

**INTERNATIONAL COURT OF JUSTICE**

***CERTAIN IRANIAN ASSETS***

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

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**REJOINDER**

**SUBMITTED BY**

**THE UNITED STATES OF AMERICA**

**May 17, 2021**

**ANNEXES**

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# ANNEX 403



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release the carrier from liability or to set a lower limit is null and void (Arts. 22-23). Actions for damages must be brought before the court of the domicile of the carrier or of the place where he has an establishment through which the contract was concluded, or before the court of the place of destination (Art. 28). Arbitration clauses are, however, permitted, provided the arbitration is to be effected within the jurisdictions indicated. A statute of limitations of two years is provided (Art. 29).

The convention constitutes a beginning for the unification of certain branches of private air law. Even if the convention is not presently ratified, the continuity planned in the work of the technical committee and of the diplomatic conferences will insure its being taken as a basis for further discussion. Its provisions may seem to some to be unduly favorable to the carrier; but when the insurance companies have a somewhat better basis for calculating their actuarial risks, insurance will be generally resorted to in protecting against losses. It is true, the convention is designed to encourage the extension of air transportation, and its provisions must be viewed in this light.

The scope of the Warsaw Conference was intentionally a modest one. Other subjects will soon be placed upon the agenda for future conferences. The technical committee has under consideration a draft relating to the responsibility for injuries to third parties upon the subjacent territory. This is a matter upon which international agreement will be much more difficult of accomplishment. The Pan American Convention of 1928 provides that reparations for damages caused to persons or property located in the subjacent territory shall be governed by the laws of each State (Art. 28). The International Convention of 1919 is, of course, entirely silent upon this question.

The irresistible logic of recent achievements in the art of aerial navigation is rapidly making aerial law, like maritime law, one of world-wide rather than of local or regional significance. While there are certain important differences, yet so far as transportation by air tends to be carried on internationally by regular lines, there is a marked analogy in many respects to the problems of international maritime transportation. The Warsaw Conference indicates a definite trend toward recognizing the analogy. The future fate of the convention, as well as of the labors of the further diplomatic conferences contemplated by its final protocol, will have an important influence on the further development of international commercial aviation.

ARTHUR K. KUHN

#### INTERNATIONAL LEGISLATION ON THE TREATMENT OF FOREIGNERS

Fifteen years ago a leading scholar in the field of international law could write: "The legal position of the alien has in the progress of time advanced from that of complete outlawry, in the days of early Rome and the Germanic

tribes, to that of practical assimilation with nationals, at the present time."<sup>1</sup> The problem of the treatment of the alien had become chiefly that of securing for him this equal treatment to which he was by law entitled, or, indeed, better treatment still if the local conditions of law and government were too unsatisfactory.

In the past decade, however, and indeed during the World War itself, the equal and equitable treatment of the alien began to be abandoned, or deliberately reversed, in favor of discriminatory treatment of one sort or another, in a great many European States. The emotionally colorless legal "alien" became the hated "foreigner," and was so treated in one phase of life after another, until finally it seemed necessary to attempt to secure some standardization and perhaps some revision of the national legislations and administrative arrangements in this matter if European commerce were to be relieved of its more pressing burdens. Hence the International Conference on the Treatment of Foreigners, convened by the Council of the League of Nations, whose first session was held in Paris last winter and whose second session is to be held, presumably, in the course of the coming year.

The conference at its first session provided another extremely interesting and illuminating example of the difficulties which beset the codification of old international law and the adoption of new international law today. At Paris last winter, at The Hague in March, in Geneva this spring, the story has been the same: the nations find it almost impossible either to codify the old law or replace it with new. There is an impression abroad that the post-war period had been very fruitful in international legislation; alongside of this picture should be placed the records of the conferences mentioned, the Conference on Import and Export Prohibitions, the Tariff Truce Conference, and several others. The Conference on the Treatment of Foreigners finally decided to adjourn without attempting to conclude any convention at all, and leave matters to a second meeting, together with such efforts as could be made in the interval to smooth out divergences and conflicts of opinion among the participants.

Two major questions arise in these circumstances. What are the causes for such a situation? And what is the cure?

On the first point we have several interesting comments in the records of the Foreigners Conference, but none more striking and enlightening than those of the representative of the League's Economic Committee, M. Serruys, made in the tenth plenary session. In the course of his remarks M. Serruys attributed the failure of the conference to an attempt to secure "a uniform doctrine notwithstanding disparities in situations of law and fact." He further alluded to the situations of certain States which were prevented from taking a progressive or advanced position "owing to their inferior de-

<sup>1</sup> Borchard, E. M., *Diplomatic Protection of Citizens Abroad*, 1915, 817; also (*ibid.*): " . . . at the present time, in his private relations, the legal position of the alien is practically the same as that of the national."



velopment, their recent sufferings, their perhaps still backward legislation, and the exigencies of their future evolution." And he rightly added that an open acknowledgment of this situation in point of fact constituted an important step in dealing with the whole matter.

Other comments might, of course, be made upon this situation or upon these international divergences. Some observers might argue that the refusal of certain States to adopt liberal methods of treating the alien resulted, not from conditions of fact which would be recognized by all as reasonably justifying restrictive measures, but from policies and legislation animated by unreasonably narrow and shortsighted views of the principles of solidarity and reciprocity or exchange of benefits in the international community. Still others might feel that it betokened surviving hatred of neighboring nations, or fear, or the spirit of revenge, or plans for future war. The general description of the situation would still remain accurate: international codification and legislation are extremely difficult today because of persistent and recently increased disparities in facts and in feelings among the nations. This difficulty is no thing new, but it is especially striking, especially stubborn, and especially deplorable today.

What is to be done? There are those who would advocate doing nothing, those who would advocate doing a great deal, and it is very difficult to devise a reasonable compromise between the two. To do nothing means to assume that there do exist accepted rules or certain principles of international law on this matter, when the existing variety of practices followed and theories held among the nations may be so great that any such assumption is false and foolishly false. To codify the law at the minimum of general acceptance, would, as M. Serruys and several of the States represented at the Foreigners Conference felt, mean definite and decided retrogression in many quarters and a general retrogressive effect all around. To compel the backward States to accept advanced standards is out of the question. The things which ought not to be done can easily be specified; but what then can be done of any value?

Perhaps, after all, the answer is imposed by the facts of the situation. M. Serruys may be quoted again. The conference, taking as its doctrine that of the most liberal States, would try to bring within the fold those States which might still need to adapt themselves to this more liberal doctrine in five or even ten years (earlier he had said "fifteen"), when certain conditions had been removed. The League was carrying on a long campaign by the art of persuasion and making what must be a long sustained effort on behalf of international coöperation. It had need of hope to undertake such a task, although the conference itself had no need of success at the outset in order to persevere in its accomplishment. Apparently, in the mind of the speaker, two variable factors could be expected to change in the situation, namely economic conditions and men's ideas or feelings. An extremely interesting but extremely difficult problem in sociological jurisprudence is thus adum-

brated. Without attempting to even state that problem here, it may simply be recalled that over forty years of unsuccessful conferences were needed, in the latter part of the 19th century, before the nations could agree upon approximately adequate and effective sanitary conventions. By patience, by persistent pressure, by scientific preparation of the most thorough sort, perhaps by considerably greater subdivision of the topics to be treated than heretofore, the work of codification and legislation in problems current today may, it would seem, be gradually carried on.

PITMAN B. POTTER

#### THE INTERNATIONAL PROTECTION OF WHALES

The problem of international measures for the protection of whales is brought one step nearer solution by the recent report to the Council of the Economic Committee of the League of Nations.<sup>1</sup> The problem has been under active consideration since the League Committee for the Progressive Codification of International Law included in its list of topics ripe for international action, the Exploitation of the Riches of the Sea. This committee, in its report of April 20, 1927, advocated the convocation of an international conference of experts which should cooperate with the Permanent Council for the Exploration of the Sea at Copenhagen. The Council of the League proposed to refer the matter to the Economic Committee which, under a subsequent Assembly resolution, studied the matter in conjunction with the Copenhagen Council. As a result of a meeting of a Committee of Experts, at Berlin in April, 1930, a draft convention dealing solely with the international protection of whales has been submitted to the Council of the League by the Economic Committee.

The draft convention applies only to baleen whales. There is a total prohibition of the destruction of certain species, and of young and "immature" whales, and of females accompanied by young. There is a requirement looking toward complete utilization of the carcass; a restriction on gunners' contracts, eliminating pay solely on the basis of the size of the kill; and a requirement for licensing whaling vessels. The area for the application of the proposed convention is unlimited. Signatory States are required to furnish statistical data to a central organization to be designated.

This draft convention is based largely on the Norwegian law of June 21, 1929, but is less complete. This law authorizes the prohibition of the capture of whales in tropical and subtropical waters, it having been demonstrated that in these areas the condition of the whales is so poor as not to warrant their commercial exploitation. This law was studied in detail by the Copenhagen Council, which felt that further scientific investigation was necessary before definite approval was accorded the suggestion of closing certain areas. The chief information available to the Council was the ex-

<sup>1</sup> Doc. C. 353. M. 146. 1930. II.



# ANNEX 404



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"RESPONSIBILITY OF STATES," AT THE HAGUE  
CODIFICATION CONFERENCE

By EDWIN M. BORCHARD  
*Professor of Law, Yale University*

Among the three subjects which the Committee of Experts for the Progressive Codification of International Law considered ripe for codification was the subject of "Responsibility of States for Damage Caused in Their Territory to the Person or Property of Foreigners." Acting on that assumption, the Committee sent out to the Governments at least three separate documents between 1925 and 1929: first, a Report of its Sub-committee, consisting of Messrs. Guerrero of Salvador, and Wang Chung Hui of China;<sup>1</sup> second, a Schedule of Points drawn up by the so-called Preparatory Committee of Experts, a smaller body, and designed to elicit replies from the different governments, presenting their views on different aspects of the general subject; and finally, the Bases of Discussion,<sup>2</sup> consisting of the replies to the Schedule of Points made by some thirty governments, the substance of these replies being then crystallized into propositions called Bases of Discussion, on which The Hague Conference of the governments, called for March 13, 1930, was to conduct its deliberations. Perhaps that Conference was handicapped from the start by the fact that the Guerrero report, which had been circulated, departed materially, in some of its fundamental postulates and premises (representing minority views) from the subsequent Bases of Discussion, which reflected the views of the majority of the replying governments. Of the Latin-American nations, Chile was practically the only country to respond to the Schedule of Points on the Responsibility of States, and then only within the narrowest limits.

With this preparation, the Commission appointed at The Hague to deal with the Responsibility of States held sixteen meetings between March 17 and April 11, when it confessed its inability to arrive at a convention. Some 42 states, were represented in the Commission, of which eight only were Latin-American, namely, Brazil, Chile, Uruguay, Colombia, Cuba, Nicaragua, Mexico, and Salvador. Besides the full meetings of the Commission, three sub-committees and a drafting committee functioned throughout the sessions. Although no final convention was concluded, the Commission did vote a tentative and partial list of ten articles, which commanded the support of majorities, some of them preponderant. But inasmuch as

<sup>1</sup> Printed in Special Supplement to this JOURNAL, Vol. XX (1926), pp. 177-203; see editorial comment on the report in this JOURNAL, Vol. XX (1926), pp. 738-747.

<sup>2</sup> League of Nations, C. 75. M. 69. 1929. V, 253 pp., double folio pages (French and English), with a supplement containing late replies from the United States and Canada.

the article predicating state responsibility upon lack of due diligence in preventing or punishing the acts of private individuals, one of the most well-established rules of international law, commanded a majority only of twenty-one to seventeen—for reasons to be mentioned hereafter—it became evident that on second reading the required two-thirds vote would be unobtainable. Whereupon, the minority of seventeen, as a condition of its support for a convention, submitted proposals for the amendment of some of the articles already agreed upon—proposals which the majority found itself unable to accept. Efforts at negotiation to bridge the differences proving fruitless, it was ultimately decided not to conclude a convention or even to submit a report which would do more than record the inability to reach an agreement.

Notwithstanding this apparent failure, the articles tentatively agreed upon and the debates in support may exert some influence, for good or ill, upon the further development of international law, for the evidence afforded by the deliberations, under the somewhat liberal privilege of citing authority which international legal procedure admits, may be adduced, as occasion permits or requires, in support of particular legal views by interested governments, counsel, or tribunals. For that reason, interest attaches to the articles arrived at, to their evolution in the Commission and in the subcommittees, and to the views advanced and expounded by the several delegations in the course of the proceedings.

At the first session of the Commission on Responsibility of States, Professor Basdevant of France was elected Chairman; His Excellency A. Diaz de Villar, Cuban Minister at The Hague, Vice-Chairman; and Professor de Visscher of Belgium, Reporter. The Chairman proposed the appointment by the Commission of a drafting committee to act with the Reporter, consisting of His Excellency G. de Vianna Kelsch (Brazil), Professor Cavaglieri (Italy), and Mr. Borchard (United States). Three sub-committees, to which particular problems were assigned, were also appointed. With this organization, the Commission proceeded to the consideration of the articles of a convention.

The French Government on the opening day moved the adoption of a proposition, independently of any Basis of Discussion, which was designed to lay the legal foundation for international responsibility. This proposal, adopted unanimously, became Article 1 of the tentative convention, and as revised read as follows:

International responsibility is incurred by a state if there is any failure on the part of its organs to carry out the international obligations of the state which causes damage to the person or property of a foreigner on the territory of the state.

This proposal was supported by the argument that it carries out the theory of Articles 1382 and 1384 of the French Civil Code to the effect that a person is responsible for the damages that by fault he or his employees cause to



another.<sup>3</sup> It was believed that this article would incorporate in international law the theory of fault as the basis of responsibility, as distinct from the theory of risk. A certain amount of discussion took place in the Conference on the theoretical basis of responsibility—a question which it was ultimately decided to leave unsolved except as embodied in the French proposal.

In the first place, it is doubtful whether the article is as clear as might be supposed, either as a question of theory or practice. The first question that arises is, Who are the "organs" of the state whose function it is to carry out the state's international obligations? The term "organs," in speaking of state agents, was given modern currency by Otto Gierke, the celebrated German jurist. It was his view, derived from the "real theory" of the corporation, that the corporation and its officers were one, like the hand or mouth is to man.<sup>4</sup> But it has been denied that the supposed rule of liability for the acts of organs represents liability for one's own acts (Art. 1382), but that it represents rather vicarious liability for the acts of another (Art. 1384); whereas some schools of thought have considered only the higher authorities as embraced within the category of "organs" (Art. 1382), minor officials being deemed *préposés* or employees (Art. 1384). Also, "organs" for municipal and for international obligations may well be different. The French proposal did not solve these theoretical doubts.

Moreover, the word "failure" may not imply fault at all. Failure through inability or constitutional lack of authority to perform a duty, *e.g.*, a federal inability to try mob violence crimes, would equally impose international liability. Indeed, should we question the validity of the identification theory of Gierke and consider an officer an employee of the state, it seems rather that the basis of the state's responsibility is risk, that is, the state must assume the risk of the officer's inefficient conduct in injuring others, leaving aside for the moment the vital distinctions between municipal liability and international liability. It seems rather futile to enter into a long theoretical discussion on the particular basis of responsibility, whether for fault or for risk, because international tribunals and Foreign Offices do not concern themselves with such theories in dealing with international claims. A developing jurisprudence, moreover, as municipal experience has shown, necessarily departs from the theory of fault, which constitutes a subjective

<sup>3</sup> Article 1384 covers the principal's responsibility for the wrongful acts of various types of agents, *e.g.*, parents for children, masters for servants, schoolmasters (now the state) for pupils, artisans for apprentices, etc. But an amendment of 1899 gives parents, artisans, and schoolmasters an opportunity to escape liability by proving that they could not prevent the wrongful act. Section 831 of the German Civil Code also limits the principal's liability by enabling him to disprove any implication of fault on his part. On private law theories of governmental responsibility in tort, see Borchard, *Theories of Governmental Responsibility in Tort*, 28 *Columbia Law Review* (1928) 577, 597 *et seq.*, 607, note 82.

<sup>4</sup> Gierke, *Genossenschaftstheorie* (1887), 743, 750 *et seq.*; Hafter, *Die Delikts- und Straffähigkeit der Personenverbände* (Berlin, 1903), 25 *et seq.*; Michoud, "*De la responsabilité de l'Etat à raison des fautes de ses agents*," 3 *Rev. de Droit Pub.* (1895) 401.

factor in liability. Practical administrators of the law must look to the results of human action; and all tribunals, municipal and international, have been led gradually to enlarge upon the theory of subjective fault by holding a principal liable for the results of acts or omissions of agents or employees without inquiring into the state of mind actuating the individual who caused the damage. This has been the experience of the common law, the experience of the French Council of State in dealing with the municipal responsibility of the French Government for the acts or omissions of its officials,<sup>5</sup> and it will doubtless be the experience in ever greater degree of international tribunals.<sup>6</sup>

Some consideration was given by the drafting committee and others to the question whether the word "responsibility" was an accurate translation of the French *responsabilité*. Several delegates preferred "liability," because the English word "responsible" or "responsibility," even in this narrow connection, is used in English in several senses, *e.g.*, accountable, answerable, and liable, and in the proposed convention frequently has all three senses. Inasmuch as it is a direct derivative from the Latin *respondere*, to respond (in satisfaction or reparation), or to make answer—a procedural as well as substantive institution—it was thought by some that the Reporter might, in his eventual report, mention the fact that the word "responsibility" was used for convenience only and was to be understood in the sense of liability for the breach of an international obligation to be discharged by international reparation in damages or otherwise.

Article 2 of the tentative convention, as redrafted, read as follows:

The expression "international obligations" in the present convention means obligations resulting from treaty, as well as those based upon custom or the general principles of law, which are designed to assure to foreigners in respect of their persons and property a treatment in conformity with the rules accepted by the community of nations.

