve not only the tensions that currently exist between international trade principles and environmental, health, and similar concerns,<sup>127</sup> but also tensions between different ambiguously defined rights within the WTO dispute settlement process.

Normative conflicts of this kind would appear to be increasing in number, for “[a]s a society becomes more integrated more obligations are laid upon its members and the rights of each subject of law become also more restricted.”<sup>128</sup> Some authors have already recognized that rules of a conflicts of law character are required in international law, just as they have long been needed in national legal systems.<sup>129</sup> From the

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<sup>125</sup> *Ibid.* at para. 159. The Appellate Body also noted that the location of this line “moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ.” In this instance, it found that the State Department, without taking into consideration conditions within other WTO members, required them to adopt essentially the same regulatory program as the U.S., and that it had failed to engage in serious negotiations for the protection of sea turtles. Instead, it opted for negotiations with regard to some members and a unilateral import ban, imposed through non-transparent, *ex parte* processes, with regard to others. This constituted unjustifiable as well as arbitrary discrimination, and therefore violated article XX.

<sup>126</sup> See *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products (Complaint by Canada)* (2000), WTO Doc. WT/DS135/R at para. 8.259 (Panel Report), online: WTO <[http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_status\\_e.htm#2000](http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm#2000)> (date accessed: 6 May 2002) [hereinafter *Asbestos Case*]; *United States—Import Measures on Certain Products from the European Communities (Complaint by the European Communities)* (2000), WTO Doc. WT/DS165/R at para. 6.112 (Panel Report), online: WTO <[http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_status\\_e.htm#2000](http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm#2000)> (date accessed: 6 May 2002).

<sup>127</sup> For further discussion on this tension, see generally “Symposium: The *United States—Import Prohibition of Certain Shrimp and Shrimp Products Case*” (1998) 9 Y.B. Int’l Env. L. 3; D. Ahn, “Environmental Disputes in the GATT/WTO: Before and After US-Shrimp Case” (1999) 20 Mich. J. Int’l L. 819; H. Nordström & S. Vaughan, *Trade and Environment* (Geneva: World Trade Organization, 1999).

<sup>128</sup> Cheng, *supra* note 4 at 131.

<sup>129</sup> See e.g. W. Czaplinski & G. Danilenko, “Conflicts of Norms in International Law” (1990) 21 Netherl. Y.B. Int’l L. 3; A.E. Boyle, “Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction” (1997) 46 I.C.L.Q. 37; J.B. Mus, “Conflicts Between Treaties in International Law” (1998) 45 Netherl. Int’l L. Rev. 208; J. Charney, “Is International Law Threatened by Multiple International Tribunals?” (1998) 271 Rec. des Cours 101; “Symposium Issue: The Proliferation of International Tribunals: Piecing Together the Puzzle” (1999) 31 N.Y.U. J. Int’l L. & Pol. 679.



common law tradition, the principles of *res judicata* and *lis peudens* are needed to resolve conflicts between the differing jurisdictions and decisions of an increasing number of international courts and tribunals. The principles of *lex posteriori* and *lex specialis* are already being used to resolve conflicts between differing treaty obligations,<sup>129</sup> while the concept of *ordre public*, in the form of *jus cogens*, is sometimes invoked by courts and tribunals struggling to deal with conflicting rights, obligations, and interests.<sup>131</sup> But as has already been explained, *jus cogens* rules provide only a partial answer to conflicts of law situations in international law, much as concepts of *ordre public* provide only a partial answer to conflicts in and between national legal systems.<sup>132</sup> It is in this context of an increasingly dense and complex international legal system, brimming with potential conflicts of law, that the principle of abuse of rights continues to find application.

When abuse of rights was discussed by the ILC during the 1960s and 1970s, A.J.P. Tammes argued that the principle was a special source of state responsibility in situations where “there was no clearly defined interaction of rights and obligations and the rights remained undivided in law.”<sup>133</sup> Francisco García-Amador, acting then as the commission’s first Special Rapporteur on State Responsibility, took a similar approach,<sup>134</sup> while his successor, Roberto Ago, altered the language somewhat by proposing a “primary rule” to the effect “that States were under an international obligation not to exercise their rights beyond a certain limit.”<sup>135</sup> Terminological differences aside, these members of the ILC recognized that abuse of rights may be particularly

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<sup>129</sup> On *lex posteriori*, see *Vienna Convention*, *supra* note 118, art. 30(3) at 691. On *lex specialis*, see A. McNair, *The Law of Treaties* (Oxford: Clarendon Press, 1961) at 219-20; G. Fitzmaurice, “The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Points” (1957) 33 *Brit. Y.B. Int’l L.* 203 at 236-38. For a discussion of earlier applications of both principles, see *Mavrommatis Palestine Concessions (Jurisdiction) Case* (1924), P.C.I.J. (Ser. A) No. 2 at 32; *European Commission of the Danube (Advisory Opinion)* (1927), P.C.I.J. (Ser. B) No. 14 at 23.

<sup>131</sup> On *jus cogens*, see generally *supra* note 118.

<sup>132</sup> See discussion above, Part IV. That said, where such peremptory rules do exist, they will supersede the principle of abuse of rights in their application. See *e.g.* article 26 of the *Draft Articles on State Responsibility*, *supra* note 56: “Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.”

<sup>133</sup> “1075th Meeting” in *Yearbook of the International Law Commission 1970*, vol. 1 (New York: United Nations, 1971) 181 at para. 40.

<sup>134</sup> *Supra* note 50 at 57-58. For further discussion see Part II above.

<sup>135</sup> R. Ago, “The Internationally Wrongful Act of the State, Source of International Responsibility” 3rd report on State responsibility (UN Doc. A/CN.4/246 and Add. 1-3) in *Yearbook of the International Law Commission 1971*, vol. 2, part 1 (New York: United Nations, 1973) 199 at para. 68 (CN.4/SER.A/1971/Add.1 (Part 1)). Ago proposed this change so that the constituent element of the wrongful act would “still be represented by the violation of an obligation and not by the exercise of a right” (*ibid.* at para. 68).



useful when there is a lack of clarity as to the limits needed to resolve or prevent normative conflicts. That said, the principle should not be regarded as a substitute for other criteria such as good faith, reasonableness, or normal administration, if those are already clearly set out as part of an existing rule.<sup>136</sup>

Along similar lines, Vaughan Lowe proposes that concepts such as sustainable development and abuse of rights are best regarded as “interstitial norms”.<sup>137</sup> Such norms do not have any “independent normative charge of their own” but instead “direct the manner in which competing or conflicting norms that do have their own normativity should interact in practice.”<sup>138</sup> As Lowe explains:

These interstitial or modifying norms are simply concepts. If the tribunal chooses to adopt the concept, the very *idea* of sustainable development is enough to point the tribunal towards a coherent approach to a decision in cases where development and environment conflict. There is absolutely no need for the concept to have been embodied in State practice coupled with the associated *opinio juris*. Its employment does not depend upon it having normative force of the kind held by primary norms of international law. Tribunals employ interstitial norms not because those norms are obligatory as a matter of law, but because they are necessary in order that legal reasoning should proceed. All that is needed to enable the norms to perform this role is that they be clearly and coherently articulated. ...

These interstitial norms can exercise a very great influence on the system. For instance, the importance of sustainable development in reconciling the conflicting demands of development and the environment can scarcely be overstated.<sup>139</sup>

Lowe considers abuse of rights to be an interstitial norm of growing importance:

The effect of interstitial norms is to set the tone of the approach of international law to contemporary problems, bringing subtlety and depth to the relatively crude, black-and-white quality of primary norms. I have used one example; but I expect there to be many others in the coming decades, during a phase in the development of international law analogous to the development of equity in English law ... The concept of *abus de droit*, already established in the approach of civil lawyers to international law, is likely to achieve much greater prominence as a check upon exercises of legal power by States.<sup>140</sup>

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<sup>136</sup> See I. Brownlie, *Principles of Public International Law*, 5th ed. (Oxford: Clarendon Press, 1998) at 448.

<sup>137</sup> V. Lowe, “The Politics of Law-making: Are the Method and Character of Norm Creation Changing?” in M. Byers, ed., *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford: Oxford University Press, 2000) 207 at 212-21.

<sup>138</sup> *Ibid.* at 216.

<sup>139</sup> *Ibid.* at 217 [emphasis in original].

<sup>140</sup> *Ibid.* at 218.



Whether as a general principle of law or as an “interstitial norm”, the principle of abuse of rights still has an important role to play. Moreover, that role might extend beyond situations of normative conflict into situations where the problem is the absence of a countervailing right rather than the problem of mediating between different rights.

## VI. Abuse of Rights, Common Spaces, and Matters of Common Concern

The principle of abuse of rights may be particularly useful in those situations where rights have traditionally been the least restricted, for example, with regard to activities by states within their own territory. As Francisco García-Amador explained: “[I]t is necessarily true that the doctrine of the abuse of rights finds its widest application in the context of ‘unregulated matters’, that is, matters which ‘are essentially within the domestic jurisdiction’ of States.”<sup>141</sup> One example of such a matter involves nationality, where there is a lack of agreement as to whether the revocation of nationality causing statelessness is prohibited by customary international law.<sup>142</sup> In response, a number of scholars have suggested that unnecessary and extreme but otherwise legal actions taken by a state against its own population, including mass revocations of nationality so as to cause statelessness, could be regarded as abuses of rights.<sup>143</sup>

A second, related example concerns the right of states to expel aliens from their territory. Although in most instances this right is not limited by customary international law, Liechtenstein argued in the *Nottebohm Case* that Guatemala’s refusal to readmit Nottebohm, who had attained permanent resident status there, was an abuse of

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<sup>141</sup> *Supra* note 50 at 60.

<sup>142</sup> See J.M. Chan, “The Right to Nationality as a Human Right: The Current Trend Towards Recognition” (1991) 12 H.R.L.J. 1 at 13-14; R. Plender, “The Legal Basis of International Jurisdiction to Act with Regard to the Internally Displaced” (1994) 6 Int’l. J. Refugee L. 345 at 356 (arguing that there is no such right); J.L. Blackman, “State Succession and Statelessness: The Emerging Right to an Effective Nationality Under International Law” (1998) 19 Mich. J. Int’l L. 1141 at 1191; T.L. Lee, “Refugees from Bhutan: Nationality, Statelessness and the Right to Return” (1998) 10 Int’l J. Refugee L. 118 at 139 (arguing that such a right exists); “Draft articles on nationality of natural persons in relation to the succession of States” in ILC, *Report of the International Law Commission on the work of its fifty-first session*, UN GAOR, 54th Sess., Supp. No. 10, UN Doc. A/54/10 (1999), c. IVE.1 at art. 15, online: ILC <<http://www.un.org/law/ilc/reports/1999/english/99repfra.htm>> (date accessed: 6 May 2002).

<sup>143</sup> See Lauterpacht, *Function of Law*, *supra* note 2 at 300-01; Jennings & Watts, *supra* note 86 at 408; Plender, *ibid.* at 356. Compare P. Weis, *Nationality and Statelessness in International Law* (London: Stevens, 1956) at 116-17, 129.



its right to regulate the admission of aliens because the refusal of re-admission was without just cause and equivalent to an illegal expulsion.<sup>144</sup>

Another area where abuse of rights finds application is with regard to activities that occur outside the territory of any state, in "common spaces" such as the high seas, or in multiple states without any particular territorial nexus, as is the case with the Internet and some sources of pollution. Territory is becoming a less salient feature of the international legal landscape as contemporary problems increasingly reach across and beyond state borders, blurring traditional concepts of sovereignty and responsibility.

The *UNCLOS* and other instruments demonstrate that many states are now willing to surrender some of their freedom to act in common spaces in favour of an environmental common interest, with concepts such as the "common heritage of mankind" having become an accepted part of international law.<sup>145</sup> However, there is still no specific, widely accepted body of law governing the pollution of common spaces. Treaty law, either with regard to the high seas,<sup>146</sup> the Antarctic<sup>147</sup> or space,<sup>148</sup> suffers from both a lack of precision and a limited number of ratifications. For example, in article VII(3) of the "Agreed Measures for the Conservation of Antarctic Fauna and Flora" the contracting parties affirm with regard to marine pollution: "Each Participating Government shall take all reasonable steps towards the alleviation of pollution of the waters adjacent to the coast and ice shelves."<sup>149</sup> Similarly, the pollution provisions of the *UNCLOS* focus on the obligations of individual states to "adopt laws and regulations to prevent, reduce and control pollution."<sup>150</sup> As Alan Boyle points out with

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<sup>144</sup> *Nottebohm Case*, *supra* note 27. See also *Boffolo Case*, *supra* note 42; Politis, *supra* note 58 at 101-09. See generally G. Goodwin-Gill, *International Law and the Movement of Persons between States* (Oxford: Clarendon Press, 1978) at 201-310.

<sup>145</sup> See art. 136 *UNCLOS*, *supra* note 35 at 1293; K. Baslar, *The Concept of the Common Heritage of Mankind in International Law* (The Hague: Martinus Nijhoff, 1998); R.St.J. Macdonald, "The Common Heritage of Mankind" in U. Beyerlin *et al.*, eds., *Recht zwischen Umbruch und Bewahrung: Festschrift für Rudolf Bernhardt* (Berlin: Springer-Verlag, 1995) 153. On international environmental law generally, see Birnie & Boyle, *supra* note 57.

<sup>146</sup> See *UNCLOS*, *ibid.*; *United Nations Convention on the High Seas*, 29 April 1958, 450 U.N.T.S. 11.

<sup>147</sup> *Antarctic Treaty*, 1 December 1959, 402 U.N.T.S. 71, 12 U.S.T. 794; *Conference on the Conservation of Antarctic Marine Living Resources*, 20 May 1980, 19 I.L.M. 837.

<sup>148</sup> See *United Nations: Draft Convention on Liability for Damage Caused by Objects Launched into Outer Space, Report of the Legal Sub-Committee of its Tenth Session*, UN Legal Sub-Committee, 1971, UN Doc. A/A.C.105/94, 10 I.L.M. 965.

<sup>149</sup> Appendix to *Antarctica: Measures in Furtherance of Principles and Objectives of the Antarctic Treaty*, Recommendations of Third Antarctic Treaty Consultative Meeting, 2-13 June 1964, 17 U.S.T. 991 at 999 (TIAS 6058).

<sup>150</sup> *UNCLOS*, *supra* note 35, art. 207 (pollution from land-based sources). See also *UNCLOS* arts. 208 (pollution from sea-bed activities subject to national jurisdiction), 210 (pollution by dumping), 211 (pollution from vessels), 212 (pollution from or through the atmosphere).



regard to the latter treaty, “To say that states have a duty to regulate pollution is to beg the question what regulations they must adopt, a question the Convention does not satisfactorily answer.”<sup>151</sup> Boyle goes on to write that “there is an insidious uncertainty about too much of the phraseology and a danger it may be used to undermine the Convention’s effectiveness.”<sup>152</sup>

The existence of detailed customary international law with regard to pollution in these areas is doubtful,<sup>153</sup> in part because state practice indicates that many governments feel that they can, with impunity, permit pollution to occur.<sup>154</sup> Similar problems exist with regard to high seas fishing and whaling.<sup>155</sup>

Moreover, almost all the instruments that address pollution in common spaces deal with the issue of liability in terms of damage to natural or juridical persons,<sup>156</sup> with some only providing the possibility of compensation for injuries caused within state territory.<sup>157</sup> The 1988 *Convention on the Regulation of Antarctic Mineral Re-*

<sup>151</sup> A. Boyle, “Marine Pollution under the Law of the Sea Convention” (1985) 79 A.J.I.L. 347 at 357.

<sup>152</sup> *Ibid.* at 357. See also J.P.A. Bernhardt, “A Schematic Analysis of Vessel-Source Pollution: Prescriptive and Enforcement Regimes in the Law of the Sea Conference” (1979) 20 Va. J. Int’l L. 265.

<sup>153</sup> See Boyle, *ibid.* at 366.

<sup>154</sup> Greenpeace estimates that 568,000 tons of oil are dumped or spilled into the oceans each year by the shipping industry. Oil platforms account for additional spills but Greenpeace makes no estimates on that figure. See Greenpeace Research Laboratories, “Report on the World’s Oceans” (1998), online: Greenpeace <<http://www.greenpeace.org/~oceans/>> (date accessed: 6 May 2002). An industry group, the International Tanker Owners Pollution Federation Limited, estimates that in the 1990s anywhere from 9,000 tons (in 1995) to 435,000 tons (in 1991) of oil were spilled by tankers. The group reports that annual spill rates vary dramatically year by year, but in the aggregate there has been a downward trend in spills from oil tankers. See “ITOPF Historical Data: Statistics,” online: International Tanker Owners Pollution Federation <<http://www.itopf.com/stats.html>> (date accessed: 6 May 2002).

<sup>155</sup> For further discussion on high seas fishing, see W.T. Burke, *The New International Law of Fisheries: UNCLOS 1982 and Beyond* (Oxford: Clarendon Press, 1994); R. Rayfuse, “Enforcement of High Seas Fisheries Agreements: Observation and Inspection under the Convention on the Conservation of Antarctic Marine Living Resources” (1998) 13 Int’l J. Marine & Coastal L. 579 at 585; N. Nelson, “International Concern for the Sustainability of the World’s Fisheries: United Nations Efforts to Combat Over-Fishing and International Debate Over State Fishing Subsidies” (1999) Colo. J. Int’l Envtl. L. & Pol’y 157. On whaling, see H.S. Schiffman, “The Protection of Whales in International Law: A Perspective for the Next Century” (1996) 22 Brooklyn J. Int’l L. 303; J.D. Lindemann, “The Dilemma of the International Whaling Commission: The Loophole Provisions of the Commission vs. the World Conscience” (1998) 7 Detroit J. Int’l L. & Pract. 491.

<sup>156</sup> See Principle 22 of the 1972 *Stockholm Declaration*, *supra* note 57 and Principle 13 of the 1992 *Rio Declaration*, *supra* note 57; *UNCLOS*, *supra* note 35. See generally M. Arsanjani & W.M. Reisman, “The Quest for an International Liability Regime for the Protection of the Global Commons” in K. Wellens, ed., *International Law: Theory and Practice. Essays in Honour of Eric Suy* (The Hague: Martinus Nijhoff, 1998) 469.

<sup>157</sup> See *e.g.* *International Convention on Civil Liability for Oil Pollution Damage*, 29 November 1969, 973 U.N.T.S. 3, art. 2.



*source Activities* was a striking exception to the general pattern in that it provided the possibility of compensation for harm caused to the Antarctic environment independent of that harm's consequences for individual persons.<sup>158</sup> However, the Convention never entered into force and it was superseded by the 1991 *Madrid Protocol on Environmental Protection to the Antarctic Treaty*.<sup>159</sup> And while the *Madrid Protocol* put in place a moratorium on Antarctic mining, it does not, as yet, contain a liability regime.<sup>160</sup>

As was explained above, the ILC has avoided the issue of common spaces when preparing its *Draft Articles on Injurious Consequences*.<sup>161</sup> The commission attempted to pre-empt criticism of its decision not to deal with liability for injurious consequences except in transboundary situations by defining "transnational harm" in an extremely broad manner, as "harm caused in the territory of or in other places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned share a common border."<sup>162</sup> In its commentary to the draft articles, however, the commission specified that transnational harm includes, *inter alia*, "injurious impacts on ships or platforms of other States on the high seas."<sup>163</sup> The focus throughout is on harm caused to individual states rather than harm caused to common spaces such as the high seas, Antarctica, or space.

The decision not to include harm caused to common spaces was criticized by several states in their responses to a version of the *Draft Articles on Injurious Consequences* circulated in 1998. For example: "The Netherlands deplores the absence of a provision on the obligation to prevent damage to common areas, i.e., areas beyond the limits of national jurisdiction."<sup>164</sup> Italy not only disagreed with the decision, it also

<sup>158</sup> 25 November 1988, 27 I.L.M. 859. Art. 8(2)(a) reads: "An Operator shall be strictly liable for ... damage to the Antarctic environment or dependent or associated ecosystems arising from its Antarctic mineral resource activities, including payment in the event that there has been no restoration to the *status quo ante*." See generally R. Wolfrum, *The Convention on the Regulation of Antarctic Mineral Resource Activities* (Berlin: Springer-Verlag, 1991); A. Watts, *International Law and the Antarctic Treaty System* (Cambridge: Grotius, 1992) at 165-204; C.C. Joyner, *Governing the Frozen Commons* (Columbia: University of South Carolina Press, 1998) at 149, 169-73.

<sup>159</sup> 3 October 1992, 30 I.L.M. 1455, online: Antarctica Online <<http://www.antdiv.gov.au/information/treaty/protocol.asp>> (date accessed: 6 May 2002) [hereinafter *Madrid Protocol*]. See generally L. Pineschi, "The Madrid Protocol on the Protection of the Antarctic Environment and Its Effectiveness" in F. Francioni & T. Scovazzi, eds., *International Law for Antarctica* (The Hague: Kluwer Law International, 1996) 261.

<sup>160</sup> See *Madrid Protocol*, *ibid.*, art. 16, which simply postpones negotiations on rules and procedures concerning liability. See generally F. Francioni, "Liability for Damage to the Antarctic Environment" in Francioni & Scovazzi, eds., *ibid.* 581.

<sup>161</sup> *Supra* note 57. See discussion above, notes 56-57 and accompanying text.

<sup>162</sup> *Ibid.*, art. 2(c).

<sup>163</sup> *Ibid.*

<sup>164</sup> ILC, Report of the Secretary-General, *International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law (Prevention of Transboundary Damage from Haz-*



pointed out that the ICJ, in its advisory opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, “had referred to prevention specifically in relation to regions over which no State had sovereignty.”<sup>165</sup>

In contrast, the *Draft Articles on State Responsibility* would extend to common spaces, for instance, through the application of article 48(1): “Any State other than an injured State is entitled to invoke the responsibility of another State ... if ... (b) The obligation breached is owed to the international community as a whole.”<sup>166</sup> However, the *Draft Articles on State Responsibility* are premised on the existence of an “internationally wrongful act of a State”, in other words, “a breach of an international obligation of the State.”<sup>167</sup> In addition, they are inapplicable where clear legal rules do not yet limit the exercise of states’ rights in common spaces, at least since the ILC created a distinction between wrongful and lawful activities within the law of state responsibility, broadly speaking.<sup>168</sup> And with “international liability for injurious consequences of acts not prohibited by international law” being the new paradigm for dealing with environmental harm in transboundary situations, the more traditional approach of developing new obligations to limit old rights could become all the more difficult with regard to other kinds of environmental harm.

That said, as the problem of extraterritorial pollution becomes increasingly serious, and fish stocks and whale populations suffer further declines, treaties and rules of customary international law will undoubtedly be developed to provide more precise rules for common spaces. This will take time, with progress requiring the co-operation of the vast majority of states, many of which face contradictory and often pervasive pressures, such as feeding, employing, and housing their people. It is also clear that pollution, over-fishing, and whaling disputes arising in common spaces will increasingly be taken to international courts and tribunals, even before any specific law evolves. Early examples of this trend include the *Fisheries Jurisdiction Case*,<sup>169</sup> where

*ardous Activities*), UN GA ILC, 52d Sess., UN Doc. A/CN.4/509 at 5 (17 April 2000), online: ILC <<http://www.un.org/law/ilc/sessions/52/english/acn4509e.pdf>> (date accessed: 6 May 2002).

<sup>165</sup> ILC, *Report on the fiftieth session*, UN GAOR, 53d Sess., UN Doc. A/C.6/53/SR.15 at para. 65. For a contrary view, see China’s comments, UN Doc. A/C.6/53/SR.14 at para. 40.

<sup>166</sup> *Supra* note 56.

<sup>167</sup> *Ibid.*, art. 2(b).

<sup>168</sup> The distinction has been described as “fundamentally misconceived”. See I. Brownlie, *State Responsibility* (Oxford: Clarendon Press, 1983) at 50. See similarly M.B. Akehurst, “International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law” (1985) 16 *Netherl. Y.B. Int’l L.* 3 at 8. For a lengthy analysis of the distinction, see Boyle, “State Responsibility”, *supra* note 57.

<sup>169</sup> (*Spain v. Canada*), [1998] I.C.J. Rep. 4. The dispute concerned the adoption of national legislation enabling the seizure of foreign fishing vessels on the high seas, and the subsequent arrest of a Spanish trawler pursuant to that legislation. The court concluded that it did not have jurisdiction because of a reservation concerning fisheries conservation measures, entered into by Canada in 1994, in respect of its acceptance of compulsory jurisdiction.



Spain sought to take Canada to the ICJ over unilateral efforts to protect straddling fish stocks, and the *Southern Bluefin Tuna Cases*, where Australia and New Zealand sought to take Japan to arbitration under Annex VII of the *UNCLOS*.<sup>170</sup>

In the absence of more specific rules and principles, international courts and tribunals faced with these issues could, and probably should, look to abuse of rights as a general principle of law whose violation in itself constitutes a wrong giving rise to state responsibility. Applying the principle to common spaces, a state's right to pollute or extract resources would be weighed against international society's interest in a clean, sustainable environment.<sup>171</sup> Initially, state rights might be accorded considerable weight. But though it remains uncertain at what point international courts and tribunals would accept and apply the broad powers offered by abuse of rights with regard to these issues, as the global environment becomes increasingly threatened, the balance will eventually shift in favour of community interests. When and how it does so will depend on how important the interest in a clean environment is considered to be, and the ambient perception of how much degradation can be tolerated.

In this context, it should be noted that rights may be abused either immediately or prospectively. The interest in clean oceans would be injured in an immediate manner if, by some catastrophic accident, the biota of an entire ocean were eliminated by the discharge of some horrendously poisonous substance. Yet the same interest would also be injured by any small spill of a destructive substance, although that spill might not itself cause widespread damage. In itself, a small spill will not amount to an abuse of rights. However, if the exercise of the right to discharge a small quantity denies the interest in a clean ocean *in concert with* similar exercises of that right by others, then

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<sup>170</sup> The dispute concerned the conservation and management of southern bluefin tuna under the *Convention for the Conservation of Southern Bluefin Tuna*, 10 May 1993, A.T.S. 1994 No. 16, online: Australian Legal Information Institute <<http://www.austlii.edu.au/au/other/dfat/treaties/1994/16.html>> (date accessed: 6 May 2002). Provisional measures were granted by the International Tribunal for the Law of the Sea. See *New Zealand v. Japan, Australia v. Japan (Provisional Measures)* (1999), Cases Nos. 3 and 4, online: International Tribunal for the Law of the Sea <[http://www.itlos.org/start2\\_en.html](http://www.itlos.org/start2_en.html)> (date accessed: 6 May 2002). The arbitral tribunal that was subsequently constituted to hear the case, however, held that article 16 of the 1993 Convention requires the consent of all parties for adjudication or arbitration under the *UNCLOS*, and that Japan had not consented. See *Australia and New Zealand v. Japan* (2000), (Arbitral Tribunal, Arbitrators: Schwebel, Feliciano, Keith, Tresselt, Yamada), online: International Centre for Settlement of Investment Disputes <<http://www.worldbank.org/icsid/bluefintuna/main.htm>> (date accessed: 6 May 2002).