It may be of interest to state the reason why such an article found its way into the convention. It arose at the demand of the delegate from Salvador, Dr. Guerrero, and the delegate from Rumania, Professor Sipsom, in connection with Basis of Discussion No. 2, which read as follows:

A state is responsible for damage suffered by a foreigner as the result either of the enactment of legislation incompatible with its international obligations, resulting from treaty or otherwise, or a failure to enact the legislation necessary for carrying out those obligations.

Doctor Guerrero stated that, unless he knew what the international obligations were to which he was expected to subscribe, he could not sign the convention on behalf of his Government. He considered it necessary, therefore,

<sup>5</sup> 28 Columbia Law Review (1928) 734, 748 *et seq.*

<sup>6</sup> For further elaboration of these ideas, see Borchard, "Theoretical aspects of the international responsibility of states" in Bruns' *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1929), 223, 224 *et seq.*



to have a definition of international obligations and, in fact, proposed a definition by sources, reading:

International obligations are those arising from treaty or from established custom recognized as law by all states.

A considerable number of the delegates felt that it was impossible to define such a phrase as "international obligations" and, indeed, undesirable to do so, inasmuch as the scope of the term would be evolved by courts and practice as time went on. There was much support, therefore, for the Italian proposal to strike out of Basis of Discussion No. 2 the words "resulting from treaty or otherwise," which would have left "international obligations" undefined. In order, however, to bring about unanimity if possible, a sub-committee was appointed whose function it was to define or indicate the sources of the term "international obligations."

At this early stage of the proceedings, a difference of policy appeared among the delegates. The representatives of certain states, including Salvador and Rumania, were anxious to limit international responsibility as much as possible, feeling, doubtless, that the existing law had gone beyond what they considered just. It appeared in the course of the discussion of the sub-committee that Dr. Guerrero was particularly anxious to limit the scope of international obligations to treaties and custom accepted as law by all states, including the smaller states. Apparently it was believed that, by narrowing the definition or sources of international obligations in this form, certain rules which tribunals had developed on such subjects as denial of justice could be limited, because they were not recognized as law or as sound law by some of the smaller states, but were in fact disputed. Thus, the minority group of seventeen states, in their proposals to the majority near the end of the Conference, suggested that the last line of Article 2 be changed to read: "in conformity with the rules *indisputably* admitted by the international community." It was pointed out by numerous delegates that Article 38 of the Statute of the Permanent Court of International Justice gave to that court a series of sources upon which they could draw for the rules of law to be applied. Aside from treaty and custom, which by practice had developed into a rule of law, there were two additional sources admitted, namely, (3) the general principles of law recognized by civilized states, and (4) the doctrines of jurists.

It was to these third and fourth sources that Dr. Guerrero was particularly hostile. It was argued by some delegates that, inasmuch as so many of the countries were already signatories of the Statute of the Permanent Court, it would now be impossible for them to suggest that international law or international obligations had a narrower scope or source. Indeed, in the sub-committee the proposal of the United States that "international obligations in the sense of this Convention are derived from international law" received nine votes out of eleven; but a desire for unanimity

induced a further attempt to bring about the accession of the Salvadorean and Rumanian delegates. After several meetings, the sub-committee finally evolved the draft above mentioned as Article 2, which, though agreed to by Salvador and Rumania in the sub-committee, was finally adopted by the Commission by an overwhelming majority, twenty-eight to three, with Rumania and Salvador not voting. Possibly the reason for their abstention was the introduction of the phrase "or the general principles of law" which are by the definition recognized as a source of international obligations.

Inasmuch as the definition was an amalgam of several different proposals, it is perhaps inevitably open to criticism. The Italian delegate poked some fun at it and stated that he would vote for it only because he considered it meaningless. Possibly he is right. The purpose was to indicate that the several sources of international law which create international obligations have as their aim the assurance to a foreigner of a certain minimum of civilized treatment. That this adds but little if anything to our knowledge of international law and leaves as much vagueness in "international obligations" as there is now, is probably not to be doubted. This also may account for the abstention from vote in the Commission by the Salvadorean and Rumanian delegates, who may have felt that their desire to specify the sources of international obligations was not met by the draft finally evolved.

Article 3 of the tentative convention read:

The international responsibility of a state imports the duty to make reparation for the damage sustained in so far as it results from failure to comply with its international obligation.

This is practically the first sentence of original Basis of Discussion No. 29. That Basis was designed to present certain rules governing the measure of damages. The above-mentioned article merely stated the general principle that international responsibility implies an obligation to make reparation for the damage caused. The United States had suggested this obvious fact in its original proposal for Article 1 of the Convention, which had read as follows:

The term "responsibility" as used in this convention involves a duty on the part of the State concerned to make reparation for damage suffered by a foreigner in its territory as the result of its failure to comply with an international obligation.

Several other delegations had made somewhat the same proposal. It seemed to them unnecessary to make two separate articles to the effect that failure to comply with an international obligation created responsibility, and that responsibility imported a duty to make reparation.

The third sub-committee, to whom had been referred Bases 19 and 29,<sup>7</sup>

<sup>7</sup> "The extent of the state's responsibility depends upon all the circumstances and, in particular, upon whether the act of the private individual was directed against a foreigner as such and upon whether the injured person had adopted a provocative attitude." (Basis 19.)

brought in a report, accepted by the Conference, which recommended that everything after the first sentence in Basis 29 be struck out. The deleted matter included a provision for possible reparation in the form of an apology (deemed by the sub-committee political in character), for the punishment of guilty offenders (deemed covered by Basis 18),<sup>8</sup> for damages for mental suffering (deemed inappropriate, as but a slight contribution to the measure of damages), for a limitation of the damages to the direct consequences of the breach of the obligation (deemed adequately covered by sentence one of Basis 29 and to invite unwelcome dispute with respect to the question as to what are the damages caused to an individual by a failure to punish an offender, as in the *Janes* case ),<sup>9</sup> for responsibility of a guaranteeing state for the obligation contracted by the guaranteed state (deemed more appropriate to Basis 23),<sup>10</sup> and a statement that in principle "the damages due are to be placed at the disposal of the injured state," which the sub-committee deemed inherent in the very term "international responsibility."

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"Responsibility involves for the state concerned an obligation to make good the damage suffered in so far as it results from failure to comply with the international obligation. It may also, according to the circumstances, and when this consequence follows from the general principles of international law, involve the obligation to afford satisfaction to the state which has been injured in the person of its national, in the shape of an apology (given with the appropriate solemnity) and (in proper cases) the punishment of the guilty persons.

"Reparation may, if there is occasion, include an indemnity to the injured persons in respect of moral suffering caused to them.

"Where the state's responsibility arises solely from failure to take proper measures after the act causing the damage has occurred, it is only bound to make good the damage due to its having failed, totally or partially, to take such measures.

"A state which is responsible for the action of other states is bound to see that they execute the measures which responsibility entails, so far as it rests with them to do so; if it is unable to do so, it is bound to furnish an equivalent compensation.

"In principle, any indemnity to be accorded is to be put at the disposal of the injured state." (Basis 29.)

The sub-committee, whose report was approved by the Commission, recommended the suppression of Basis 19, partly because it was considered merely supplementary to Basis 18, partly because it dealt with the measure of damages, which it was deemed best to omit from the convention, partly because it suggested too vague a measure in that it "depends upon all the circumstances," partly because the subjective attitude of the wrongdoer with respect to the foreigner or the foreigner's "provocative attitude" presented questions of fact, the effect of which had better be left to the court to determine rather than to a code.

<sup>8</sup> See *infra*, note 21.

<sup>9</sup> *Janes* (U. S.) v. Mexico, Opinions of Commissioners, General Claims Commission, United States and Mexico, p. 108, printed in this JOURNAL, Vol. 21, p. 362, discussed in this JOURNAL, Vol. 21, p. 516; Vol. 22, p. 140.

<sup>10</sup> "Where a state is entrusted with the conduct of the foreign relations of another political unit, the responsibility for damage suffered by foreigners on the territory of the latter belongs to such state.

"Where one government is entrusted with the conduct of the foreign relations of several states, the responsibility for damage suffered by foreigners on the territories of such states belongs to such common or central government." (Basis 23.)



M. Politis of the Greek delegation proposed an amendment to the first sentence above mentioned, reading:

Responsibility imports for the state concerned the obligation to make reparation for the damage sustained in the exact measure that the damage arises from the incidents constituting the failure to comply with the international obligation.

The reporter of the sub-committee expressed an objection to the last clause indicating the measure of damages, because it was believed that it conflicted with the proposal of the sub-committee to omit all reference to the measure of damages, a subject whose development it was thought should be left to international tribunals. Besides, as already observed, it raised the great question, somewhat insisted upon by the Mexican delegate and others, whether there was any damage caused to an injured foreigner or his next of kin, if he were killed, because the state fails to punish the guilty offender. Such a conclusion might have condemned numerous awards of international tribunals which have assessed damages upon a state for a failure to punish a guilty offender, though it may be admitted that the tribunals have not adequately taken into account the differences involved in the failure to punish, which may sometimes involve complete indifference to the crime and, therefore, may properly lead to an inference of ratification or complicity or condonation of the offense, and a merely trifling negligence which may permit an offender to escape apprehension or conviction without indicating either indifference, or complicity, or condonation. M. Politis thereupon consented to withdraw the second clause of his amendment, the first clause of which was then in practical agreement with the first clause of the proposal of the sub-committee. Nevertheless, the question was raised again in connection with Basis 18 (Article 10 of the tentative convention), and doubtless helped to produce the large minority vote which proved so fateful to any ultimate convention.

An amendment was then proposed to stop the draft of Basis 29 with the words "Responsibility imports for the state concerned the obligation to make reparation for the damage sustained," which would probably have sufficed for the purposes of the convention, because the second clause "in so far as," etc., in one sense either practically repeated Article 1 or in another sense raised again the question as to the measure of damages. The vote on the omission of the second clause stood seventeen to seventeen. The two clauses were then voted upon separately, the first being unanimously voted by thirty-five votes, and the second by twenty-nine to four. Thereupon, the whole paragraph, which became Article 3, was adopted by a unanimous vote of thirty-two states.<sup>11</sup>

In the proposals submitted by the minority to the majority after the impasse had been reached April 4, the sense of the Politis amendment was

<sup>11</sup> Twelfth Meeting, April 1, 1930.

again introduced in the words "direct and immediate" in the following draft:

The international responsibility of the state entails the duty to repair damage suffered in so far as it is the *direct and immediate* consequence of the failure to comply with the international obligation.

Article 4 of the tentative convention read as follows:

(1) A state's international responsibility may not be invoked as regards reparation for damage sustained by a foreigner until after exhaustion of the remedies available to the injured person under the municipal law of the state.

(2) This rule does not apply in the cases mentioned in Paragraph 2 of Article 9.

This local remedy rule came originally from Basis of Discussion No. 27.<sup>12</sup> It was there stated, however, in a somewhat ambiguous form, namely, that, "where the foreigner has a legal remedy open to him in the courts of the state (which term includes administrative courts), the state may require that any question of international responsibility shall remain in suspense until its courts have given their final decision."

There was much objection to the ambiguity involved in the expression "any question of international responsibility shall remain in suspense." It was contended by numerous delegations, including particularly the representatives of Spain, Denmark, Portugal, Egypt, Norway, Chile, Mexico, Rumania, and Salvador, that international responsibility cannot even arise until local remedies, if available, have been exhausted. The first proposal of the United States in amendment of Basis of Discussion No. 27 read:

Where the foreigner has a remedy open to him in the courts of the state (which term includes administrative courts) international responsibility does not ordinarily arise until the local remedies have been exhausted and a denial of justice or other breach of international law established.

The representatives of Switzerland and the Netherlands questioned this view by suggesting cases in which Ambassadors had been injured, or in which there was an insult to the national flag, or in which the alien had been injured because he was a citizen of a particular state.<sup>13</sup> In these cases, it was alleged, international responsibility to the injured state might immediately arise, though the injured alien might have to pursue his local remedies.

<sup>12</sup> "Where the foreigner has a legal remedy open to him in the courts of the state (which term includes administrative courts), the state may require that any question of international responsibility shall remain in suspense until its courts have given their final decision. This rule does not exclude application of the provisions set out in Bases of Discussion Nos. 5 and 6." (Basis 27.)

<sup>13</sup> The Dutch delegate also spoke of "distinguished" citizens being injured, but the Mexican delegate answered that he could find no distinction between "distinguished" and other citizens, both having to exhaust local remedies, if available. Sixth Meeting, March 22, 1930.

They thus contemplated two claims arising out of the same facts. The German and the British delegations, possibly because of the confusion created by the injection of Ambassadors' injuries and national insults, contended that, in some cases, either position might be true. The amendment which finally became the basis of discussion was that of Belgium, which read, in the first English translation:

This responsibility may, in principle, arise only after the parties concerned have exhausted the remedies allowed them under the internal law.

It was pointed out, however, that the French "*mis en jeu*" was really properly translatable as "invoked," whereupon several of the delegations, including that of the United States, suggested that the matter of theory might be left aside undetermined, and that all states could agree on the principle that responsibility may not be invoked until after exhaustion of local remedies. This seemed to satisfy all the states and the rule was adopted practically unanimously.<sup>14</sup>

Some doubt was injected by an amendatory clause introduced by the Swiss delegate, and ultimately adopted, reading: "as regards reparation for damage sustained by a foreigner." This clause was defended on the ground that it clarified the fact that international responsibility or the claim for pecuniary reparation could not be invoked until after exhaustion of local remedies, but that the political claim of the state arising out of a direct offense to its flag or prestige might in certain cases be advanced without awaiting the exhaustion of local remedies. A motion of Dr. Guerrero, of Salvador, to strike out the clause was lost, eighteen to sixteen.

It was pointed out that the Commission was considering a pecuniary claims

<sup>14</sup> The Commission thus avoided the awkward conclusion, which the Swiss and Dutch view entailed, that international responsibility might arise before it could be invoked. The suggestion that rights can exist without remedies is not a particularly happy one, from a legal point of view. It is sterile. That is why it seemed best to many delegations to combine in one article the substantive existence of international responsibility and the duty to make reparation, both concepts being essential to and inherent in responsibility. Before there was a duty to make international reparation there could be no international responsibility; and ordinarily before there was an exhaustion of available local remedies, there could be no duty to make such international reparation, *i.e.*, international responsibility. That, by definition, was the view of the Harvard Research, Art. 6, "A state is not ordinarily responsible (under a duty to make reparation to another state) until the local remedies available to the injured alien have been exhausted." Dr. Maurtua, the distinguished Peruvian scholar, in suggesting that international responsibility can arise before it can be invoked (Victor M. Maurtua and James Brown Scott, *Responsibility of states for damage caused in their territory to the person or property of foreigners*, New York, Oxford Press, 1930, p. 53) and in criticizing the Harvard Research "formula," Art. 6, apparently overlooks the precise definition of international responsibility adopted in Article 6 just mentioned and differs from all the Latin-American and the overwhelming majority of all other delegates at the Conference. See further on this question the article in Bruns' *Zeitschrift*, *supra*, note 6, pp. 233-242. After the impasse of April 4, the seventeen minority delegates again suggested the restoration of the word "arise" instead of "be invoked."



convention, embodying the circumstances under which formal claims arising out of injuries to aliens could be advanced diplomatically, and that the exhaustion of local remedies was ordinarily a condition of such formal international complaint. Naturally the convention in no way purported to limit or qualify the right of protest, inquiry and good offices to see that an alien obtained his rights, matters quite independent of formal claims for reparation.

As originally proposed, the article contained the words "in principle," indicating that there were certain exceptional cases in which local remedies need not be exhausted. This idea was expressed by the word "ordinarily" in the proposal of the United States. There was considerable objection in the sub-committee to this supposedly limiting word, some delegations contending that the use of the term "in principle" actually destroyed the principle. Inasmuch as the Preparatory Committee of Experts in Basis of Discussion 27 had introduced a sentence to the effect that the rule was inapplicable in cases of denial of justice, the sub-committee reverted to this form by adding a sentence in substitution of the words "in principle" reading that the "rule does not apply in the cases mentioned" in Article 9 (Denial of Justice).

The original Belgian proposal was advanced as an amendment to Basis of Discussion No. 7, dealing with acts of the executive power. It was pointed out, however, that local relief was possible against legislation and judicial determinations in many countries, especially as the word "legislation" in this convention might be deemed to cover also legislation of minor political bodies, such as states, counties, municipalities, and districts. In view of the fact that local remedies might be available against any form of state action, the Commission approved a proposal of the drafting committee to make the article a general one, to be placed near the beginning of the convention and applying to every form of state action described in the convention.

Article 5 of the tentative convention read:

A state cannot avoid international responsibility by invoking its municipal law.

The Preparatory Committee had framed this Basis of Discussion (No. 1) as follows:

A state cannot escape its responsibility under international law by invoking the provisions of its municipal law.

Objection was raised to the word "escape," and the word "disclaim" and then "avoid" substituted. In the discussion it was suggested that there are cases in which a state can deny any international responsibility by showing that the foreigner had been given every right and form of redress accorded to the national—for example, in many instances, an action against the officer who injured him. This, however, it was pointed out, is not the type of case intended, for in such a case there is, in fact, as a rule, no international re-

sponsibility in the absence of a denial of justice. It was remarked that, when international responsibility actually does attach, the state cannot disclaim or avoid it by pointing to a statute or judicial decision or other provision of its municipal law contrary to international law. This thought was expressed in the proposals of the United States by a suggested article reading:

A state cannot justify its failure to comply with an international obligation or escape responsibility incurred under international law or treaty by invoking the provisions of its municipal law incompatible therewith.

A motion to suppress Article 5 altogether was lost by a vote of nineteen to thirteen.<sup>15</sup>

Article 6 of the tentative convention read as follows:

International responsibility is incurred by a state if damage is sustained by a foreigner as a result either of the enactment of legislation incompatible with its international obligations or of the non-enactment of legislation necessary for carrying out those obligations.

This article is merely an application of Article 1, which posited responsibility for the acts of "organs" of the state, by specifying the legislature as such an organ. It was argued that to mention the legislature specially in connection with the omission of legislation was unnecessary because with respect to foreign countries the state is a unit, regardless of the constitutional organs which may violate its international obligations. These obligations might be performed by executive decree or in any way other than legislation and still satisfy the international obligation. The particular organ through which the state acts, it was argued, was a matter of internal concern only, and not of international concern. It was replied, however, that in certain cases states might specifically undertake to enact legislation carrying out a treaty or other international obligation, in which event the failure to enact the legislation, if causing damage to a foreigner, would entail international responsibility. The article carried by twenty-nine votes, with several abstentions.

Article 7 of the tentative convention read as follows:

International responsibility is incurred by a state if damage is sustained by a foreigner as a result of an act or omission on the part of the executive power incompatible with the international obligations of the state.

This was practically an adoption of Basis of Discussion No. 7 and gave rise to no particular discussion. On the suggestion that local remedies might exist in some cases even against acts of the executive power, it was pointed out that if there were local remedies there would probably be no international obligation until such remedies had been exhausted, and that the Belgian amendment covering the local remedy rule, originally designed as a

<sup>15</sup> The subject-matter of Article 5 was entirely omitted from the proposals submitted by the minority of seventeen delegates after the impasse of April 4.



part of this article, would, when given an independent place at the head of the convention, be clearly applicable to every expression of state action, including that of the legislature, or executive, or minor officials. The article was adopted unanimously.

Article 8, as reported by the drafting committee, read as follows:

1. International responsibility is incurred by a state if damage is sustained by a foreigner as a result of acts or omissions of its officials, acting within the limits of their authority, when such acts or omissions contravene the international obligations of the state.

2. International responsibility is likewise incurred by a state if damage is sustained by a foreigner as a result of unauthorized acts of its officials performed under cover of their official character if the acts contravene the international obligations of the state.

International responsibility is, however, not incurred by a state if the official's lack of authority was so apparent that the foreigner should have been aware of it and could in consequence have avoided the damage.

This article was an outgrowth of Bases of Discussion Nos. 12 and 13.<sup>16</sup> The United States had proposed a combination of Bases 12 and 13 in one article, to read as follows:

A state is responsible for damage suffered by a foreigner as the result of wrongful acts or omissions of its officials within the scope of their office or function when such acts or omissions are incompatible with the international obligations of the state.

Several delegations, particularly those of Latin America, contended vigorously that paragraph (2) of the article adopted, dealing with the acts of officials outside their authority but within the general scope of their employment or "under cover of their official character," did not entail international responsibility, because the officers were acting illegally and contrary to their orders and were, therefore, not agents of the state. This, indeed, is a rule of municipal law in many countries, as, for example, in the United States and in England, and in many continental countries that have not yet advanced to the stage of France and Germany, in which it is admitted that the state must assume responsibility in municipal law for the wrongful acts of its officers acting within the scope of their employment even though directly contrary to their orders and outside their authority. Nevertheless, in international law, claims commissions have on frequent occasions applied

<sup>16</sup> "A state is responsible for damage suffered by a foreigner as the result of acts or omissions of its officials, acting within the limits of their authority, when such acts or omissions contravene the international obligations of the state." (Basis 12.)

"A state is responsible for damage suffered by a foreigner as the result of acts of its officials, even if they were not authorised to perform them, if the officials purported to act within the scope of their authority and their acts contravened the international obligations of the state." (Basis 13.)

the rule embodied in the article,<sup>17</sup> which was adopted by a majority of twenty to six, with numerous abstentions. It may be worthy of note, therefore, that in international law the doctrine of *respondeat superior* is admitted, whereas in municipal law it is, to a considerable extent, still denied.

The suggestion may be made that this would imply a duty on the part of a state whose official had wrongfully injured a foreigner to pay damages to the foreigner under circumstances where the national would not receive compensation. If this were true, it would place the foreigner in a position of advantage over the national. The answer to this suggestion would be that the article states that the act of the official would have to "contravene" the "international obligations" of the state, and that if in a particular state, as in the United States, an action against the officer was the only remedy available either to a national or to a foreigner, the making available of such a remedy would be a full compliance with the international obligation of the state; and under such a system no international responsibility could arise, unless there was a denial of justice in the pursuit of the local remedy against the officer. Not as much attention as it deserved was called to the fact that the vast majority of cases arise through the wrongful acts of officials in contravention of municipal law, and that in such cases international responsibility does not arise at all until there has been a denial of justice or other breach of international law by the state. It is probable that many of the delegates conceived the original act of the official injuring the foreigner, regardless of whether it contravened municipal law or international law, to be the act contemplated by the article. The debate was not as clear as it might have been in drawing the distinction between municipal responsibility of the state, which might or might not be assumed under a local system for violation of municipal law by an officer, and the international responsibility of the state, which in most cases would be involved only in the event of a denial of justice. The denial of justice or violation of a treaty must be attributable, of course, to an official of the state.

Sharp differences developed in the Commission with respect to this paragraph governing unauthorized acts of officials. It will be recalled that in the original Guerrero Report of 1926 and in the Fourth Conclusion of the Sub-Committee of Experts, liability for unauthorized acts had been admitted within the narrowest limits only, namely, where the government, (1) knowing that the act is about to be committed fails to prevent it, or, if committed, fails to discipline or punish the officer; or (2) permits no legal recourse against him by the injured alien.<sup>18</sup> This view found marked expression in the Hague Conference, and twenty states only voted for the

<sup>17</sup> See e.g., *Metzger (Germany) v. Venezuela*, Feb. 13, 1903, *Ralston, Venezuelan Arbitrations*, p. 578; *The Jessie et al. (Gt. Brit.) v. United States*, Aug. 18, 1910, *Nielsen's Report*, 79, 480; *Panther case (Brazil) v. Germany*, 1905, 13 *Rev. Gen. D. I. P.* (1906) 200; *Panama Star and Herald (U. S.) v. Colombia*, 1886, *Moore's Digest*, VI, 642, 775.

<sup>18</sup> See this *JOURNAL*, Vol. 20, p. 743; *Bruns' Zeitschrift*, *supra*, 228 *et seq.*

broader liability. Indeed, it was rumored that some of the outvoted states contemplated withdrawing from the Conference at this point, and when the deadlock was subsequently reached, the proposals for a compromise submitted by the minority omit all reference to responsibility for unauthorized acts of officers. Some delegates conceived that this omission left the issue open and unsettled; but far from this being true, as was argued by others, an affirmance of liability for authorized acts impliedly concedes a rule of non-liability for unauthorized acts.

Partly to appease the objections which had been raised to the imposition of liability for acts of officials outside their authority but within the scope of their employment, the last paragraph was inserted, under which a case was contemplated in which the official's lack of authority was so manifest that the foreigner could not have regarded him as an agent of the state and could have avoided the damage he sustained. The paragraph, therefore, contemplates two operative facts—the manifest *ultra vires* of the officer, and the power of the foreigner to have escaped injury.

The original Basis 13 had undertaken to impose liability "if the officials purported to act within the scope of their official capacity." Several delegations objected to the term "purported," because an officer might wrongfully assume powers not vested in him in his actual official capacity, and should, therefore, not bind the state; and, on the other hand, in certain cases, the state ought to be liable for acts within the scope of the officer's employment, even if he did not purport to act in his official capacity. The Preparatory Committee probably intended to convey by the word "purport" the idea included in the words "under cover of their official character"—the term finally adopted in the convention.

Several delegations had suggested the combination of Bases 2 (legislative) and 7 (executive) organs, and of 12 and 13 (officers, authorized and unauthorized). The delegation of India advanced an ingenious suggestion for the combination in one article of all agents of the state, including Basis 1 (Article 5), as follows:

A state is liable for the damage suffered by a foreigner within its territory by the act or omission of any of its organs (executive, legislative, or judicial) in contravention of the state's international obligations, any provision of the municipal law to the contrary notwithstanding.

The suggestion was not acted upon, although numerous delegations were of the opinion that the foundation articles should be disposed of as quickly as possible, in order that progress might be made on the definition of what constituted the international obligations, breach of which created international responsibility. To that objective, only a few articles, including 9 and 10, were devoted.

Article 9 of the tentative convention read as follows:



International responsibility is incurred by a State if damage is sustained by a foreigner as a result of the fact.

(1) that a judicial decision, which is not subject to appeal, is clearly incompatible with the international obligations of the state;

(2) that, in a manner incompatible with the said obligations, the foreigner has been hindered by the judicial authorities in the exercise of his right to pursue judicial remedies or has encountered in the proceedings unjustifiable obstacles or delays implying a refusal to do justice.

The claim against the state must be lodged not later than two years after the judicial decision has been given, unless it is proved that special reasons exist which justify extension of this period.

The first paragraph of this article is practically the second paragraph of original Basis of Discussion 5.<sup>19</sup> In the original Basis 27, dealing with the local remedy rule, "courts" were said to include administrative tribunals. This parenthetical inclusion is not contained in Article 9, dealing with the courts, as now drafted, or is it referred to in Article 4. It may be assumed to be understood, however.

The phrase "which is not subject to appeal" was objected to by the Swiss delegate on the allegation that it decides the question as to when responsibility arises, a decision which, he contended, was intentionally left open by the local remedy rule in Article 4. He claimed that the phrase in question indicates that responsibility does not arise until after all local appeals have been exhausted, and he seemed to entertain the belief that the court decision in first instance if alleged to be contrary to an international obligation entails international responsibility.

His objection probably indicates that his theory as to the time of the conclusiveness of state action and initiation of international responsibility is questionable, but in an effort to induce a withdrawal of the objection, the Belgian delegate ingeniously suggested that judicial action is a single action from beginning to end, and that it cannot be said that the state has spoken finally until all appeals have been exhausted; whereas, when a minor official acts in alleged contravention of a treaty or international law, an action which is then subject to review by a judicial tribunal, two distinct organs of the state are in question, and that it might be said that the administrative or executive action of the official is state action which might in certain circum-

<sup>19</sup> "A state is responsible for damage suffered by a foreigner as the result of the fact that:

(1) He is refused access to the courts to defend his rights;

(2) A judicial decision which is final and without appeal is incompatible with the treaty obligations or other international obligations of the state;

(3) There has been unconscionable delay on the part of the courts;

(4) The substance of a judicial decision has manifestly been prompted by ill-will toward foreigners as such or as subjects of a particular state." (Basis 5.)

"A state is responsible for damage suffered by a foreigner as the result of the courts following a procedure and rendering a judgment vitiated by faults so gross as to indicate that they did not offer the guarantees indispensable for the proper administration of justice." (Basis 6.)

stances entail international responsibility subject to its discharge by judicial correction. The explanation of the supposed distinction might rather indicate its essential unsoundness, for it would infer that the action of a minor official is more conclusive on the state than the decision of a court, no matter how high, which is still subject to appeal. It is believed that the issue raised indicates the conclusion that, until the state has spoken finally, that is, until local relief has been exhausted, international responsibility cannot properly be created or invoked. It cannot be determined whether there is any international responsibility until it is known what the final state action will be, a fact which cannot be known until available appeals and local opportunities for correction of the error or wrongful act, if any, have been exhausted. Possibly a suggestion of Dr. Latifi, the Indian delegate, may be helpful: He suggested that, when breach of treaty or rule of international (not municipal) law is alleged, international responsibility is inchoate, becoming complete or ripe only when the state has spoken finally, and if the breach is then uncorrected, the wrong dates back to the original injury. This is but another way of saying that no formal claim can be made until the state has spoken finally, in ordinary cases, for the question whether there is an international claim (responsibility) depends on the nature of that decision—but the measure of damages might look back to the date of original injury. To such a legal proposition, there can be no objection.

A question was raised with respect to the word "clearly" in the first paragraph before the word "incompatible." The argument was made that, if a decision is incompatible with a treaty or international law, there is no necessity for inserting the word "clearly" or "manifestly" (*manifestement*). The delegate from Danzig, Dr. Crusen, from whose draft this word was taken, explained that it was inserted in order to prevent too frequent and ill-considered a resort to the Permanent Court of International Justice from decisions of national courts alleged to infringe international law. He expressed his willingness to accept any other word which would indicate this thought. Inasmuch, however, as it could not be known whether a decision was manifestly incompatible with an international obligation until this had been determined by an international tribunal, the thought was deemed difficult to express in any language. The objection was finally abandoned on the ground that the matter probably would not prove important.

Paragraph (1) of the article deals with final judicial decisions incompatible with international obligations, a fact which may not necessarily involve a denial of justice. The second paragraph, however, is designed to cover denial of justice.

It was proposed by the Austrian delegation, supported by the Italian, British, United States, and other delegations, that the best term for the conception in question was "denial of justice." It was suggested in the subcommittee dealing with this question that it was impossible and indeed undesirable to attempt to define a term which fixes only a standard of conduct

and is subject to application to particular cases. The representatives of Rumania, Mexico, Salvador, and other Latin-American countries objected so vigorously to the term "denial of justice," which they contended had been misconstrued by many international tribunals, that it was decided to endeavor to find a definition sufficiently broad to cover the conception of denial of justice without using the term. Bases of Discussion Nos. 5 and 6 had included several examples of denial of justice, namely, refusal of access to the courts, unconscionable delay, decisions directed against foreigners as such, and a broad residuary clause (Basis No. 6) reading:

A state is responsible for damage suffered by a foreigner as the result of the courts following a procedure and rendering a judgment vitiated by faults so gross as to indicate that they did not offer the guarantees indispensable for the proper administration of justice.

The United States had accepted this Basis, merely suggesting a change of the word "and" after "procedure" to "or." Objections to this Basis, however, were so many that the sub-committee voted to drop it and were then driven to the necessity of finding a substitute. This appeared for a time almost impossible. Indeed, the nearest approach to agreement seemed to be centered upon a proposal of the German delegate to the effect that state responsibility is incurred by a state for the action of its judicial authorities incompatible with the state's international obligations. This seemed to many, however, to be too broad a generalization. The Italian delegate, Dr. Giannini, then suggested a way out by proposing a combination of a Polish proposal and a French proposal for paragraph (2). The Polish proposal had read that responsibility was incurred if the foreigner was hindered by the courts in the exercise of his rights, which the Polish delegation intended to mean rights under local law. This they defined in parentheses as "denial of justice." The addition of the words "in a manner incompatible with the international obligations of the state" would give this phrase a broader connotation, for which reason it was accepted by those states interested in having a broad definition of "denial of justice."

The second sentence reading "or has encountered in the proceedings unjustifiable obstacles or delays implying a refusal to do justice" originally ended, in the French proposal, with the words "implying a refusal to decide the case." This was objected to as inadequate, for the courts often did not refuse to decide cases, but were corrupt, biased, influenced by the executive, or in other ways were lacking in that impartiality implicit in the proper administration of justice. Cases were cited pointing out the inadequacy of the definition. On this protest the phrase was changed to read "implying a refusal to do justice," which is considerably broader and may be deemed to cover difficulties in the procedure prior to judgment which would justify an allegation of denial of justice.

In its original form the words "deliberate or" were inserted before the



word "unjustifiable," but it was thought by the drafting committee that "unjustifiable" was broad enough to cover the adjective "deliberate."

The German delegate had pointed out that justice may be denied by the executive or legislature in refusing open access to the courts or in influencing the courts, and that this was not covered by Article 9. It was suggested, however, that such breaches of international obligations would be covered by the articles dealing with wrongful acts or omissions of the legislative or executive authorities, so that in a sense all instances of denial of justice would not be covered by Article 9.

In the Commission, the Uruguayan delegate contended that the term "exercise of the rights which belong to the alien," as the sub-committee's draft originally read, was too broad and uncertain, although preferred by many of the delegates. He suggested the substitution of the words "*ester en justice*" (to pursue judicial remedies), an amendment which was accepted by the Commission. It may be hoped that Article 9, however unsatisfactory, would, had a convention been adopted, have been broad enough to warrant the belief that the term "denial of justice" had not been unduly limited, and that scope had been given to the judicial development of the concept embraced in the term.

The third paragraph of Article 9, indicating that a claim must be lodged within two years of a final judicial decision of a national court, was originally a Danish amendment, limited to one year. It was argued in support that judicial decisions and their reasons spoke for themselves, that a country ought not to be subject to claims because of such decisions for an indefinite period, and that if international claim is to be made, it should be made within a reasonable time. The delegations of the United States, Great Britain, and others objected to the clause as new legislation and as limiting the privilege of international recourse, which might often require a longer period for investigation to determine whether or not a claim should be made. This is especially true in connection with large groups of claims arising, for example, out of war or insurrection, in which it might be difficult to examine the facts in many cases within a short period. The amendment was, however, adopted by a majority of sixteen to fifteen, with a qualifying clause that special reasons, presumably to be passed upon by a tribunal, might justify an extension of the period. The whole article was then adopted unanimously, but with two abstentions.

Article 10 of the tentative convention read as follows:

As regards damage caused to a foreigner or his property by private persons, the state is only responsible where the damage sustained by the foreigner results from the fact that the state has failed to take such measures as in the circumstances should normally have been taken to prevent, redress or inflict punishment for the acts causing the damage.