<sup>171</sup> The development of substantive rules on the protection of common spaces does not, of course, in itself provide standing for the enforcement of such rules. Although the issue of standing is not addressed here, the development of enforcement mechanisms usually follows, rather than predates, the creation of substantive rules. For a useful overview of the standing issue, see J. Charney, "Third State Remedies for Environmental Damage to the World's Common Spaces" in F. Francioni & T. Scovazzi, eds., *International Responsibility for Environmental Harm* (London: Graham & Trotman, 1991) 149.



any of the contributing acts might be regarded as abusive. Lauterpacht hinted at this balance when he wrote that there is an abuse of rights “each time the general interest of the community is injuriously affected as the result of the sacrifice of an important social or individual interest to a less important, though hitherto legally recognized, individual right.”<sup>172</sup>

It is also noteworthy that developments in international environmental law are beginning to extend beyond the usual situations of transboundary pollution and efforts to protect common spaces into “matters of common concern” that fit neither of these more traditional paradigms.<sup>173</sup> As with the nationality and expulsion of aliens examples referred to above, how states behave within their territories can sometimes cause disproportionate harm to the particular or common interests of other states, even if those states are not neighbours. When such instances are not already governed by more specific principles, abuse of rights could, and perhaps already does, apply.

## VII. Abuse of Rights and the Promotion of Normative Change

Abuse of rights may also play a role in promoting legal change. As Lowe suggests, abuse of rights may encourage the development of more precise principles limiting the exercise of rights, or at least greater specificity in the drafting of treaties, as part of a general move towards the greater inclusion of equitable concepts in international law.<sup>174</sup> For example, the meaning of the chapeau to article XX of the GATT might well be clarified by way of a further agreement among the member states of the WTO as a result, in part, of the Appellate Body’s decision in the *Shrimp-Turtle Case*.<sup>175</sup> A more likely development, however, is that repeated applications of abuse of rights to the chapeau will result in greater specificity through the resulting body of

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<sup>172</sup> Lauterpacht, *Function of Law*, *supra* note 2 at 286.

<sup>173</sup> See F. Kirgis, “Standing to Challenge Human Endeavors that Could Change the Climate” (1990) 84 A.J.I.L. 525 at 527; J. Brunnée & S. Toope, “Environmental Security and Freshwater Resources: A Case for International Ecosystem Law” (1994) 5 Y.B. Int’l Env. L. 41 at 73-74; the Preamble to the 1992 *United Nations Conference on Environment and Development: Convention on Biological Diversity*, 4 June 1993, Can. T.S. 1993 No. 24, 31 I.L.M. 818, online: [Convention on Biological Diversity <http://www.biodiv.org/convention/articles.asp>](http://www.biodiv.org/convention/articles.asp) (date accessed: 6 May 2002), which states that “the conservation of biological diversity is a common concern of humankind”; the Preamble to the 1992 *United Nations Conference on Environment and Development: Framework Convention on Climate Change*, 19 June 1993, Can. T.S. 1994 No. 7, 31 I.L.M. 849, online: [United Nations Framework Convention on Climate Change <http://unfccc.int/resource/conv/index.html>](http://unfccc.int/resource/conv/index.html) (date accessed: 6 May 2002), which states that “change in the Earth’s climate and [the] adverse effects [of rapid climate change] are a common concern of humankind.”

<sup>174</sup> Lowe, *supra* note 137 at 208. See discussion above, Part V.

<sup>175</sup> *Supra* notes 121-22 and accompanying text. See discussion above, Part V.



case law, which might eventually make the express articulation of abuse of rights no longer required.<sup>176</sup>

As Wolfgang Friedmann explained with regard to the expropriation of foreign-owned property:

In the present greatly diversified family of nations—which comprises states of starkly differing stages of economic development, as well as of conflicting political and social ideologies—the notions, for example, of “equity,” “reasonableness” or “abuse of rights” ... do, and are bound to, differ widely. What to the one party is an abuse is to the other the reassertion of a long withheld “natural” right. It is therefore in the individualizing application of such guideposts by impartial arbiters to concrete and unique situations that such principles as equity or abuse of rights can contribute to the evolution of a new balance of rights and duties in many fields of international law.<sup>177</sup>

In some contexts, this process may lead to the development of sub-principles, such as the neighbour principle, that render the more general principle of abuse of rights redundant there.<sup>178</sup> And as Lowe explains, abuse of rights could play this and other roles even if it were not itself a positive rule of international law.<sup>179</sup> One such way is by reaffirming, through its very invocation and application, that the rights of states are no longer general and primordial. With time, this reaffirmation could contribute to changing how people, both within the discipline of international law and without, think about states, their rights, and perhaps even the very character of international law.<sup>180</sup> The end result could well be new positive rules of international law directed at the very same goals.

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<sup>176</sup> See Kiss, *Droit international de l'environnement*, *supra* note 78. For the beginnings of greater specificity, see especially the *Asbestos Case*, *supra* note 126 at paras. 8.160ff.

<sup>177</sup> W. Friedmann, “The Uses of ‘General Principles’ in the Development of International Law” (1963) 57 A.J.I.L. 279 at 289-90 [footnotes omitted]. See also Handl, *supra* note 86 at 57.

<sup>178</sup> See discussion above, Part IV.

<sup>179</sup> See Part V above. Ian Brownlie writes, “[I]t may be said that the doctrine is a useful agent in the progressive development of the law, but that, as a general principle, it does not exist in positive law.” *Supra* note 136 at 448. See also B.D. Smith, *State Responsibility and the Marine Environment* (Oxford: Clarendon Press, 1988) at 85: “When international law defines conduct as wrongful it is by reference to rules, such as the obligation to prevent environmental harm, which may reflect the logic of abuse of rights; it is not, however, by recourse to the abstraction of abuse of rights itself.”

<sup>180</sup> Recent international relations literature on “constructivism” is of some relevance here. See e.g. J.G. Ruggie, *Constructing the World Polity: Essays on International Institutionalization* (London: Routledge, 1998); A. Wendt, *Social Theory of International Politics* (Cambridge: Cambridge University Press, 1999); J. Brunnée & S. Toope, “International Law and Constructivism: Elements of an Interactional Theory of International Law” (2000) 39 Colum. J. Transnat'l L. 19.



## Conclusion

This article argues that abuse of rights is a long-standing general principle of law that continues to play an important role in certain limited contexts by imposing restrictions on, or mediating between, state rights otherwise characterized as general or primordial. Within national legal systems, each actor's rights are necessarily limited by the rights and interests of others. Thanks in part to the principle of abuse of rights, the same holds true in international law.

The principle also plays a role in the promotion of legal change. In an international society that itself continues to experience rapid and far-reaching change, long-standing general principles of law such as abuse of rights help to extend legal controls to previously unregulated areas, and to fill new gaps as they appear. As international lawyers rush forward to meet the challenges of the twenty-first century, they would be wise not to leave abuse of rights, one of their most basic tools, behind.

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# ANNEX 239







**UNITED STATES - IMPORT PROHIBITION OF  
CERTAIN SHRIMP AND SHRIMP PRODUCTS**

**AB-1998-4**

*Report of the Appellate Body*



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the existing language of the chapeau of Article XX by examining its ordinary meaning, in light of its context and object and purpose in order to determine whether the United States measure at issue qualifies for justification under Article XX. It is proper for us to take into account, as part of the context of the chapeau, the specific language of the preamble to the *WTO Agreement*, which, we have said, gives colour, texture and shading to the rights and obligations of Members under the *WTO Agreement*, generally, and under the GATT 1994, in particular.

156. Turning then to the chapeau of Article XX, we consider that it embodies the recognition on the part of WTO Members of the need to maintain a balance of rights and obligations between the right of a Member to invoke one or another of the exceptions of Article XX, specified in paragraphs (a) to (j), on the one hand, and the substantive rights of the other Members under the GATT 1994, on the other hand. Exercise by one Member of its right to invoke an exception, such as Article XX(g), if abused or misused, will, to that extent, erode or render naught the substantive treaty rights in, for example, Article XI:1, of other Members. Similarly, because the GATT 1994 itself makes available the exceptions of Article XX, in recognition of the legitimate nature of the policies and interests there embodied, the right to invoke one of those exceptions is not to be rendered illusory. The same concept may be expressed from a slightly different angle of vision, thus, a balance must be struck between the *right* of a Member to invoke an exception under Article XX and the *duty* of that same Member to respect the treaty rights of the other Members. To permit one Member to abuse or misuse its right to invoke an exception would be effectively to allow that Member to degrade its own treaty obligations as well as to devalue the treaty rights of other Members. If the abuse or misuse is sufficiently grave or extensive, the Member, in effect, reduces its treaty obligation to a merely facultative one and dissolves its juridical character, and, in so doing, negates altogether the treaty rights of other Members. The chapeau was installed at the head of the list of "General Exceptions" in Article XX to prevent such far-reaching consequences.

157. In our view, the language of the chapeau makes clear that each of the exceptions in paragraphs (a) to (j) of Article XX is a *limited and conditional* exception from the substantive obligations contained in the other provisions of the GATT 1994, that is to say, the ultimate availability of the exception is subject to the compliance by the invoking Member with the requirements of the chapeau.<sup>151</sup> This interpretation of the chapeau is confirmed by its negotiating

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<sup>151</sup>This view is consistent with the approach taken by the panel in *United States – Section 337 of the United States Tariff Act of 1930*, which stated:

Article XX is entitled "General Exceptions" and ... the central phrase in the introductory clause reads: "nothing in this Agreement shall be construed to prevent the adoption or enforcement ... of measures...". Article XX(d) thus provides a *limited and conditional exception from obligations under other provisions*.<sup>151</sup> (emphasis added) Adopted 7 November 1989, BISD 365/345, para. 5.9.



# ANNEX 240







# GENERAL PRINCIPLES OF LAW AND INTERNATIONAL DUE PROCESS

Principles and Norms Applicable  
in Transnational Disputes

Charles T. Kotuby Jr. and Luke A. Sobota

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damages.<sup>108</sup> There are practical reasons for this. In the commercial arbitration context, “tribunals rightly tend to avoid making awards that are difficult to enforce.”<sup>109</sup> In the investor-state context, this may be attributed to a concern that *restitutio in integrum* would infringe upon sovereign prerogatives or to the reality that suits are typically brought only when the “investment relationship ha[s] broken down,” such that claimants are primarily interested in compensation.<sup>110</sup>

These variances aside, there remains a baseline principle that is universally applied in the event of a breach: *some* sort of reparation must follow. As Cheng observed, “[r]eparation is the indispensable complement of a failure to ‘follow a contract’ and there is no necessity for this to be stated in the [contract] itself.”<sup>111</sup> Any breach of an engagement, whatever its duration or materiality, involves an obligation to make reparation so that each party may place entire confidence in the good faith of the other. General principles governing reparation are discussed in chapter 2.F.

## B. Abuse of Rights and the Principle of Proportionality

*There is no legal right, however well established, which could not, in some circumstances, be refused recognition on the ground that it has been abused.*

—Sir Hersch Lauterpacht<sup>112</sup>

The negative corollary of the good faith exercise of a legal entitlement is the universal prohibition on abuse of rights. This principle relates not to how rights are obtained (*viz.*, by law or contract), but to how they are exercised.<sup>113</sup> As Cheng

108 CRCICA Award No. 6/1985, in *ARBITRAL AWARDS OF THE CAIRO REGIONAL CENTRE OF INTERNATIONAL COMMERCIAL ARBITRATION* 189 (Mohie Eldin I. Alam Eldin ed., 2000) (“It is an established principle of law . . . that an aggrieved party is entitled to damages for losses suffered and profit lost which flow as a direct and normal consequence of the breach by the other party. In other words, the party must be put in the same position as he would have been in if the breach had not occurred. The Claimant was awarded damages on that basis.”); *Karaha Bodas Co. L.L.C. v. Pertamina and PT. PLN (Persero)*, *INT’L ARB. REP.*, at C-2, § 79 (Mar. 2001) (“There can be no doubt that in case of breach of contract, the prejudiced party is entitled to damages. This general principle of law, which is part of Indonesian law, has not been disputed by either party.”).

109 REDFERN & HUNTER, *supra* note 103, § 9.53.

110 Christoph Schreuer, *Non-pecuniary Remedies in ICSID Arbitration*, 20(4) *ARB. INT’L* 325, 332 (2004).

111 CHENG, *supra* note 2, at 113 (quoting *Factory at Chorzów (Fed. Rep. Ger. v. Pol.)*, Merits, Judgment, 1928 P.C.I.J. (Ser. A.) No. 17, at 29 (Sept. 13)).

112 SIR HERSCHE LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* 164 (1958).

113 See GARDINER, *supra* note 27, at 148.



observed, “[e]very right is the legal protection of a legitimate interest, [so] [a]n alleged exercise of a right not in furtherance of such an interest, but with the malicious purpose of injuring others can no[t] claim the protection of the law.”<sup>114</sup> To determine whether a proscribed abuse has occurred, particularly on the part of a State, international courts and tribunals have developed the related principle of proportionality. This chapter discusses both.

### 1. The General Prohibition on the Abuse of Rights

When the term “general principles” was being inserted in the PCIJ Statute, Arturo Ricci-Busatti, the Italian member of the Committee, referred to “abuse of rights” as one of the general principles of law.<sup>115</sup> Since then, numerous judges, arbitrators, and scholars have considered abuse of rights to be part of international law, whether as a general principle of law or as part of customary international law.<sup>116</sup> The principle of abuse of rights has been invoked by States in defense or prosecution of international claims;<sup>117</sup> frequently cited by the ICJ;<sup>118</sup> and applied by inter-state,<sup>119</sup> investor-state,<sup>120</sup> and private arbitration panels.<sup>121</sup>

<sup>114</sup> CHENG, *supra* note 2, at 122–23.

<sup>115</sup> Permanent Court of International Justice: Advisory Committee of Jurists, *Procès-verbaux of the Proceedings of the Committee, June 16th–July 24th 1920, with Annexes*, at 314–15, 335; *Saipem S.p.A. v. People’s Republic of Bangladesh*, ICSID Case No. ARB/05/7, Decision on Jurisdiction, ¶¶ 154–58 (Mar. 21, 2007); *Waguih Elie George Siag & Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Decision on Jurisdiction, ¶¶ 119, 125, 213 (Apr. 11, 2007).

<sup>116</sup> Michael Byers, *Abuse of Rights: An Old Principle, A New Age*, 47 MCGILL L.J. 389, 397 (2002).

<sup>117</sup> A number of States have argued for the applicability of abuse of rights in state-to-state cases, including the United Kingdom in the *Fisheries Jurisdiction Case (U.K. v. Ice)*, Memorial on the Merits of the Dispute Submitted by the Government of the United Kingdom, 1975 I.C.J. Pleadings 266, ¶¶ 153–54 (July 31, 1973); Liechtenstein in the *Nottebohm Case (Liech. v. Guat.)*, Memorial Submitted by the Government of the Principality of Liechtenstein, 1955 I.C.J. Pleadings 21, ¶ 51 (Jan. 26, 1952); Norway in the *Certain Norwegian Loans Case (Fr. v. Nor.)*, 1957 I.C.J. 9, 73 (July 6, 1957) (dissenting opinion of Judge Basdevant); Liberia and Ethiopia in the *South West Africa Case (Eth. v. S. Afr.; Liber. v. S. Afr.)*, Second Phase, Judgment, 1966 I.C.J. 6, at 10 (July 18); Belgium in *Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain)*, Second Phase, Judgment, 1970 I.C.J. 3, 17 (Feb. 5); and Australia in the *Nuclear Tests Case*, see *Nuclear Tests (Austl. v. Fr.)*, Judgment, 1974 I.C.J. 253, 362 (Dec. 20); and the Federal Republic of Yugoslavia in the *Genocide Case*, see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro)*, Provisional Measures, Order, 1993 I.C.J. 325, ¶ 19 (Sept. 13).

<sup>118</sup> See, e.g., *Fisheries Case (U.K. v. Nor.)*, Judgment, 1951 I.C.J. 116, 141–42 (Dec. 18).

<sup>119</sup> See, e.g., *Canada v. France*, 82 INT’L L. REP. 590, ¶ 28 (1986).

<sup>120</sup> See, e.g., *Saipem S.p.A. v. People’s Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award, ¶ 160 (June 30, 2009) (concluding that when a State exercises a right for a purpose that is different from that for which that right was created, this constitutes an abuse of rights).

<sup>121</sup> See, e.g., *The Gibraltar Football Association (GFA)/Union des Associations Européennes de Football (UEFA)*, Arbitration CAS 2002/O/410.



Although a right can be used maliciously with the intent to cause injury, it is more often used as an artifice, with the “form of the law . . . being used to cover the commission of what in fact is an unlawful act.”<sup>122</sup> For instance, although a State is permitted by international law to take private property for the public good under certain circumstances, it cannot pretextually invoke the public good to take property for private profit.<sup>123</sup> Inherent in the cabined right to expropriate is the bona fide pursuit of a legitimate sovereign interest; where that interest is absent, the State lacks the right to expropriate and its false invocation of the right is necessarily abusive.<sup>124</sup> Similarly, Article XX of the General Agreement on Tariffs and Trade (GATT) allows States to impose trade measures that would otherwise conflict with broader GATT provisions to the extent that they are necessary to protect human, animal, or plant life, or exhaustible natural resources. The chapeau to the Article states that the excepted measures are not to be applied in a manner that “would constitute . . . a disguised restriction on international trade.” The WTO Appellate Body has interpreted this to be an “expression” of the “general principle of law” prohibiting the abusive exercise of rights: “To permit one member to abuse or misuse its right to invoke an exception would be effectively to allow that member to degrade its own treaty obligations as well as to devalue the treaty rights of other Members.”<sup>125</sup> The general principle thus serves to provide “additional interpretative guidance” in determining the precise line between the rights and obligations of WTO members.<sup>126</sup>

Given their corrosive effect on the system of law in general, abuses of rights are roundly condemned. It has been recognized since Roman times *that acts taken under the pretense of law, but for an illicit purpose, are not to be countenanced*—*malitis non est indulgendum and ex re sed non ex nomine*.<sup>127</sup> Numerous countries from the civil law tradition have provisions

122 CHENG, *supra* note 2, at 122.

123 *Id.* at 123 (citing the *Walter F. Smith Case*, UNRIAA 913, 917–18 (1929)).

124 *Kelo v. City of New London*, 545 U.S. 469, 490 (2005) (Kennedy, J., concurring) (“transfers intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits, are forbidden”).

125 Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶¶ 156–59, WT/DS58/AB/R (Oct. 12, 1998) (adopted Nov. 6, 1998).

126 *Id.* ¶¶ 156–59.

127 CHENG, *supra* note 2, at 122–23. See also Alexandre Kiss, *Abuse of Rights*, in 1 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (R. Burnhardt ed., 1992).



expressly barring abuse of rights,<sup>128</sup> and the principle has attained a special status under European Union law.<sup>129</sup> Illustrative is Article 7 of the Spanish Civil Code:

The law does not protect abuse of rights or the antisocial exercise of rights. Every act or omission that, by virtue of the intention of the actor, the object thereof, or the circumstances in which it is undertaken manifestly surpasses the normal limits of exercise of a right, causing damage to a third party, shall give rise to liability in damages and to the adoption of judicial or administrative measures that will prevent persistence in the abuse.

Although not as readily apparent in the common law, the principle operates there as well in the form of torts such as nuisance, duress, and abuse of process.<sup>130</sup> Sir Hersch Lauterpacht wrote that “[t]he law of torts . . . is to a large extent a list of wrongs arising out of what society considers to be an abuse of rights.”<sup>131</sup> Almost universally, then, parties must not be allowed to abuse the legal process so as to harm or harass others—in other words, to invoke a “right, power, or competency

128 Bolivian Civil Code art. 107 (a party “is not allowed to exercise their right in a manner contrary to economic or social purpose in which view the right has been given”); German Civil Code art. 226 (“the exercise of a right cannot be allowed when it has the purpose of causing harm to another”); Greek Civil Code art. 281 (“It is prohibited to exercise a right if this exercise clearly exceeds the limits imposed by good faith, good morals or social and economic order of law.”); Mexican Civil Code art. 840 (“It is not lawful to exercise property rights so that their application does not give any result other than to cause harm to a third party, without utility to the owner.”); Civil Code of the Netherlands § 3.13.2 (“A right can be abused, among others, when it is exercised with no other purpose than to damage another person or with another purpose than for which it is granted.”); Paraguayan Civil Code art. 372 (“[R]ights shall be exercised in good faith. Abusive exercise of rights is not protected under the law and involves liability of the person exercising it for the resulting damages, whether he exercises such right for the purpose of causing damages, even if without benefit for himself, or if his actions are contrary to the purposes for which the law recognized such rights.”); Portuguese Civil Code art. 334 (“The exercise of a right is illegitimate when the holder clearly exceeds the limits imposed by good faith, good customs or the social or economic goal of that right.”); Swiss Civil Code art. 2 of preliminary title (“Everyone must, in the exercise of his rights and in the performance of his duties, act with truth and faith. The open misuse of a right finds no protection in the law.”). See generally Byers, *supra* note 116, at 395 (surveying a number of civil law jurisdictions, and observing that although the principle “means somewhat different things in different civil law systems, it remains an enduring element of the civil law”); *Emsland-Stärke GmbH v. Hauptzollamt Hamburg-Jonas*, Case C-110/99, 2000 E.C.R. I-1595, I-1615 (European Court of Justice (ECJ) holding that a German company’s transportation of materials into Switzerland to obtain an export refund only to immediately return the materials to Germany was abusive because it ran against the purpose of the export refund (objective element) and was done with the intent of taking unfair advantage of the benefit (subjective element)); accord *Halifax plc, Leeds Permanent Development Services Ltd., Country Wide Property Investments Ltd v. Commissioners of Customs & Excise*, Case C-255/02, 2006 E.C.R. I-1655.

129 See, e.g., *Kofoed Case*, 321/05, 2007 E.C.R. I-5795, ¶ 38 (July 5, 2007).

130 See Byers, *supra* note 116, at 394–97 (citing Australian, U.S., and English authorities, and observing that “regardless of the label used, it appears that the same general principle is at work”).

131 HERSCH LAUTERPACHT, *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY* 297 (1933).



whose form or purpose is not consistent with the purposes of the right, power, or competency concerned, for instance, if it is exercised for the purpose of evading an . . . obligation or obtaining an undue advantage.”<sup>132</sup>

Although private parties can be (and often are) accused of abusing their rights,<sup>133</sup> in the modern regime of investment arbitration, States are also frequently accused of the same in the exercise of official legislative or administrative powers.<sup>134</sup> In either case, analysis of the accusation focuses on two salient questions.

*First*, does the invocation of the right conform to the scope and purpose of the right? This element was discussed in *PSEG v. Turkey*, where the tribunal found that the Turkish Ministry of Energy and Natural Resources had engaged in an “abuse of authority” by making demands for renegotiation of the claimant’s contract—as it was permitted to do—that “went far beyond the purpose of the Law and attempted to reopen aspects of the Contract that were not at issue in this context or even within [its] authority.”<sup>135</sup> Similarly, in *Metalclad v. Mexico*, the tribunal concluded that a Mexican municipal government violated the minimum standard of treatment when it denied the claimant’s application for a construction permit on the basis of alleged “environmental impact considerations.”<sup>136</sup> According to the *Metalclad* tribunal, the right to deny permits had been granted to the municipal government only for purposes of addressing “appropriate construction considerations,” and its reliance on environmental considerations was therefore “improper.”<sup>137</sup>

*Second*, even if the exercise of a right conforms to its scope and purpose, is the stated reason for the invocation of the right truthful? An exercise of authority

132 JEAN SALMON, *DICTIONNAIRE DE DROIT INTERNATIONAL PUBLIC* 3–4 (2001).

133 In the investment-treaty context, for instance, investors are often accused of abusing the rights of procedure to access international arbitration proceedings. See, e.g., *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, ¶ 143 (Apr. 15, 2009) (concluding that Claimant incurred in an abuse of rights (*détournement de procédure*) by creating a “legal fiction in order to gain access to an international arbitration procedure to which it was not entitled”); *Cementownia “Nowa Huta” S.A. v. Republic of Turkey*, ICSID Case No. ARB (AF)/06/2, Award, ¶ 159 (Sept. 17, 2009) (“[T]he Claimant has intentionally and in bad faith abused the arbitration; it purported to be an investor when it knew that this was not the case. This constitutes indeed an abuse of process.”).

134 Michael Akehurst, *Jurisdiction in International Law*, 46 *BRIT. Y.B. INT’L L.* 145, 189 n.3 (1972–1973) (“legislative jurisdiction . . . can give rise to genuine examples of abuse of rights”).

135 *PSEG Global Inc. et al. v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, ¶ 247 (Jan. 19, 2007).

136 *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, ¶ 86 (Aug. 30, 2000).

137 *Id.* See also *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, ¶ 144 (Apr. 15, 2009) (concluding that the claimant’s restructuring after the dispute arose but before the initiation of arbitration “was an abuse of the system of international ICSID investment arbitration”); *Mobil Corp., Venezuela Holdings B.V. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, ¶¶ 169–85 (June 10, 2010).



that could ostensibly be aimed at achieving a legitimate purpose may nevertheless be abusive if the State is unable to demonstrate that this was the actual purpose.<sup>138</sup> This issue arose in the *ADC v. Hungary* case. There, the respondent State defended that the regulatory measures at issue were in “the strategic interests of the State,”<sup>139</sup> undertaken pursuant to its right to “regulate its own economy, to enact and modify laws, [and] to secure the proper application of law.”<sup>140</sup> Nevertheless, the tribunal held that Hungary had unlawfully expropriated the claimant’s investment in violation of the standard of fair and equitable treatment:

Although the Respondent repeatedly attempted to persuade the Tribunal that the Amending Act, the Decree and the actions taken in reliance thereon were necessary and important for the harmonization of the Hungarian Government’s transport strategy, laws and regulations with the EU law, it failed to substantiate such a claim with convincing facts or legal reasoning. . . . If mere reference to “public interest” can magically put such interest into existence and therefore satisfy this requirement, then this requirement would be rendered meaningless since the Tribunal can imagine no situation in which this requirement would not have been met.<sup>141</sup>

In *S.D. Myers v. Canada*, the respondent State similarly argued that its import ban “was made because Canada believed PCBs are a significant danger to health and the environment when exported without appropriate assurances of safe transportation and destruction,”<sup>142</sup> and that it was “necessary to protect human, animal or plant life or health or was necessary for the conservation of living or non-living exhaustible natural resource.”<sup>143</sup> In evaluating this line of argument, the tribunal first noted that “[t]he intent of government is a complex and multifaceted matter,” and that it could “only characterize Canada’s motivation or intent fairly by examining the record of the evidence as a whole.”<sup>144</sup> After carrying out that (comprehensive) examination,<sup>145</sup> the tribunal determined:

Insofar as intent is concerned, the documentary record as a whole clearly indicates that the Interim Order and the Final Order were intended primarily to protect the Canadian PCB disposal industry from U.S. competition.