This article, which hardly came before the drafting committee for revision, was adopted on the afternoon of April 4, the 15th meeting of the Commission,

by a very slight majority—twenty-one to seventeen. The article was an amendment of a text proposed by the second sub-committee,<sup>20</sup> in substitution of Bases 10, 17, 18.<sup>21</sup> One might suppose that so well-established a legal proposition would receive unanimous support, for it merely enacts the due diligence rule which claims commissions have applied on innumerable occasions. The article, however, met two objections—one relevant, the other believed to be somewhat less so. The first objection was that of the Mexican delegate, shared by others, that the failure to inflict punishment does not increase the damage suffered by the foreigner as the result of a private tort. This was but the reiteration of a position already advanced in connection with other articles and, while noted, was not put to a vote. The second objection, which, it is believed, had little relation to the subject-matter of the article, reiterated the well-known view that the maximum measure of an alien's protection was that enjoyed by the national; that is to say, equality of diligence, and not "due" diligence, is the correct criterion. It is believed that the objection was not well founded, because "equality" of treatment and "due diligence" are not comparable terms; but the "due diligence" article was availed of as a springboard from which to launch an attack, in entire good faith, upon those rules of international law which have measured the alien's rights quite independently of any reference to what nationals might enjoy or suffer.

The debate was limited because of the pressure for time on the afternoon

<sup>20</sup> "A state is responsible for damage caused by a private person to the person or property of a foreigner if it has failed to take such preventive or punitive measures as in the circumstances might properly be expected of it."

*Commentary of the sub-committee:*

"It was recognised that a state is in principle not internationally responsible for damage caused by a private person to the person or property of a foreigner. In such a case the state can only become responsible through its own act.

"This is the case where the State has failed to take such preventive or punitive measures as in the circumstances might properly be expected of it.

"The text submitted to the Committee is the result of reciprocal concessions between different points of view. It has been intentionally drafted in very wide terms so as to leave to international tribunals the full freedom of judgment which they must have in order to take account of the varying circumstances of particular cases."

<sup>21</sup> "A state is responsible for damage suffered by a foreigner as the result of failure on the part of the executive power to show such diligence in the protection of foreigners as, having regard to the circumstances and to the status of the persons concerned, could be expected from a civilised state. The fact that a foreigner is invested with a recognised public status imposes upon the state a special duty of vigilance." (Basis 10.)

"A state is responsible for damage caused by a private individual to the person or property of a foreigner if it has failed to show in the protection of such foreigner's person or property such diligence as, having regard to the circumstances and to any special status possessed by him, could be expected from a civilised state." (Basis 17.)

"A state is responsible for damage caused by a private individual to the person or property of a foreigner if it has failed to show such diligence in detecting and punishing the author of the damage as, having regard to the circumstances, could be expected from a civilised state." (Basis 18.)



the article was considered. Haste was possibly a mistake. After the introduction of the sub-committee's draft, the opposition was led by Dr. C. C. Wu, the Chinese delegate, who addressed himself to the following alternative proposal of China:

A state is only responsible for damage caused by private persons to the person or property of foreigners if it has manifestly failed to take such preventive or punitive measures as in the circumstances might reasonably be expected of it had the persons injured been its own nationals.

It is hard to say what difference in legal result the adoption of this draft would have had, but the argument made in support of it probably prevented its adoption by the majority. That argument was, in effect, that a foreigner must take into account the administrative organization of a country to which he goes as much as he takes into account its climate, and that he cannot claim greater privileges or protection than nationals. Dr. Wu also added that such words as "normally," "reasonably," or "properly"—all of which were suggested as alternatives in the sub-committee's draft—were not a satisfactory test of the standard of protection to be accorded, because of their uncertainty, whereas the standard of "national treatment" seemed to the speaker a satisfactory test. The Chinese delegate failed to state that such terms as "due," "reasonably," "normally"—one of which was used in his own draft—inevitably took into account the conditions of time and circumstance, and constituting standards merely, would necessarily be applied to particular facts, ordinarily after the exhaustion of local remedies, by diplomatic contentions or by an international tribunal which would determine whether the measures taken by the government were such as might normally, reasonably, or properly have been expected under the circumstances.

The Chinese delegate, it is believed, was in the main correct in asserting as a principle that, in first instance, the foreigner's rights are governed by the local law, and that, if the foreigner receives the same treatment as a national, he or his country would ordinarily have no legitimate ground for complaint. The flaw in the argument was that the proposition was made too absolute, for international law has probably established the rule that certain exceptional types of injury transgressing the requirements of civilized justice or administration would justify an international claim, even though nationals might for lack of a remedy have to tolerate them. The principle that equality of treatment between nationals and aliens suffices to release a state from pecuniary liability for injuries to aliens is conditioned upon the assumption that its administration of law and order satisfies the requirements of civilized justice—and the possibility of proving the contrary would be exceptional only.<sup>22</sup> Yet their insistence upon a categorical rule

<sup>22</sup> See Borchard, *Diplomatic Protection of Citizens Abroad* (1915), §44 and authorities there cited.

that equality of treatment with nationals was, presumably, the maximum that an alien could demand, moved seventeen nations to vote against the due diligence rule as framed, and ultimately served to prevent that two-thirds vote without which a convention could not be concluded. In the proposals submitted after the deadlock by the minority, as representing their views of what the convention should provide, it is stated in the first article, defining international obligations, that "this provision does not affect the question of the equality of treatment for foreigners and nationals in so far as the protection of their persons and that of their property is concerned." It is somewhat singular that the proposed Convention of Paris, November, 1929, to govern the rights of foreigners, and the proposed Hague Convention on the international responsibility of states arising out of injuries to foreigners both broke down on the issue of equality—the former because, it is understood, it would not concede equality to foreigners in municipal law, the latter because equality under all circumstances was not deemed by the majority sufficient.

Finally, reference may be made to an amendment to the sub-committee's draft, proposed by the Hungarian delegate, adding to it at the end the phrase "provided local remedies have been exhausted without redress." Strictly speaking, this addition is necessary in order to make the definition of international responsibility for the acts of private individuals complete and legally correct. It was pointed out, however, that the local remedy rule contained in Article 4 applied to every article of the convention dealing with state action, and that it would also necessarily apply to this article. In the belief that it was unnecessary to mention the local remedy rule specifically in this article as distinguished from others, the amendment was voted down.

As already observed, the minority of seventeen, having on April 4 reached the conclusion that the tentative convention arrived at was unsatisfactory to them, laid before the majority certain conditions upon their adherence to any convention. In the caucuses which were held by majority and minority, the United States took no part. The minority suggested, without justification, it is believed, that only such Bases had been considered as imposed responsibility, and they therefore asked that Bases denying responsibility, such as Basis 22, dealing with damage by mob violence, etc.,<sup>23</sup> and Basis 24,

<sup>23</sup> "A state is, in principle, not responsible for damage caused to the person or property of a foreigner by persons taking part in an insurrection or riot or by mob violence." (Basis 22.)

"Nevertheless, a state is responsible for damage caused to the person or property of a foreigner by persons taking part in an insurrection or riot or by mob violence if it failed to use such diligence as was due in the circumstances in preventing the damage and punishing its authors." (Basis 22 (a).)

"A state must accord to foreigners to whom damage has been caused by persons taking part in an insurrection or riot or by mob violence the same indemnities as it accords to its own nationals in similar circumstances." (Basis 22 (b).)

"A state is responsible for damage caused to foreigners by an insurrectionist party which has been successful and has become the government to the same degree as it is responsible

dealing with self-defense of the state as a ground for disclaiming responsibility,<sup>24</sup> should also be considered. This, the majority willingly conceded. The minority also proposed an article denying state liability for a "political" crime against a foreign public official unless the state has neglected its duty of special vigilance to prevent the crime or punish the guilty.<sup>25</sup> Probably this article would not have given rise to difficulty. The minority also proposed an article dealing with the nationality of claims, adopting the usual rule that the injured person must have been a national of the claiming state at the time the injury arose and at the time of presentation of the claim.<sup>26</sup> Probably this article also would not have given rise to objection.

Consideration of these articles by the full Commission became abortive, however, because of the modifications suggested by the minority in the articles already tentatively agreed upon, particularly, as already observed, the suggested elimination of the paragraph imposing liability for the unauthorized acts of officials, the suppression of the due diligence rule, and the insistence upon absolute equality as the maximum of alien privilege.

Among the subjects not considered by the conference were: 1. Liability for the wrongful acts or omissions of political subdivisions of a state or of political units whose foreign relations it conducts (Bases 16 and 23); 2. Concessions or contracts and public debts (Bases 3, 8, 4, and 9); 3. Liability for the deprivation of liberty (Basis 11); 4. Liability for withdrawing a private right of recourse (Bases 15 and 20); 5. Damages resulting from insurrections, riots, or other disturbances (Bases 21 and 22, with its subdivisions); 6. The measure of damages (Bases 19 and 29); 7. Certain grounds for disclaiming responsibility, such as self-defense (Basis 24), reprisals (Basis 25), and the Calvo Clause (Basis 26); and 8. The national character of claims (Basis 28). The jurisdictional clause (Basis 30) was considered, but not

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for damage caused by acts of the government *de jure* or its officials or troops." (Basis 22 (c).)

"A state is responsible for damage caused to the person or property of a foreigner by persons taking part in a riot or by mob violence if the movement was directed against foreigners as such, or against persons of a particular nationality, unless the government proves that there was no negligence on its part or on the part of its officials." (Basis 22 (d).)

<sup>24</sup> "A state is not responsible for damage caused to a foreigner if it proves that its act was occasioned by the immediate necessity of self-defense against a danger with which the foreigner threatened the state or other persons.

"Should the circumstances not fully justify the acts which caused the damage, the state may be responsible to an extent to be determined." (Basis 24.)

<sup>25</sup> "The international responsibility of a state, for a political crime committed against the person of a foreigner that assumes a public character, is not involved unless the state has neglected its duty of special vigilance in regard to the appropriate measures with a view to preventing the crime or with a view to the pursuit, arrest and trial of the guilty person."

<sup>26</sup> "A state cannot claim pecuniary indemnity, by reason of damages suffered by a private person on the territory of a foreign state, unless the injured person was, at the moment when the damages were caused, and remained up to the decision to intervene, a national of the claimant state."

voted upon, because the general drafting committee of the conference had proposed a uniform article for the judicial settlement of differences which was to be incorporated in all of the conventions concluded.

It should be added that many of the proposals advanced by the different delegations and which, it is hoped, may be printed in the final report of the conference, constitute contributions whose ultimate effect on international law may be considerable. In this connection, mention may be made of the proposals of the British Government dealing with the nationality of claims, and of the proposals of other governments dealing with other topics of the proposed convention. The official documents thus placed before the conference by the participating governments, together with the official replies printed by the League of Nations, constitute source material of considerable value, which, as occasion permits, is likely to be drawn upon by international tribunals. In spite of the fact, therefore, that no convention was arrived at—and the conclusion seems inescapable that the subject of international responsibility of states for injuries to aliens is not ripe for codification—the amount of thought which was concentrated upon the subject, and which has resulted in so many official and scientific expressions of opinion, is likely to exert considerable influence upon the further development of international law.

# ANNEX 405





JAMES CRAWFORD

CAMBRIDGE  
STUDIES IN  
INTERNATIONAL  
AND  
COMPARATIVE  
LAW

# State Responsibility

The General Part



CAMBRIDGE

Annex 405

# State Responsibility

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## The General Part

James Crawford



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18  
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In an interdependent world the well-being of many countries rests upon an influx of foreign and managerial skills, the owners of which must be given effective protection against unjust persecution or discrimination.<sup>177</sup>

Compared with the 1929 Draft, the 1961 Draft Convention on the International Responsibility of States for Injuries to Aliens<sup>178</sup> represents a far more ambitious undertaking.<sup>179</sup> Section A (general principles and scope) contained two provisions on the basic principles of state responsibility (Draft Article 1) and the primacy of international law (Draft Article 2). Beyond this, the Draft reflected the concern with investor protection. Section B (Draft Articles 3–13) was a catalogue of investor rights, concerning areas such as arrest and detention, due process, expropriation, preservation of means of livelihood and the concept of denial of justice. This was further reflected in the provisions dealing with compensation, which were stated not as general principles, but in terms of exactly which investor protection had been breached – thus, Draft Article 5 on arrest and detention corresponded to Draft Article 28 on damages for personal injury and the deprivation of liberty.<sup>180</sup>

The 1961 (and to a lesser extent, the 1929) Draft had a certain influence on the work of the ILC.<sup>181</sup> In particular, their continued conceptualization of state responsibility as a facet of investor protection defined García-Amador's approach to the subject. But this proved unacceptable, a road not taken:<sup>182</sup> under Roberto Ago (Italy) (1963–80), the focus shifted to developing a comprehensive set of secondary rules that would underpin international law as a whole, leaving questions of investor protection to be developed in other ways.<sup>183</sup>

## 1.4 The work of the International Law Commission

### 1.4.1 *The first reading: 1949–1996*

Following the establishment of the ILC in 1947, state responsibility was identified as deserving of early attention. But the issues associated with

<sup>177</sup> Ibid., 545.      <sup>178</sup> Ibid., 548.

<sup>179</sup> Crawford and Grant, in Grant and Barker (2007), 93.      <sup>180</sup> Further: *ibid.*, 92–3.

<sup>181</sup> Ibid., 94–100.

<sup>182</sup> See, most evocatively, the criticism of El-Kouri (United Arab Republic), who saw the approach as 'reminiscent of the capitulations system applied in the territories of the Ottoman Empire in the nineteenth century, where aliens were almost a privileged class when compared to nationals': ILC Ybk 1959/I, 141. Further: *ibid.*, 149 (Tunkin); *ibid.* (Erim); *ibid.*, 150 (Bartoš).

<sup>183</sup> Crawford and Grant, in Grant and Barker (2007), 102–8.

responsibility – indeed, the very definition of the field – were to prove intractable.

Work began in 1956 under García-Amador as Special Rapporteur.<sup>184</sup> At this time, the ILC (influenced heavily by the work of the Harvard Research) was particularly focused on state responsibility for injury to aliens and their property, that is to say the content of the substantive rules of law in that sub-field. Six reports were submitted between 1956 and 1961, but the ILC barely considered them, ostensibly due to the demands of other topics including diplomatic immunities, the law of the sea and the law of treaties. It was felt that the disagreement and division that this conception of the field of responsibility attracted would stunt progress, and the topic was set aside. Indeed, García-Amador's reports prompted substantial criticism on matters of both substance and overall approach.<sup>185</sup>

This false start was reversed in 1962, when an intercessional subcommittee of the ILC, chaired by Ago, recommended a focus not on injuries to aliens in particular, but rather on 'the definition of the general rules governing the international responsibility of the state'. In so doing,

there would be no question of neglecting the experience and material gathered in certain special sectors, specially that of responsibility for injuries to the person or property of aliens; and, secondly, that careful attention should be paid to the possible repercussions which new developments in international law may have had on responsibility.<sup>186</sup>

Ago was appointed Special Rapporteur in 1963, and produced eight reports between 1969 and 1980, including a further substantial addendum to his final report on the subject after his election to the International Court. During his tenure, the ILC provisionally adopted thirty-five articles, together comprising Part One (Origin of state responsibility) of the Draft Articles on State Responsibility.<sup>187</sup>

In 1979, William Riphagen (Netherlands) was appointed Special Rapporteur, presenting seven reports between 1980 and 1986. Ago's achievements were reinforced, with Riphagen presenting a complete set of Draft

<sup>184</sup> On the work of García-Amador, see further Müller, in Crawford, Pellet and Olleson (eds.), *The Law of International Responsibility* (2010) 69. For his proposals see Appendix 4.

<sup>185</sup> Notably, García-Amador's championing of the individual as a subject of international law was the cause of substantial criticism: First Report, ILC Ybk 1956/II, 197ff. Further: Crawford and Grant, in Grant and Barker (2007), 89–90; Müller (2010), 72–4.

<sup>186</sup> ILC Ybk 1963/II, 228.

<sup>187</sup> Ago's contribution to the law of state responsibility was prodigious: see Pellet, in Crawford, Pellet and Olleson (2010) 75, 76–83.

Articles on Parts Two (Content, forms and degrees of international responsibility) and Three (Settlement of disputes). However, again owing to the priority given to other topics, only five articles from Part Two were adopted by the ILC during this period.

On Riphagen's retirement from the ILC in 1987, Gaetano Arangio-Ruiz (Italy) was appointed Special Rapporteur, presenting eight reports from 1988 to 1996. During this time, the Drafting Committee was able to deal with the remainder of Parts Two and Three. In 1996 Arangio-Ruiz resigned as Special Rapporteur under curious circumstances,<sup>188</sup> but this did not prevent the ILC from adopting a full set of Draft Articles on first reading (hereafter 'the Draft Articles').<sup>189</sup>

The Draft Articles were a significant statement, already much cited by the courts and discussed in the literature. A number of the features of the text could be considered as established, forming basic assumptions for the second reading. The first concerned the general coverage of the text. Part One of the Draft Articles concerned questions of responsibility arising from the breach of any international obligation. No attempt was made to limit the scope of the Draft Articles to obligations owed by states to other states. The Draft Articles did not distinguish between treaty and non-treaty obligations, excluding the notion that international law draws any distinction between responsibility *ex delicto* and *ex contractu*.<sup>190</sup> Nor did they distinguish between obligations of a bilateral or multilateral character. This general approach was affirmed in Draft Article 19(1), which provided that 'An act of a State which constitutes a breach of an international obligation is an internationally wrongful act, regardless of the subject matter of the obligation breached.' Later paragraphs of Draft Article 19 drew a highly controversial distinction between international 'crimes' of states and other delicts, but this carried no consequences – beyond the stigma of a state being labelled as 'criminal' – within the text of Part One itself.

Another basal presumption laid down in 1996 concerned the principle of 'objective responsibility', in the sense that the law as codified in the Draft Articles contained no requirement of *mens rea* on the part of a

<sup>188</sup> ILC Ybk 1996/I, 30–1, 46–7. See Arangio-Ruiz, (1998) 81 RDI 110.

<sup>189</sup> ILC Ybk 1996/II(2), 58ff. For the text see Appendix 5.

<sup>190</sup> See e.g. Draft Articles, Arts. 16, 17, the latter proclaiming the irrelevance of 'the origin, whether customary, convention or other' of the obligation breached. Cf. Draft Articles, Art. 40(2)(f), which drew a barely defensible (and wholly inconsistent) distinction between treaties and other rules of international law established for the protection of collective interests. Further: *Rainbow Warrior (New Zealand/France)*, (1990) 82 ILR 500, 550.



delinquent state: an act incurring state responsibility could occur even where a state did not undertake the act intentionally or through a failure of due diligence.<sup>191</sup> This superficially formal move in fact addressed a number of problems which, left unresolved, could have caused great doctrinal controversy. It was again consistent with the universal approach to the field, freeing state responsibility from particular categories of rules such as those concerning diplomatic protection and injury to aliens. But too much should not be read into this position.<sup>192</sup> As a set of secondary rules, the silence of the Draft Articles did not indicate an outright prohibition of the attachment of subjective fault to breaches of state responsibility: the position taken was neutral, and while no *mens rea* was ordinarily required on the part of the state, the primary rule could introduce such a requirement in a given context.

This raises the third presumption of the 1996 *acquis*, the distinction between primary and secondary rules.<sup>193</sup> The rules of state responsibility are considered to be secondary rules, governing the application of the primary rules, being those international legal obligations incumbent on states by way of custom or treaty. The necessity of such a distinction was evident from García-Amador's final proposals.<sup>194</sup> Without it, the project was in constant danger of trying to do too much, in effect telling states what obligations they could and could not have.

The Draft Articles, however, contained a number of unresolved difficulties, chief among which was the criminalization of international law contained in Draft Article 19. Reservations as to the terminology of 'crimes' and the implications of Draft Article 19 more generally led to vocal opposition from various states, with the United Kingdom's position being illustrative:

There is no basis in customary international law for the concept of international crimes. Nor is there a clear need for it. Indeed it is entirely possible that the concept would impede, rather than facilitate, the condemnation of egregious breaches of the law. The proposed draft articles are likely to make it more difficult for the international community to frame the terms of the condemnation so as to match precisely the particular circumstances of each case of wrongdoing. By establishing

<sup>191</sup> See e.g. Draft Articles, Arts. 1, 3, 40. <sup>192</sup> Gattini, (1999) 10 EJIL 397.

<sup>193</sup> See further David, in Crawford, Pellet and Olleson (2010) 27.

<sup>194</sup> See e.g. ILC Ybk 1961/II, 46. García-Amador's proposals tended towards the hubristic, and included, *inter alia*, a truncated code of human rights, a parallel statement of the rights of aliens and their property and of the relationship between international responsibility and contractual liability, and a rule about the relations of foreign parent companies and local subsidiaries.

the category of international crimes, the danger of polarizing moral and political judgments into a crude choice between crimes and delicts is increased. There is a real possibility of dissipating international concern with the causes and consequences of wrongful acts by focusing debates on the question whether or not those acts should be classified as international crimes, rather than on the substance of the wrong. There is also a serious risk that the category will become devalued, as cases of greater and lesser wrongs are put together in the same category, or as some wrongs are criminalized while others of equal gravity are not.<sup>195</sup>

Other states continued to support the broad notion behind Draft Article 19, but without being wedded to the terminology.<sup>196</sup> Indeed, the ILC footnoted that it was not wedded to it itself.<sup>197</sup>

Further problems which arose out of the Draft Articles included a certain excess of prescription and refinement in Part One, Chapter III, which sought to establish a typology of obligations in international law. In addition, structural problems existed within the provisions of Part Two, including in particular

- (a) the identification of states entitled to invoke responsibility, either as an 'injured State' or as a state with a more general legal interest in the breach of the obligations;
- (b) the implementation of responsibility by injured states and states with a legal interest in the breach (e.g. such issues as the invocation of responsibility and cases involving a plurality of states); and
- (c) the legal consequences flowing from the commission of an 'international crime' as defined in Draft Article 19.

Thus, at the close of its forty-eighth session in 1996, the ILC had been presented with a complete set of draft provisions on the law of state responsibility for the first time since the project was slated for codification in 1947. However, the articles so presented exposed a number of controversial issues such that their adoption was, as they stood, impossible. Substantial effort and compromise by the Commission would be required during the second reading.

#### 1.4.2 *The second reading: 1998–2001*

In 1997 the ILC appointed the author as Special Rapporteur and committed to completing the second reading of the Draft Articles by 2001.<sup>198</sup>

<sup>195</sup> ILC Ybk 1998/II(1), 120.

<sup>196</sup> See e.g. *ibid.*, 113 (Austria), 114 (Czech Republic), 115 (Denmark, on behalf of the Nordic countries), 115–16 (France), 116–18 (Ireland).

<sup>197</sup> ILC Ybk 1996/II(2), 63. <sup>198</sup> On the process see further Pellet (2010), 83–7.

Three major issues were identified as requiring reconsideration: international crimes of states, the regime of countermeasures and settlement of disputes.<sup>199</sup>

Unsurprisingly, a great deal of discussion took place within the Commission on the vexed question of Draft Article 19 and the concept of international crimes of states. Initially put to one side to enable consensus to be reached on other issues, the provision was ultimately deleted outright. However, the idea of a hierarchy of international legal norms did not disappear entirely from the project. Within the framework of Part Two of the Draft Articles, provision was made for special consequences applicable to 'serious breaches of obligations owed to the international community as a whole': these included the possibility of aggravated damages as well as certain obligations on the part of third states not to recognize a breach of such norms or a state of affairs arising therefrom as lawful. All states were also under an obligation to co-operate in order to suppress such situations.<sup>200</sup> But this formulation proved too broad and had to be narrowed further still to secure adoption: the concept of aggravated damages was abandoned outright and the duties of non-recognition and of co-operative suppression were limited to circumstances in which the breach complained of was of a peremptory or *ius cogens* norm.<sup>201</sup> Finally, it was recognized that every state had the capacity to invoke state responsibility for breaches of obligations owed to the international community as a whole, irrespective of their seriousness.

Another suite of issues addressed by the ILC during the second reading concerned Part Three, Chapter I, and the invocation of responsibility. The first such problem was Draft Article 40, which considered the invocation of responsibility by 'non-injured' states where an *erga omnes* norm was breached. Concerned that the provision of standing to all states in such cases would lead to a tsunami of international litigation, the ILC created two entirely new provisions. The first, which when finally adopted became Article 42, defined in narrower and more precise terms the concept of the injured state, drawing on the analogy of Article 60(2) of the Vienna Convention on the Law of Treaties.<sup>202</sup> The second, finally adopted as Article 48, dealt with the invocation of responsibility in the collective interest – particularly in relation to obligations *erga*

<sup>199</sup> ILC Ybk 1997/II(2), 11, 58.

<sup>200</sup> See Draft Arts. 41, 42 provisionally adopted in 2000: Crawford, Third Report, 106–9.

<sup>201</sup> Crawford, Fourth Report, 12–4. <sup>202</sup> 22 May 1969, 1155 UNTS 331.



*omnes* – thus giving effect to the dictum of the International Court in the *Barcelona Traction* case.<sup>203</sup> Of additional concern was whether reparation was available to injured and non-injured states alike in the case of a breach of multilateral or communitarian norms. The ILC decided that the position of the broader class of states interested in the breach of a collective or community obligation was subsidiary to that of a state which had suffered actual damage: thus, although ‘non-injured’ states possessed standing with respect to the breach of a communitarian norm, their remedies were limited under the terms of what would become Article 49 to the right to call for cessation of the act in question and to seek assurances of non-repetition. The right of such states to reparation was limited to doing so only in the name of the injured state – that is, the state most interested in the outcome of the dispute.

The second reading also saw substantial amendments to the Draft Articles’ consideration of countermeasures, with the relevant provisions moved from Part Two, Chapter III, to a new Part Three dealing with the implementation of responsibility. There, they were refined and developed further to stress the instrumental function of countermeasures in ensuring compliance<sup>204</sup> to prohibit certain categories of countermeasures<sup>205</sup> and to clarify the procedural conditions for their exercise.<sup>206</sup> These amendments would prove to be the most controversial aspect of the provisional text adopted by the ILC in 2000.

On 31 May 2001, the ILC adopted the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA), a set of fifty-nine provisions and associated commentary.<sup>207</sup> On 12 December 2001, the United Nations General Assembly (UNGA) took note of the Articles, annexed the text to GA Resolution 56/83 and recommended it to all governments without prejudice to their future adoption or other appropriate action.<sup>208</sup> This was in line with the ILC’s recommendation that the ARSIWA be annexed to a resolution of the General Assembly pursuant to Article 23(b) of the ILC Statute,<sup>209</sup> and that the Assembly

<sup>203</sup> *Barcelona Traction, Light & Power Company, Limited (Spain v. Belgium)*, Second Phase, ICJ Rep. 1970 p. 3, at 32.

<sup>204</sup> A position endorsed by the International Court in *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, ICJ Rep. 1997 p. 7, at 56–7.

<sup>205</sup> Ultimately adopted as ARSIWA, Art. 50 (Obligations not affected by countermeasures).

<sup>206</sup> Ultimately adopted as ARSIWA, Art. 52 (Conditions relating to resort to countermeasures).

<sup>207</sup> ILC Ybk 2001/II(2), 26ff. <sup>208</sup> GA Res. 56/83, 12 December 2001, §§3–4.

<sup>209</sup> GA Res. 174(II), 21 November 1947.



then consider 'at a later stage, and in light of the importance of the topic, the possibility of convening an international conference of plenipotentiaries to examine the draft articles ... with a view to concluding a convention on the topic'.<sup>210</sup> The ILC's recommendation was a compromise between those members of the Commission who believed that the ARSIWA would serve the international legal order best as simply evidence of international law,<sup>211</sup> and those who thought that the potential of the Articles could only be realized via their adoption as an international convention – that is, a source of law in its own right.<sup>212</sup>

### 1.4.3 Responses to the 2001 Articles

The General Assembly in 2004 adjourned its decision as to the final form of the Articles,<sup>213</sup> deferring again in 2007<sup>214</sup> and in 2010.<sup>215</sup> On each occasion, the General Assembly requested that the Secretary-General solicit comments from members as to how the matter was to proceed. Those few states that were minded to comment (usually Western) were generally opposed to the idea of subjecting the ARSIWA to a full diplomatic convention, which would have the potential to introduce disagreement and compromise additional to that which had already delayed by some forty years the codification of state responsibility.<sup>216</sup> The opinion of the United Kingdom is illustrative:

It is difficult to see what would be gained by the adoption of a convention ... The draft articles are already proving their worth and are entering the fabric of international law through State practice, decisions of courts and tribunals and writings. They are referred to consistently in the work of foreign ministries and other Government departments. The impact of the draft articles on international law will only increase with time, as is demonstrated by the growing number of references to the draft articles in recent years.

This achievement should not be put at risk lightly ... [T]here is a real risk that in moving towards the adoption of a convention based on the draft articles old

<sup>210</sup> ILC Ybk 2001/II(2), 25.

<sup>211</sup> That is: not a source of law proper within the meaning of the Statute of the International Court of Justice, 26 June 1945, 2187 UNTS 3, Art. 38(1)(a)–(c), but a 'subsidiary means for the determination of rules of law' within the meaning of Art. 38(1)(d).

<sup>212</sup> See further Pellet (2010), 86–7. <sup>213</sup> GA Res. 59/35, 16 December 2004.

<sup>214</sup> GA Res. 62/61, 6 December 2007.

<sup>215</sup> GA Res. 65/19, 6 December 2010. The subject is due for reconsideration at the 68th session of the GA (2013).

<sup>216</sup> See e.g. UN Doc. A/62/63; UN Doc. A/62/63 Add.1.

issues may be reopened. This would result in a series of fruitless debates that may unravel the text of the draft articles and weaken the current consensus. It may well be that the international community is left with nothing . . . Even were a text to be agreed, it is unlikely that the text would enjoy the wide support currently accorded to the draft articles . . . If few States were to ratify a convention, that instrument would have less legal force than the draft articles as they now stand, and may stifle the development of the law in an area traditionally characterized by State practice and case law. In fact, there is a significant risk that a convention with a small number of participants may have a de-codifying effect, may serve to undermine the current status of the draft articles and may be a 'limping' convention, with little or no practical effect.<sup>217</sup>

Accompanying the various state views in 2007 on the Articles was a document containing no less than 129 cases before international or domestic courts and tribunals where the ARSIWA or the Draft Articles on first reading were referred to with approval.<sup>218</sup> The Articles are an active and useful part of the process of international law. They are considered by courts and commentators to be in whole or in large part an accurate codification of the customary international law of state responsibility,<sup>219</sup> as demonstrated, for example by the International Court in the *Bosnian Genocide* case:

The rules for attributing alleged internationally wrongful conduct to a State do not vary with the nature of the wrongful act in question in the absence of a clearly expressed *lex specialis*. Genocide will be considered as attributable to a State if and to the extent that the physical acts constitutive of genocide that have been committed by organs or persons other than the State's own agents were carried out, wholly or in part, on the instructions or directions of the State, or under its effective control. This is the state of customary international law, as reflected in the ILC Articles on State Responsibility.<sup>220</sup>

<sup>217</sup> UN Doc. A/62/63, 6. See also the comments of the Nordic countries per Norway (*ibid.*, 4) and the US (UN Doc. A/62/63 Add.1, 2).

<sup>218</sup> These were collected by the Secretary-General in applying the terms of GA Res. 59/35, 2 December 2004: UN Doc. A/62/62; UN Doc. A/62/62 Add.1.

<sup>219</sup> See e.g. Hober, in Muchlinski, Ortino and Schreuer (eds.), *The Oxford Handbook of International Investment Law* (2008) 549, 553 ('there is a general consensus the [ARSIWA] accurately reflect customary international law on state responsibility').

<sup>220</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ Rep, 2007 p. 43, 209. Application of the ARSIWA as reflective of custom has been particularly prevalent in the field of investor-state arbitration: see e.g. *Noble Ventures Inc. v. Romania*, ICSID Case No. ARB/01/11, 12 October 2005, §69 ('While [the ARSIWA] are not binding, they are widely regarded as a codification of customary international law.');

*EDF (Services) Ltd v. Romania*, ICSID Case No. ARB/05/13, 8 October 2009, §187 n. 7 ('The [ARSIWA] have

Until such time as the General Assembly reaches a definite position as to the final form of the ARSIWA, they will continue to contribute to international law, and be further consolidated and refined through their application by courts and tribunals.

been frequently applied by courts and arbitral tribunals as declaratory of customary international law'). On the question of a Convention on State Responsibility see further Chapter 2.





# ANNEX 406



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Amity and ECON REL Treaty. EMBTELS 90 AUG 23; 93 AUG 24. EMB may, at its discretion, proceed as suggested closing PARAS EMBTEL 93. In conjunction or as alternative tactic, AMB may wish arrange interview FONMIN purpose making most firm and earnest representations against charges US proposals contain invidious implications or reflect unfavorably upon ETHIO. Stress FOL ~~at~~ PTS. Every provision binds US as well as ETHIO, and US has been obligated by similar treaties since early independence. If invidious RE ETHIO, equally so RE US and host other nations, including recent signatories: ITAL, URUG, IRELAND, COLOM, GR, Israel. Except note on ADMIN justice, no US proposals drafted with particular REF ETHIO situation, but prepared GEN use NEGOTS many countries. In proposing treaty to ETHIO, DEPT had no motive other than make agreement based squarely upon equality and reciprocity. It assumed ETHIO, on PT ~~assuming~~ ~~assuming~~ increased responsibility and enhanced stature INTERNATL affairs, prepared negotiate modern treaty incorporating enlightened principles and adapted present world conditions. While DEPT remains disposed seriously seek agreement every substantive problem

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it feels there can be little utility in constantly revising proposals meet what appear be largely captious objections.

ART V, PARA 3. Communication right important one denied certain parts world. Far from implying ETHIO violation, DEPT seeks ETHIO COOP in promoting objective universal inviolability.

ART VI, PARA 2. DEPT holds little justification subjecting aliens special requirements RE security costs and judgment. Treaties with Ireland, COLOM, GR, Israel specifically include SUBJ within NATL treatment rule. In acceding ETHIO request exception permitting discrimination, DEPT considered some standard necessary prevent abuses, cases of which reported certain countries.

ART VII, PARA 2. QTE Most constant protection and security UNQTE time-honored treaty language. As stated DEPTTEL 55 AUG 7, clause to be given reasonable not strictest interpretation. In DEPT'S view, provision declaratory of INTERNATL law, not more severe rule than INTERNATL law, as ETHIO contends. RE liability, DEPT'S view is that party obligated exercise QTE due diligence UNQTE make assurance effective, and that liability arises in case failure exercise due diligence. If provision unacceptable, DEPT suggests adoption language ART II existing treaty (1914). Accordingly ART V, PARA 2, first sentence may be amended as follows; QTE Each HCP shall assure, throughout the extent of its territories, the security of the nationals of the other HCP UNQTE. ART VII, PARA 2, may be similarly amended.

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For URINFO, certain of Ministry's proposals appear acceptable, and explanations <sup>should</sup> ~~should~~ remove basis any real concern in certain others, but apparently necessary take action discourage continuation unreasoned objections.

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(208)

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# ANNEX 407





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1954 NOV 13 PM 12 55

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By HLL/TCC, NARA, Date 7/2/84

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Treaty Article IV one. Substitution "unlawful" for "unreasonable" destroys effect provision. Original clause intended express general requirement of careful regard in accord general purpose of treaty for legitimate interests foreign investors without interference country's right proper regulation. Proposed substitution suggests intent apply unreasonable measures. Clause not vital~~x~~ but Embassy should try obtain acceptance.