138 See *EDF (Servs.) Ltd. v. Romania*, ICSID Case No. ARB/05/13, Award, ¶ 303 (Oct. 8, 2009).

139 *ADC Affiliate Ltd. v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, ¶ 392 (Oct. 2, 2006).

140 *Id.* ¶ 384.

141 *Id.* ¶ 430.

142 *S.D. Myers Inc. v. Gov’t of Canada*, UNCITRAL, Partial Award, ¶¶ 152, 155 (Nov. 13, 2000).

143 *Id.* ¶ 155.

144 *Id.* ¶ 161.

145 *Id.* ¶¶ 162–92.



Canada produced no convincing witness testimony to rebut the thrust of the documentary evidence. The Tribunal finds that there was no legitimate environmental reason for introducing the ban. Insofar as there was an indirect environmental objective . . . it could have been achieved by other measures.<sup>146</sup>

Relying on this finding, the *S.D. Myers* tribunal concluded that Canada had violated both the national treatment standard and the minimum standard of treatment of aliens.<sup>147</sup>

Despite its widespread recognition, the notion of an *abuse of rights* may be a misnomer because what is in fact at issue is the *absence* of the right asserted. The principle thus has its detractors. Some consider it an oxymoron or “logomachies.”<sup>148</sup> “A speaker who uses ‘abuse of rights’ to refer to conduct that is outside the scope of the right is simply talking nonsense.”<sup>149</sup> It is true that, in most cases, an abuse of rights could be recast in terms of the party acting without any right at all. For example, under international law, a State has no power to expropriate except where necessary and in the public interest; nor can a State, consistent with the national treatment standard, exercise its regulatory powers so as to protect domestic producers from foreign competition. But this reconception of the issue does not alter the unlawfulness of the conduct, and the doctrine of abuse of rights continues to persist as a general principle notwithstanding the theoretical issues surrounding it. This is a reflection of the reality that rights today are rarely absolute. In most circumstances, a party’s rights in one area are limited by its obligations in another, including respect for the potentially conflicting rights of others.<sup>150</sup> The specific exercise of a legal entitlement must therefore be measured on its own terms and relative to other pertinent legal interests, which is exactly what the abuse of rights doctrine does. The phrase “abuse of rights,” moreover, goes some way in capturing the perniciousness of the wrong. The doctrine focuses upon the conduct and intent of the actor, who is attempting to commit an unlawful act—with impunity—through the pretense of exercising a legal right. It is precisely the beguiling invocation of a legal entitlement that makes the conduct so abusive and corrosive.<sup>151</sup>

146 *Id.* §§ 194–95.

147 *Id.* §§ 256, 268.

148 MARCEL PLANIOL ET AL., *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS*, vol. II, No. 871 (1952).

149 Frederick Schauer, *Can Rights Be Abused?*, 31 *PHIL. Q.* 225, 227 (1981).

150 See CHENG, *supra* note 2, at 131.

151 Some jurists have considered the passage of time and presentation of stale claims to be an abuse of right. See, e.g., George P. Fletcher, *The Right and the Reasonable*, 98 *HARV. L. REV.* 949, 980 (1985).







# ANNEX 241







**EUROPEAN COMMUNITIES –  
MEASURES AFFECTING ASBESTOS AND ASBESTOS –  
CONTAINING PRODUCTS**

***Report of the Panel***

The report of the Panel on *European Communities – Measures Affecting Asbestos and Asbestos – Containing Products* is being circulated to all Members, pursuant to the DSU. The report is being circulated as an unrestricted document from 18 September 2000 pursuant to the Procedures for the Circulation and Derestriction of WTO Documents (WT/L/160/Rev.1). Members are reminded that in accordance with the DSU only parties to the dispute may appeal a panel report. An appeal shall be limited to issues of law covered in the Panel report and legal interpretations developed by the Panel. There shall be no *ex parte* communications with the Panel or Appellate Body concerning matters under consideration by the Panel or Appellate Body.

Note by the Secretariat: This Panel Report shall be adopted by the Dispute Settlement Body (DSB) within 60 days after the date of its circulation unless a party to the dispute decides to appeal or the DSB decides by consensus not to adopt the report. If the Panel Report is appealed to the Appellate Body, it shall not be considered for adoption by the DSB until after the completion of the appeal. Information on the current status of the Panel Report is available from the WTO Secretariat.



alternative technology, scientifically evaluated by the competent authority as harmless or less harmful. Since 1990, the European Communities, under Directive 90/394/EEC, has provided for the replacement of asbestos. This Directive recommends the principle of replacing a dangerous substance or process with a non-dangerous or less dangerous substance or process, where one exists. In 1983, WTO Members began to ban the use of asbestos, including chrysotile. Among EC Members, Austria banned chrysotile in 1990, followed by Finland and Italy in 1992, and Germany in 1993. Canada might have expected France to follow suit.

8.248 Furthermore, the European Communities assert that there are no provisions in the GATT or the TBT Agreement requiring consistency in the application of health measures against substances that pose a carcinogenic risk for human health. Accepting Canada's argument that it could not legitimately have anticipated the ban imposed by the Decree because France did not simultaneously ban other potentially dangerous substances (such as lead and copper) would be equivalent to preventing Members entirely from taking measures to protect human health on their territory.

8.249 Moreover, according to the European Communities, Canada cannot claim a legitimate expectation of "improved" market access with respect to a product which entails risks for human health when, as the facts show, the tendency is for exports to the industrialized countries to fall. Canada must give detailed reasons as to why it could legitimately have expected that France would not adopt measures restricting or eliminating the use of any asbestos product after the Uruguay Round negotiations, given the growing scientific evidence that all types of asbestos and asbestos-containing products are carcinogenic to humans.

8.250 The European Communities then argue that Canada fails to demonstrate how the Decree upsets the competitive relationship between asbestos and fibrous or non-fibrous substitute products. It has not established a "clear correlation" between the two. The issue is not whether equality of competitive conditions exists but whether the relative conditions of competition which existed between domestic and foreign products as a consequence of the relevant tariff concessions have been upset. The EC consider that the products for which the competitive conditions must be examined are those covered by the tariff concession. If a tariff concession is granted for asbestos, the competitive conditions to be examined are those concerning Canadian asbestos and French asbestos. It is irrelevant to compare chrysotile with French substitute products because such products cannot be considered in terms of the same relevant tariff concession.

8.251 Canada rejects the EC's claim that an examination of the impact of the Decree's effect on competitive conditions must be limited to Canadian asbestos and French asbestos. This approach is contradicted by two panel reports which have clearly established that Article XXIII:1(b) can be invoked in the case of a measure which upsets the competitive relationship between two non-identical products.<sup>206</sup>

## **2. Analysis by the Panel**

### **(a) Preliminary issues**

#### *(i) Questions before the Panel*

8.252 Article XXIII:1(b) of the GATT 1994 (Nullification or impairment) reads as follows:

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<sup>206</sup> Canada refers to the Report of the Working Party on *Australian Subsidy on Ammonium Sulphate*, adopted on 3 April 1950, II/188 and to the Report of the Panel on Complaints in *Treatment by Germany of Imports of Sardines*, (hereinafter "*Germany – Sardines*"), adopted on 31 October 1952, BISD 1S/53.



"1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of

[...]

(b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement,

[...]

the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it."

8.253 The Panel notes, first of all, that the EC have put forward two arguments which, if well-founded, should lead us to conclude that Article XXIII:1(b) does not apply to the facts in this case. If we find that these arguments are not pertinent, we shall examine the substance of the Canadian complaint.

8.254 The EC's two arguments which could determine the applicability of Article XXIII:1(b) are as follows:

8.255 Firstly, the EC claim that the rules on non-violation nullification apply only if the measure in question does not fall under other provisions of the GATT 1994. Article XXIII:1(b) is applicable only if the Panel reaches the conclusion that the Decree is consistent with Article III of the GATT 1994. Otherwise there cannot be "non-violation". In the light of the introductory clause of Article XX of the GATT 1994, the European Communities conclude that if the French measure is considered "necessary" for the protection of human health by the Panel and hence if specific rules have been applied in this respect, the provisions of Article XXIII:1(b) of the GATT are inapplicable.

8.256 Canada replies that the cases *Uruguay – Recourse to Article XXIII*<sup>207</sup> and *United States – Trade Measures Affecting Nicaragua*<sup>208</sup> do not support the EC's interpretation. Moreover, inasmuch as Article 26:1(b) of the Understanding provides for the granting of compensation rather than the withdrawal of a measure, recourse in non-violation affects neither the adoption nor the application of the contested measure.

8.257 The EC's second argument is that while it is possible to have legitimate expectations in connection with a purely commercial measure, it is not possible to claim legitimate expectations with respect to a measure that is taken to protect human health and can therefore be justified, particularly in the light of Article XX(b) of the GATT 1994. The protection of human health is a fundamental duty and cannot be compromised or restricted by the concept of non-violation.

8.258 For Canada, the distinction made by the EC between measures of a purely commercial nature and measures which have health-protection related aspects has no basis either in the texts of the WTO Agreement or in case-law. A legitimate expectation does not in any way concern a particular measure adopted by a Member, but rather the opportunities for competition agreed during multilateral trade negotiations on a given product. The Community reasoning is also wrong because it does not concur with the preparatory work on the GATT 1947, which shows that the objective of Article XXIII:1(b) is to prevent abuse of the provisions of the General Agreement.

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<sup>207</sup> Adopted on 16 November 1962, BISD 11S/95.

<sup>208</sup> L/6053 (1986), unadopted.



8.259 The EC consider that Canada has taken a selective look at the preparatory documents. As the Appellate Body pointed out in the *United States – Shrimp* case, the conditions laid down in the chapeau of Article XX(b) are meant precisely to address situations in which a Member applies in bad faith and in an abusive manner the exceptions laid down in Article XX. There cannot be two sets of provisions which address the same problem twice.

(ii) *The EC's argument according to which the rules on non-violation nullification apply only if the measure in question does not fall under other provisions of the GATT.*

8.260 The EC seem to believe that the fact that a measure is "justified" on the basis of Article XX creates a legal situation different, on the one hand, from the situation in which the measure violates a provision of the GATT 1994 and, on the other, from the situation in which the measure does not fall under the provisions of the GATT 1994. In support of their position, the EC cite a passage from the Panel Report in *Japan – Film* which mentions that Article XXIII:1(b) provides "the means to redress government actions not otherwise regulated by GATT rules ...". The Communities also refer to the introductory clause of Article XX which states that "nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures" necessary to protect human life or health.

8.261 The Panel recalls, first of all, that both the preamble to Article 26.1 of the Understanding and Article XXIII:1(b) use the words "measure, *whether or not it conflicts with the provisions* [of the particular agreement]" (emphasis added). To begin with, it should be noted that the wording of Article XXIII:1(b) shows unequivocally that this provision applies both in situations in which a measure conflicts and in situations in which it does not conflict with the provisions of the GATT 1994. Above, we found that the treatment accorded by the Decree to chrysotile asbestos fibres violated Article III:4 of the GATT 1994 as such, in as much as these products were like the substitute fibres mentioned by the parties and the treatment of products containing chrysotile asbestos and products containing the substitute fibres mentioned by the parties was discriminatory. Accordingly, the Decree *conflicts* with the provisions of Article III:4, in the sense in which that word is used in Article XXIII:1(b).<sup>209</sup> However, we note that the introductory clause of Article XX states that "nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures" necessary to protect human life or health, which might suggest that a provision consistent with the requirements of Article XX no longer conflicts with Article III:4, because Article III:4 cannot be construed as preventing this kind of measure. However, whether a measure *justified* on the basis of Article XX of the GATT 1994 is considered still to be in conflict with Article III:4 or is considered no longer to conflict with Article III:4 because justified under Article XX, under the terms of Article XXIII:1(b) the latter continues to be applicable to it.

8.262 We also note, firstly, that the introductory clause to Article XX, to which the EC refer, concerns the *adoption or enforcement* of measures necessary to protect health. The application of Article XXIII:1(b) does not prevent either the adoption or the enforcement of the Decree concerned. Article 26:1(b) stipulates that even where a measure has been found to nullify or impair benefits under, or impede the attainment of objectives, of the GATT 1994 without violation thereof, there is no obligation to withdraw the measure. Accordingly, there is no contradiction between the invocation of Article XX and the application of Article XXIII:1(b). However, that Article must be applied in such a way as to protect the balance of rights and duties negotiated.<sup>210</sup> Accordingly, we do not consider that

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<sup>209</sup> This remark is made without prejudice to Canada's allegations based on Article XXIII:1(a) (see Section VIII.A.2(a) above).

<sup>210</sup> See the Report of the Panel in *EEC – Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-feed Proteins*, adopted on 25 January 1990, BISD 37S/86 (hereinafter "*EEC – Oilseeds*", para.148, where the Panel considered that:



# ANNEX 242







**REPORTS OF INTERNATIONAL  
ARBITRAL AWARDS**

**RECUEIL DES SENTENCES  
ARBITRALES**

**Award in the Arbitration regarding the Iron Rhine (“Ijzeren Rijn”) Railway  
between the Kingdom of Belgium and the Kingdom of the Netherlands, decision  
of 24 May 2005**

24 May 2005

VOLUME XXVII pp.35-125



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**PART II**

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**Award in the Arbitration regarding the  
Iron Rhine (“Ijzeren Rijn”) Railway between the  
Kingdom of Belgium and the Kingdom of the Netherlands**

**Decision of 24 May 2005**

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**Sentence arbitrale relative au chemin  
de fer dit Iron Rhine (“Ijzeren Rijn”) entre le  
Royaume de Belgique et le Royaume des Pays-Bas**

**Décision du 24 mai 2005**



200. The Netherlands essentially agrees with this position. Further, it is willing to pay the extra costs caused by the rerouting (NR, p. 21, para. 85).

201. The Tribunal concludes that the Parties concur that any decision by the Netherlands on the rerouting of the Iron Rhine railway would require the agreement of Belgium. It also notes that such agreement seems in principle to be forthcoming.

#### D. CONCLUSIONS

202. With respect to the measures envisaged by the Netherlands discussed above, Belgium argues that the Netherlands is under an obligation to apply its legislation in the way least unfavourable for Belgium; in not doing so the Netherlands would be acting contrary to the principles of reasonableness and good faith. Belgium regards some of the measures envisaged as an unnecessary interference with its transit right. They would constitute a breach by the Netherlands of its obligations towards Belgium (BR, pp. 32-33, 46, and 68-71, paras. 37, 50, and 70).

203. The Netherlands argues that it treats the reactivation of the Iron Rhine railway in the same way as other railways in the Netherlands. It accepts Belgium’s right to reactivation, but it sees no reason why the Iron Rhine railway should be treated more favourably than regular Netherlands railways. In requiring the envisaged measures for the reactivation, the Netherlands claims that it is acting reasonably and in good faith. Its actions do not constitute an abuse of right, and are not arbitrary or discriminatory. In fact, it asserts that its legislative requirements are applied in the most favourable way for Belgium (NR, pp. 40-42, paras. 158-170).

204. In the view of the Tribunal, the obligations of the Netherlands under Article XII of the 1839 Treaty of Separation do not require it to apply its national legislation and policy with respect to the reactivation of the Iron Rhine railway in a more favourable way than with respect to other railways in the Netherlands, unless such non-discriminatory application would amount to a denial of Belgium’s transit right or render the exercise of that right unreasonably difficult.

205. The Tribunal concludes that the measures as such as presently envisaged by the Netherlands cannot be regarded as amounting to a denial of Belgium’s transit right or render the exercise of the right unreasonably difficult. The related but distinct question as to whether the laying of the costs for any of these measures on Belgium would amount to a denial of Belgium’s transit right or render the exercise of the right unreasonably difficult will be addressed by the Tribunal in Chapter VI.

206. Since the Netherlands insists that the envisaged measures flow exclusively from the application of its national legislation, and Belgium does



not say otherwise, the Tribunal has not found it necessary to address any issue of constraints posed by EC law (*see* Chapter III above).

## Chapter VI

### ALLOCATION OF COSTS

207. The Tribunal will now turn to the issue of the allocation of costs which forms the subject-matter of the third Question put jointly by the Parties to the Tribunal. It is formulated in the following terms:

In the light of the answers to the previous questions, to what extent should the cost items and financial risks associated with the use, restoration, adaptation and modernisation of the historical route of the Iron Rhine on Dutch territory be borne by Belgium or by the Netherlands? Is Belgium obliged to fund investments over and above those that are necessary for the functionality of the historical route of the railway line?

208. The Tribunal notes that under the Arbitration Agreement it is requested to render its decision on the basis of international law, including European law if necessary. It is not authorized to decide these matters *ex aequo et bono*. The introductory words of the third Question clearly indicate that the Tribunal's decision on the cost allocation shall be rendered in the light of the Tribunal's answers to the two previous Questions. The ensuing consideration by the Tribunal of the question of costs is thus based upon the reasoning in the previous chapters.

209. The Tribunal observes that the 1839 Treaty of Separation does not refer to "financial risks". The Parties use that term in the Questions they jointly put to the Tribunal, without specifying the meaning they give to it, nor in their pleadings does either Party explain its understanding of the term. The Tribunal understands that in the context of infrastructure projects such term refers to the covering of financial costs over and above those budgeted for the project, due to different factors, such as higher than projected inflation, underestimation of the costs, unforeseen events, and increases in the costs of materials used and of labour costs. The Tribunal notes that, whatever position on the question of allocation of risks and costs, respectively, the Parties may have taken from time to time in negotiations, the Parties, in their pleadings, have not made any distinction between the costs of the reactivation and financial risks associated with it, nor have they suggested that the financial risks should be borne by a Party other than that which would bear the costs themselves. The Tribunal is of the view that the financial risks are not to be severed from the costs. Thus, the Party which bears the costs will also have to bear the financial risks, and, when the Tribunal refers in this chapter to the costs, it should be understood as including the financial risks as well.



# ANNEX 243





**REPORTS OF INTERNATIONAL  
ARBITRAL AWARDS**

**RECUEIL DES SENTENCES  
ARBITRALES**

**Filleting within the Gulf of St. Lawrence between Canada and France**

17 July 1986

VOLUME XIX pp. 225-296



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**PART VI**

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**Case concerning filleting within the Gulf of St. Lawrence  
between Canada and France**

**Decision of 17 July 1986**

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**Affaire concernant le filetage à l'intérieur  
du golfe du Saint-Laurent entre le Canada et la France**

**Sentence du 17 juillet 1986**



*willing to concede but only in favour of authentic Saint-Pierre vessels*<sup>17</sup>, ni que ce souci s'est heurté au refus de la France de modifier les dispositions qu'elle avait elle-même proposées. Il faut en conclure que l'immatriculation des chalutiers visés à l'article 4, *b*, faite en conformité avec les dispositions de la législation française, a été considérée par les Parties, ensemble avec le principe de bonne foi qui, selon l'article 26 de la Convention de Vienne sur le droit des traités, préside nécessairement à l'exécution des traités, comme formant une garantie suffisante contre tout risque d'exercice abusif de ses droits par la Partie française.

Le Tribunal se bornera à rappeler que le droit, pour un Etat, de déterminer par sa législation les conditions d'immatriculation des navires en général, et des bateaux de pêche en particulier, relève de la compétence exclusive de cet Etat, pour autant qu'il existe un lien substantiel entre l'Etat et le navire et que l'Etat du pavillon exerce effectivement sa juridiction et son contrôle sur les navires battant son pavillon (Convention du 10 décembre 1982 sur le droit de la mer, articles 91 et 94, et Convention de Genève sur la haute mer du 29 avril 1958, article 5).

28. Selon le Tribunal, un arrangement de voisinage du type de celui énoncé à l'article 4 de l'Accord consacre au profit des Parties contractantes la reconnaissance de droits appelés à s'exercer concurremment dans un même secteur géographique et réclame de ce fait, de la part des titulaires de ces droits, mesure et modération dans leur mise en œuvre et coopération dans le règlement des contestations relatives à cette mise en œuvre. Il en est ainsi en l'espèce où le droit de "continuer à pêcher", consacré au profit des navires visés à l'article 4, *b*, doit s'harmoniser avec le droit du Canada d'appliquer ses règlements relatifs à la pêche aux bateaux français opérant à l'intérieur du golfe du Saint-Laurent.

Le Tribunal attache une particulière importance à cette observation, non seulement parce qu'il est convaincu que l'avenir des relations réciproques des Parties dans la zone du golfe est conditionné par la manière raisonnable dont elles useront de leurs droits respectifs, mais aussi parce que les travaux préparatoires de l'Accord portent trace de cette commune intention (voir *infra*, par. 56 à 58).

29. Le Tribunal relève enfin que, tant à raison de son titre même qu'à raison du contenu de ses articles 2 et 4, l'Accord du 27 mars 1972 appartient à la catégorie des accords de réciprocité, en ce sens qu'il implique un échange de prestations de même nature entre les deux Etats contractants qui se concèdent mutuellement des droits de

<sup>17</sup> Déclaration de M. Wershof au cours des entretiens préliminaires de juillet 1964 — Annexe n° 42 du Mémoire du Canada, p. 14, par. 41 : ... que des chalutiers métropolitains déguisés en chalutiers locaux ou même en chalutiers armés par des équipages étrangers mais immatriculés à Saint-Pierre pourraient... tirer avantage de tout privilège que le Canada pourrait être disposé à accorder uniquement en faveur d'authentiques navires saint-pierrais (*traduction du Tribunal*).





# ANNEX 244





PCA Case No. 2012-12

**IN THE MATTER OF AN ARBITRATION  
BEFORE A TRIBUNAL CONSTITUTED IN ACCORDANCE WITH THE AGREEMENT  
BETWEEN THE GOVERNMENT OF HONG KONG AND THE GOVERNMENT OF  
AUSTRALIA FOR THE PROMOTION AND PROTECTION OF INVESTMENTS,  
SIGNED ON 15 SEPTEMBER 1993 (THE “TREATY”)**

**-and-**

**THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW RULES OF  
ARBITRATION AS REVISED IN 2010 (“UNCITRAL RULES”)**

**-between-**

**PHILIP MORRIS ASIA LIMITED**

**(“Claimant”)**

**-and-**

**THE COMMONWEALTH OF AUSTRALIA**

**(“Respondent”, and together with the Claimant, the “Parties”)**

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**AWARD ON JURISDICTION AND ADMISSIBILITY**

**17 December 2015**

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**ARBITRAL TRIBUNAL**

Professor Karl-Heinz Böckstiegel (President)  
Professor Gabrielle Kaufmann-Kohler  
Professor Donald M. McRae

**REGISTRY**

Dr. Dirk Pulkowski  
Permanent Court of Arbitration

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Claimant was to have acquired its investment by the date of enactment of the TPP Act, *i.e.* by 21 November 2011. The Tribunal observes that, whether the Tribunal refers to the date when the restructuring was decided (3 September 2010) or when it was completed (23 February 2011), both events occurred before the date of the enactment of the TPP Act.

534. Therefore, and without prejudice to its later finding on abuse of rights, the Tribunal concludes that the requirements for the Tribunal’s jurisdiction *ratione temporis* are met.

**E. WHETHER THE CLAIMANT’S INVOCATION OF THE TREATY CONSTITUTES AN ABUSE OF RIGHTS**

535. Finally, the Tribunal must address whether the invocation of the Treaty by the Claimant constitutes an abuse of rights under the present circumstances.

536. The essence of the Respondent’s position is as follows. The doctrine of abuse of rights delimits the tribunal’s jurisdiction as defined by the consent of the Parties to the Treaty.<sup>1043</sup> While the Respondent accepts that it must meet the burden establishing an abuse, it does not accept that there is a presumption that the Claimant acted in good faith in bringing its claim, in undergoing a corporate restructuring and subsequently relying on Treaty protections.<sup>1044</sup> According to the Respondent, there is no case law to support this contention.<sup>1045</sup> Rather, cases hold that the entitlement of the Claimant to bring a claim under the Treaty is circumscribed by the scope of the consent of the parties to the Treaty, and such consent and its scope cannot be presumed, but instead must be positively established.<sup>1046</sup> In discharging the burden of proof, the Respondent does not need to meet an exceptionally high evidentiary standard,<sup>1047</sup> such as a standard of “egregious conduct”.<sup>1048</sup> The case law indicates that an abuse of right can be found where a corporate restructuring is *motivated* wholly or partly by a desire to gain access to treaty protection in order to bring a claim in respect of a specific dispute<sup>1049</sup> that, at the time of the restructuring, *exists* or is *foreseeable*.<sup>1050</sup> In these circumstances, the restructuring is intended to

<sup>1043</sup> Respondent’s Reply on Preliminary Objections, para. 443.

<sup>1044</sup> Respondent’s Reply on Preliminary Objections, para. 450.

<sup>1045</sup> Respondent’s Reply on Preliminary Objections, paras 447–448.

<sup>1046</sup> Respondent’s Reply on Preliminary Objections, para. 448.

<sup>1047</sup> Respondent’s Reply on Preliminary Objections, para. 458.

<sup>1048</sup> Respondent’s Reply on Preliminary Objections, para. 458.

<sup>1049</sup> Respondent’s Reply on Preliminary Objections, paras 455, 508.

<sup>1050</sup> Respondent’s Reply on Preliminary Objections, para. 466.



create an unfair advantage for the foreign investor because the investor has no intention of performing any economic activity in the host State.<sup>1051</sup>

537. The Claimant argues that the application of the doctrine of abuse of rights results in depriving a claimant of rights that otherwise fall squarely within the jurisdiction of the tribunal.<sup>1052</sup> Such a deprivation is to be made only in exceptional circumstances.<sup>1053</sup> To meet the burden of proof, the Respondent must overcome a presumption in favour of the Claimant that it has brought its claim in good faith.<sup>1054</sup> The threshold for establishing an abuse of rights is that of compelling evidence of egregious bad faith akin to fraud.<sup>1055</sup> “Foreseeability” is not relevant to establishing abuse of rights—the critical test is bad faith.<sup>1056</sup> To the extent that foreseeability is relevant, it must be to a very high standard of probability. The “motivation” of an investor is indeed a criterion of abuse of rights. However, bad faith does not exist by virtue of a mere corporate restructuring with a view to taking advantage of Treaty protections. Such normal business practice meets neither the standard of “egregious” conduct nor that of bad faith.<sup>1057</sup>

#### **1. Arbitral Case Law Regarding “Abuse of Rights”**

538. The present case is by no means the first investment arbitration in which it is disputed whether a BIT claim brought shortly after restructuring is admissible. Therefore, the Tribunal considers that it is appropriate to review the relevant case law on this point.

539. As a preliminary matter, it is clear, and recognised by all earlier decisions that the threshold for finding an abusive initiation of an investment claim is high. It is equally accepted that the notion of abuse does not imply a showing of bad faith. Under the case law, the abuse is subject to an objective test and is seen in the fact that an investor who is not protected by an investment treaty restructures its investment in such a fashion as to fall within the scope of protection of a treaty in view of a specific foreseeable dispute. Although it is sometimes said that an abuse of right might also exist in the case of restructuring in respect of an existing dispute, if the dispute already exists, then a tribunal would normally lack jurisdiction *ratione temporis*.

<sup>1051</sup> Respondent’s Reply on Preliminary Objections, para. 491.

<sup>1052</sup> Claimant’s Counter-Memorial on Preliminary Objections, para. 323.

<sup>1053</sup> Claimant’s Counter-Memorial on Preliminary Objections, para. 323.

<sup>1054</sup> Claimant’s Rejoinder on Preliminary Objections, para. 324.

<sup>1055</sup> Claimant’s Counter-Memorial on Preliminary Objections, para. 336.

<sup>1056</sup> Claimant’s Counter-Memorial on Preliminary Objections, paras 345.

<sup>1057</sup> Claimant’s Counter-Memorial on Preliminary Objections, para. 337.

540. A detailed examination of the relevant cases reveals the following considerations in connection with the legal test for an abuse of right. Among these, it is first and foremost uncontroversial that the mere fact of restructuring an investment to obtain BIT benefits is not *per se* illegitimate.

541. In *Tidewater v. Venezuela*, the tribunal said:

184. [I]t is a perfectly legitimate goal and no abuse of an investment protection treaty regime, for an investor to seek to protect itself from the general risk of future disputes with a host [S]tate in this way.<sup>1058</sup>

542. In *Mobil Corporation v. Venezuela*, the tribunal said:

204. The aim of the restructuring of their investments in Venezuela through a Dutch holding was to protect those investments against breaches of their rights by the Venezuelan authorities by gaining access to ICSID arbitration through the BIT. The tribunal considers that this was a perfectly legitimate goal as far as it concerned future disputes.<sup>1059</sup>

543. In a similar vein, the tribunal in *Gremcitel v. Peru* said:

184. In the Tribunal's view, it is now well-established, and rightly so, that an organization or reorganization of a corporate structure designed to obtain investment treaty benefits is not illegitimate *per se*, including where this is done with a view to shielding the investment from possible future disputes with the host [S]tate.<sup>1060</sup>

544. In *Aguas del Tunari SA v. Bolivia*, the tribunal observed:

... [T]o the extent that Bolivia argues that the December 1999 transfer of ownership was a fraudulent or abusive device to assert jurisdiction under the BIT, that:... (d) it is not uncommon in practice and—absent a particular limitation—not illegal to locate one's operation in a jurisdiction perceived to provide a beneficial regulatory and legal environment in terms, for example, of taxation or the substantive law of the jurisdiction, including the availability of a BIT.<sup>1061</sup>

545. At the same time, it may amount to an abuse of process to restructure an investment to obtain BIT benefits in respect of a foreseeable dispute. After commenting that it is legitimate for an investor to seek to protect itself from the general risk of future disputes, the tribunal in *Tidewater v. Venezuela* went on to say:

<sup>1058</sup> *Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., Twenty Grand Offshore, L.L.C., Point Marine, L.L.C., Twenty Grand Marine Service, L.L.C., Jackson Marine, L.L.C. and Zapata Gulf Marine Operators, L.L.C. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Jurisdiction, 8 February 2013 (“*Tidewater Decision on Jurisdiction*”), para. 184.

<sup>1059</sup> *Mobil Corporation, Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd., Mobil Venezolana de Petróleos Holdings, Inc., Mobil Cerro Negro, Ltd., and Mobil Venezolana de Petróleos, Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010 (“*Mobil Corporation Decision on Jurisdiction*”), para. 204.

<sup>1060</sup> *Gremcitel Award*, para. 184.

<sup>1061</sup> *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, para. 330.



At the heart, therefore, of this issue is a question of fact as to the nature of the dispute between the parties, and a question of timing as to when the dispute that is the subject of the present proceedings arose or could reasonably have been foreseen... If the Claimants' contentions are found to be correct as a matter of fact, then, in the view of the Tribunal, no question of abuse of treaty can arise. On the other hand, if the Respondent's submissions on the course of events are correct, then there may be a real question of abuse of treaty.

[...]

But the same is not the case in relation to pre-existing disputes between the specific investor and the [S]tate. Thus, the critical issue remains one of fact: was there such a pre-existing dispute?<sup>1062</sup>

546. The point was reiterated in *Mobil Corporation v. Venezuela*:

205. With respect to pre-existing disputes, the situation is different and the Tribunal considers that to restructure investments only in order to gain jurisdiction under a BIT for such disputes would constitute, to take the words of the *Phoenix* Tribunal, "an abusive manipulation of the system of international investment protection under the ICSID convention and the BITs".<sup>1063</sup>

547. The tribunal in *Pac Rim v. El Salvador* elaborated on this point, setting out a test for distinguishing between a general risk of future disputes and a specific dispute, stating:

2.99. [...] In the Tribunal's view, the dividing-line [between legitimate restructure and an abuse of process] occurs when the relevant party can see an actual dispute or can foresee a specific future dispute as a very high probability and not merely as a possible controversy.<sup>1064</sup>

548. The *Gremcitel* tribunal posited a simpler test stating:

185. However, a restructuring carried out with the intention to invoke the treaty's protections at a time when the dispute is foreseeable may constitute an abuse of process depending on the circumstances.<sup>1065</sup>

549. The principle that a restructuring undertaken to gain treaty protection in light of a specific dispute can constitute an abuse was reiterated in *Lao Holdings v. Laos* in the following terms:

70. The Tribunal considers that it is clearly an abuse for an investor to manipulate the nationality of a company subsidiary to gain jurisdiction under an international treaty at a time when the investor is aware that events have occurred that negatively affect its investment and may lead to arbitration. In particular, abuse of process must preclude unacceptable manipulations by a claimant acting in bad faith who is fully aware prior to the change in nationality of the "legal dispute," as submitted by the Respondent.<sup>1066</sup>

550. While they admit that, under certain circumstances, a restructuring may constitute an abuse, investor-State tribunals have set a high threshold for finding an abuse of process, requiring proof of the foreseeability of the claim and depending on the particular circumstances of each case. The *Tidewater* tribunal said:

<sup>1062</sup> *Tidewater* Decision on Jurisdiction, paras 145–146 and 184.

<sup>1063</sup> *Mobil Corporation* Decision on Jurisdiction, para. 205.

<sup>1064</sup> *Pac Rim* Decision on the Respondent's Jurisdictional Objections, para. 2.99.

<sup>1065</sup> *Gremcitel* Award, para. 185.

<sup>1066</sup> *Lao Holdings N.V. v. Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Decision on Jurisdiction, 21 February 2014, para. 70.

147. [u]nder general international law as well as under ICSID case law, abuse of right is to be determined in each case, taking into account all the circumstances of the case...<sup>1067</sup>

551. That statement was reiterated in *Mobil Corporation v. Venezuela*.<sup>1068</sup>

552. The requirement of a high threshold was articulated by the *Chevron (I)* tribunal in the following terms:

143. ... [I]n all legal systems, the doctrines of abuse of rights, estoppel and waiver are subject to a high threshold. Any right leads normally and automatically to a claim for its holder. It is only in very exceptional circumstances that a holder of a right can nevertheless not raise and enforce the resulting claim. The high threshold results from the seriousness of a charge of bad faith amounting to abuse of process. As Judge Higgins stated in her 2003 Separate Opinion in the *Oil Platforms* case, there is “a general agreement that the graver the charge the more confidence must there be in the evidence relied on.”<sup>1069</sup>

553. A similar approach was taken by the tribunal in *Gremcitel* when it said:

186. As for any abuse of right, the threshold for a finding of abuse of process is high, as a court or tribunal will obviously not presume an abuse, and will affirm the evidence of an abuse only “in very exceptional circumstances”. Furthermore, as the Tribunal in *Mobil v. Venezuela* stated, “[u]nder general international law as well as under ICSID case law, abuse of right is to be determined in each case, taking into account all the circumstances of the case.”<sup>1070</sup>

554. Despite the variations in the formulations used in the decisions just quoted, this Tribunal considers that case law has articulated legal tests on abuse of right that are broadly analogous, revolving around the concept of foreseeability.<sup>1071</sup> In the Tribunal’s view, foreseeability rests between the two extremes posited by the tribunal in *Pac Rim v. El Salvador*—“a very high probability and not merely a possible controversy”. On this basis, the initiation of a treaty-based investor-State arbitration constitutes an abuse of rights (or an abuse of process, the rights abused being procedural in nature) when an investor has changed its corporate structure to gain the protection of an investment treaty at a point in time when a specific dispute was foreseeable. The Tribunal is of the opinion that a dispute is foreseeable when there is a reasonable prospect, as stated by the *Tidewater* tribunal, that a measure which may give rise to a treaty claim will materialise. The Tribunal will now apply this test to the facts of the case.

## 2. The Restructuring in the Context of Political Developments

555. Both Parties have presented long timelines of events, which need to be taken into account. In the following paragraphs, the Tribunal will juxtapose developments occurring at the corporate

<sup>1067</sup> *Tidewater* Decision on Jurisdiction, para. 147.

<sup>1068</sup> *Mobil Corporation* Decision on Jurisdiction, para. 177.

<sup>1069</sup> *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 34877, Interim Award, 1 December 2008, para. 143.

<sup>1070</sup> *Gremcitel* Award, para. 186.

<sup>1071</sup> See also *Gremcitel* Award, fn. 219.



restructuring decision were not offered as witnesses by the Claimant. Nor was the Tribunal presented with contemporaneous corporate memoranda or other internal correspondence sufficiently explaining the business case for the restructuring in detail.

583. In this context, the Tribunal is inclined to place limited weight on Mr. Pellegrini's testimony as it became apparent during the hearing that Mr. Pellegrini was not familiar with details of legal or corporate strategy. Against this background, the expert report of Professor Lys does carry weight, especially as it remains unrebutted by other expert evidence, and Professor Lys was not called for cross-examination.
584. Therefore, the Tribunal finds that the Claimant has not been able to prove that tax or other business reasons were determinative for the restructuring. From all the evidence on file, the Tribunal can only conclude that the main and determinative, if not sole, reason for the restructuring was the intention to bring a claim under the Treaty, using an entity from Hong Kong.

#### **4. Conclusion**

585. In view of the above considerations, the Tribunal concludes that the commencement of treaty-based investor-State arbitration constitutes an abuse of right (or abuse of process) when an investor has changed its corporate structure to gain the protection of an investment treaty at a point in time where a dispute was foreseeable. A dispute is foreseeable when there is a reasonable prospect that a measure that may give rise to a treaty claim will materialise.
586. In the present case, the Tribunal has found that the adoption of the Plain Packaging Measures was foreseeable well before the Claimant's decision to restructure was taken (let alone implemented). On 29 April 2010, Australia's Prime Minister Kevin Rudd and Health Minister Roxon unequivocally announced the Government's intention to introduce Plain Packaging Measures. In the Tribunal's view, there was no uncertainty about the Government's intention to introduce plain packaging as of that point. Accordingly, from that date, there was at least a reasonable prospect that legislation equivalent to the Plain Packaging Measures would eventually be enacted and a dispute would arise. Political developments after 29 April 2010 did not involve any change in the intention of the Government to introduce Plain Packaging Measures and, thus, were not such as to change the foreseeability assessment.
587. The Tribunal's conclusion is reinforced by a review of the evidence regarding the Claimant's professed alternative reasons for the restructuring. The record indeed shows that the principal, if not sole, purpose of the restructuring was to gain protection under the Treaty in respect of the very measures that form the subject matter of the present arbitration. For the Tribunal, the

adoption of the Plain Packaging Measures was not only foreseeable but actually foreseen by the Claimant when it chose to change its corporate structure.

588. In light of the foregoing discussion, the Tribunal cannot but conclude that the initiation of this arbitration constitutes an abuse of rights, as the corporate restructuring by which the Claimant acquired the Australian subsidiaries occurred at a time when there was a reasonable prospect that the dispute would materialise and as it was carried out for the principal, if not sole, purpose of gaining Treaty protection. Accordingly, the claims raised in this arbitration are inadmissible and the Tribunal is precluded from exercising jurisdiction over this dispute.

#### **F. COSTS OF ARBITRATION**

589. As this Interim Award (final save as to costs) comes to the conclusion that this Tribunal cannot exercise its jurisdiction, it brings the present proceedings to an end, but for a decision on the costs of arbitration.

590. The Tribunal will provide the Parties with an opportunity to make submissions regarding the amounts and the allocation of the costs of the proceedings, and the Tribunal will then fix and allocate the costs of arbitration in a final award on costs.



## VII. DECISIONS

For the reasons set out above in this Award, the Tribunal unanimously decides, declares, and awards as follows:

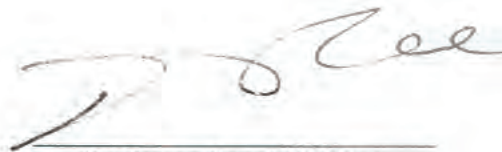
- I. **The claims raised in this arbitration are inadmissible;**
- II. **Therefore, the Tribunal is precluded from exercising jurisdiction over this dispute;**
- III. **Costs are reserved for a final award limited to costs.**

Place of Arbitration: Singapore.

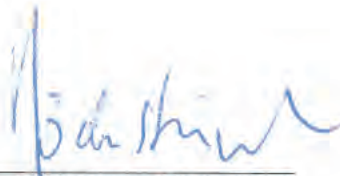
Date of Award: *17 December 2015*



Professor Gabrielle Kaufmann-Kohler  
Co-arbitrator



Professor Donald McRae  
Co-arbitrator



Professor Karl-Heinz Böckstiegel  
Presiding Arbitrator





# ANNEX 245





**Centre International pour le Règlement  
des Différends Relatifs aux Investissements**

**CAPITAL FINANCIAL HOLDINGS LUXEMBOURG SA**

**c.**

**REPUBLIQUE DU CAMEROUN**

**Affaire CIRDI No. ARB/15/18**

**Sentence**

Tribunal arbitral

M. le Professeur Pierre Tercier, Président

M<sup>e</sup> Alexis Mourre, Arbitre

M. le Professeur Alain Pellet, Arbitre

Secrétaire du Tribunal arbitral

M. Benjamin Garel

*Date d'envoi aux Parties : 22 juin 2017*

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Me Pierre Heitzmann  
Me Nicole Dolenz  
Me Claire Habibi  
Me Ileana M. Smeureanu  
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### Pour la Défenderesse

M. Peter Wolrich  
Mme Gabriela Alvarez-Avila  
Mme Nadia Darwazeh  
Mme Virginie Liautaud  
Mme Marie-Odile Trouvé  
**Curtis Mallet-Prevost, Colt & Mosle LLP**  
Paris, France

Et

M. Laurent Ezzo  
Ministre de la Justice, Garde des Sceaux  
**Ministère de la Justice, Direction de la  
Législation**  
Yaoundé, Cameroun



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## TABLE DES ABREVIATIONS

Abréviations usuelles	
art.	Article
CCI	Chambre de Commerce Internationale de Paris
ch.	Chiffre
chap.	Chapitre
CIRDI	Centre International pour le Règlement des Différends Relatifs aux Investissements
Convention CIRDI	Convention (de Washington) du 18 mars 1965 pour le Règlement des Différends relatifs aux Investissements entre États et Ressortissants d'autres États
ég.	Egalement
etc.	Et cætera
l.	Ligne
Ltd.	Limited
M. / MM.	Monsieur / Messieurs
op. cit.	Opus citatum
OP n° [...]	Ordonnance de Procédure n° [...]
p. / pp.	Page / pages
par. / pars.	Paragraphe / paragraphes
Règlement CIRDI	Règlement de procédure relatif aux instances d'arbitrage du CIRDI
TR xx.10.2016, pp : ll	Transcription de l'audience des 6 et 7 octobre 2016 (pages:lignes)



<b>Parties au litige</b>	
CFHL	Capital Financial Holdings Luxembourg SA
République / Cameroun	République du Cameroun
<b>Abréviations relatives au litige en cause</b>	
BEI	Banque Européenne d'Investissement
CBC	Commercial Bank Cameroon
CEMAC	Communauté Économique et Monétaire des Etats de l'Afrique Centrale
CFHC	Capital Financial Holdings Cameroun Sarl
COBAC	Commission Bancaire de l'Afrique Centrale
FCFA	Franc de la Communauté Française Africaine
FGH	Fotso Group Holdings Limited
ILDC Holding	International Local Development Consortium Holding Cameroun SA
NSIA	Nouvelle Société Interafricaine d'Assurance
RfA	Request for Arbitration
SFI	Société Financière Internationale
Traité	Convention entre l'Union économique belgo-luxembourgeoise et la République Unie du Cameroun en matière de promotion et de protection réciproques des investissements, entrée en vigueur le 1 <sup>er</sup> novembre 1981
WWH Ltd.	World Wide Holdings Limited Dubai

## DRAMATIS PERSONAE

NOM	FONCTION	PIECES
Yves-Michel Fotso	Ancien administrateur de CFHL (du 07.01.05 au 17.12.14), actionnaire majoritaire de FGH (90%)	pièce R-7 ; pièce C-138 ; pièce R-9
Georges Djadjo	Ancien administrateur de CFHL (du 07.01.05 au 17.12.14)	Pièce R-7 ; pièce C-138
Alain Lam	Ancien administrateur de CFHL (du 07.01.05 au 29.04.11)	Pièce R-7 ; pièce R-39
Bruno Beernaerts	Ancien administrateur de CFHL (du 07.01.05 au 29.04.11)	Pièce R-7 ; pièce R-39
Michel Leconte	Ancien administrateur de CFHL (du 31.07.06 au 17.12.14)	Pièce R-4 ; pièce C-138
Francesco Abbruzzese	Représentant d'Initium Real Estate	Pièce C-124
Guy Arlette	Administrateur de CFHL (dès le 19.12.14)	Pièce R-4
Jean-Pierre Verlaine	Administrateur de CFHL (dès le 25.01.16)	Pièce R-40
Adrien Coulombel	Administrateur de CFHL (dès le 25.01.16)	Pièce R-40
Victor Fotso	Ancien administrateur de CBC, actionnaire minoritaire de FGH	RfA par. 41
Martin Luther Njanga Njoh	administrateur provisoire de la CBC	Pièces C-12 et C-13
Sidi Mougnaïl	administrateur séquestre des actions de CBC détenues par CFHL	pièce C-23
Jan de Bruyne	Ambassadeur du Royaume de Belgique en République du Cameroun agissant comme chargé d'affaires du Luxembourg	Pièce C-79



351. La Demanderesse affirme avoir déposé ses déclarations fiscales en 2008 et 2009 (Mémoire en duplique par. 176, pièces C-152 à C-153, C-114 à C-115 et C-118 à C-119). Elle aurait seulement eu des taxes fixes à payer chaque année depuis sa création, comme en attesteraient des exemples produits par la Demanderesse pour les années 2012 et 2013 montrant les paiements de taxes fixes d'office auprès de l'administration luxembourgeoise après la déclaration envoyée par la Demanderesse en 2009 (Mémoire en duplique par. 177, pièces C-150 et C-160).
352. D'ailleurs, la Demanderesse ne conteste pas que certaines déclarations fiscales ont été déposées avec retard (Mémoire en duplique par. 178). Cependant, ces retards n'auraient eu aucun impact sur la détermination de son administration centrale, car ce qui importerait serait que la Demanderesse ait maintenu son administration centrale au Luxembourg (Mémoire en duplique par. 178, Avis Prüm).
353. Les contrats de services conclus entre la Demanderesse et ses domiciliataires, à savoir, successivement, Deloitte, Fidéi Capita, Initium Corporate Services et Engelwood, prévoient que les domiciliataires se chargent de la préparation des déclarations annuelles en matière d'impôt (pièces C-101 p. 8 ; C-108 p. 2 ; C-123 p. 2 ; C-139.1 p. 2). Il est incontesté que la Demanderesse a déposé la grande majorité de ces déclarations fiscales d'une façon tardive en 2015. Il est également incontesté que la Demanderesse ne devait que payer des taxes d'office, et, bien que les impôts aient été payés tardivement, ils ont été payés au Luxembourg.
354. Toutefois, le Tribunal arbitral relève *d'un point de vue chronologique* que la Demanderesse n'a déposé ses déclarations fiscales pour les années 2008 à 2014 qu'en novembre 2015, soit avec plusieurs années de retard et seulement après la naissance du différend entre les Parties (pièces C-152 à C-159). Le Tribunal arbitral y reviendra en relation avec l'invocation de l'abus de droit (cf. ci-dessous par. 363).

## **5. Appréciation globale et invocation de l'abus de droit**

### **5.1 L'appréciation globale**

355. Ainsi qu'il l'a affirmé plus haut, le Tribunal considère que les éléments traités ci-dessus ne sont pas des critères cumulatifs, et, inversement, qu'aucun de ces éléments ne suffit, à lui seul, pour forger la conviction du Tribunal arbitral sur la réalité du siège social de la Demanderesse. Il faut dès lors faire une appréciation globale de tous les critères, ainsi que de la chronologie des faits.
356. Elle doit être faite à la lumière de l'esprit de la Convention, dont l'objet est de protéger des investisseurs étrangers, ce qui requiert par conséquent un clair rattachement à un autre Etat. La Convention n'a pas pour objet de protéger un quelconque investisseur, mais uniquement des investisseurs étrangers. Cela vaut également pour les sociétés holding, même si la manifestation de certains éléments d'administration peut être moins flagrante. La protection d'un investisseur ne peut se fonder sur une existence purement formelle. En l'espèce, le



Tribunal arbitral ne peut admettre que la Demanderesse avait son siège social réel au Luxembourg au moment des faits. Dès lors, la Demanderesse n'avait pas la nationalité luxembourgeoise au sens de la Convention et du Traité.

357. Il importe de rappeler (ci-dessus par. 212) que le rôle du Tribunal arbitral est exclusivement de déterminer si, pour bénéficier de la protection, la Demanderesse remplit la condition fixée par les textes applicables, ce qu'il a fait pour décider que ce n'est pas le cas.

## 5.2 L'invocation de l'abus de droit

358. Les raisons qui établissent le caractère artificiel du siège social réel de la Demanderesse conduisent à s'interroger sur l'existence d'un abus de droit en l'espèce.

Le Tribunal arbitral considère que, pour surplus de droit, il lui appartient de se prononcer sur ce point qui a fait l'objet de développements importants de la part des Parties. Il souligne cependant que ses conclusions sur ce point se surajoutent à celles concernant le caractère fictif du siège social luxembourgeois de la Demanderesse qui suffit pour écarter sa compétence *ratione personae*.

359. A titre complémentaire, la Défenderesse demande en effet au Tribunal arbitral [Déf. 4] de « décider que la Demanderesse a commis un abus de droit » (cf. Mémoire sur la compétence par. 370). La Demanderesse avait pris à cet égard une conclusion spécifique en demandant au Tribunal arbitral [Dem. 2] de « constater que CFHL n'a commis aucun abus de droit ». Elle a toutefois abandonné cette conclusion dans la dernière version qu'elle a proposée dans sa soumission sur les coûts (Mémoire sur les coûts Dem. par. 17), sans en donner les raisons. Ce changement tardif est cependant sans portée, dès lors que la conclusion principale tend à ce que le Tribunal arbitral se déclare compétent, ce qui implique qu'il rejette aussi l'exception tirée de l'abus de droit.
360. Il n'est pas contesté qu'un tribunal arbitral est en droit de refuser sa compétence si l'investisseur a créé de manière frauduleuse les conditions qui pourraient l'autoriser à poursuivre un Etat sur le fondement de violations alléguées de ses obligations internationales relatives aux investissements. Les cas les plus courants et les plus flagrants concernent des situations dans lesquelles une entité a été créée au dernier moment, à seule fin de constituer un rattachement territorial au traité invoqué.
361. Dans l'affaire *Phoenix*, un national tchèque était à la tête de deux sociétés tchèques faisant objet de poursuites pénales pour évasion fiscale en République Tchèque. Ce national avait alors créé une société israélienne, détenant les deux sociétés tchèques, et avait soumis une demande d'arbitrage CIRDI contre la République Tchèque en se prévalant du TBI entre ces deux Etats. Le tribunal arbitral a considéré que la création d'une société pour pouvoir profiter de la protection d'un TBI, « without any significant economic activity, which is the fundamental prerequisite of any investor's protection », constitue un abus du système CIRDI et donc un abus de droit (*Phoenix Action Ltd. c. République Tchèque*, Affaire CIRDI No. ARB/06/5, Sentence du 15 avril 2009, par. 93, cf. par. 113 [pièce RL-60]). Similairement,



dans l'affaire *Renée Rose Levy*, les demandeurs avaient, après la naissance du différend, transféré leurs parts sociales à une personne physique ayant une nationalité leur permettant d'initier une procédure d'arbitrage devant le CIRDI. Le tribunal arbitral dans cette affaire a ensuite décliné sa compétence, en considérant que la manière de procéder des demandeurs constituait un abus de droit (*Renée Rose Levy et Gremcitel S.A. c. Peru*, Affaire CIRDI No. ARB/11/17, Sentence du 9 janvier 2015, par. 191, 195 [pièce RL-93]); cf. également *Cementownia c. Turquie*, Affaire CIRDI No. ARB(AF)/06/2, Sentence du 17 septembre 2009, par. 154 [pièce CL-57]).

362. Il est vrai que la situation est partiellement différente en l'espèce dans la mesure où la société a effectivement été constituée au Luxembourg plusieurs années avant le début de la procédure. Mais l'analyse détaillée qui a été faite a établi que cette société était restée en sommeil durant de nombreuses années et que ce n'est qu'en 2014, soit précisément au moment où a été envisagée et lancée la procédure d'arbitrage que des mesures ont été prises pour corriger les insuffisances et créer l'apparence d'une société luxembourgeoise en activité. Indirectement, cela permet de donner au différend une apparence internationale, limitée toutefois à la situation de la Demanderesse.
363. En particulier, il convient de rappeler ceci :
- Pendant près de quatre ans, aucune assemblée générale ni aucune réunion du conseil d'administration n'a été tenue (cf. ci-dessus pars. 298, 317).
  - De même, durant toute cette période, la Demanderesse a omis de nommer des administrateurs. Ces manquements n'ont été corrigés qu'en fin 2014, quand le différend entre les Parties existait déjà, et juste avant le dépôt de la Requête d'Arbitrage (cf. ci-dessus par. 327).
  - Durant plusieurs années, les comptes pour les périodes de 2008 à 2014 n'ont jamais été approuvés. Ce n'est qu'en 2015 que la Demanderesse a régularisé la situation (cf. ci-dessus par. 335).
  - Il en va de même pour l'envoi des déclarations fiscales (cf. ci-dessus par. 354)
364. L'absence totale d'activité de la Demanderesse pendant une si longue période et son « réveil » soudain après la notification du différend sont à cet égard révélateurs d'une existence purement formelle à la date déterminante. Les démarches décrites ci-avant ne sauraient convaincre le Tribunal que le siège social réel de la Demanderesse était, lorsque la Requête d'arbitrage a été déposée au CIRDI, situé au Luxembourg, comme l'exige le Traité.
365. De même, au vu de la mise au point orchestrée après des années de léthargie, le Tribunal arbitral doit constater que, même si la Demanderesse n'a pas spécialement été créée pour bénéficier de la protection du Traité, elle a bel et bien été « réveillée » pour étayer la réalité de son siège social luxembourgeois, aux fins de satisfaire aux conditions de nationalité posées par le Traité. Partant, le comportement de la Demanderesse doit être qualifié d'abusif, la privant du bénéfice des dispositions procédurales et substantielles du Traité.