Article IV two. This paragraph one of most important in treaty, and acceptance any substantial change very difficult. Irish treaty version less specific except on withdrawals and not used in more recent U.S. treaties. Interests in property covered in Protocol (seven) Irish treaty. Coverage indirect interests essential and in Iran's interest since important encourage foreign investment through participation Iranian corporations as well as directly. U.S. investment through third country corporations also contributes Iran's economic development. Department cannot neglect interests U.S. investors whether investments direct or indirect. Unclear how exchange notes would make Iran's acceptance easier, but will consider. Final sentence cannot be dropped since it spells out meaning "just compensation".

DECLASSIFICATION DATE 7/31/80  
 PER McNamara OFFICE CDC  
 FADRC FOI CASE NO. 2000639 Dyson

*Dullles*  
**BULLLES**  
 NEW  
 0341J 6/11/85/11-1354

Drafted by: *Jeg*  
 EDT:CP:VBSetser:hc 11/2/54

Telegraphic transmission and classification approved by: *VH*  
 V. G. Setser

Clearances:

OFD *RP*

*L/E*  
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Origin

Info

Treaty Article VIII. Proposed exception barter and clearing agreement not acceptable for inclusion ~~in~~ treaty with long range effects. Would undermine <sup>US</sup> ~~the~~ policy promote multilateral trade on non-discriminatory basis.

FYI agreements like with France possibly in violation 1943 Trade Agreement. Department has no intent <sup>now</sup> ~~to~~ raise question such violations/ but may be difficult make strong case against Iran proposal without question applicability Trade Agreement arising. Use discretion ~~in~~ discussing matter with Iranians. ~~in~~ case danger serious controversy over trade matters/ Department may wish consider dropping Article VIII and other provisions relating solely exchange goods and stand ~~in~~ Article III existing Trade Agreement.

Principal purpose paragraph 6-a to assure against claims under MFN clause based upon free entry into U.S. of fish taken by U.S. vessels on high seas or, by virtue special agreements, within territorial waters foreign countries.

This Document Must Be Returned to  
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CSHU

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*(yes)*  
**DULLES**

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Ancl. 49  
Rev \_\_\_\_\_

Drafted by:

*JH*  
EDT:CP:VGS:hc 11/19/54

Telegraphic transmission and classification approved by:

*VGS*  
V. G. Setser

Clearances:

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GTI

COMMERCE

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# ANNEX 408





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New York, 2000

**No. 30174**

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**FRANCE  
and  
ARGENTINA**

**Agreement on the reciprocal promotion and protection of  
investments (with related letter). Signed at Paris on  
3 July 1991**

*Authentic texts: French and Spanish.*

*Registered by France on 3 August 1993.*

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**FRANCE  
et  
ARGENTINE**

**Accord sur l'encouragement et la protection réciproques des  
investissements (avec lettre connexe). Signé à Paris le  
3 juillet 1991**

*Textes authentiques : français et espagnol.*

*Enregistré par la France le 3 août 1993.*

## [TRANSLATION — TRADUCTION]

AGREEMENT<sup>1</sup> BETWEEN THE GOVERNMENT OF THE FRENCH REPUBLIC AND THE GOVERNMENT OF THE ARGENTINE REPUBLIC ON THE RECIPROCAL PROMOTION AND PROTECTION OF INVESTMENTS

The Government of the French Republic and the Government of the Argentine Republic, hereinafter referred to as “the Contracting Parties”,

Desiring to develop economic cooperation between the two States and to create favourable conditions for French investments in Argentina and Argentine investments in France,

Convinced that the promotion and protection of such investments are likely to stimulate transfers of capital and technology between the two countries in the interest of their economic development,

Have agreed on the following provisions:

*Article 1*

For the purposes of this Agreement:

1. The term “investment” shall apply to assets such as property, rights and interests of any category, and particularly but not exclusively, to:

(a) Movable and immovable property and all other real rights such as mortgages, preferences, usufructs, sureties and similar rights;

(b) Shares, issue premiums and other forms of participation, albeit minority or indirect, in companies constituted in the territory of either Contracting Party;

(c) Bonds, claims and rights to any benefit having an economic value;

(d) Copyrights, industrial property rights (such as patents for inventions, licences, registered trade marks, industrial models and designs), technical processes, registered trade names and goodwill;

(e) Concessions accorded by law or by virtue of a contract, including concessions to prospect for, cultivate, mine or develop natural resources, including those situated in the maritime zones of the Contracting Parties;

it being understood that the said assets shall be or shall have been invested and, in accordance with the provisions of this Agreement, the related provisions laid down in conformity with the legislation of the Contracting Party in whose territory or maritime zone the investment is made, before or after the entry into force of this Agreement.

Any change in the form in which assets are invested shall not affect their status as an investment, provided that the change is not contrary to the legislation of the Contracting Party in whose territory or maritime zone the investment is made.

<sup>1</sup> Came into force on 3 March 1993, i.e., one month after the date of receipt of the last of the notifications by which the Parties had informed each other of the completion of the required internal procedures, in accordance with article 13.





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[TRANSLATION — TRADUCTION]

AGREEMENT<sup>1</sup> BETWEEN THE ARGENTINE REPUBLIC AND THE  
KINGDOM OF SPAIN ON THE RECIPROCAL PROMOTION AND  
PROTECTION OF INVESTMENTS

The Argentine Republic and the Kingdom of Spain, hereinafter referred to as “the Parties”,

Desiring to intensify economic cooperation for the economic benefit of both countries,

Intending to create favourable conditions for investments made by investors of either State in the territory of the other State,

Recognizing that the promotion and protection of investments in accordance with this Agreement will encourage initiatives in this field,

Have agreed as follows:

*Article I*

DEFINITIONS

1. For the purposes of this Agreement, the term “investors” shall mean:

(a) Individuals having their domicile in either Party and the nationality of that Party, in accordance with the agreements in force on this matter between the two countries;

(b) Legal entities, including companies, groups of companies, trading companies and other organizations constituted in accordance with the legislation of that Party and having their main office in the territory of that Party.

2. The term “investments” shall mean any kind of assets, such as property and rights of every kind, acquired or effected in accordance with the legislation of the country receiving the investment and in particular, but not exclusively, the following:

- Shares and other forms of participation in companies;
- Rights derived from any kind of contribution made with the intention of creating economic value, including loans directly linked with a specific investment, whether capitalized or not;
- Movable and immovable property and real rights such as mortgages, privileges, sureties, usufructs and similar rights;
- Any kind of rights in the field of intellectual property, including patents, trade marks, manufacturing licenses and know-how;
- Concessions granted by law or by virtue of a contract for engaging in economic and commercial activity, in particular those related to the prospection, cultivation, mining or development of natural resources.

<sup>1</sup> Came into force on 28 September 1992, the date on which the Parties notified each other (on 9 July and 28 September 1992) of the completion of the required constitutional procedures, in accordance with article XI (1).

The content and scope of the rights corresponding to the various categories of assets shall be determined by the laws and regulations of the Party in whose territory the investment is situated.

No modification in the legal forum in which assets and capital have been invested or reinvested shall affect their status as investments in accordance with this Agreement.

3. The terms "investment income or earnings" shall mean returns from an investment in accordance with the definition contained in the preceding paragraph and shall expressly include profits, dividends and interest.

4. The term "territory" shall mean the land territory of each Party, as well as the exclusive economic zone and the continental shelf beyond the limits of the territorial sea of each Party over which it has or may have, in accordance with international law, jurisdiction and sovereign rights for the purposes of prospection, exploration and conservation of natural resources.

#### *Article II*

##### PROMOTION AND ACCEPTANCE

1. Each Party shall, to the extent possible, promote investments made in its territory by investors of the other Party and shall accept those investments in accordance with its legislation.

2. This Agreement shall also apply to capital investments made before its entry into force by investors of one Party in the territory of the other Party in accordance with the legislation of the latter Party. This Agreement shall not, however, apply to disputes or claims arising before its entry into force.

#### *Article III*

##### PROTECTION

1. Each Party shall protect within its territory investments made in accordance with its legislation by investors of the other Party and shall not obstruct, by unjustified or discriminatory measures, the management, maintenance, use, enjoyment, extension, sale and, where appropriate, liquidation of such investments.

2. Each Party shall endeavour to grant the necessary permits in connection with such investments and, within the framework of its legislation, shall permit the execution of manufacturing licensing contracts and of technical, commercial, financial or administrative assistance and shall grant the requisite permits in connection with the activities of consultants or experts engaged by investors of the other Party.

#### *Article IV*

##### TREATMENT

1. Each Party shall guarantee in its territory fair and equitable treatment of investments made by investors of the other Party.



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New York, 2000



No. 30682

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**UNITED KINGDOM OF GREAT BRITAIN  
AND NORTHERN IRELAND  
and  
ARGENTINA**

**Agreement for the promotion and protection of investments.  
Signed at London on 11 December 1990**

*Authentic texts: English and Spanish.*

*Registered by the United Kingdom of Great Britain and Northern Ireland  
on 18 February 1994.*

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**ROYAUME-UNI DE GRANDE-BRETAGNE  
ET D'IRLANDE DU NORD  
et  
ARGENTINE**

**Accord relatif à l'encouragement et à la protection des inves-  
tissements. Signé à Londres le 11 décembre 1990**

*Textes authentiques : anglais et espagnol.*

*Enregistré par le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord  
le 18 février 1994.*

AGREEMENT<sup>1</sup> BETWEEN THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND THE GOVERNMENT OF THE REPUBLIC OF ARGENTINA FOR THE PROMOTION AND PROTECTION OF INVESTMENTS

The Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina;

Desiring to create favourable conditions for greater investment by investors of one State in the territory of the other State;

Recognising that the encouragement and reciprocal protection under international agreement of such investments will be conducive to the stimulation of individual business initiative and will increase prosperity in both States;

Have agreed as follows:

ARTICLE I

**Definitions**

For the purposes of this Agreement:

- (a) "investment" means every kind of asset defined in accordance with the laws and regulations of the Contracting Party in whose territory the investment is made and admitted in accordance with this Agreement and in particular, though not exclusively, includes:
- (i) movable and immovable property and any other property rights such as mortgages, liens or pledges;
  - (ii) shares in and stock and debentures of a company and any other form of participation in a company, established in the territory of either of the Contracting Parties;
  - (iii) claims to money which are directly related to a specific investment or to any performance under contract having a financial value;
  - (iv) intellectual property rights, goodwill, technical processes and know-how;
  - (v) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.

A change in the form in which assets are invested does not affect their character as investments. The term "investment" includes all investments, whether made before or after the date of entry into force of this Agreement, but the provisions of this Agreement shall not apply to any dispute concerning an investment which arose, or any claim concerning an investment which was settled, before its entry into force;

- (b) "returns" means the amounts yielded by an investment and in particular, though not exclusively, includes profit, interest, capital gains, dividends, royalties and fees;

<sup>1</sup> Came into force on 19 February 1993, the date of the last of the notifications by which the Contracting Parties informed each other of the completion of the required constitutional formalities, in accordance with article 13.



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New York, 2004

[ ENGLISH TEXT — TEXTE ANGLAIS ]

AGREEMENT ON ENCOURAGEMENT AND RECIPROCAL PROTECTION  
OF INVESTMENTS BETWEEN THE KINGDOM OF THE NETHER-  
LANDS AND THE CZECH AND SLOVAK FEDERAL REPUBLIC

The Government of the Kingdom of the Netherlands and the Government of the Czech and Slovak Federal Republic, hereinafter referred to as the Contracting Parties,

Desiring to extend and intensify the economic relations between them particularly with respect to investments by the investors of one Contracting Party in the territory of the other Contracting Party,

Recognizing that agreement upon the treatment to be accorded to such investments will stimulate the flow of capital and technology and the economic development of the Contracting Parties and that fair and equitable treatment is desirable,

Taking note of the Final Act of the Conference on Security and Cooperation in Europe, signed on August, 1st 1975 in Helsinki,

Have agreed as follows:

*Article 1*

For the purposes of the present Agreement:

a) the term "investments" shall comprise every kind of asset invested either directly or through an investor of a third State and more particularly, though not exclusively:

- (i) movable and immovable property and all related property rights;
- (ii) shares, bonds and other kinds of interests in companies and joint ventures, as well as rights derived therefrom;
- (iii) title to money and other assets and to any performance having an economic value;
- (iv) rights in the field of intellectual property, also including technical processes, goodwill and know-how;
- (v) concessions conferred by law or under contract, including concessions to prospect, explore, extract and win natural resources.

b) the term "investors" shall comprise:

- (i) natural persons having the nationality of one of the Contracting Parties in accordance with its law;
- (ii) legal persons constituted under the law of one of the Contracting Parties.

c) the term "territory" also includes the maritime areas adjacent to the coast of the State concerned, to the extent to which that State may exercise sovereign rights or jurisdiction in those areas according to international law.





# ANNEX 409



**TREATY BETWEEN  
THE GOVERNMENT OF THE UNITED STATES OF AMERICA  
AND THE GOVERNMENT OF [Country]  
CONCERNING THE ENCOURAGEMENT  
AND RECIPROCAL PROTECTION OF INVESTMENT**

The Government of the United States of America and the Government of [Country] (hereinafter the “Parties”);

*Desiring* to promote greater economic cooperation between them with respect to investment by nationals and enterprises of one Party in the territory of the other Party;

*Recognizing* that agreement on the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the Parties;

*Agreeing* that a stable framework for investment will maximize effective utilization of economic resources and improve living standards;

*Recognizing* the importance of providing effective means of asserting claims and enforcing rights with respect to investment under national law as well as through international arbitration;

*Desiring* to achieve these objectives in a manner consistent with the protection of health, safety, and the environment, and the promotion of internationally recognized labor rights;

*Having* resolved to conclude a Treaty concerning the encouragement and reciprocal protection of investment;

Have agreed as follows:

2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

3. The treatment to be accorded by a Party under paragraphs 1 and 2 means, with respect to a regional level of government, treatment no less favorable than the treatment accorded, in like circumstances, by that regional level of government to natural persons resident in and enterprises constituted under the laws of other regional levels of government of the Party of which it forms a part, and to their respective investments.

#### **Article 4: Most-Favored-Nation Treatment**

1. Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

#### **Article 5: Minimum Standard of Treatment<sup>8</sup>**

1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.

2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:

- (a) “fair and equitable treatment” includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and
- (b) “full protection and security” requires each Party to provide the level of police protection required under customary international law.

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<sup>8</sup> Article 5 [Minimum Standard of Treatment] shall be interpreted in accordance with Annex A.



3. A determination that there has been a breach of another provision of this Treaty, or of a separate international agreement, does not establish that there has been a breach of this Article.

4. Notwithstanding Article 14 [Non-Conforming Measures](5)(b) [subsidies and grants], each Party shall accord to investors of the other Party, and to covered investments, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife.

5. Notwithstanding paragraph 4, if an investor of a Party, in the situations referred to in paragraph 4, suffers a loss in the territory of the other Party resulting from:

- (a) requisitioning of its covered investment or part thereof by the latter's forces or authorities; or
- (b) destruction of its covered investment or part thereof by the latter's forces or authorities, which was not required by the necessity of the situation,

the latter Party shall provide the investor restitution, compensation, or both, as appropriate, for such loss. Any compensation shall be prompt, adequate, and effective in accordance with Article 6 [Expropriation and Compensation](2) through (4), *mutatis mutandis*.

6. Paragraph 4 does not apply to existing measures relating to subsidies or grants that would be inconsistent with Article 3 [National Treatment] but for Article 14 [Non-Conforming Measures](5)(b) [subsidies and grants].

#### **Article 6: Expropriation and Compensation<sup>9</sup>**

1. Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation"), except:

- (a) for a public purpose;
- (b) in a non-discriminatory manner;
- (c) on payment of prompt, adequate, and effective compensation; and
- (d) in accordance with due process of law and Article 5 [Minimum Standard of Treatment](1) through (3).

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<sup>9</sup> Article 6 [Expropriation] shall be interpreted in accordance with Annexes A and B.

## **Annex B**

### **Expropriation**

The Parties confirm their shared understanding that:

1. Article 6 [Expropriation and Compensation](1) is intended to reflect customary international law concerning the obligation of States with respect to expropriation.

2. An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.

3. Article 6 [Expropriation and Compensation](1) addresses two situations. The first is direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.

4. The second situation addressed by Article 6 [Expropriation and Compensation](1) is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.

- (a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:
  - (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;
  - (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and
  - (iii) the character of the government action.
- (b) Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.

# ANNEX 410





## 2012 U.S. Model Bilateral Investment Treaty

### TREATY BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF [Country] CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENT

The Government of the United States of America and the Government of [Country] (hereinafter the “Parties”);

*Desiring* to promote greater economic cooperation between them with respect to investment by nationals and enterprises of one Party in the territory of the other Party;

*Recognizing* that agreement on the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the Parties;

*Agreeing* that a stable framework for investment will maximize effective utilization of economic resources and improve living standards;

*Recognizing* the importance of providing effective means of asserting claims and enforcing rights with respect to investment under national law as well as through international arbitration;

*Desiring* to achieve these objectives in a manner consistent with the protection of health, safety, and the environment, and the promotion of internationally recognized labor rights;

*Having* resolved to conclude a Treaty concerning the encouragement and reciprocal protection of investment;

Have agreed as follows:

### **Article 3: National Treatment**

1. Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.
2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
3. The treatment to be accorded by a Party under paragraphs 1 and 2 means, with respect to a regional level of government, treatment no less favorable than the treatment accorded, in like circumstances, by that regional level of government to natural persons resident in and enterprises constituted under the laws of other regional levels of government of the Party of which it forms a part, and to their respective investments.