## 6. Conclusion

366. Il découle des considérations qui précèdent que le Tribunal décide de faire droit à la conclusion [Déf. 1] selon laquelle il doit décliner sa compétence *ratione personae* sur la base de la Convention CIRDI et du Traité, ainsi que, par surcroît de droit, la conclusion [Déf. 4] selon laquelle la Demanderesse commet un abus de droit.

## V. La compétence *ratione materiae* du Tribunal arbitral

### 1. La question

367. La Défenderesse demande au Tribunal arbitral de :
- [Déf. 2] *Décliner sa compétence ratione materiae sur la base de la Convention et du Traité ;*
- alors que la Demanderesse demande au Tribunal arbitral de :
- [Dem. 1] *Se déclarer compétent sur la base de la Convention et du Traité.*
368. Dans ses écritures et ses plaidoiries orales, la Défenderesse conteste la compétence *ratione materiae* du Tribunal arbitral. Elle soutient que la Demanderesse n'aurait pas effectué un investissement ni au sens de la Convention CIRDI ni au sens des termes du Traité. Elle soutient également que le prétendu investissement de la Demanderesse ne remplirait pas l'exigence de légalité posée par le Traité.
369. En soi, le Tribunal arbitral pourrait se dispenser d'analyser ce motif dès lors qu'il a déjà rejeté sa compétence *ratione personae*. Il juge néanmoins opportun, compte tenu des données de l'espèce, d'examiner par surabondance de droit la question de sa compétence *ratione materiae*.
370. Le Tribunal arbitral doit donc décider deux questions :
- premièrement, si la Demanderesse a effectué un investissement au sens de l'article 25 de la Convention CIRDI et au sens des termes du Traité ; et
  - deuxièmement, si la Demanderesse a effectué un investissement au sens des termes du Traité, en particulier si elle remplit les conditions de légalité posées par le Traité.



# ANNEX 246





*English is not an official language of the Swiss Confederation. This translation is provided for information purposes only and has no legal force.*

## Swiss Civil Code

of 10 December 1907 (Status as of 1 January 2019)

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*The Federal Assembly of the Swiss Confederation,*  
 based on Article 64 of the Federal Constitution<sup>1,2</sup>  
 and having considered the Dispatch of the Federal Council dated 28 May 1904<sup>3</sup>,  
*decrees:*

### Introduction

#### Art. 1

A. Application  
of the law

<sup>1</sup> The law applies according to its wording or interpretation to all legal questions for which it contains a provision.

<sup>2</sup> In the absence of a provision, the court<sup>4</sup> shall decide in accordance with customary law and, in the absence of customary law, in accordance with the rule that it would make as legislator.

<sup>3</sup> In doing so, the court shall follow established doctrine and case law.

#### Art. 2

B. Scope and  
limits of legal  
relationships

<sup>1</sup> Every person must act in good faith in the exercise of his or her rights and in the performance of his or her obligations.

I. Acting in good  
faith

<sup>2</sup> The manifest abuse of a right is not protected by law.

#### Art. 3

II. Good faith

<sup>1</sup> Where the law makes a legal effect conditional on the good faith of a person, there shall be a presumption of good faith.

AS 24 233, 27 207 and BS 2 3

<sup>1</sup> [BS 1 3]. This provision corresponds to Art. 122 of the Federal Constitution of 18 April 1999 (SR 101).

<sup>2</sup> Amended by Annex No. 2 of the Civil Jurisdiction Act of 24 March 2000, in force since 1 Jan. 2001 (AS 2000 2355; BBl 1999 2829).

<sup>3</sup> BBl 1904 IV 1, 1907 VI 367

<sup>4</sup> Term in accordance with No I 1 of the FA of 26 June 1998, in force since 1 Jan. 2000 (AS 1999 1118; BBl 1996 I 1). This amendment is taken into consideration throughout the Code.





# ANNEX 247







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

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

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

Zur Nutzung dieser Übersetzung lesen Sie bitte den Hinweis unter "[Translations](#)".

For conditions governing use of this translation, please see the information provided under "[Translations](#)".

## German Civil Code

### BGB

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

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

1. Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ L 39 of 14 February 1976, p. 40),
2. Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses (OJ L 61 of 5 March 1977, p. 26),
3. Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (OJ L 372 of 31 December 1985, p. 31),
4. Council Directive 87/102/EEC for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit (OJ L 42 of 12 February 1987, p. 48, last amended by Directive 98/7/EC of the European Parliament and of the Council of 16 February 1998 amending Directive 87/102/EEC for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit (OJ L 101 of 1 April 1998, p. 17),
5. Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (OJ L 158 of 23 June 1990, p. 59),
6. Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ L 95 of 21 April 1993, p. 29),
7. Directive 94/47/EC of the European Parliament and of the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis (OJ L 280 of 29 October 1994, p. 82),

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

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

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

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

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

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

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## **Book 1 General Part**

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### **Division 1 Persons**

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#### **Title 1 Natural persons, consumers, entrepreneurs**

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##### **Section 1 Beginning of legal capacity**

The legal capacity of a human being begins on the completion of birth.

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##### **Section 2 Beginning of majority**

Majority begins at the age of eighteen.

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##### **Sections 3 – 6 (repealed)**

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##### **Section 7 Residence; establishment and termination**

(1) A person who settles permanently in a place establishes his residence in that place.

(2) There may be a residence in more than one place at the same time.

(3) Residence is terminated if the person abandons the place of residence with the intention of giving it up.

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##### **Section 8 Residence of persons who lack full capacity to contract**



(2) If a right has been procured for the purpose of securing a claim, the retransfer of the right may not be demanded on the basis of the limitation of the claim. If title has been retained, the right to revoke the contract may be exercised even if the secured claim is statute-barred.

(3) Subsections (1) and (2) above do not apply to the limitation of claims for interest and other recurring obligations.

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### **Section 217 Limitation of collateral performance**

A claim for collateral performance dependent on the main claim becomes statute-barred at the same time as the main claim, even if the specific limitation period applying to the claim for collateral performance has not ended.

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### **Section 218 Ineffectiveness of revocation**

(1) Revocation for non-performance or for the failure to perform in conformity with the contract is ineffective if the claim for performance or the claim for cure is now statute-barred and the obligor invokes this. This applies even if, in accordance with section 275 (1) to (3), section 439 (3) or section 635 (3), the obligor is not required to perform and the claim for performance or cure would be statute-barred. Section 216 (2), sentence 2, remains unaffected.

(2) Section 214 (2) applies with the necessary modifications.

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### **Sections 219 - 225 (repealed)**

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### **Division 6 Exercise of rights, self-defence, self-help**

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### **Section 226 Prohibition of chicanery**

The exercise of a right is not permitted if its only possible purpose consists in causing damage to another.

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### **Section 227 Self-defence against persons**

(1) An act required for self-defence is not unlawful.

(2) Self-defence is the defence required to ward off a present unlawful assault on oneself or another.

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### **Section 228 Necessity**

A person who damages or destroys a thing belonging to another in order to ward off from himself or from another a danger threatened by the thing does not act unlawfully if the damage or destruction is necessary to ward off the danger and the damage is not out of proportion to the danger. If the person acting in this manner caused the danger, he is obliged to pay damages.

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### **Section 229**





# ANNEX 248





**CIVIL CODE OF QUÉBEC***PRELIMINARY PROVISION*

The Civil Code of Québec, in harmony with the Charter of human rights and freedoms ([chapter C-12](#)) and the general principles of law, governs persons, relations between persons, and property.

The Civil Code comprises a body of rules which, in all matters within the letter, spirit or object of its provisions, lays down the *jus commune*, expressly or by implication. In these matters, the Code is the foundation of all other laws, although other laws may complement the Code or make exceptions to it.

**BOOK ONE****PERSONS****TITLE ONE****ENJOYMENT AND EXERCISE OF CIVIL RIGHTS**

**1.** Every human being possesses juridical personality and has the full enjoyment of civil rights.

---

1991, c. 64, a. 1.

**2.** Every person is the holder of a patrimony.

It may be the subject of a division or of an appropriation to a purpose, but only to the extent provided by law.

---

1991, c. 64, a. 2; I.N. 2014-05-01.

**3.** Every person is the holder of personality rights, such as the right to life, the right to the inviolability and integrity of his person, and the right to the respect of his name, reputation and privacy.

These rights are inalienable.

---

1991, c. 64, a. 3.

**4.** Every person is fully able to exercise his civil rights.

In certain cases, the law provides for representation or assistance.

---

1991, c. 64, a. 4.

**5.** Every person exercises his civil rights under the name assigned to him and stated in his act of birth.

---

1991, c. 64, a. 5.

**6.** Every person is bound to exercise his civil rights in accordance with the requirements of good faith.

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1991, c. 64, a. 6; 2016, c. 4, s. 2.

**7.** No right may be exercised with the intent of injuring another or in an excessive and unreasonable manner, and therefore contrary to the requirements of good faith.





# ANNEX 249





## United Nations Convention on the Law of the Sea

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## PREAMBLE

*The States Parties to this Convention,*

*Prompted* by the desire to settle, in a spirit of mutual understanding and cooperation, all issues relating to the law of the sea and aware of the historic significance of this Convention as an important contribution to the maintenance of peace, justice and progress for all peoples of the world,

*Noting* that developments since the United Nations Conferences on the Law of the Sea held at Geneva in 1958 and 1960 have accentuated the need for a new and generally acceptable Convention on the law of the sea,

*Conscious* that the problems of ocean space are closely interrelated and need to be considered as a whole,

*Recognizing* the desirability of establishing through this Convention, with due regard for the sovereignty of all States, a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment,

*Bearing in mind* that the achievement of these goals will contribute to the realization of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries, whether coastal or land-locked,

*Desiring* by this Convention to develop the principles embodied in resolution 2749 (XXV) of 17 December 1970 in which the General Assembly of the United Nations solemnly declared *inter alia* that the area of the seabed and ocean floor and the subsoil thereof, beyond the limits of national jurisdiction, as well as its resources, are the common heritage of mankind, the exploration and exploitation of which shall be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States,

*Believing* that the codification and progressive development of the law of the sea achieved in this Convention will contribute to the strengthening of peace, security, cooperation and friendly relations among all nations in conformity with the principles of justice and equal rights and will promote the economic and social advancement of all peoples of the world, in accordance with the Purposes and Principles of the United Nations as set forth in the Charter,

*Affirming* that matters not regulated by this Convention continue to be governed by the rules and principles of general international law,

*Have agreed* as follows:

- (c) disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations, unless the Security Council decides to remove the matter from its agenda or calls upon the parties to settle it by the means provided for in this Convention.
2. A State Party which has made a declaration under paragraph 1 may at any time withdraw it, or agree to submit a dispute excluded by such declaration to any procedure specified in this Convention.
3. A State Party which has made a declaration under paragraph 1 shall not be entitled to submit any dispute falling within the excepted category of disputes to any procedure in this Convention as against another State Party, without the consent of that party.
4. If one of the States Parties has made a declaration under paragraph 1(a), any other State Party may submit any dispute falling within an excepted category against the declarant party to the procedure specified in such declaration.
5. A new declaration, or the withdrawal of a declaration, does not in any way affect proceedings pending before a court or tribunal in accordance with this article, unless the parties otherwise agree.
6. Declarations and notices of withdrawal of declarations under this article shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the States Parties.

*Article 299*

*Right of the parties to agree upon a procedure*

1. A dispute excluded under article 297 or excepted by a declaration made under article 298 from the dispute settlement procedures provided for in section 2 may be submitted to such procedures only by agreement of the parties to the dispute.
2. Nothing in this section impairs the right of the parties to the dispute to agree to some other procedure for the settlement of such dispute or to reach an amicable settlement.

## **PART XVI**

### **GENERAL PROVISIONS**

*Article 300*

*Good faith and abuse of rights*

States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right.



# ANNEX 250





# European Convention on Human Rights



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

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

Annex 250



# **European Convention on Human Rights**

as amended by Protocols Nos. 11  
and 14

supplemented by Protocols Nos. 1, 4,  
6, 7, 12, 13 and 16



The text of the Convention is presented as amended by the provisions of Protocol No. 14 (ETS no. 194) as from its entry into force on 1 June 2010. The text of the Convention had previously been amended according to the provisions of Protocol No. 3 (ETS no. 45), which entered into force on 21 September 1970, of Protocol No. 5 (ETS no. 55), which entered into force on 20 December 1971, and of Protocol No. 8 (ETS no. 118), which entered into force on 1 January 1990, and comprised also the text of Protocol No. 2 (ETS no. 44) which, in accordance with Article 5 § 3 thereof, had been an integral part of the Convention since its entry into force on 21 September 1970. All provisions which had been amended or added by these Protocols were replaced by Protocol No. 11 (ETS no. 155), as from the date of its entry into force on 1 November 1998. As from that date, Protocol No. 9 (ETS no. 140), which entered into force on 1 October 1994, was repealed and Protocol No. 10 (ETS no. 146) lost its purpose.

The current state of signatures and ratifications of the Convention and its Protocols as well as the complete list of declarations and reservations are available at [www.conventions.coe.int](http://www.conventions.coe.int).

Only the English and French versions of the Convention are authentic.

European Court of Human Rights  
Council of Europe  
F-67075 Strasbourg cedex  
[www.echr.coe.int](http://www.echr.coe.int)

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# Convention for the Protection of Human Rights and Fundamental Freedoms

Rome, 4.XI.1950

THE GOVERNMENTS SIGNATORY HERETO, being members of the Council of Europe,

Considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10<sup>th</sup> December 1948;

Considering that this Declaration aims at securing the universal and effective recognition and observance of the Rights therein declared;

Considering that the aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of Human Rights and Fundamental Freedoms;

Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend;

Being resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration,



Have agreed as follows:

### **ARTICLE 1**

#### **Obligation to respect Human Rights**

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

### **SECTION I RIGHTS AND FREEDOMS**

#### **ARTICLE 2**

##### **Right to life**

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
  - (a) in defence of any person from unlawful violence;
  - (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
  - (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

### **ARTICLE 3**

#### **Prohibition of torture**

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

### **ARTICLE 4**

#### **Prohibition of slavery and forced labour**

1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour.
3. For the purpose of this Article the term "forced or compulsory labour" shall not include:
  - (a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;
  - (b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;
  - (c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
  - (d) any work or service which forms part of normal civic obligations.

## ARTICLE 5

### **Right to liberty and security**

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
  - (a) the lawful detention of a person after conviction by a competent court;
  - (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
  - (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
  - (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
  - (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
  - (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

## ARTICLE 6

### **Right to a fair trial**

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:



- (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
- (b) to have adequate time and facilities for the preparation of his defence;
- (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

#### **ARTICLE 7**

##### **No punishment without law**

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

#### **ARTICLE 8**

##### **Right to respect for private and family life**

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

#### **ARTICLE 9**

##### **Freedom of thought, conscience and religion**

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

## ARTICLE 10

### **Freedom of expression**

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

## ARTICLE 11

### **Freedom of assembly and association**

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

## ARTICLE 12

### **Right to marry**

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

## ARTICLE 13

### **Right to an effective remedy**

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

## ARTICLE 14

### **Prohibition of discrimination**

The enjoyment of the rights and freedoms set forth in this 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.

## ARTICLE 15

### **Derogation in time of emergency**

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.



2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

#### **ARTICLE 16**

##### **Restrictions on political activity of aliens**

Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.

#### **ARTICLE 17**

##### **Prohibition of abuse of rights**

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

#### **ARTICLE 18**

##### **Limitation on use of restrictions on rights**

The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

## **SECTION III EUROPEAN COURT OF HUMAN RIGHTS**

### **ARTICLE 19**

#### **Establishment of the Court**

To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights, hereinafter referred to as "the Court". It shall function on a permanent basis.

### **ARTICLE 20**

#### **Number of judges**

The Court shall consist of a number of judges equal to that of the High Contracting Parties.

### **ARTICLE 21**

#### **Criteria for office**

1. The judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence.
2. The judges shall sit on the Court in their individual capacity.
3. During their term of office the judges shall not engage in any activity which is incompatible with their independence, impartiality or with the demands of a full-time office; all questions arising from the application of this paragraph shall be decided by the Court.

## ARTICLE 22

### Election of judges

The judges shall be elected by the Parliamentary Assembly with respect to each High Contracting Party by a majority of votes cast from a list of three candidates nominated by the High Contracting Party.

## ARTICLE 23

### Terms of office and dismissal

1. The judges shall be elected for a period of nine years. They may not be re-elected.
2. The terms of office of judges shall expire when they reach the age of 70.
3. The judges shall hold office until replaced. They shall, however, continue to deal with such cases as they already have under consideration.
4. No judge may be dismissed from office unless the other judges decide by a majority of two-thirds that that judge has ceased to fulfil the required conditions.

## ARTICLE 24

### Registry and rapporteurs

1. The Court shall have a Registry, the functions and organisation of which shall be laid down in the rules of the Court.
2. When sitting in a single-judge formation, the Court shall be assisted by rapporteurs who shall function under the authority of the President of the Court. They shall form part of the Court's Registry.

## ARTICLE 25

### Plenary Court

The plenary Court shall

- (a) elect its President and one or two Vice-Presidents for a period of three years; they may be re-elected;
- (b) set up Chambers, constituted for a fixed period of time;
- (c) elect the Presidents of the Chambers of the Court; they may be re-elected;
- (d) adopt the rules of the Court;
- (e) elect the Registrar and one or more Deputy Registrars;
- (f) make any request under Article 26, paragraph 2.

## ARTICLE 26

### Single-judge formation, Committees, Chambers and Grand Chamber

1. To consider cases brought before it, the Court shall sit in a single-judge formation, in committees of three judges, in Chambers of seven judges and in a Grand Chamber of seventeen judges. The Court's Chambers shall set up committees for a fixed period of time.
2. At the request of the plenary Court, the Committee of Ministers may, by a unanimous decision and for a fixed period, reduce to five the number of judges of the Chambers.
3. When sitting as a single judge, a judge shall not examine any application against the High Contracting Party in respect of which that judge has been elected.
4. There shall sit as an *ex officio* member of the Chamber and the Grand Chamber the judge elected in respect of the High Contracting Party concerned. If there is none or if that judge is



unable to sit, a person chosen by the President of the Court from a list submitted in advance by that Party shall sit in the capacity of judge.

5. The Grand Chamber shall also include the President of the Court, the Vice-Presidents, the Presidents of the Chambers and other judges chosen in accordance with the rules of the Court. When a case is referred to the Grand Chamber under Article 43, no judge from the Chamber which rendered the judgment shall sit in the Grand Chamber, with the exception of the President of the Chamber and the judge who sat in respect of the High Contracting Party concerned.

#### **ARTICLE 27**

##### **Competence of single judges**

1. A single judge may declare inadmissible or strike out of the Court's list of cases an application submitted under Article 34, where such a decision can be taken without further examination.
2. The decision shall be final.
3. If the single judge does not declare an application inadmissible or strike it out, that judge shall forward it to a committee or to a Chamber for further examination.

#### **ARTICLE 28**

##### **Competence of Committees**

1. In respect of an application submitted under Article 34, a committee may, by a unanimous vote,
  - (a) declare it inadmissible or strike it out of its list of cases, where such decision can be taken without further examination; or

(b) declare it admissible and render at the same time a judgment on the merits, if the underlying question in the case, concerning the interpretation or the application of the Convention or the Protocols thereto, is already the subject of well-established case-law of the Court.

2. Decisions and judgments under paragraph 1 shall be final.
3. If the judge elected in respect of the High Contracting Party concerned is not a member of the committee, the committee may at any stage of the proceedings invite that judge to take the place of one of the members of the committee, having regard to all relevant factors, including whether that Party has contested the application of the procedure under paragraph 1.(b).

#### **ARTICLE 29**

##### **Decisions by Chambers on admissibility and merits**

1. If no decision is taken under Article 27 or 28, or no judgment rendered under Article 28, a Chamber shall decide on the admissibility and merits of individual applications submitted under Article 34. The decision on admissibility may be taken separately.
2. A Chamber shall decide on the admissibility and merits of inter-State applications submitted under Article 33. The decision on admissibility shall be taken separately unless the Court, in exceptional cases, decides otherwise.

#### **ARTICLE 30**

##### **Relinquishment of jurisdiction to the Grand Chamber**

Where a case pending before a Chamber raises a serious question affecting the interpretation of the Convention or the Protocols thereto, or where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court, the Chamber may, at any

time before it has rendered its judgment, relinquish jurisdiction in favour of the Grand Chamber, unless one of the parties to the case objects.

### **ARTICLE 31**

#### **Powers of the Grand Chamber**

The Grand Chamber shall

- (a) determine applications submitted either under Article 33 or Article 34 when a Chamber has relinquished jurisdiction under Article 30 or when the case has been referred to it under Article 43;
- (b) decide on issues referred to the Court by the Committee of Ministers in accordance with Article 46, paragraph 4; and
- (c) consider requests for advisory opinions submitted under Article 47.

### **ARTICLE 32**

#### **Jurisdiction of the Court**

1. The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto which are referred to it as provided in Articles 33, 34, 46 and 47.
2. In the event of dispute as to whether the Court has jurisdiction, the Court shall decide.

### **ARTICLE 33**

#### **Inter-State cases**

Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party.

### **ARTICLE 34**

#### **Individual applications**

The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

### **ARTICLE 35**

#### **Admissibility criteria**

1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.
2. The Court shall not deal with any application submitted under Article 34 that
  - (a) is anonymous; or
  - (b) is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information.



3. The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:

- (a) the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application; or
- (b) the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.

4. The Court shall reject any application which it considers inadmissible under this Article. It may do so at any stage of the proceedings.

#### **ARTICLE 36**

##### **Third party intervention**

1. In all cases before a Chamber or the Grand Chamber, a High Contracting Party one of whose nationals is an applicant shall have the right to submit written comments and to take part in hearings.

2. The President of the Court may, in the interest of the proper administration of justice, invite any High Contracting Party which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings.

3. In all cases before a Chamber or the Grand Chamber, the Council of Europe Commissioner for Human Rights may submit written comments and take part in hearings.

#### **ARTICLE 37**

##### **Striking out applications**

1. The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that

- (a) the applicant does not intend to pursue his application; or
- (b) the matter has been resolved; or
- (c) for any other reason established by the Court, it is no longer justified to continue the examination of the application.

However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires.

2. The Court may decide to restore an application to its list of cases if it considers that the circumstances justify such a course.

#### **ARTICLE 38**

##### **Examination of the case**

The Court shall examine the case together with the representatives of the parties and, if need be, undertake an investigation, for the effective conduct of which the High Contracting Parties concerned shall furnish all necessary facilities.

#### **ARTICLE 39**

##### **Friendly settlements**

1. At any stage of the proceedings, the Court may place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for human rights as defined in the Convention and the Protocols thereto.

2. Proceedings conducted under paragraph 1 shall be confidential.
3. If a friendly settlement is effected, the Court shall strike the case out of its list by means of a decision which shall be confined to a brief statement of the facts and of the solution reached.
4. This decision shall be transmitted to the Committee of Ministers, which shall supervise the execution of the terms of the friendly settlement as set out in the decision.

#### **ARTICLE 40**

##### **Public hearings and access to documents**

1. Hearings shall be in public unless the Court in exceptional circumstances decides otherwise.
2. Documents deposited with the Registrar shall be accessible to the public unless the President of the Court decides otherwise.

#### **ARTICLE 41**

##### **Just satisfaction**

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.

#### **ARTICLE 42**

##### **Judgments of Chambers**

Judgments of Chambers shall become final in accordance with the provisions of Article 44, paragraph 2.

#### **ARTICLE 43**

##### **Referral to the Grand Chamber**

1. Within a period of three months from the date of the judgment of the Chamber, any party to the case may, in exceptional cases, request that the case be referred to the Grand Chamber.
2. A panel of five judges of the Grand Chamber shall accept the request if the case raises a serious question affecting the interpretation or application of the Convention or the Protocols thereto, or a serious issue of general importance.
3. If the panel accepts the request, the Grand Chamber shall decide the case by means of a judgment.

#### **ARTICLE 44**

##### **Final judgments**

1. The judgment of the Grand Chamber shall be final.
2. The judgment of a Chamber shall become final
  - (a) when the parties declare that they will not request that the case be referred to the Grand Chamber; or
  - (b) three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or
  - (c) when the panel of the Grand Chamber rejects the request to refer under Article 43.
3. The final judgment shall be published.



## ARTICLE 45

### **Reasons for judgments and decisions**

1. Reasons shall be given for judgments as well as for decisions declaring applications admissible or inadmissible.
2. If a judgment does not represent, in whole or in part, the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.

## ARTICLE 46

### **Binding force and execution of judgments**

1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.
3. If the Committee of Ministers considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment, it may refer the matter to the Court for a ruling on the question of interpretation. A referral decision shall require a majority vote of two-thirds of the representatives entitled to sit on the committee.
4. If the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two-thirds of the representatives entitled to sit on the committee, refer to the Court the question whether that Party has failed to fulfil its obligation under paragraph 1.
5. If the Court finds a violation of paragraph 1, it shall refer the case to the Committee of Ministers for consideration of the measures to be taken. If the Court finds no violation of paragraph 1, it shall refer the case to the Committee of Ministers, which shall close its examination of the case.

## ARTICLE 47

### **Advisory opinions**

1. The Court may, at the request of the Committee of Ministers, give advisory opinions on legal questions concerning the interpretation of the Convention and the Protocols thereto.
2. Such opinions shall not deal with any question relating to the content or scope of the rights or freedoms defined in Section I of the Convention and the Protocols thereto, or with any other question which the Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention.
3. Decisions of the Committee of Ministers to request an advisory opinion of the Court shall require a majority vote of the representatives entitled to sit on the committee.

## ARTICLE 48

### **Advisory jurisdiction of the Court**

The Court shall decide whether a request for an advisory opinion submitted by the Committee of Ministers is within its competence as defined in Article 47.

## ARTICLE 49

### **Reasons for advisory opinions**

1. Reasons shall be given for advisory opinions of the Court.
2. If the advisory opinion does not represent, in whole or in part, the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.
3. Advisory opinions of the Court shall be communicated to the Committee of Ministers.



## ARTICLE 50

### **Expenditure on the Court**

The expenditure on the Court shall be borne by the Council of Europe.



## ARTICLE 51

### **Privileges and immunities of judges**

The judges shall be entitled, during the exercise of their functions, to the privileges and immunities provided for in Article 40 of the Statute of the Council of Europe and in the agreements made thereunder.



## SECTION III

### **MISCELLANEOUS PROVISIONS**

#### **ARTICLE 52**

##### **Inquiries by the Secretary General**

On receipt of a request from the Secretary General of the Council of Europe any High Contracting Party shall furnish an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of the Convention.

#### **ARTICLE 53**

##### **Safeguard for existing human rights**

Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party.

#### **ARTICLE 54**

##### **Powers of the Committee of Ministers**

Nothing in this Convention shall prejudice the powers conferred on the Committee of Ministers by the Statute of the Council of Europe.



## ARTICLE 55

### **Exclusion of other means of dispute settlement**

The High Contracting Parties agree that, except by special agreement, they will not avail themselves of treaties, conventions or declarations in force between them for the purpose of submitting, by way of petition, a dispute arising out of the interpretation or application of this Convention to a means of settlement other than those provided for in this Convention.

## ARTICLE 56

### **Territorial application**

1. Any State may at the time of its ratification or at any time thereafter declare by notification addressed to the Secretary General of the Council of Europe that the present Convention shall, subject to paragraph 4 of this Article, extend to all or any of the territories for whose international relations it is responsible.
2. The Convention shall extend to the territory or territories named in the notification as from the thirtieth day after the receipt of this notification by the Secretary General of the Council of Europe.
3. The provisions of this Convention shall be applied in such territories with due regard, however, to local requirements.
4. Any State which has made a declaration in accordance with paragraph 1 of this Article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Court to receive applications from individuals, non-governmental organisations or groups of individuals as provided by Article 34 of the Convention.

## ARTICLE 57

### **Reservations**

1. Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this Article.
2. Any reservation made under this Article shall contain a brief statement of the law concerned.

## ARTICLE 58

### **Denunciation**

1. A High Contracting Party may denounce the present Convention only after the expiry of five years from the date on which it became a party to it and after six months' notice contained in a notification addressed to the Secretary General of the Council of Europe, who shall inform the other High Contracting Parties.
2. Such a denunciation shall not have the effect of releasing the High Contracting Party concerned from its obligations under this Convention in respect of any act which, being capable of constituting a violation of such obligations, may have been performed by it before the date at which the denunciation became effective.
3. Any High Contracting Party which shall cease to be a member of the Council of Europe shall cease to be a Party to this Convention under the same conditions.
4. The Convention may be denounced in accordance with the provisions of the preceding paragraphs in respect of any territory to which it has been declared to extend under the terms of Article 56.

## ARTICLE 59

### Signature and ratification

1. This Convention shall be open to the signature of the members of the Council of Europe. It shall be ratified. Ratifications shall be deposited with the Secretary General of the Council of Europe.
2. The European Union may accede to this Convention.
3. The present Convention shall come into force after the deposit of ten instruments of ratification.
4. As regards any signatory ratifying subsequently, the Convention shall come into force at the date of the deposit of its instrument of ratification.
5. The Secretary General of the Council of Europe shall notify all the members of the Council of Europe of the entry into force of the Convention, the names of the High Contracting Parties who have ratified it, and the deposit of all instruments of ratification which may be effected subsequently.

DONE AT ROME THIS 4<sup>TH</sup> DAY OF NOVEMBER 1950, in English and French, both texts being equally authentic, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary General shall transmit certified copies to each of the signatories.

## Protocol

# to the Convention for the Protection of Human Rights and Fundamental Freedoms

Paris, 20.III.1952

THE GOVERNMENTS SIGNATORY HERETO, being members of the Council of Europe,

Being resolved to take steps to ensure the collective enforcement of certain rights and freedoms other than those already included in Section I of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (hereinafter referred to as "the Convention"),

Have agreed as follows:

## ARTICLE 1

### Protection of property

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.



## **ARTICLE 2**

### **Right to education**

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

## **ARTICLE 3**

### **Right to free elections**

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

## **ARTICLE 4**

### **Territorial application**

Any High Contracting Party may at the time of signature or ratification or at any time thereafter communicate to the Secretary General of the Council of Europe a declaration stating the extent to which it undertakes that the provisions of the present Protocol shall apply to such of the territories for the international relations of which it is responsible as are named therein.

Any High Contracting Party which has communicated a declaration in virtue of the preceding paragraph may from time to time communicate a further declaration modifying the terms of any former declaration or terminating the application of the provisions of this Protocol in respect of any territory.

A declaration made in accordance with this Article shall be deemed to have been made in accordance with paragraph 1 of Article 56 of the Convention.

## **ARTICLE 5**

### **Relationship to the Convention**

As between the High Contracting Parties the provisions of Articles 1, 2, 3 and 4 of this Protocol shall be regarded as additional Articles to the Convention and all the provisions of the Convention shall apply accordingly.

## **ARTICLE 6**

### **Signature and ratification**

This Protocol shall be open for signature by the members of the Council of Europe, who are the signatories of the Convention; it shall be ratified at the same time as or after the ratification of the Convention. It shall enter into force after the deposit of ten instruments of ratification. As regards any signatory ratifying subsequently, the Protocol shall enter into force at the date of the deposit of its instrument of ratification.

The instruments of ratification shall be deposited with the Secretary General of the Council of Europe, who will notify all members of the names of those who have ratified.

DONE AT PARIS ON THE 20<sup>TH</sup> DAY OF MARCH 1952, in English and French, both texts being equally authentic, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary General shall transmit certified copies to each of the signatory governments.

# Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms securing certain rights and freedoms other than those already included in the Convention and in the First Protocol thereto

Strasbourg, 16.IX.1963

THE GOVERNMENTS SIGNATORY HERETO, being members of the Council of Europe,

Being resolved to take steps to ensure the collective enforcement of certain rights and freedoms other than those already included in Section 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4th November 1950 (hereinafter referred to as the "Convention") and in Articles 1 to 3 of the First Protocol to the Convention, signed at Paris on 20th March 1952,

Have agreed as follows:

## ARTICLE 1

### **Prohibition of imprisonment for debt**

No one shall be deprived of his liberty merely on the ground of inability to fulfil a contractual obligation.

## ARTICLE 2

### **Freedom of movement**

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.

## ARTICLE 3

### **Prohibition of expulsion of nationals**

1. No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national.
2. No one shall be deprived of the right to enter the territory of the State of which he is a national.

## ARTICLE 4

### **Prohibition of collective expulsion of aliens**

Collective expulsion of aliens is prohibited.



## ARTICLE 5

### **Territorial application**

1. Any High Contracting Party may, at the time of signature or ratification of this Protocol, or at any time thereafter, communicate to the Secretary General of the Council of Europe a declaration stating the extent to which it undertakes that the provisions of this Protocol shall apply to such of the territories for the international relations of which it is responsible as are named therein.
2. Any High Contracting Party which has communicated a declaration in virtue of the preceding paragraph may, from time to time, communicate a further declaration modifying the terms of any former declaration or terminating the application of the provisions of this Protocol in respect of any territory.
3. A declaration made in accordance with this Article shall be deemed to have been made in accordance with paragraph 1 of Article 56 of the Convention.
4. The territory of any State to which this Protocol applies by virtue of ratification or acceptance by that State, and each territory to which this Protocol is applied by virtue of a declaration by that State under this Article, shall be treated as separate territories for the purpose of the references in Articles 2 and 3 to the territory of a State.
5. Any State which has made a declaration in accordance with paragraph 1 or 2 of this Article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Court to receive applications from individuals, non-governmental organisations or groups of individuals as provided in Article 34 of the Convention in respect of all or any of Articles 1 to 4 of this Protocol.

## ARTICLE 6

### **Relationship to the Convention**

As between the High Contracting Parties the provisions of Articles 1 to 5 of this Protocol shall be regarded as additional Articles to the Convention, and all the provisions of the Convention shall apply accordingly.

## ARTICLE 7

### **Signature and ratification**

1. This Protocol shall be open for signature by the members of the Council of Europe who are the signatories of the Convention; it shall be ratified at the same time as or after the ratification of the Convention. It shall enter into force after the deposit of five instruments of ratification. As regards any signatory ratifying subsequently, the Protocol shall enter into force at the date of the deposit of its instrument of ratification.
  2. The instruments of ratification shall be deposited with the Secretary General of the Council of Europe, who will notify all members of the names of those who have ratified.
- In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.
- DONE AT STRASBOURG, THIS 16<sup>TH</sup> DAY OF SEPTEMBER 1963, in English and in French, both texts being equally authoritative, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary General shall transmit certified copies to each of the signatory states.

# Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty

Strasbourg, 28.IV.1983

THE MEMBER STATES OF THE COUNCIL OF EUROPE, signatory to this Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 (hereinafter referred to as "the Convention"),

Considering that the evolution that has occurred in several member States of the Council of Europe expresses a general tendency in favour of abolition of the death penalty;

Have agreed as follows:

## ARTICLE 1

### **Abolition of the death penalty**

The death penalty shall be abolished. No one shall be condemned to such penalty or executed.

## ARTICLE 2

### **Death penalty in time of war**

A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions. The State shall communicate to the Secretary General of the Council of Europe the relevant provisions of that law.

## ARTICLE 3

### **Prohibition of derogations**

No derogation from the provisions of this Protocol shall be made under Article 15 of the Convention.

## ARTICLE 4

### **Prohibition of reservations**

No reservation may be made under Article 57 of the Convention in respect of the provisions of this Protocol.

## ARTICLE 5

### **Territorial application**

1. Any State may at the time of signature or when depositing its instrument of ratification, acceptance or approval, specify the territory or territories to which this Protocol shall apply.
2. Any State may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Protocol to any other territory specified in the declaration. In respect of such territory the Protocol shall enter into force on the first day of the month following the date of receipt of such declaration by the Secretary General.



3. Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn by a notification addressed to the Secretary General. The withdrawal shall become effective on the first day of the month following the date of receipt of such notification by the Secretary General.

## ARTICLE 6

### **Relationship to the Convention**

As between the States Parties the provisions of Articles 1 to 5 of this Protocol shall be regarded as additional Articles to the Convention and all the provisions of the Convention shall apply accordingly.

## ARTICLE 7

### **Signature and ratification**

The Protocol shall be open for signature by the member States of the Council of Europe, signatories to the Convention. It shall be subject to ratification, acceptance or approval. A member State of the Council of Europe may not ratify, accept or approve this Protocol unless it has, simultaneously or previously, ratified the Convention. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

## ARTICLE 8

### **Entry into force**

1. This Protocol shall enter into force on the first day of the month following the date on which five member States of the Council of Europe have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 7.

2. In respect of any member State which subsequently expresses its consent to be bound by it, the Protocol shall enter into force on the first day of the month following the date of the deposit of the instrument of ratification, acceptance or approval.

## ARTICLE 9

### **Depositary functions**

The Secretary General of the Council of Europe shall notify the member States of the Council of:

- (a) any signature;
- (b) the deposit of any instrument of ratification, acceptance or approval;
- (c) any date of entry into force of this Protocol in accordance with Articles 5 and 8;
- (d) any other act, notification or communication relating to this Protocol.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

DONE AT STRASBOURG, THIS 28<sup>TH</sup> DAY OF APRIL 1983, in English and in French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe.

# Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms

Strasbourg, 22.XI.1984

THE MEMBER STATES OF THE COUNCIL OF EUROPE, signatory hereto,

Being resolved to take further steps to ensure the collective enforcement of certain rights and freedoms by means of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (hereinafter referred to as "the Convention"),

Have agreed as follows:

## ARTICLE 1

### **Procedural safeguards relating to expulsion of aliens**

1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:
  - (a) to submit reasons against his expulsion,
  - (b) to have his case reviewed, and
  - (c) to be represented for these purposes before the competent authority or a person or persons designated by that authority.

2. An alien may be expelled before the exercise of his rights under paragraph 1.(a), (b) and (c) of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security.

## ARTICLE 2

### **Right of appeal in criminal matters**

1. Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.
2. This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal.

## ARTICLE 3

### **Compensation for wrongful conviction**

When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed, or he has been pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to the law or the practice of the State concerned, unless it is proved that the nondisclosure of the unknown fact in time is wholly or partly attributable to him.



## ARTICLE 4

### **Right not to be tried or punished twice**

1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.
2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.
3. No derogation from this Article shall be made under Article 15 of the Convention.

## ARTICLE 5

### **Equality between spouses**

Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution. This Article shall not prevent States from taking such measures as are necessary in the interests of the children.

## ARTICLE 6

### **Territorial application**

1. Any State may at the time of signature or when depositing its instrument of ratification, acceptance or approval, specify the territory or territories to which the Protocol shall apply and State the extent to which it undertakes that the provisions of this Protocol shall apply to such territory or territories.

2. Any State may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Protocol to any other territory specified in the declaration. In respect of such territory the Protocol shall enter into force on the first day of the month following the expiration of a period of two months after the date of receipt by the Secretary General of such declaration.

3. Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn or modified by a notification addressed to the Secretary General. The withdrawal or modification shall become effective on the first day of the month following the expiration of a period of two months after the date of receipt of such notification by the Secretary General.

4. A declaration made in accordance with this Article shall be deemed to have been made in accordance with paragraph 1 of Article 56 of the Convention.

5. The territory of any State to which this Protocol applies by virtue of ratification, acceptance or approval by that State, and each territory to which this Protocol is applied by virtue of a declaration by that State under this Article, may be treated as separate territories for the purpose of the reference in Article 1 to the territory of a State.

6. Any State which has made a declaration in accordance with paragraph 1 or 2 of this Article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Court to receive applications from individuals, non-governmental organisations or groups of individuals as provided in Article 34 of the Convention in respect of Articles 1 to 5 of this Protocol.

## ARTICLE 7

### **Relationship to the Convention**

As between the States Parties, the provisions of Article 1 to 6 of this Protocol shall be regarded as additional Articles to the Convention, and all the provisions of the Convention shall apply accordingly.

## ARTICLE 8

### **Signature and ratification**

This Protocol shall be open for signature by member States of the Council of Europe which have signed the Convention. It is subject to ratification, acceptance or approval. A member State of the Council of Europe may not ratify, accept or approve this Protocol without previously or simultaneously ratifying the Convention. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

## ARTICLE 9

### **Entry into force**

1. This Protocol shall enter into force on the first day of the month following the expiration of a period of two months after the date on which seven member States of the Council of Europe have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 8.
2. In respect of any member State which subsequently expresses its consent to be bound by it, the Protocol shall enter into force on the first day of the month following the expiration of a period of two months after the date of the deposit of the instrument of ratification, acceptance or approval.

## ARTICLE 10

### **Depositary functions**

The Secretary General of the Council of Europe shall notify all the member States of the Council of Europe of:

- (a) any signature;
- (b) the deposit of any instrument of ratification, acceptance or approval;
- (c) any date of entry into force of this Protocol in accordance with Articles 6 and 9;
- (d) any other act, notification or declaration relating to this Protocol.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

DONE AT STRASBOURG, THIS 22<sup>ND</sup> DAY OF NOVEMBER 1984, in English and French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe.



# Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms

Rome, 4.XI.2000

THE MEMBER STATES OF THE COUNCIL OF EUROPE, signatory hereto,

Having regard to the fundamental principle according to which all persons are equal before the law and are entitled to the equal protection of the law;

Being resolved to take further steps to promote the equality of all persons through the collective enforcement of a general prohibition of discrimination by means of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (hereinafter referred to as "the Convention");

Reaffirming that the principle of nondiscrimination does not prevent States Parties from taking measures in order to promote full and effective equality, provided that there is an objective and reasonable justification for those measures,

Have agreed as follows:

## ARTICLE 1

### **General prohibition of discrimination**

1. The enjoyment of any right set forth by law 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.
2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

## ARTICLE 2

### **Territorial application**

1. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance or approval, specify the territory or territories to which this Protocol shall apply.
2. Any State may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Protocol to any other territory specified in the declaration. In respect of such territory the Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of receipt by the Secretary General of such declaration.
3. Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn or modified by a notification addressed to the Secretary General of the Council of Europe. The withdrawal or modification shall become effective on the first day of the month following the expiration of a period of three months after the date of receipt of such notification by the Secretary General.

4. A declaration made in accordance with this Article shall be deemed to have been made in accordance with paragraph 1 of Article 56 of the Convention.

5. Any State which has made a declaration in accordance with paragraph 1 or 2 of this Article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Court to receive applications from individuals, non-governmental organisations or groups of individuals as provided by Article 34 of the Convention in respect of Article 1 of this Protocol.

### **ARTICLE 3**

#### **Relationship to the Convention**

As between the States Parties, the provisions of Articles 1 and 2 of this Protocol shall be regarded as additional Articles to the Convention, and all the provisions of the Convention shall apply accordingly.

### **ARTICLE 4**

#### **Signature and ratification**

This Protocol shall be open for signature by member States of the Council of Europe which have signed the Convention. It is subject to ratification, acceptance or approval. A member State of the Council of Europe may not ratify, accept or approve this Protocol without previously or simultaneously ratifying the Convention. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

### **ARTICLE 5**

#### **Entry into force**

1. This Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date on which ten member States of the Council of Europe have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 4.

2. In respect of any member State which subsequently expresses its consent to be bound by it, the Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of the deposit of the instrument of ratification, acceptance or approval.

### **ARTICLE 6**

#### **Depositary functions**

The Secretary General of the Council of Europe shall notify all the member States of the Council of Europe of:

- (a) any signature;
- (b) the deposit of any instrument of ratification, acceptance or approval;
- (c) any date of entry into force of this Protocol in accordance with Articles 2 and 5;
- (d) any other act, notification or communication relating to this Protocol.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

DONE AT ROME, THIS 4TH DAY OF NOVEMBER 2000, in English and in French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe.



# Protocol No. 13

## to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty in all circumstances

Vilnius, 3.V.2002

THE MEMBER STATES OF THE COUNCIL OF EUROPE, signatory hereto,

Convinced that everyone's right to life is a basic value in a democratic society and that the abolition of the death penalty is essential for the protection of this right and for the full recognition of the inherent dignity of all human beings;

Wishing to strengthen the protection of the right to life guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (hereinafter referred to as "the Convention");

Noting that Protocol No. 6 to the Convention, concerning the Abolition of the Death Penalty, signed at Strasbourg on 28 April 1983, does not exclude the death penalty in respect of acts committed in time of war or of imminent threat of war;

Being resolved to take the final step in order to abolish the death penalty in all circumstances,

Have agreed as follows:

### ARTICLE 1

#### **Abolition of the death penalty**

The death penalty shall be abolished. No one shall be condemned to such penalty or executed.

### ARTICLE 2

#### **Prohibition of derogations**

No derogation from the provisions of this Protocol shall be made under Article 15 of the Convention.

### ARTICLE 3

#### **Prohibition of reservations**

No reservation may be made under Article 57 of the Convention in respect of the provisions of this Protocol.

### ARTICLE 4

#### **Territorial application**

1. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance or approval, specify the territory or territories to which this Protocol shall apply.
2. Any State may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Protocol to any other territory specified in the declaration. In respect of such territory the Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of receipt by the Secretary General of such declaration.

3. Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn or modified by a notification addressed to the Secretary General. The withdrawal or modification shall become effective on the first day of the month following the expiration of a period of three months after the date of receipt of such notification by the Secretary General.

## ARTICLE 5

### **Relationship to the Convention**

As between the States Parties the provisions of Articles 1 to 4 of this Protocol shall be regarded as additional Articles to the Convention, and all the provisions of the Convention shall apply accordingly.

## ARTICLE 6

### **Signature and ratification**

This Protocol shall be open for signature by member States of the Council of Europe which have signed the Convention. It is subject to ratification, acceptance or approval. A member State of the Council of Europe may not ratify, accept or approve this Protocol without previously or simultaneously ratifying the Convention. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

## ARTICLE 7

### **Entry into force**

1. This Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date on which ten member States of the Council of Europe have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 6.

2. In respect of any member State which subsequently expresses its consent to be bound by it, the Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of the deposit of the instrument of ratification, acceptance or approval.

## ARTICLE 8

### **Depositary functions**

The Secretary General of the Council of Europe shall notify all the member States of the Council of Europe of:

- (a) any signature;
- (b) the deposit of any instrument of ratification, acceptance or approval;
- (c) any date of entry into force of this Protocol in accordance with Articles 4 and 7;
- (d) any other act, notification or communication relating to this Protocol.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

DONE AT VILNIUS, THIS 3RD DAY OF MAY 2002, in English and in French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe.



# Protocol No. 16

## to the Convention on the Protection of Human Rights and Fundamental Freedoms

Strasbourg, 2.X.2013

THE MEMBER STATES OF THE COUNCIL OF EUROPE AND OTHER HIGH CONTRACTING PARTIES TO THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, signed at Rome on 4 November 1950 (hereinafter referred to as "the Convention"), signatories hereto,

Having regard to the provisions of the Convention and, in particular, Article 19 establishing the European Court of Human Rights (hereinafter referred to as "the Court");

Considering that the extension of the Court's competence to give advisory opinions will further enhance the interaction between the Court and national authorities and thereby reinforce implementation of the Convention, in accordance with the principle of subsidiarity;

Having regard to Opinion No. 285 (2013) adopted by the Parliamentary Assembly of the Council of Europe on 28 June 2013,

Have agreed as follows:

### ARTICLE 1

1. Highest courts and tribunals of a High Contracting Party, as specified in accordance with Article 10, may request the Court to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto.
2. The requesting court or tribunal may seek an advisory opinion only in the context of a case pending before it.
3. The requesting court or tribunal shall give reasons for its request and shall provide the relevant legal and factual background of the pending case.

### ARTICLE 2

1. A panel of five judges of the Grand Chamber shall decide whether to accept the request for an advisory opinion, having regard to Article 1. The panel shall give reasons for any refusal to accept the request.
2. If the panel accepts the request, the Grand Chamber shall deliver the advisory opinion.
3. The panel and the Grand Chamber, as referred to in the preceding paragraphs, shall include ex officio the judge elected in respect of the High Contracting Party to which the requesting court or tribunal pertains. If there is none or if that judge is unable to sit, a person chosen by the President of the Court from a list submitted in advance by that Party shall sit in the capacity of judge.

### **ARTICLE 3**

The Council of Europe Commissioner for Human Rights and the High Contracting Party to which the requesting court or tribunal pertains shall have the right to submit written comments and take part in any hearing. The President of the Court may, in the interest of the proper administration of justice, invite any other High Contracting Party or person also to submit written comments or take part in any hearing.

### **ARTICLE 4**

1. Reasons shall be given for advisory opinions.
2. If the advisory opinion does not represent, in whole or in part, the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.
3. Advisory opinions shall be communicated to the requesting court or tribunal and to the High Contracting Party to which that court or tribunal pertains.
4. Advisory opinions shall be published.

### **ARTICLE 5**

Advisory opinions shall not be binding.

### **ARTICLE 6**

As between the High Contracting Parties the provisions of Articles 1 to 5 of this Protocol shall be regarded as additional articles to the Convention, and all the provisions of the Convention shall apply accordingly.

### **ARTICLE 7**

1. This Protocol shall be open for signature by the High Contracting Parties to the Convention, which may express their consent to be bound by:
  - (a) signature without reservation as to ratification, acceptance or approval; or
  - (b) signature subject to ratification, acceptance or approval, followed by ratification, acceptance or approval.
2. The instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

### **ARTICLE 8**

1. This Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date on which ten High Contracting Parties to the Convention have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 7.
2. In respect of any High Contracting Party to the Convention which subsequently expresses its consent to be bound by it, the Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of the expression of its consent to be bound by the Protocol in accordance with the provisions of Article 7.

### **ARTICLE 9**

No reservation may be made under Article 57 of the Convention in respect of the provisions of this Protocol.



## ARTICLE 10

Each High Contracting Party to the Convention shall, at the time of signature or when depositing its instrument of ratification, acceptance or approval, by means of a declaration addressed to the Secretary General of the Council of Europe, indicate the courts or tribunals that it designates for the purposes of Article 1, paragraph 1, of this Protocol. This declaration may be modified at any later date and in the same manner.

## ARTICLE 11

The Secretary General of the Council of Europe shall notify the member States of the Council of Europe and the other High Contracting Parties to the Convention of:

- (a) a any signature;
- (b) the deposit of any instrument of ratification, acceptance or approval;
- (c) any date of entry into force of this Protocol in accordance with Article 8;
- (d) any declaration made in accordance with Article 10; and
- (e) any other act, notification or communication relating to this Protocol.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

Done at Strasbourg, this 2nd day of October 2013, in English and French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe and to the other High Contracting Parties to the Convention.

# European Convention on Human Rights

European Court of Human Rights  
Council of Europe  
F-67075 Strasbourg cedex

[www.echr.coe.int](http://www.echr.coe.int)

ENG

Annex 250



# ANNEX 251





# **AGREEMENT ON PORT STATE MEASURES TO PREVENT, DETER AND ELIMINATE ILLEGAL, UNREPORTED AND UNREGULATED FISHING**

## **PREAMBLE**

*The Parties to this Agreement,*

*Deeply concerned* about the continuation of illegal, unreported and unregulated fishing and its detrimental effect upon fish stocks, marine ecosystems and the livelihoods of legitimate fishers, and the increasing need for food security on a global basis,

*Conscious* of the role of the port State in the adoption of effective measures to promote the sustainable use and the long-term conservation of living marine resources,

*Recognizing* that measures to combat illegal, unreported and unregulated fishing should build on the primary responsibility of flag States and use all available jurisdiction in accordance with international law, including port State measures, coastal State measures, market related measures and measures to ensure that nationals do not support or engage in illegal, unreported and unregulated fishing,

*Recognizing* that port State measures provide a powerful and cost-effective means of preventing, deterring and eliminating illegal, unreported and unregulated fishing,

*Aware of* the need for increasing coordination at the regional and interregional levels to combat illegal, unreported and unregulated fishing through port State measures,

*Acknowledging* the rapidly developing communications technology, databases, networks and global records that support port State measures,

*Recognizing* the need for assistance to developing countries to adopt and implement port State measures,

*Taking note of* the calls by the international community through the United Nations System, including the United Nations General Assembly and the Committee on Fisheries of the Food and Agriculture Organization of the United Nations, hereinafter referred to as 'FAO', for a binding international instrument on minimum standards for port State measures, based on the 2001 FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing and the 2005 FAO Model Scheme on Port State Measures to Combat Illegal, Unreported and Unregulated Fishing,

*Bearing in mind* that, in the exercise of their sovereignty over ports located in their territory, States may adopt more stringent measures, in accordance with international law,

*Recalling* the relevant provisions of the United Nations Convention on the Law of the Sea of 10 December 1982, hereinafter referred to as the ‘Convention’,

*Recalling* the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks of 4 December 1995, the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas of 24 November 1993 and the 1995 FAO Code of Conduct for Responsible Fisheries,

*Recognizing* the need to conclude an international agreement within the framework of FAO, under Article XIV of the FAO Constitution,

*Have agreed as follows:*

## **PART 1 GENERAL PROVISIONS**

### **Article 1 Use of terms**

For the purposes of this Agreement:

- (a) “conservation and management measures” means measures to conserve and manage living marine resources that are adopted and applied consistently with the relevant rules of international law including those reflected in the Convention;
- (b) “fish” means all species of living marine resources, whether processed or not;
- (c) “fishing” means searching for, attracting, locating, catching, taking or harvesting fish or any activity which can reasonably be expected to result in the attracting, locating, catching, taking or harvesting of fish;



- (d) “fishing related activities” means any operation in support of, or in preparation for, fishing, including the landing, packaging, processing, transshipping or transporting of fish that have not been previously landed at a port, as well as the provisioning of personnel, fuel, gear and other supplies at sea;
- (e) “illegal, unreported and unregulated fishing” refers to the activities set out in paragraph 3 of the 2001 FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, hereinafter referred to as ‘IUU fishing’;
- (f) “Party” means a State or regional economic integration organization that has consented to be bound by this Agreement and for which this Agreement is in force;
- (g) “port” includes offshore terminals and other installations for landing, transshipping, packaging, processing, refuelling or resupplying;
- (h) “regional economic integration organization” means a regional economic integration organization to which its member States have transferred competence over matters covered by this Agreement, including the authority to make decisions binding on its member States in respect of those matters;
- (i) “regional fisheries management organization” means an intergovernmental fisheries organization or arrangement, as appropriate, that has the competence to establish conservation and management measures; and
- (j) “vessel” means any vessel, ship of another type or boat used for, equipped to be used for, or intended to be used for, fishing or fishing related activities.