### **Article 4: Most-Favored-Nation Treatment**

1. Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.
2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

### **Article 5: Minimum Standard of Treatment<sup>9</sup>**

1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.
2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:

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<sup>9</sup> Article 5 [Minimum Standard of Treatment] shall be interpreted in accordance with Annex A.

- (a) “fair and equitable treatment” includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and
- (b) “full protection and security” requires each Party to provide the level of police protection required under customary international law.

3. A determination that there has been a breach of another provision of this Treaty, or of a separate international agreement, does not establish that there has been a breach of this Article.

4. Notwithstanding Article 14 [Non-Conforming Measures](5)(b) [subsidies and grants], each Party shall accord to investors of the other Party, and to covered investments, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife.

5. Notwithstanding paragraph 4, if an investor of a Party, in the situations referred to in paragraph 4, suffers a loss in the territory of the other Party resulting from:

- (a) requisitioning of its covered investment or part thereof by the latter’s forces or authorities; or
- (b) destruction of its covered investment or part thereof by the latter’s forces or authorities, which was not required by the necessity of the situation,

the latter Party shall provide the investor restitution, compensation, or both, as appropriate, for such loss. Any compensation shall be prompt, adequate, and effective in accordance with Article 6 [Expropriation and Compensation](2) through (4), *mutatis mutandis*.

6. Paragraph 4 does not apply to existing measures relating to subsidies or grants that would be inconsistent with Article 3 [National Treatment] but for Article 14 [Non-Conforming Measures](5)(b) [subsidies and grants].

## **Article 6: Expropriation and Compensation**<sup>10</sup>

1. Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization (“expropriation”), except:

- (a) for a public purpose;
- (b) in a non-discriminatory manner;
- (c) on payment of prompt, adequate, and effective compensation; and

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<sup>10</sup> Article 6 [Expropriation] shall be interpreted in accordance with Annexes A and B.

## **Annex B**

### **Expropriation**

The Parties confirm their shared understanding that:

1. Article 6 [Expropriation and Compensation](1) is intended to reflect customary international law concerning the obligation of States with respect to expropriation.

2. An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.

3. Article 6 [Expropriation and Compensation](1) addresses two situations. The first is direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.

4. The second situation addressed by Article 6 [Expropriation and Compensation](1) is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.

- (a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:
  - (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;
  - (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and
  - (iii) the character of the government action.
- (b) Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.

# ANNEX 411





## CHAPTER 14

### INVESTMENT

#### Article 14.1: Definitions

For the purposes of this Chapter:

**covered investment** means, with respect to a Party, an investment in its territory of an investor of another Party in existence as of the date of entry into force of this Agreement or established, acquired, or expanded thereafter;

**enterprise** means an enterprise as defined in Article 1.5 (General Definitions), and a branch of an enterprise;

**enterprise of a Party** means an enterprise constituted or organized under the law of a Party, or a branch located in the territory of a Party and carrying out business activities there;

**freely usable currency** means “freely usable currency” as determined by the International Monetary Fund under its *Articles of Agreement*;

**investment** means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. An investment may include:

- (a) an enterprise;
- (b) shares, stock and other forms of equity participation in an enterprise;
- (c) bonds, debentures, other debt instruments, and loans;<sup>1</sup>
- (d) futures, options, and other derivatives;
- (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;
- (f) intellectual property rights;

<sup>1</sup> Some forms of debt, such as bonds, debentures, and long-term notes or loans, are more likely to have the characteristics of an investment, while other forms of debt, such as claims to payment that are immediately due, are less likely to have these characteristics.

## ANNEX 14-B

### EXPROPRIATION

The Parties confirm their shared understanding that:

1. An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right<sup>18</sup> or property interest in an investment.
2. Article 14.8.1 (Expropriation and Compensation) addresses two situations. The first is direct expropriation, in which an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.
3. The second situation addressed by Article 14.8.1 (Expropriation and Compensation) is indirect expropriation, in which an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.
  - (a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:
    - (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred,
    - (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations,<sup>19</sup> and
    - (iii) the character of the government action, including its object, context, and intent.
  - (b) Non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations, except in rare circumstances.

<sup>18</sup> For greater certainty, the existence of a property right is determined with reference to a Party's law.

<sup>19</sup> For greater certainty, whether an investor's investment-backed expectations are reasonable depends, to the extent relevant, on factors such as whether the government provided the investor with binding written assurances and the nature and extent of governmental regulation or the potential for government regulation in the relevant sector.

# ANNEX 412





Brussels, 14 September 2016  
(OR. en)

10973/16  
ADD 3

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**Interinstitutional File:**  
**2016/0206 (NLE)**

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WTO 195  
SERVICES 20  
FDI 16  
CDN 12

**LEGISLATIVE ACTS AND OTHER INSTRUMENTS**

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Subject: Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part

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## EXPROPRIATION

The Parties confirm their shared understanding that:

1. Expropriation may be direct or indirect:
  - (a) direct expropriation occurs when an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure; and
  - (b) indirect expropriation occurs if a measure or series of measures of a Party has an effect equivalent to direct expropriation, in that it substantially deprives the investor of the fundamental attributes of property in its investment, including the right to use, enjoy and dispose of its investment, without formal transfer of title or outright seizure.
2. The determination of whether a measure or series of measures of a Party, in a specific fact situation, constitutes an indirect expropriation requires a case-by-case, fact-based inquiry that takes into consideration, among other factors:
  - (a) the economic impact of the measure or series of measures, although the sole fact that a measure or series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred;

- (b) the duration of the measure or series of measures of a Party;
  - (c) the extent to which the measure or series of measures interferes with distinct, reasonable investment-backed expectations; and
  - (d) the character of the measure or series of measures, notably their object, context and intent.
3. For greater certainty, except in the rare circumstance when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations.



# ANNEX 413







EUROPEAN  
COMMISSION

Brussels, 18.4.2018  
COM(2018) 194 final

ANNEX 2

**ANNEX**

*to the*

**Proposal for a Council Decision**

**on the conclusion of the Investment Protection Agreement between the European Union and its Member States of the one part, and the Republic of Singapore, of the other part**

## EXPROPRIATION

The Parties confirm their shared understanding that:

1. Article 2.6 (Expropriation) addresses two situations. The first is direct expropriation where a covered investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure. The second is indirect expropriation where a measure or series of measures by a Party has an effect equivalent to direct expropriation in that it substantially deprives the covered investor of the fundamental attributes of property in its covered investment, including the right to use, enjoy and dispose of its covered investment, without formal transfer of title or outright seizure.
2. The determination of whether a measure or series of measures by a Party, in a specific situation, constitutes an indirect expropriation requires a case-by-case, fact-based inquiry that considers, among other factors:
  - (a) the economic impact of the measure or series of measures and its duration, although the fact that a measure or a series of measures by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;

- (b) the extent to which the measure or series of measures interferes with the possibility to use, enjoy or dispose of the property; and
- (c) the character of the measure or series of measures, notably its object, context and intent.

For greater certainty, except in the rare circumstance where the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measure or series of measures by a Party that are designed and applied to protect legitimate public policy objectives such as public health, safety and the environment, do not constitute indirect expropriation.

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# ANNEX 414



**Disclaimer:** In view of the Commission's transparency policy, the Commission is publishing the texts of the Trade Part of the Agreement following the agreement in principle announced on 21 April 2018.

The texts are published for information purposes only and may undergo further modifications including as a result of the process of legal revision. The texts are still under negotiations and not finalised. However, in view of the growing public interest in the negotiations, the texts are published at this stage of the negotiations for information purposes. These texts are without prejudice to the final outcome of the agreement between the EU and Mexico.

The texts will be final upon signature. The agreement will become binding on the Parties under international law only after completion by each Party of its internal legal procedures necessary for the entry into force of the Agreement (or its provisional application).

## **CHAPTER XX**

### **INVESTMENT**

#### **Section A**

### **GENERAL PROVISIONS**

#### **Article 1 Right to regulate**

The Parties affirm the right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, social services, public education, safety, environment or public morals, social or consumer protection, privacy and data protection, the promotion and protection of cultural diversity, or competition.

#### **Article 2 Scope**

This Chapter applies to measures adopted or maintained by<sup>1</sup>:

- (a) the central, regional, or local governments and authorities of that Party; and
- (b) any person, including a state enterprise or any other non-governmental body in the exercise of powers delegated by central, regional, or local governments or authorities.

#### **Article 3 Definitions**

For the purpose of this Chapter:

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<sup>1</sup> For greater certainty, this Chapter covers measures by entities listed under paragraph (a) and (b), which are adopted or maintained either directly, or indirectly by instructing, directing or controlling other entities with regard to those measures.

### ANNEX ON EXPROPRIATION

The Parties confirm their shared understanding that:

1. A measure or series of measures by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.
2. Article 12(1) (Expropriation and Compensation) addresses two situations. The first is direct expropriation, which occurs when an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure.
3. The second situation addressed by Article 12(1) (Expropriation and Compensation) is indirect expropriation, which occurs when a measure or series of measures by a Party has an effect equivalent to direct expropriation, in that it substantially deprives the investor of the fundamental attributes of property in its investment, including the right to use, enjoy and dispose of its investment, without formal transfer of title or outright seizure.
4. The determination of whether a measure or series of measures by a Party, in a specific situation, constitutes an indirect expropriation requires a case-by-case, fact-based inquiry that considers, among other factors:
  - (i) the economic impact of the measure or series of measures, although the fact that a measure or series of measures by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;
  - (ii) the duration of the measure or series of measures by a Party;
  - (iii) the extent to which the government measure interferes with the distinct and reasonable expectations of the investor arising out of the investment; and
  - (iv) the character of the the measure or series of measures, notably their object and context.
3. For greater certainty, non-discriminatory measures by a Party that are designed and applied to protect legitimate policy objectives, such as the protection of public health, social services, public education, safety, and the environment, or public morals, social or consumer protection, privacy and data protection, or the promotion and protection of cultural diversity do not constitute indirect expropriations, except in the rare circumstance when the impact of a measure or series of measures is manifestly excessive in light of its purpose.

# ANNEX 415







# Canada-Colombia Free Trade Agreement

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## Chapter Eight - Investment

### Section A - Investment

#### Article 801: Scope and Coverage

1. This Chapter shall apply to measures adopted or maintained by a Party relating to:

(a) investors of the other Party;

(b) covered investments; and

(c) with respect to Articles 807, 815 and 816, all investments in the territory of the Party.

2. For greater certainty, the provisions of this Chapter do not bind a Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement.

3. Consistent with Articles 1305 (Competition Policy, Monopolies and State Enterprises - Designated Monopolies) and 1306 (Competition Policy, Monopolies and State Enterprises State Enterprises) the Parties confirm their understanding that nothing in this Chapter shall be construed to prevent a Party from designating a monopoly, or from maintaining or establishing a state enterprise.

[Top of page](#)

#### Article 802: Relation to Other Chapters

1. In the event of any inconsistency between this Chapter and another Chapter, the other Chapter shall prevail to the extent of the inconsistency.

2. A requirement by a Party that a service supplier of the other Party post a bond or other form of financial security as a condition of the cross-border supply of a service into its territory does not of itself make this Chapter applicable to measures adopted or maintained by the Party relating to the cross-border supply of the service. This Chapter applies to measures adopted or maintained by the Party relating to the posted bond or financial security, to the extent that such bond or financial security is a covered investment.

3. This Chapter shall not apply to measures adopted or maintained by a Party to the extent that they are covered by Chapter Eleven (Financial Services).

- (a) be temporary and be eliminated as soon as the circumstances leading to their imposition no longer exist;
- (b) be of general application;
- (c) be imposed and be applied in good faith;
- (d) be consistent with Articles 803 and 804; and
- (e) not impose, with respect to deposits of investors of Canada, any terms or conditions that are more restrictive than those applied at the time such deposits were made.

4. Upon adopting a measure pursuant to paragraph 1 or 2, Colombia shall provide to Canada the reasons for the adoption of the measure as well as any relevant information.

5. For the purposes of this Annex:

**foreign credit** means any type of foreign debt financing whatever its nature, form or maturity period; and

**foreign direct investment** means an investment of an investor of Canada, other than a foreign credit, made in order to:

- (a) establish a Colombian enterprise or increase the capital of an existing Colombian enterprise; or
- (b) acquire equity of an existing Colombian enterprise, but excludes such an investment that is of a purely financial character and is designed only to gain indirect access to the financial market of Colombia.

[Top of page](#)

## **Annex 811**

### **Indirect Expropriation**

The Parties confirm their shared understanding that:

1. Paragraph 1 of Article 811 addresses two situations. The first situation is direct expropriation, where an investment is nationalized or otherwise directly expropriated as provided for under international law.
2. The second situation is indirect expropriation, which results from a measure or series of measures of a Party that have an effect equivalent to direct expropriation without formal transfer of title or outright seizure.
  - (a) The determination of whether a measure or series of measures of a Party constitute an indirect expropriation requires a case-by-case, fact-based inquiry that considers, among other factors:
    - (i) the economic impact of the measure or series of measures, although the sole fact that a measure or series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred,
    - (ii) the extent to which the measure or series of measures interfere with distinct, reasonable investment-backed expectations, and

(iii) the character of the measure or series of measures;

(b) Except in rare circumstances, such as when a measure or series of measures is so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted in good faith, non-discriminatory measures by a Party that are designed and applied to protect legitimate public welfare objectives, for example health, safety and the protection of the environment, do not constitute indirect expropriation.

[Top of page](#)

## **Annex 821**

### **Standard Waiver and Consent In Accordance with Article 821 of this Agreement**

In the interest of facilitating the filing of waivers as required by Article 821 of this Agreement, and to facilitate the orderly conduct of the dispute resolution procedures set out in Section B, the following standard waiver forms shall be used, depending on the type of claim.

Claims filed under Article 819 must be accompanied by either Form 1, where the investor is a national of a Party, or Form 2, where the investor is a Party, a state enterprise thereof, or an enterprise of such Party.

Where the claim is based on loss or damage to an interest in an enterprise of the other Party that is a juridical person that the investor owns or controls directly or indirectly, either Form 1 or 2 must be accompanied by Form 3.

Claims made under Article 820 must be accompanied by either Form 1, where the investor is a national of a Party, or Form 2, where the investor is a Party, a state enterprise thereof, or an enterprise of such Party, and Form 4.

[Top of page](#)

#### **Form 1**

**Consent and waiver for an investor bringing a claim under Article 819 or Article 820 (where the investor is a national of a Party) of the Free Trade Agreement between Canada and the Republic of Colombia done on (date of signature):**

I, (Name of investor) , consent to arbitration in accordance with the procedures set out in this Agreement, and waive my right to initiate or continue before any administrative tribunal or court under the law of either Party to the Agreement, or other dispute settlement procedures, any proceedings with respect to the measure of (Name of disputing Party) that is alleged to be a breach referred to in Article 819, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of (Name of disputing Party).

(To be signed and dated)

[Top of page](#)

#### **Form 2**

**Consent and waiver for an investor bringing a claim under Article 819 or Article 820 (where the investor**



# ANNEX 416





## Krederi Ltd. v. Ukraine (ICSID Case No. ARB/14/17)

Excerpts of the Award of July 2, 2018 made pursuant to Rule 48(4) of the ICSID Arbitration Rules of 2006

### Claimant

Krederi Limited (“Krederi Ltd.”, a company incorporated under the laws of England and Wales)

### Respondent

Ukraine

### Tribunal

August Reinisch (President of the Tribunal, Austrian), appointed by the parties

Markus Wirth (Swiss), appointed by the Claimant

Gavan Griffith (Australian), appointed by the Respondent

### Award

July 2, 2018

### Instrument relied on for consent to ICSID arbitration

Bilateral Investment Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland (“UK”) and the Government of Ukraine (“Ukraine”) for the Promotion and Reciprocal Protection of Investments, dated February 10, 1993 entered into force on the same date

### Procedure

*Applicable Arbitration Rules:* ICSID Arbitration Rules of 2006

*Place of Proceedings:* Paris, France

*Procedural Language:* English

*Full Procedural Details:* Available at <https://www.worldbank.org/icsid>

### Factual Background

This dispute relates to three land plots located in Kiev, Ukraine that the Claimant acquired via two Ukrainian companies. The Claimant alleged that it had plans to develop a multi-functional complex including a luxury hotel, shopping area, multi-level parking, as well as residential, office, and retail spaces on the land. In the Claimant’s view, the land plots were lost as a result of various measures by Ukraine, in violation of the BIT, most importantly through four court proceedings allegedly conducted in an irregular fashion falling short of due process.

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EXCERPTS

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

**Krederi Ltd.**

**v.**

**Ukraine**

**ICSID Case No. ARB/14/17**

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## **AWARD**

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***Members of the Tribunal***

Prof. Dr. August Reinisch, President

Dr. Markus Wirth, Arbitrator

Dr. Gavan Griffith QC, Arbitrator

***Secretary of the Tribunal***

Ms. Ella Rosenberg

*Date of dispatch to the Parties: 2 July 2018*

705. This understanding of the requirement of due process is also reflected in the reasoning of the tribunal in *ADC v. Hungary*<sup>398</sup> upon which Claimant relies.<sup>399</sup>

Some basic legal mechanisms, such as reasonable advance notice, a fair hearing and an unbiased and impartial adjudicator to assess the actions in dispute, are expected to be readily available and accessible to the investor to make such legal procedure meaningful. In general, the legal procedure must be of a nature to grant an affected investor a reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard. If no legal procedure of such nature exists at all, the argument that “*the actions are taken under due process of law*” rings hollow.<sup>400</sup>

706. Thus, in the Tribunal’s view, the requirement that an expropriation be not only accompanied by compensation, but also carried out for a public purpose and in accordance with due process of law is already inherent in Article 6(1) of the Treaty. Therefore, there is no need to invoke any third-party BIT with an express due process requirement in its expropriation clause via the MFN clause of the Treaty.