## **Article 2**

### **Objective**

The objective of this Agreement is to prevent, deter and eliminate IUU fishing through the implementation of effective port State measures, and thereby to ensure the long-term conservation and sustainable use of living marine resources and marine ecosystems.

### **Article 3**

#### **Application**

1. Each Party shall, in its capacity as a port State, apply this Agreement in respect of vessels not entitled to fly its flag that are seeking entry to its ports or are in one of its ports, except for:
  - (a) vessels of a neighbouring State that are engaged in artisanal fishing for subsistence, provided that the port State and the flag State cooperate to ensure that such vessels do not engage in IUU fishing or fishing related activities in support of such fishing ; and
  - (b) container vessels that are not carrying fish or, if carrying fish, only fish that have been previously landed, provided that there are no clear grounds for suspecting that such vessels have engaged in fishing related activities in support of IUU fishing.
2. A Party may, in its capacity as a port State, decide not to apply this Agreement to vessels chartered by its nationals exclusively for fishing in areas under its national jurisdiction and operating under its authority therein. Such vessels shall be subject to measures by the Party which are as effective as measures applied in relation to vessels entitled to fly its flag.
3. This Agreement shall apply to fishing conducted in marine areas that is illegal, unreported or unregulated, as defined in Article 1(e) of this Agreement, and to fishing related activities in support of such fishing.
4. This Agreement shall be applied in a fair, transparent and non-discriminatory manner, consistent with international law.
5. As this Agreement is global in scope and applies to all ports, the Parties shall encourage all other entities to apply measures consistent with its provisions. Those that may not otherwise become Parties to this Agreement may express their commitment to act consistently with its provisions.

### **Article 4**

#### **Relationship with international law and other international instruments**

1. Nothing in this Agreement shall prejudice the rights, jurisdiction and duties of Parties under international law. In particular, nothing in this Agreement shall be construed to affect:

- (a) the sovereignty of Parties over their internal, archipelagic and territorial waters or their sovereign rights over their continental shelf and in their exclusive economic zones;
  - (b) the exercise by Parties of their sovereignty over ports in their territory in accordance with international law, including their right to deny entry thereto as well as to adopt more stringent port State measures than those provided for in this Agreement, including such measures adopted pursuant to a decision of a regional fisheries management organization.
2. In applying this Agreement, a Party does not thereby become bound by measures or decisions of, or recognize, any regional fisheries management organization of which it is not a member.
3. In no case is a Party obliged under this Agreement to give effect to measures or decisions of a regional fisheries management organization if those measures or decisions have not been adopted in conformity with international law.
4. This Agreement shall be interpreted and applied in conformity with international law taking into account applicable international rules and standards, including those established through the International Maritime Organization, as well as other international instruments.
5. Parties shall fulfil in good faith the obligations assumed pursuant to this Agreement and shall exercise the rights recognized herein in a manner that would not constitute an abuse of right.

## **Article 5**

### **Integration and coordination at the national level**

Each Party shall, to the greatest extent possible:

- (a) integrate or coordinate fisheries related port State measures with the broader system of port State controls;
- (b) integrate port State measures with other measures to prevent, deter and eliminate IUU fishing and fishing related activities in support of such fishing, taking into account as appropriate the 2001 FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing; and



- (c) take measures to exchange information among relevant national agencies and to coordinate the activities of such agencies in the implementation of this Agreement.

## **Article 6**

### **Cooperation and exchange of information**

1. In order to promote the effective implementation of this Agreement and with due regard to appropriate confidentiality requirements, Parties shall cooperate and exchange information with relevant States, FAO, other international organizations and regional fisheries management organizations, including on the measures adopted by such regional fisheries management organizations in relation to the objective of this Agreement.
2. Each Party shall, to the greatest extent possible, take measures in support of conservation and management measures adopted by other States and other relevant international organizations.
3. Parties shall cooperate, at the subregional, regional and global levels, in the effective implementation of this Agreement including, where appropriate, through FAO or regional fisheries management organizations and arrangements.

## **PART 2**

### **ENTRY INTO PORT**

## **Article 7**

### **Designation of ports**

1. Each Party shall designate and publicize the ports to which vessels may request entry pursuant to this Agreement. Each Party shall provide a list of its designated ports to FAO, which shall give it due publicity.
2. Each Party shall, to the greatest extent possible, ensure that every port designated and publicized in accordance with paragraph 1 of this Article has sufficient capacity to conduct inspections pursuant to this Agreement.

## **Article 8**

### **Advance request for port entry**

1. Each Party shall require, as a minimum standard, the information requested in Annex A to be provided before granting entry to a vessel to its port.
2. Each Party shall require the information referred to in paragraph 1 of this Article to be provided sufficiently in advance to allow adequate time for the port State to examine such information.

## **Article 9**

### **Port entry, authorization or denial**

1. After receiving the relevant information required pursuant to Article 8, as well as such other information as it may require to determine whether the vessel requesting entry into its port has engaged in IUU fishing or fishing related activities in support of such fishing, each Party shall decide whether to authorize or deny the entry of the vessel into its port and shall communicate this decision to the vessel or to its representative.
2. In the case of authorization of entry, the master of the vessel or the vessel's representative shall be required to present the authorization for entry to the competent authorities of the Party upon the vessel's arrival at port.
3. In the case of denial of entry, each Party shall communicate its decision taken pursuant to paragraph 1 of this Article to the flag State of the vessel and, as appropriate and to the extent possible, relevant coastal States, regional fisheries management organizations and other international organizations.
4. Without prejudice to paragraph 1 of this Article, when a Party has sufficient proof that a vessel seeking entry into its port has engaged in IUU fishing or fishing related activities in support of such fishing, in particular the inclusion of a vessel on a list of vessels having engaged in such fishing or fishing related activities adopted by a relevant regional fisheries management organization in accordance with the rules and procedures of such organization and in conformity with international law, the Party shall deny that vessel entry into its ports, taking into due account paragraphs 2 and 3 of Article 4.
5. Notwithstanding paragraphs 3 and 4 of this Article, a Party may allow entry into its ports of a vessel referred to in those paragraphs exclusively for the purpose of inspecting it and taking other appropriate actions in conformity with international law which are at least as effective as denial of port entry in preventing, deterring and eliminating IUU fishing and fishing related activities in support of such fishing.

6. Where a vessel referred to in paragraph 4 or 5 of this Article is in port for any reason, a Party shall deny such vessel the use of its ports for landing, transshipping, packaging, and processing of fish and for other port services including, *inter alia*, refuelling and resupplying, maintenance and drydocking. Paragraphs 2 and 3 of Article 11 apply *mutatis mutandis* in such cases. Denial of such use of ports shall be in conformity with international law.

#### **Article 10**

#### **Force majeure or distress**

Nothing in this Agreement affects the entry of vessels to port in accordance with international law for reasons of force majeure or distress, or prevents a port State from permitting entry into port to a vessel exclusively for the purpose of rendering assistance to persons, ships or aircraft in danger or distress.

### **PART 3**

### **USE OF PORTS**

#### **Article 11**

#### **Use of ports**

1. Where a vessel has entered one of its ports, a Party shall deny, pursuant to its laws and regulations and consistent with international law, including this Agreement, that vessel the use of the port for landing, transshipping, packaging and processing of fish that have not been previously landed and for other port services, including, *inter alia*, refuelling and resupplying, maintenance and drydocking, if:

- (a) the Party finds that the vessel does not have a valid and applicable authorization to engage in fishing or fishing related activities required by its flag State;
- (b) the Party finds that the vessel does not have a valid and applicable authorization to engage in fishing or fishing related activities required by a coastal State in respect of areas under the national jurisdiction of that State;
- (c) the Party receives clear evidence that the fish on board was taken in contravention of applicable requirements of a coastal State in respect of areas under the national jurisdiction of that State;



- (d) the flag State does not confirm within a reasonable period of time, on the request of the port State, that the fish on board was taken in accordance with applicable requirements of a relevant regional fisheries management organization taking into due account paragraphs 2 and 3 of Article 4; or
- (e) the Party has reasonable grounds to believe that the vessel was otherwise engaged in IUU fishing or fishing related activities in support of such fishing, including in support of a vessel referred to in paragraph 4 of Article 9, unless the vessel can establish:
  - (i) that it was acting in a manner consistent with relevant conservation and management measures; or
  - (ii) in the case of provision of personnel, fuel, gear and other supplies at sea, that the vessel that was provisioned was not, at the time of provisioning, a vessel referred to in paragraph 4 of Article 9.

2. Notwithstanding paragraph 1 of this Article, a Party shall not deny a vessel referred to in that paragraph the use of port services:

- (a) essential to the safety or health of the crew or the safety of the vessel, provided these needs are duly proven, or
- (b) where appropriate, for the scrapping of the vessel.

3. Where a Party has denied the use of its port in accordance with this Article, it shall promptly notify the flag State and, as appropriate, relevant coastal States, regional fisheries management organizations and other relevant international organizations of its decision.

4. A Party shall withdraw its denial of the use of its port pursuant to paragraph 1 of this Article in respect of a vessel only if there is sufficient proof that the grounds on which use was denied were inadequate or erroneous or that such grounds no longer apply.

5. Where a Party has withdrawn its denial pursuant to paragraph 4 of this Article, it shall promptly notify those to whom a notification was issued pursuant to paragraph 3 of this Article.

**PART 4**  
**INSPECTIONS AND FOLLOW-UP ACTIONS**

**Article 12**

**Levels and priorities for inspection**

1. Each Party shall inspect the number of vessels in its ports required to reach an annual level of inspections sufficient to achieve the objective of this Agreement.
2. Parties shall seek to agree on the minimum levels for inspection of vessels through, as appropriate, regional fisheries management organizations, FAO or otherwise.
3. In determining which vessels to inspect, a Party shall give priority to:
  - (a) vessels that have been denied entry or use of a port in accordance with this Agreement;
  - (b) requests from other relevant Parties, States or regional fisheries management organizations that particular vessels be inspected, particularly where such requests are supported by evidence of IUU fishing or fishing related activities in support of such fishing by the vessel in question; and
  - (c) other vessels for which there are clear grounds for suspecting that they have engaged in IUU fishing or fishing related activities in support of such fishing.

**Article 13**

**Conduct of inspections**

1. Each Party shall ensure that its inspectors carry out the functions set forth in Annex B as a minimum standard.
2. Each Party shall, in carrying out inspections in its ports:
  - (a) ensure that inspections are carried out by properly qualified inspectors authorized for that purpose, having regard in particular to Article 17;

- (b) ensure that, prior to an inspection, inspectors are required to present to the master of the vessel an appropriate document identifying the inspectors as such;
- (c) ensure that inspectors examine all relevant areas of the vessel, the fish on board, the nets and any other gear, equipment, and any document or record on board that is relevant to verifying compliance with relevant conservation and management measures;
- (d) require the master of the vessel to give inspectors all necessary assistance and information, and to present relevant material and documents as may be required, or certified copies thereof;
- (e) in case of appropriate arrangements with the flag State of the vessel, invite that State to participate in the inspection;
- (f) make all possible efforts to avoid unduly delaying the vessel to minimize interference and inconvenience, including any unnecessary presence of inspectors on board, and to avoid action that would adversely affect the quality of the fish on board;
- (g) make all possible efforts to facilitate communication with the master or senior crew members of the vessel, including where possible and where needed that the inspector is accompanied by an interpreter;
- (h) ensure that inspections are conducted in a fair, transparent and non-discriminatory manner and would not constitute harassment of any vessel; and
- (i) not interfere with the master's ability, in conformity with international law, to communicate with the authorities of the flag State.

#### **Article 14**

#### **Results of inspections**

Each Party shall, as a minimum standard, include the information set out in Annex C in the written report of the results of each inspection.



**Article 15**  
**Transmittal of inspection results**

Each Party shall transmit the results of each inspection to the flag State of the inspected vessel and, as appropriate, to:

- (a) relevant Parties and States, including:
  - (i) those States for which there is evidence through inspection that the vessel has engaged in IUU fishing or fishing related activities in support of such fishing within waters under their national jurisdiction; and
  - (ii) the State of which the vessel's master is a national;
- (b) relevant regional fisheries management organizations; and
- (c) FAO and other relevant international organizations.

**Article 16**  
**Electronic exchange of information**

1. To facilitate implementation of this Agreement, each Party shall, where possible, establish a communication mechanism that allows for direct electronic exchange of information, with due regard to appropriate confidentiality requirements.
2. To the extent possible and with due regard to appropriate confidentiality requirements, Parties should cooperate to establish an information-sharing mechanism, preferably coordinated by FAO, in conjunction with other relevant multilateral and intergovernmental initiatives, and to facilitate the exchange of information with existing databases relevant to this Agreement.
3. Each Party shall designate an authority that shall act as a contact point for the exchange of information under this Agreement. Each Party shall notify the pertinent designation to FAO.
4. Each Party shall handle information to be transmitted through any mechanism established under paragraph 1 of this Article consistent with Annex D.

5. FAO shall request relevant regional fisheries management organizations to provide information concerning the measures or decisions they have adopted and implemented which relate to this Agreement for their integration, to the extent possible and taking due account of the appropriate confidentiality requirements, into the information-sharing mechanism referred to in paragraph 2 of this Article.

## **Article 17**

### **Training of inspectors**

Each Party shall ensure that its inspectors are properly trained taking into account the guidelines for the training of inspectors in Annex E. Parties shall seek to cooperate in this regard.

## **Article 18**

### **Port State actions following inspection**

1. Where, following an inspection, there are clear grounds for believing that a vessel has engaged in IUU fishing or fishing related activities in support of such fishing, the inspecting Party shall:

- (a) promptly notify the flag State and, as appropriate, relevant coastal States, regional fisheries management organizations and other international organizations, and the State of which the vessel's master is a national of its findings; and
- (b) deny the vessel the use of its port for landing, transshipping, packaging and processing of fish that have not been previously landed and for other port services, including, *inter alia*, refuelling and resupplying, maintenance and drydocking, if these actions have not already been taken in respect of the vessel, in a manner consistent with this Agreement, including Article 4.

2. Notwithstanding paragraph 1 of this Article, a Party shall not deny a vessel referred to in that paragraph the use of port services essential for the safety or health of the crew or the safety of the vessel.

3. Nothing in this Agreement prevents a Party from taking measures that are in conformity with international law in addition to those specified in paragraphs 1 and 2 of this Article, including such measures as the flag State of the vessel has expressly requested or to which it has consented.

## **Article 19**

### **Information on recourse in the port State**

1. A Party shall maintain the relevant information available to the public and provide such information, upon written request, to the owner, operator, master or representative of a vessel with regard to any recourse established in accordance with its national laws and regulations concerning port State measures taken by that Party pursuant to Articles 9, 11, 13 or 18, including information pertaining to the public services or judicial institutions available for this purpose, as well as information on whether there is any right to seek compensation in accordance with its national laws and regulations in the event of any loss or damage suffered as a consequence of any alleged unlawful action by the Party.
2. The Party shall inform the flag State, the owner, operator, master or representative, as appropriate, of the outcome of any such recourse. Where other Parties, States or international organizations have been informed of the prior decision pursuant to Articles 9, 11, 13 or 18, the Party shall inform them of any change in its decision.

## **PART 5**

### **ROLE OF FLAG STATES**

## **Article 20**

### **Role of flag States**

1. Each Party shall require the vessels entitled to fly its flag to cooperate with the port State in inspections carried out pursuant to this Agreement.
2. When a Party has clear grounds to believe that a vessel entitled to fly its flag has engaged in IUU fishing or fishing related activities in support of such fishing and is seeking entry to or is in the port of another State, it shall, as appropriate, request that State to inspect the vessel or to take other measures consistent with this Agreement.
3. Each Party shall encourage vessels entitled to fly its flag to land, transship, package and process fish, and use other port services, in ports of States that are acting in accordance with, or in a manner consistent with this Agreement. Parties are encouraged to develop, including through regional fisheries management organizations and FAO, fair, transparent and non-discriminatory procedures for identifying any State that may not be acting in accordance with, or in a manner consistent with, this Agreement.
4. Where, following port State inspection, a flag State Party receives an inspection report indicating that there are clear grounds to believe that a vessel entitled to fly its flag



has engaged in IUU fishing or fishing related activities in support of such fishing, it shall immediately and fully investigate the matter and shall, upon sufficient evidence, take enforcement action without delay in accordance with its laws and regulations.

5. Each Party shall, in its capacity as a flag State, report to other Parties, relevant port States and, as appropriate, other relevant States, regional fisheries management organizations and FAO on actions it has taken in respect of vessels entitled to fly its flag that, as a result of port State measures taken pursuant to this Agreement, have been determined to have engaged in IUU fishing or fishing related activities in support of such fishing.

6. Each Party shall ensure that measures applied to vessels entitled to fly its flag are at least as effective in preventing, deterring, and eliminating IUU fishing and fishing related activities in support of such fishing as measures applied to vessels referred to in paragraph 1 of Article 3.

## **PART 6**

### **REQUIREMENTS OF DEVELOPING STATES**

#### **Article 21**

##### **Requirements of developing States**

1. Parties shall give full recognition to the special requirements of developing States Parties in relation to the implementation of port State measures consistent with this Agreement. To this end, Parties shall, either directly or through FAO, other specialized agencies of the United Nations or other appropriate international organizations and bodies, including regional fisheries management organizations, provide assistance to developing States Parties in order to, *inter alia*:

- (a) enhance their ability, in particular the least-developed among them and small island developing States, to develop a legal basis and capacity for the implementation of effective port State measures;
- (b) facilitate their participation in any international organizations that promote the effective development and implementation of port State measures; and
- (c) facilitate technical assistance to strengthen the development and implementation of port State measures by them, in coordination with relevant international mechanisms.

2. Parties shall give due regard to the special requirements of developing port States Parties, in particular the least-developed among them and small island developing States, to ensure that a disproportionate burden resulting from the implementation of this Agreement is not transferred directly or indirectly to them. In cases where the transfer of a disproportionate burden has been demonstrated, Parties shall cooperate to facilitate the implementation by the relevant developing States Parties of specific obligations under this Agreement.

3. Parties shall, either directly or through FAO, assess the special requirements of developing States Parties concerning the implementation of this Agreement.

4. Parties shall cooperate to establish appropriate funding mechanisms to assist developing States in the implementation of this Agreement. These mechanisms shall, *inter alia*, be directed specifically towards:

- (a) developing national and international port State measures;
- (b) developing and enhancing capacity, including for monitoring, control and surveillance and for training at the national and regional levels of port managers, inspectors, and enforcement and legal personnel;
- (c) monitoring, control, surveillance and compliance activities relevant to port State measures, including access to technology and equipment; and
- (d) assisting developing States Parties with the costs involved in any proceedings for the settlement of disputes that result from actions they have taken pursuant to this Agreement.

5. Cooperation with and among developing States Parties for the purposes set out in this Article may include the provision of technical and financial assistance through bilateral, multilateral and regional channels, including South-South cooperation.

6. Parties shall establish an *ad hoc* working group to periodically report and make recommendations to the Parties on the establishment of funding mechanisms including a scheme for contributions, identification and mobilization of funds, the development of criteria and procedures to guide implementation, and progress in the implementation of the funding mechanisms. In addition to the considerations provided in this Article, the *ad hoc* working group shall take into account, *inter alia*:

- (a) the assessment of the needs of developing States Parties, in particular the least-developed among them and small island developing States;

- (b) the availability and timely disbursement of funds;
- (c) transparency of decision-making and management processes concerning fundraising and allocations; and
- (d) accountability of the recipient developing States Parties in the agreed use of funds.

Parties shall take into account the reports and any recommendations of the *ad hoc* working group and take appropriate action.

## **PART 7**

### **DISPUTE SETTLEMENT**

#### **Article 22**

##### **Peaceful settlement of disputes**

1. Any Party may seek consultations with any other Party or Parties on any dispute with regard to the interpretation or application of the provisions of this Agreement with a view to reaching a mutually satisfactory solution as soon as possible.
2. In the event that the dispute is not resolved through these consultations within a reasonable period of time, the Parties in question shall consult among themselves as soon as possible with a view to having the dispute settled by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their own choice.
3. Any dispute of this character not so resolved shall, with the consent of all Parties to the dispute, be referred for settlement to the International Court of Justice, to the International Tribunal for the Law of the Sea or to arbitration. In the case of failure to reach agreement on referral to the International Court of Justice, to the International Tribunal for the Law of the Sea or to arbitration, the Parties shall continue to consult and cooperate with a view to reaching settlement of the dispute in accordance with the rules of international law relating to the conservation of living marine resources.



**PART 8**  
**NON-PARTIES**

**Article 23**

**Non-Parties to this Agreement**

1. Parties shall encourage non-Parties to this Agreement to become Parties thereto and/or to adopt laws and regulations and implement measures consistent with its provisions.
2. Parties shall take fair, non-discriminatory and transparent measures consistent with this Agreement and other applicable international law to deter the activities of non-Parties which undermine the effective implementation of this Agreement.

**PART 9**  
**MONITORING, REVIEW AND ASSESSMENT**

**Article 24**

**Monitoring, review and assessment**

1. Parties shall, within the framework of FAO and its relevant bodies, ensure the regular and systematic monitoring and review of the implementation of this Agreement as well as the assessment of progress made towards achieving its objective.
2. Four years after the entry into force of this Agreement, FAO shall convene a meeting of the Parties to review and assess the effectiveness of this Agreement in achieving its objective. The Parties shall decide on further such meetings as necessary.

**PART 10**  
**FINAL PROVISIONS**

**Article 25**

**Signature**

This Agreement shall be open for signature at FAO from the Twenty-second day of November 2009 until the Twenty-first day of November 2010 by all States and regional economic integration organizations.

## **Article 26**

### **Ratification, acceptance or approval**

1. This Agreement shall be subject to ratification, acceptance or approval by the signatories.
2. Instruments of ratification, acceptance or approval shall be deposited with the Depositary.

## **Article 27**

### **Accession**

1. After the period in which this Agreement is open for signature, it shall be open for accession by any State or regional economic integration organization.
2. Instruments of accession shall be deposited with the Depositary.

## **Article 28**

### **Participation by Regional Economic Integration Organizations**

1. In cases where a regional economic integration organization that is an international organization referred to in Annex IX, Article 1, of the Convention does not have competence over all the matters governed by this Agreement, Annex IX to the Convention shall apply *mutatis mutandis* to participation by such regional economic integration organization in this Agreement, except that the following provisions of that Annex shall not apply:

(a) Article 2, first sentence; and

(b) Article 3, paragraph 1.

2. In cases where a regional economic integration organization that is an international organization referred to in Annex IX, Article 1, of the Convention has competence over all the matters governed by this Agreement, the following provisions shall apply to participation by the regional economic integration organization in this Agreement:

(a) at the time of signature or accession, such organization shall make a declaration stating:

(i) that it has competence over all the matters governed by this Agreement;

- (ii) that, for this reason, its member States shall not become States Parties, except in respect of their territories for which the organization has no responsibility; and
  - (iii) that it accepts the rights and obligations of States under this Agreement;
- (b) participation of such an organization shall in no case confer any rights under this Agreement on member States of the organization;
- (c) in the event of a conflict between the obligations of such organization under this Agreement and its obligations under the Agreement establishing the organization or any acts relating to it, the obligations under this Agreement shall prevail.

## **Article 29**

### **Entry into force**

1. This Agreement shall enter into force thirty days after the date of deposit with the Depositary of the twenty-fifth instrument of ratification, acceptance, approval or accession in accordance with Article 26 or 27.
2. For each signatory which ratifies, accepts or approves this Agreement after its entry into force, this Agreement shall enter into force thirty days after the date of the deposit of its instrument of ratification, acceptance or approval.
3. For each State or regional economic integration organization which accedes to this Agreement after its entry into force, this Agreement shall enter into force thirty days after the date of the deposit of its instrument of accession.
4. For the purposes of this Article, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by its Member States.

## **Article 30**

### **Reservations and exceptions**

No reservations or exceptions may be made to this Agreement.



## **Article 31**

### **Declarations and statements**

Article 30 does not preclude a State or regional economic integration organization, when signing, ratifying, accepting, approving or acceding to this Agreement, from making a declaration or statement, however phrased or named, with a view to, *inter alia*, the harmonization of its laws and regulations with the provisions of this Agreement, provided that such declaration or statement does not purport to exclude or to modify the legal effect of the provisions of this Agreement in their application to that State or regional economic integration organization.

## **Article 32**

### **Provisional application**

1. This Agreement shall be applied provisionally by States or regional economic integration organizations which consent to its provisional application by so notifying the Depositary in writing. Such provisional application shall become effective from the date of receipt of the notification.
2. Provisional application by a State or regional economic integration organization shall terminate upon the entry into force of this Agreement for that State or regional economic integration organization or upon notification by that State or regional economic integration organization to the Depositary in writing of its intention to terminate provisional application.

## **Article 33**

### **Amendments**

1. Any Party may propose amendments to this Agreement after the expiry of a period of two years from the date of entry into force of this Agreement.
2. Any proposed amendment to this Agreement shall be transmitted by written communication to the Depositary along with a request for the convening of a meeting of the Parties to consider it. The Depositary shall circulate to all Parties such communication as well as all replies to the request received from Parties. Unless within six months from the date of circulation of the communication one half of the Parties object to the request, the Depositary shall convene a meeting of the Parties to consider the proposed amendment.
3. Subject to Article 34, any amendment to this Agreement shall only be adopted by consensus of the Parties present at the meeting at which it is proposed for adoption.

4. Subject to Article 34, any amendment adopted by the meeting of the Parties shall come into force among the Parties having ratified, accepted or approved it on the ninetieth day after the deposit of instruments of ratification, acceptance or approval by two-thirds of the Parties to this Agreement based on the number of Parties on the date of adoption of the amendment. Thereafter the amendment shall enter into force for any other Party on the ninetieth day after that Party deposits its instrument of ratification, acceptance or approval of the amendment.

5. For the purposes of this Article, an instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by its Member States.

#### **Article 34**

##### **Annexes**

1. The Annexes form an integral part of this Agreement and a reference to this Agreement shall constitute a reference to the Annexes.

2. An amendment to an Annex to this Agreement may be adopted by two-thirds of the Parties to this Agreement present at a meeting where the proposed amendment to the Annex is considered. Every effort shall however be made to reach agreement on any amendment to an Annex by way of consensus. An amendment to an Annex shall be incorporated in this Agreement and enter into force for those Parties that have expressed their acceptance from the date on which the Depositary receives notification of acceptance from one-third of the Parties to this Agreement, based on the number of Parties on the date of adoption of the amendment. The amendment shall thereafter enter into force for each remaining Party upon receipt by the Depositary of its acceptance.

#### **Article 35**

##### **Withdrawal**

Any Party may withdraw from this Agreement at any time after the expiry of one year from the date upon which the Agreement entered into force with respect to that Party, by giving written notice of such withdrawal to the Depositary. Withdrawal shall become effective one year after receipt of the notice of withdrawal by the Depositary.

**Article 36**  
**The Depositary**

The Director-General of FAO shall be the Depositary of this Agreement. The Depositary shall:

- (a) transmit certified copies of this Agreement to each signatory and Party;
- (b) register this Agreement, upon its entry into force, with the Secretariat of the United Nations in accordance with Article 102 of the Charter of the United Nations;
- (c) promptly inform each signatory and Party to this Agreement of all:
  - (i) signatures and instruments of ratification, acceptance, approval and accession deposited under Articles 25, 26 and 27;
  - (ii) the date of entry into force of this Agreement in accordance with Article 29;
  - (iii) proposals for amendment to this Agreement and their adoption and entry into force in accordance with Article 33;
  - (iv) proposals for amendment to the Annexes and their adoption and entry into force in accordance with Article 34; and
  - (v) withdrawals from this Agreement in accordance with Article 35.

**Article 37**  
**Authentic texts**

The Arabic, Chinese, English, French, Russian and Spanish texts of this Agreement are equally authentic.

IN WITNESS WHEREOF, the undersigned Plenipotentiaries, being duly authorized, have signed this Agreement.

DONE in Rome on this Twenty-second day of November, 2009.



**ANNEX A**

**Information to be provided in advance by vessels requesting port entry**

<b>1. Intended port of call</b>								
<b>2. Port State</b>								
<b>3. Estimated date and time of arrival</b>								
<b>4. Purpose(s)</b>								
<b>5. Port and date of last port call</b>								
<b>6. Name of the vessel</b>								
<b>7. Flag State</b>								
<b>8. Type of vessel</b>								
<b>9. International Radio Call Sign</b>								
<b>10. Vessel contact information</b>								
<b>11. Vessel owner(s)</b>								
<b>12. Certificate of registry ID</b>								
<b>13. IMO ship ID, if available</b>								
<b>14. External ID, if available</b>								
<b>15. RFMO ID, if applicable</b>								
<b>16. VMS</b>		No		Yes: National		Yes: RFMO(s)		Type:
<b>17. Vessel dimensions</b>			Length		Beam		Draft	
<b>18. Vessel master name and nationality</b>								
<b>19. Relevant fishing authorization(s)</b>								
<i>Identifier</i>	<i>Issued by</i>	<i>Validity</i>	<i>Fishing area(s)</i>	<i>Species</i>	<i>Gear</i>			
<b>20. Relevant transshipment authorization(s)</b>								
<i>Identifier</i>		<i>Issued by</i>		<i>Validity</i>				
<i>Identifier</i>		<i>Issued by</i>		<i>Validity</i>				
<b>21. Transshipment information concerning donor vessels</b>								
<i>Date</i>	<i>Location</i>	<i>Name</i>	<i>Flag State</i>	<i>ID number</i>	<i>Species</i>	<i>Product form</i>	<i>Catch area</i>	<i>Quantity</i>

<b>22. Total catch onboard</b>				<b>23. Catch to be offloaded</b>
<i>Species</i>	<i>Product form</i>	<i>Catch area</i>	<i>Quantity</i>	<i>Quantity</i>

**Port State inspection procedures**

Inspectors shall:

- a) verify, to the extent possible, that the vessel identification documentation onboard and information relating to the owner of the vessel is true, complete and correct, including through appropriate contacts with the flag State or international records of vessels if necessary;
- b) verify that the vessel's flag and markings (e.g. name, external registration number, International Maritime Organization (IMO) ship identification number, international radio call sign and other markings, main dimensions) are consistent with information contained in the documentation;
- c) verify, to the extent possible, that the authorizations for fishing and fishing related activities are true, complete, correct and consistent with the information provided in accordance with Annex A;
- d) review all other relevant documentation and records held onboard, including, to the extent possible, those in electronic format and vessel monitoring system (VMS) data from the flag State or relevant regional fisheries management organizations (RFMOs). Relevant documentation may include logbooks, catch, transshipment and trade documents, crew lists, stowage plans and drawings, descriptions of fish holds, and documents required pursuant to the Convention on International Trade in Endangered Species of Wild Fauna and Flora;
- e) examine, to the extent possible, all relevant fishing gear onboard, including any gear stowed out of sight as well as related devices, and to the extent possible, verify that they are in conformity with the conditions of the authorizations. The fishing gear shall, to the extent possible, also be checked to ensure that features such as the mesh and twine size, devices and attachments, dimensions and configuration of nets, pots, dredges, hook sizes and numbers are in conformity with applicable regulations and that the markings correspond to those authorized for the vessel;
- f) determine, to the extent possible, whether the fish on board was harvested in accordance with the applicable authorizations;
- g) examine the fish, including by sampling, to determine its quantity and composition. In doing so, inspectors may open containers where the fish has been pre-packed and move the catch or containers to ascertain the integrity of fish holds. Such examination may include inspections of product type and determination of nominal weight;



- h) evaluate whether there is clear evidence for believing that a vessel has engaged in IUU fishing or fishing related activities in support of such fishing;
- i) provide the master of the vessel with the report containing the result of the inspection, including possible measures that could be taken, to be signed by the inspector and the master. The master's signature on the report shall serve only as acknowledgment of the receipt of a copy of the report. The master shall be given the opportunity to add any comments or objection to the report, and, as appropriate, to contact the relevant authorities of the flag State in particular where the master has serious difficulties in understanding the content of the report. A copy of the report shall be provided to the master; and
- j) arrange, where necessary and possible, for translation of relevant documentation.

## Report of the results of the inspection

1. Inspection report no				2. Port State			
3. Inspecting authority							
4. Name of principal inspector				ID			
5. Port of inspection							
6. Commencement of inspection			YYYY		MM	DD	HH
7. Completion of inspection			YYYY		MM	DD	HH
8. Advanced notification received				Yes		No	
9. Purpose(s)		LAN	TRX	PRO	OTH (specify)		
10. Port and State and date of last port call					YYYY	MM	DD
11. Vessel name							
12. Flag State							
13. Type of vessel							
14. International Radio Call Sign							
15. Certificate of registry ID							
16. IMO ship ID, if available							
17. External ID, if available							
18. Port of registry							
19. Vessel owner(s)							
20. Vessel beneficial owner(s), if known and different from vessel owner							
21. Vessel operator(s), if different from vessel owner							
22. Vessel master name and nationality							
23. Fishing master name and nationality							
24. Vessel agent							
25. VMS		No	Yes: National		Yes: RFMOs	Type:	
26. Status in RFMO areas where fishing or fishing related activities have been undertaken, including any IUU vessel listing							
Vessel identifier	RFMO	Flag State status		Vessel on authorized vessel list		Vessel on IUU vessel list	

<b>27. Relevant fishing authorization(s)</b>						
<i>Identifier</i>	<i>Issued by</i>	<i>Validity</i>	<i>Fishing area(s)</i>	<i>Species</i>	<i>Gear</i>	
<b>28. Relevant transshipment authorization(s)</b>						
<i>Identifier</i>		<i>Issued by</i>		<i>Validity</i>		
<i>Identifier</i>		<i>Issued by</i>		<i>Validity</i>		
<b>29. Transshipment information concerning donor vessels</b>						
<i>Name</i>	<i>Flag State</i>	<i>ID no.</i>	<i>Species</i>	<i>Product form</i>	<i>Catch area(s)</i>	<i>Quantity</i>
<b>30. Evaluation of offloaded catch (quantity)</b>						
<i>Species</i>	<i>Product form</i>	<i>Catch area(s)</i>	<i>Quantity declared</i>	<i>Quantity offloaded</i>	<i>Difference between quantity declared and quantity determined, if any</i>	
<b>31. Catch retained onboard (quantity)</b>						
<i>Species</i>	<i>Product form</i>	<i>Catch area(s)</i>	<i>Quantity declared</i>	<i>Quantity retained</i>	<i>Difference between quantity declared and quantity determined, if any</i>	
<b>32. Examination of logbook(s) and other documentation</b>				<i>Yes</i>	<i>No</i>	<i>Comments</i>
<b>33. Compliance with applicable catch documentation scheme(s)</b>				<i>Yes</i>	<i>No</i>	<i>Comments</i>
<b>34. Compliance with applicable trade information scheme(s)</b>				<i>Yes</i>	<i>No</i>	<i>Comments</i>
<b>35. Type of gear used</b>						
<b>36. Gear examined in accordance with paragraph e) of Annex B</b>			<i>Yes</i>	<i>No</i>	<i>Comments</i>	
<b>37. Findings by inspector(s)</b>						
<b>38. Apparent infringement(s) noted including reference to relevant legal instrument(s)</b>						



<b>39. Comments by the master</b>
<b>40. Action taken</b>
<b>41. Master's signature</b>
<b>42. Inspector's signature</b>

**Information systems on port State measures**

In implementing this Agreement, each Party shall:

- a) seek to establish computerized communication in accordance with Article 16;
- b) establish, to the extent possible, websites to publicize the list of ports designated in accordance with Article 7 and the actions taken in accordance with the relevant provisions of this Agreement;
- c) identify, to the greatest extent possible, each inspection report by a unique reference number starting with 3-alpha code of the port State and identification of the issuing agency;
- d) utilize, to the extent possible, the international coding system below in Annexes A and C and translate any other coding system into the international system.

countries/territories:	ISO-3166 3-alpha Country Code
species:	ASFIS 3-alpha code (known as FAO 3-alpha code)
vessel types:	ISSCFV code (known as FAO alpha code)
gear types:	ISSCFG code (known as FAO alpha code)

**Guidelines for the training of inspectors**

Elements of a training programme for port State inspectors should include at least the following areas:

1. Ethics;
2. Health, safety and security issues;
3. Applicable national laws and regulations, areas of competence and conservation and management measures of relevant RFMOs, and applicable international law;
4. Collection, evaluation and preservation of evidence;
5. General inspection procedures such as report writing and interview techniques;
6. Analysis of information, such as logbooks, electronic documentation and vessel history (name, ownership and flag State), required for the validation of information given by the master of the vessel;
7. Vessel boarding and inspection, including hold inspections and calculation of vessel hold volumes;
8. Verification and validation of information related to landings, transshipments, processing and fish remaining onboard, including utilizing conversion factors for the various species and products;
9. Identification of fish species, and the measurement of length and other biological parameters;
10. Identification of vessels and gear, and techniques for the inspection and measurement of gear;
11. Equipment and operation of VMS and other electronic tracking systems; and
12. Actions to be taken following an inspection.



CERTIFIED TRUE COPY of the English version of the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing which was approved on 22 November 2009 at the Thirty-sixth Session of the FAO Conference. In accordance with the provisions of paragraph 7 of Article XIV of the FAO Constitution, this has been certified by the Director-General of the Organization and the Chairperson of the Conference.

Jacques Diouf  
Director-General  
Food and Agriculture Organization of  
the United Nations

Kathleen Merrigan  
Chairperson of the Conference



# ANNEX 252





## International Covenant on Civil and Political Rights

Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49

Preamble

The States Parties to the present Covenant,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles:

PART I

## Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

## PART II

## Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:



(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

### Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

### Article 4

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

## Article 5

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

## PART III

## Article 6

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

#### Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

#### Article 8

1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.

2. No one shall be held in servitude.

3.

(a) No one shall be required to perform forced or compulsory labour;

(b) Paragraph 3 (a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court;

(c) For the purpose of this paragraph the term "forced or compulsory labour" shall not include:

(i) Any work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;



(ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors;

(iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;

(iv) Any work or service which forms part of normal civil obligations.

#### Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

#### Article 10

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

2.

(a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;

(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

#### Article 11

No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation. Article 12

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country.

#### Article 13

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

#### Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;



(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation. 5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

## Article 15

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

#### Article 16

Everyone shall have the right to recognition everywhere as a person before the law.

#### Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

#### Article 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

#### Article 19

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

#### Article 20

1. Any propaganda for war shall be prohibited by law.

2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

#### Article 21



The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

#### Article 22

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

#### Article 23

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

2. The right of men and women of marriageable age to marry and to found a family shall be recognized.

3. No marriage shall be entered into without the free and full consent of the intending spouses.

4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

#### Article 24

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

2. Every child shall be registered immediately after birth and shall have a name.

3. Every child has the right to acquire a nationality.

#### Article 25

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country.

#### Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all

persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

#### Article 27

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

#### PART IV

#### Article 28

1. There shall be established a Human Rights Committee (hereafter referred to in the present Covenant as the Committee). It shall consist of eighteen members and shall carry out the functions hereinafter provided.

2. The Committee shall be composed of nationals of the States Parties to the present Covenant who shall be persons of high moral character and recognized competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience.

3. The members of the Committee shall be elected and shall serve in their personal capacity.

#### Article 29

1. The members of the Committee shall be elected by secret ballot from a list of persons possessing the qualifications prescribed in article 28 and nominated for the purpose by the States Parties to the present Covenant.



2. Each State Party to the present Covenant may nominate not more than two persons. These persons shall be nationals of the nominating State.

3. A person shall be eligible for renomination.

#### Article 30

1. The initial election shall be held no later than six months after the date of the entry into force of the present Covenant.

2. At least four months before the date of each election to the Committee, other than an election to fill a vacancy declared in accordance with article 34, the Secretary-General of the United Nations shall address a written invitation to the States Parties to the present Covenant to submit their nominations for membership of the Committee within three months.

3. The Secretary-General of the United Nations shall prepare a list in alphabetical order of all the persons thus nominated, with an indication of the States Parties which have nominated them, and shall submit it to the States Parties to the present Covenant no later than one month before the date of each election.

4. Elections of the members of the Committee shall be held at a meeting of the States Parties to the present Covenant convened by the Secretary General of the United Nations at the Headquarters of the United Nations. At that meeting, for which two thirds of the States Parties to the present Covenant shall constitute a quorum, the persons elected to the Committee shall be those nominees who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

#### Article 31

1. The Committee may not include more than one national of the same State.

2. In the election of the Committee, consideration shall be given to equitable geographical distribution of membership and to the representation of the different forms of civilization and of the principal legal systems.

#### Article 32

1. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. However, the terms of nine of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these nine members shall be chosen by lot by the Chairman of the meeting referred to in article 30, paragraph 4. 2. Elections at the expiry of office shall be held in accordance with the preceding articles of this part of the present Covenant.

#### Article 33

1. If, in the unanimous opinion of the other members, a member of the Committee has ceased to carry out his functions for any cause other than absence of a temporary character, the Chairman of the Committee shall notify the Secretary-General of the United Nations, who shall then declare the seat of that member to be vacant.

2. In the event of the death or the resignation of a member of the Committee, the Chairman shall immediately notify the Secretary-General of the United Nations, who shall declare the seat vacant from the date of death or the date on which the resignation takes effect.

#### Article 34

1. When a vacancy is declared in accordance with article 33 and if the term of office of the member to be replaced does not expire within six months of the declaration of the vacancy, the Secretary-General of the United Nations shall notify each of the States Parties to the present Covenant, which may within two months submit nominations in accordance with article 29 for the purpose of filling the vacancy.

2. The Secretary-General of the United Nations shall prepare a list in alphabetical order of the persons thus nominated and shall submit it to the States Parties to the present Covenant. The

election to fill the vacancy shall then take place in accordance with the relevant provisions of this part of the present Covenant.

3. A member of the Committee elected to fill a vacancy declared in accordance with article 33 shall hold office for the remainder of the term of the member who vacated the seat on the Committee under the provisions of that article.

#### Article 35

The members of the Committee shall, with the approval of the General Assembly of the United Nations, receive emoluments from United Nations resources on such terms and conditions as the General Assembly may decide, having regard to the importance of the Committee's responsibilities.

#### Article 36

The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Covenant.

#### Article 37

1. The Secretary-General of the United Nations shall convene the initial meeting of the Committee at the Headquarters of the United Nations.

2. After its initial meeting, the Committee shall meet at such times as shall be provided in its rules of procedure.

3. The Committee shall normally meet at the Headquarters of the United Nations or at the United Nations Office at Geneva.

#### Article 38



Every member of the Committee shall, before taking up his duties, make a solemn declaration in open committee that he will perform his functions impartially and conscientiously.

#### Article 39

1. The Committee shall elect its officers for a term of two years. They may be re-elected.
  
2. The Committee shall establish its own rules of procedure, but these rules shall provide, inter alia, that:
  - (a) Twelve members shall constitute a quorum;
  
  - (b) Decisions of the Committee shall be made by a majority vote of the members present.

#### Article 40

1. The States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights: (a) Within one year of the entry into force of the present Covenant for the States Parties concerned;
  - (b) Thereafter whenever the Committee so requests.
  
2. All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit them to the Committee for consideration. Reports shall indicate the factors and difficulties, if any, affecting the implementation of the present Covenant.
  
3. The Secretary-General of the United Nations may, after consultation with the Committee, transmit to the specialized agencies concerned copies of such parts of the reports as may fall within their field of competence.

4. The Committee shall study the reports submitted by the States Parties to the present Covenant. It shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties. The Committee may also transmit to the Economic and Social Council these comments along with the copies of the reports it has received from States Parties to the present Covenant.

5. The States Parties to the present Covenant may submit to the Committee observations on any comments that may be made in accordance with paragraph 4 of this article.

#### Article 41

1. A State Party to the present Covenant may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant. Communications under this article may be received and considered only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration. Communications received under this article shall be dealt with in accordance with the following procedure:

(a) If a State Party to the present Covenant considers that another State Party is not giving effect to the provisions of the present Covenant, it may, by written communication, bring the matter to the attention of that State Party. Within three months after the receipt of the communication the receiving State shall afford the State which sent the communication an explanation, or any other statement in writing clarifying the matter which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending, or available in the matter;

(b) If the matter is not adjusted to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State;

(c) The Committee shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged;

(d) The Committee shall hold closed meetings when examining communications under this article;

(e) Subject to the provisions of subparagraph (c), the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of respect for human rights and fundamental freedoms as recognized in the present Covenant;

(f) In any matter referred to it, the Committee may call upon the States Parties concerned, referred to in subparagraph (b), to supply any relevant information;

(g) The States Parties concerned, referred to in subparagraph (b), shall have the right to be represented when the matter is being considered in the Committee and to make submissions orally and/or in writing;

(h) The Committee shall, within twelve months after the date of receipt of notice under subparagraph (b), submit a report:

(i) If a solution within the terms of subparagraph (e) is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached;

(ii) If a solution within the terms of subparagraph (e) is not reached, the Committee shall confine its report to a brief statement of the facts; the written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report. In every matter, the report shall be communicated to the States Parties concerned.

2. The provisions of this article shall come into force when ten States Parties to the present Covenant have made declarations under paragraph 1 of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by any State Party shall be received after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

Article 42



1.

(a) If a matter referred to the Committee in accordance with article 41 is not resolved to the satisfaction of the States Parties concerned, the Committee may, with the prior consent of the States Parties concerned, appoint an ad hoc Conciliation Commission (hereinafter referred to as the Commission). The good offices of the Commission shall be made available to the States Parties concerned with a view to an amicable solution of the matter on the basis of respect for the present Covenant;

(b) The Commission shall consist of five persons acceptable to the States Parties concerned. If the States Parties concerned fail to reach agreement within three months on all or part of the composition of the Commission, the members of the Commission concerning whom no agreement has been reached shall be elected by secret ballot by a two-thirds majority vote of the Committee from among its members.

2. The members of the Commission shall serve in their personal capacity. They shall not be nationals of the States Parties concerned, or of a State not Party to the present Covenant, or of a State Party which has not made a declaration under article 41.

3. The Commission shall elect its own Chairman and adopt its own rules of procedure.

4. The meetings of the Commission shall normally be held at the Headquarters of the United Nations or at the United Nations Office at Geneva. However, they may be held at such other convenient places as the Commission may determine in consultation with the Secretary-General of the United Nations and the States Parties concerned.

5. The secretariat provided in accordance with article 36 shall also service the commissions appointed under this article.

6. The information received and collated by the Committee shall be made available to the Commission and the Commission may call upon the States Parties concerned to supply any other relevant information.

7. When the Commission has fully considered the matter, but in any event not later than twelve months after having been seized of the matter, it shall submit to the Chairman of the Committee a report for communication to the States Parties concerned:

(a) If the Commission is unable to complete its consideration of the matter within twelve months, it shall confine its report to a brief statement of the status of its consideration of the matter;

(b) If an amicable solution to the matter on the basis of respect for human rights as recognized in the present Covenant is reached, the Commission shall confine its report to a brief statement of the facts and of the solution reached;

(c) If a solution within the terms of subparagraph (b) is not reached, the Commission's report shall embody its findings on all questions of fact relevant to the issues between the States Parties concerned, and its views on the possibilities of an amicable solution of the matter. This report shall also contain the written submissions and a record of the oral submissions made by the States Parties concerned;

(d) If the Commission's report is submitted under subparagraph (c), the States Parties concerned shall, within three months of the receipt of the report, notify the Chairman of the Committee whether or not they accept the contents of the report of the Commission.

8. The provisions of this article are without prejudice to the responsibilities of the Committee under article 41.

9. The States Parties concerned shall share equally all the expenses of the members of the Commission in accordance with estimates to be provided by the Secretary-General of the United Nations.

10. The Secretary-General of the United Nations shall be empowered to pay the expenses of the members of the Commission, if necessary, before reimbursement by the States Parties concerned, in accordance with paragraph 9 of this article.

Article 43

The members of the Committee, and of the ad hoc conciliation commissions which may be appointed under article 42, shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

#### Article 44

The provisions for the implementation of the present Covenant shall apply without prejudice to the procedures prescribed in the field of human rights by or under the constituent instruments and the conventions of the United Nations and of the specialized agencies and shall not prevent the States Parties to the present Covenant from having recourse to other procedures for settling a dispute in accordance with general or special international agreements in force between them.

#### Article 45

The Committee shall submit to the General Assembly of the United Nations, through the Economic and Social Council, an annual report on its activities.

### PART V

#### Article 46

Nothing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies which define the respective responsibilities of the various organs of the United Nations and of the specialized agencies in regard to the matters dealt with in the present Covenant.

#### Article 47

Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.



## PART VI

### Article 48

1. The present Covenant is open for signature by any State Member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a Party to the present Covenant.

2. The present Covenant is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. The present Covenant shall be open to accession by any State referred to in paragraph 1 of this article.

4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

5. The Secretary-General of the United Nations shall inform all States which have signed this Covenant or acceded to it of the deposit of each instrument of ratification or accession.

### Article 49

1. The present Covenant shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the thirty-fifth instrument of ratification or instrument of accession.

2. For each State ratifying the present Covenant or acceding to it after the deposit of the thirty-fifth instrument of ratification or instrument of accession, the present Covenant shall enter into force three months after the date of the deposit of its own instrument of ratification or instrument of accession.

## Article 50

The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.

## Article 51

1. Any State Party to the present Covenant may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General of the United Nations shall thereupon communicate any proposed amendments to the States Parties to the present Covenant with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.

2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties to the present Covenant in accordance with their respective constitutional processes. 3. When amendments come into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of the present Covenant and any earlier amendment which they have accepted.

## Article 52

1. Irrespective of the notifications made under article 48, paragraph 5, the Secretary-General of the United Nations shall inform all States referred to in paragraph 1 of the same article of the following particulars:

(a) Signatures, ratifications and accessions under article 48;

(b) The date of the entry into force of the present Covenant under article 49 and the date of the entry into force of any amendments under article 51.

## Article 53

1. The present Covenant, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.
2. The Secretary-General of the United Nations shall transmit certified copies of the present Covenant to all States referred to in article 48.



# ANNEX 253



## Universal Declaration of Human Rights

### Preamble

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

Whereas it is essential to promote the development of friendly relations between nations,

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,

Whereas Member States have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,

Now, therefore,

The General Assembly,

Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by



teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

#### **Article 1**

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

#### **Article 2**

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

#### **Article 3**

Everyone has the right to life, liberty and security of person.

#### **Article 4**

No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

#### **Article 5**

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

## **Article 6**

Everyone has the right to recognition everywhere as a person before the law.

## **Article 7**

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

## **Article 8**

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

## **Article 9**

No one shall be subjected to arbitrary arrest, detention or exile.

## **Article 10**

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

## **Article 11**

1. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.
2. No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier

penalty be imposed than the one that was applicable at the time the penal offence was committed.

#### **Article 12**

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

#### **Article 13**

1. Everyone has the right to freedom of movement and residence within the borders of each State.
2. Everyone has the right to leave any country, including his own, and to return to his country.

#### **Article 14**

1. Everyone has the right to seek and to enjoy in other countries asylum from persecution.
2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

#### **Article 15**

1. Everyone has the right to a nationality.
2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

#### **Article 16**



1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
2. Marriage shall be entered into only with the free and full consent of the intending spouses.
3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

#### **Article 17**

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

#### **Article 18**

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

#### **Article 19**

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

#### **Article 20**

1. Everyone has the right to freedom of peaceful assembly and association.
2. No one may be compelled to belong to an association.

#### **Article 21**

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
2. Everyone has the right to equal access to public service in his country.
3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

#### **Article 22**

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

#### **Article 23**

1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
2. Everyone, without any discrimination, has the right to equal pay for equal work.
3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
4. Everyone has the right to form and to join trade unions for the protection of his interests.

#### **Article 24**

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

## **Article 25**

1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.
2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

## **Article 26**

1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.
3. Parents have a prior right to choose the kind of education that shall be given to their children.

## **Article 27**

1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.



2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

#### **Article 28**

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

#### **Article 29**

1. Everyone has duties to the community in which alone the free and full development of his personality is possible.
2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.
3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

#### **Article 30**

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.