***b. Judicial Expropriation***

707. As a general matter, this Tribunal takes the view that it is not excluded that judicial action may, in certain situations, amount to expropriation. This was recognized by the tribunal in *Saipem v. Bangladesh*<sup>401</sup> which found that the host State’s judiciary expropriated the investor’s immaterial rights under an ICC arbitral award. In its jurisdictional decision the tribunal held that “[...] there is no reason why a judicial act could not result in an expropriation.”<sup>402</sup> And in its award,<sup>403</sup> the same tribunal found that the annulment of an

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<sup>398</sup> *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, CLA-51.

<sup>399</sup> Claimant Post-Hearing Brief, ¶ 84.

<sup>400</sup> *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, CLA-51, ¶ 435.

<sup>401</sup> *Saipem S.p.A. v. The People’s Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on jurisdiction and recommendation on provisional measures, 21 March 2007, CLA-31; Award, 30 June 2009, CLA-32.

<sup>402</sup> *Saipem S.p.A. v. The People’s Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on jurisdiction and recommendation on provisional measures, 21 March 2007, CLA-31, ¶ 132.

<sup>403</sup> *Saipem S.p.A. v. The People’s Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award, 30 June 2009, CLA-32.

*Krederi Ltd. v. Ukraine*  
Excerpts of the Award

ICC award, in which “Saipem’s residual contractual rights under the investment [were] crystallised”,<sup>404</sup> amounted to an expropriation of such rights.

708. Also, the fact that in disputes over ownership ultimate outcomes will usually not benefit the State, but a third party, does not, as a matter of principle, exclude the possibility that a judicial determination may amount to expropriation. This was acknowledged by the tribunal in *Rumeli v. Kazakhstan*,<sup>405</sup> which found a creeping expropriation, although the judiciary’s action did not benefit the State, but a third party.<sup>406</sup>
709. While it is possible that judicial action amounts to expropriation, it is the exception rather than the norm. In any kind of private law dispute over ownership of movable or immovable property, courts will make a decision which of the disputing parties claiming ownership rights prevails. This will result in a finding that one party will be entitled to ownership whereas the other (or others) will not. Such judicial determinations do not constitute expropriation. Similarly, where property transfers are held to be invalid, the resulting transfers of ownership do not amount to expropriation.
710. In this regard the Tribunal concurs with the view expressed by the *Saipem v. Bangladesh* tribunal<sup>407</sup> which found that, in the specific circumstances, the host State’s judicial actions annulling an ICC award amounted to indirect expropriation,<sup>408</sup> but held that in the peculiar case of a judicial expropriation the “substantial deprivation” of ownership rights in itself

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<sup>404</sup> *Ibid.*, ¶ 128 (“[...] Saipem’s residual contractual rights under the investment as crystallised in the ICC Award.”).

<sup>405</sup> *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, CLA-12.

<sup>406</sup> *Ibid.*, ¶ 704 (“It is a characteristic of judicial expropriation that it is usually instigated by a private party for his own benefit, and not that of the State. This is no doubt a relevant consideration, although not in itself decisive, as has already been observed. The Tribunal considers however, and Respondent indeed accepted in paragraph 259 of its Rejoinder, that a transfer to a third party may amount to an expropriation attributable to the State if the judicial process was instigated by the State.”).

<sup>407</sup> *Saipem S.p.A. v. The People’s Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award, 30 June 2009, CLA-32.

<sup>408</sup> *Ibid.*, ¶. 129 (“In respect of the taking, the actions of the Bangladeshi courts do not constitute an instance of direct expropriation, but rather of “measures having similar effects” within the meaning of Article 5(2) of the BIT. Such actions resulted in substantially depriving Saipem of the benefit of the ICC Award. This is plain in light of the decision of the Bangladeshi Supreme Court that the ICC Award is “a nullity”. Such a ruling is tantamount to a taking of the residual contractual rights arising from the investments as crystallised in the ICC Award. As such, it amounts to an expropriation within the meaning of Article 5 of the BIT.”).

*Krederi Ltd. v. Ukraine*  
Excerpts of the Award

was not sufficient for a finding of expropriation because otherwise “any setting aside of an award could then found a claim for expropriation, even if the setting aside was ordered by the competent state court upon legitimate grounds.”<sup>409</sup> Rather, an additional element of illegality was required in order to turn a judicial decision into an indirect expropriation of the intangible rights under an arbitral award. In this case, the tribunal found that the “Bangladeshi courts abused their supervisory jurisdiction over the arbitration process”<sup>410</sup> and interfered with the arbitral process contrary to the New York Convention.<sup>411</sup>

711. This approach was explicitly endorsed in *Swisslion v. Macedonia*,<sup>412</sup> in which an ICSID tribunal held “[...] that a predicate for alleging a judicial expropriation is unlawful activity by the court itself.”<sup>413</sup> Since there was no such illegality the *Swisslion v. Macedonia* tribunal rejected the expropriation claim and argued that otherwise any lawful termination of contractual rights might easily be qualified as expropriatory.<sup>414</sup>

712. This approach was equally shared by the tribunal in *Garanti Koza v. Turkmenistan*,<sup>415</sup> which held:

A seizure of property by a court as the result of normal domestic legal process does not amount to an expropriation under international law unless there was an element of serious and fundamental impropriety about the legal process. Actions by state courts to enforce contract rights, including

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<sup>409</sup> *Ibid.*, ¶ 133 (“That said, given the very peculiar circumstances of the present interference, the Tribunal agrees with the parties that the substantial deprivation of Saipem’s ability to enjoy the benefits of the ICC Award is not sufficient to conclude that the Bangladeshi courts’ intervention is tantamount to an expropriation. If this were true, any setting aside of an award could then found a claim for expropriation, even if the setting aside was ordered by the competent state court upon legitimate grounds.”).

<sup>410</sup> *Ibid.*, ¶ 159.

<sup>411</sup> *Ibid.*, ¶¶ 163-169.

<sup>412</sup> *Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, Award, 6 July 2012, RLA-53.

<sup>413</sup> *Ibid.*, ¶ 313.

<sup>414</sup> *Ibid.*, ¶ 314 (“[...] the courts’ determination of breach of the Share Sale Agreement and its consequential termination did not breach the Treaty and therefore was not unlawful. The internationally lawful termination of a contract between a State entity and an investor cannot be equated to an expropriation of contractual rights simply because the investor’s rights have been terminated; otherwise, a State could not exercise the ordinary right of a contractual party to allege that its counterparty breached the contract without the State’s being found to be in breach of its international obligations. Since there was no illegality on the part of the courts, the first element of the Claimant’s expropriation claim is not established.”).

<sup>415</sup> *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Award, 19 December 2016, RLA-121.



rights to terminate a contract, have generally not been held by investment arbitration tribunals to amount to expropriation, regardless of whether the state or an instrument of the state is the contract party enforcing its rights.<sup>416</sup>

713. The Tribunal recognizes that Claimant also understands that for judicial action to amount to expropriation a due process violation is required.<sup>417</sup> In order to avoid a situation whereby any title annulment would constitute indirect expropriation or a measure tantamount to expropriation it is therefore necessary to ascertain whether an additional element of procedural illegality or denial of justice was present. Only then may a judicial decision be qualified as a measure constituting or amounting to expropriation.
714. Thus, for this Tribunal, it was necessary to ascertain whether the judicial action which led to the withdrawal of Claimant's property rights in the contested land plots was tainted by breaches of due process.
715. Since the Tribunal has come to the conclusion in its assessment of the fair and equitable treatment claim that the challenged judicial proceedings do not rise to the level of a breach of due process<sup>418</sup> the Tribunal finds that the judicial proceedings do not constitute indirect expropriation.
716. Therefore, Claimant's claim for expropriation is dismissed.
717. The Tribunal has carefully considered the Parties' submissions, including the expert reports, on damages. However, given its rulings on liability, the Tribunal does not think that it is necessary to address the Parties' damages submissions here.

#### **E. CONCLUSIONS ON LIABILITY**

718. For the reasons stated above, the Tribunal dismisses all claims. The Tribunal nonetheless notes what it considers an unsatisfactory outcome of this case: In the result the investor has lost the properties it purchased without being recouped the original sale price paid to, and

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<sup>416</sup> *Ibid.*, ¶ 365.

<sup>417</sup> Claimant Post-Hearing Brief, ¶ 9 [...]

<sup>418</sup> See above ¶ 631.

# ANNEX 417



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

In the arbitration proceeding between

**GARANTI KOZA LLP  
(CLAIMANT)**

**AND**

**TURKMENISTAN  
(RESPONDENT)**

**ICSID CASE NO. ARB/11/20**

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**AWARD**

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Rendered by an Arbitral Tribunal composed of:

John M. Townsend, President  
George Constantine Lambrou, Arbitrator  
Laurence Boisson de Chazournes, Arbitrator

Secretary of the Tribunal:

Marco Tulio Montañés-Rumayor

*Date of dispatch to the Parties:* December 19, 2016

- iv. Fourth, because Turkmenistan's insistence on the use of Smeta in the progress payment invoices had delayed submission of those invoices.
- e. Garanti Koza eventually stopped work and abandoned the project because TAY stopped paying Garanti Koza's progress payment invoices.
- f. TAY stopped paying the progress payment invoices because the bank guarantee had expired.

362. With this chain of causation in mind, we look first at the claim of direct expropriation and then at the claim of indirect expropriation.

**1. The direct expropriation claim**

363. Garanti Koza focuses its claim of direct expropriation on two acts. First, it alleges that, on February 4, 2010:

[A] committee comprising representatives of Turkmen Highways, the Ministry of Construction, the Ministry of Internal Affairs, the Turkmen intelligence Agency, a prosecutor/district attorney, as well as other Government personnel, seized Garanti Koza's factory and all the equipment, machinery and material it contained. This committee expelled Garanti Koza's remaining employees from the factory site.<sup>525</sup>

Second, it alleges that, by letter of February 22, 2010, TAY "unilaterally and wrongfully terminated the Contract."<sup>526</sup>

364. The evidence submitted to the Tribunal does not support a claim for direct expropriation. The evidence does indeed show that Garanti Koza's factory and equipment remaining in Turkmenistan after it abandoned its work on TAY's project in mid-2009 were seized by the Turkmen courts in 2010, but the evidence also supports the Respondent's argument that the actions

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<sup>525</sup> Mem. ¶ 151.

<sup>526</sup> Mem. ¶ 151.

of those courts followed as a matter of normal legal process under Turkmen law from Garanti Koza's default under the Contract.<sup>527</sup>

365. A seizure of property by a court as the result of normal domestic legal process does not amount to an expropriation under international law unless there was an element of serious and fundamental impropriety about the legal process. Actions by state courts to enforce contract rights, including rights to terminate a contract, have generally not been held by investment arbitration tribunals to amount to expropriation, regardless of whether the state or an instrument of the state is the contract party enforcing its rights. The *Impregilo* tribunal observed that, when a state entity terminates a contract, the decisive factor is “whether the reasons given for the termination constituted a legally valid ground for termination according to the provisions of the [...] Contract.”<sup>528</sup> Or as the tribunal in *Middle East Cement* put it, “normally a seizure and auction ordered by the national courts do not qualify as a taking” unless “they are not taken ‘under due process of law.’”<sup>529</sup>

366. The series of events that led to the proceedings in the Turkmen courts and the attachment and seizure of Garanti Koza's property followed the causal sequence outlined in paragraph 361 above. In the view of the Tribunal, the termination of the Contract and the subsequent actions by the Turkmen courts were largely either the result of choices made by Garanti Koza, including the decision not to seek an extension or renewal of the bank guarantee, or were caused by circumstances within its control. The actions of the Turkmen courts in enforcing TAY's rights

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<sup>527</sup> See C-Mem. ¶¶ 375-378.

<sup>528</sup> *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, June 21, 2011, ¶ 278.

<sup>529</sup> *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, April 12, 2002, ¶ 139.



under the contract thus appear to the Tribunal to have met the test articulated in *Impregilo*, which appears to this Tribunal to be the correct test.

367. To the extent that the insistence by agencies of Turkmenistan on the use of Smeta contributed to the delays that afflicted the bridge project and to the ultimate failure of Garanti Koza to complete the project and the consequent termination of the Contract, those actions have already been found by the Tribunal to have breached Turkmenistan's obligations under Article 2 of the BIT. The Tribunal concludes that those actions were too remote from the takings alleged to have amounted to a direct expropriation to consider them breaches of Article 5 of the BIT. Even if they were considered to have contributed to a breach of Article 5, any compensation for such a breach would merely duplicate the compensation due for the breach of Article 2.

368. The Claimant alleges that the process followed by the Turkmen authorities was harassing and unfair, pointing to the following sequence of events:

- a. In December 2009, the Turkmen tax administration conducted a tax inspection of Garanti Koza and announced on December 21, 2009, that it was imposing a fine of approximately USD 1 million for tax violations related to VAT. Garanti Koza states that it does not understand the reasons for this assessment and suspects that it was a use by Turkmenistan of "its tax and court apparatus to harass foreign investors."<sup>530</sup>
- b. On December 31, 2009, TAY asked Garanti Koza to return the unapplied balance of the Advance Payment, USD 14,132,121.22.<sup>531</sup>

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<sup>530</sup> Mem. ¶ 91; Buyuksandalyaci WS-1, ¶¶ 71-72.

<sup>531</sup> Mem. ¶ 92; C-90.

- c. In early February 2010, Garanti Koza says that representatives of TAY, the Ministry of Construction, the Supreme Supervision Agency, accompanied by police and military forces, came to Garanti Koza's factory in Mary, conducted an inventory, and instructed Garanti Koza's employees to leave the office.<sup>532</sup> Given that "Garanti Koza arranged for its Turkish employees to fly back to Turkey the next day,"<sup>533</sup> and the allegation that, as a result of this visit, the factory and its contents have been held by Turkmenistan since February 4, 2010,<sup>534</sup> the Tribunal finds it difficult to understand why Garanti Koza claims to have "little information" about this event.<sup>535</sup> In any event, little information about it was provided to the Tribunal.
- d. On February 8, 2010, the Turkmenistan tax administration issued a notice of fines and penalties on Garanti Koza.<sup>536</sup>
- e. On February 9, 2010, TAY asserted a claim against Garanti Koza for USD 3 million for the delay in the completion of the works, based on the original completion deadline of October 2008.<sup>537</sup>
- f. On February 20, 2010, TAY wrote to the Chief Prosecutor to ask that he bring suit against Garanti Koza to terminate the Contract.<sup>538</sup>
- g. On February 22, 2010, TAY unilaterally terminated the Contract.<sup>539</sup>

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<sup>532</sup> Mem. ¶ 94.

<sup>533</sup> Mem. ¶ 94; Buyuksandalyaci WS-1, ¶ 73.

<sup>534</sup> Mem. ¶ 94.

<sup>535</sup> Mem. ¶ 94.

<sup>536</sup> Mem. ¶ 98; C-115.

<sup>537</sup> Mem. ¶ 99; C-91.

<sup>538</sup> Mem. ¶ 101; C-92.

<sup>539</sup> Mem. ¶ 102; C-117.

h. The same day, the Chief Prosecutor filed an application with the “Arbitration court of the Supreme Court of Turkmenistan” to obtain termination of the Contract. That court summoned Garanti Koza on February 23 to appear before it on February 26, 2010. Garanti Koza states that it did not appear on that date, because it would have been “futile – and dangerous.”<sup>540</sup>

369. Garanti Koza does not allege that it has actually paid any of the tax or delay assessments referred to in the preceding paragraphs. Rather, the assessments appear to be put forward in an attempt to show that the conduct of the Turkmen authorities was improper and that it deprived Garanti Koza of procedural fairness. Garanti Koza does not allege, and in any event has not introduced evidence to demonstrate, that the proceedings described represented a departure from normal legal process in Turkmenistan. Whether or not these measures were wrongful thus seems to turn on which party was or was not in breach of the Contract, which has already been addressed in connection with Article 2 of the BIT.

## **2. The indirect expropriation claim**

370. Garanti Koza’s claim of creeping expropriation is basically the same claim as the direct expropriation claim and fails for the same reason. While the direct expropriation claim focuses on the seizure of Garanti Koza’s assets after TAY’s imposition of the delay penalty and the termination of the Contract, the indirect expropriation claim is described as a “series of acts and omissions starting in the spring of 2008 which made it increasingly difficult for Garanti Koza to continue work on the Project, ultimately depriving Garanti Koza of its entire investment.”<sup>541</sup>

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<sup>540</sup> Mem. ¶¶ 102-104.

<sup>541</sup> Mem. ¶ 132.

371. The “series of acts and omissions” alleged by the Claimant to support its claim of indirect expropriation are the same acts and omissions alleged to support its claim of direct expropriation. With the exception of the insistence by Turkmenistan on the use of Smeta (which the Tribunal has already addressed), those acts and omissions were either acts of Garanti Koza itself or followed as a consequence of actions taken or choices made by Garanti Koza. None of them, in the view of the Tribunal, amounted to a breach of Article 5 of the BIT.

### **3. The Claimant’s attempt to import the expropriation clause of other treaties via the MFN clause**

372. In addition to relying on Article 5 of the BIT, Garanti Koza seeks to rely on Article 5 of the France-Turkmenistan BIT and Article 6 of the United Arab Emirates-Turkmenistan BIT, both of which it seeks to import through the most-favored-nation (“MFN”) clause contained in Article 3 of the United Kingdom-Turkmenistan BIT. Article 3(1) of the BIT provides that neither Contracting Party shall, in its territory, subject investments of nationals and companies of the other Contracting Party to treatment less favorable than that which it affords to investments of nationals or companies of any third state. Article 3(2) provides the same protection to nationals and companies of each Contracting Party as regards their management, maintenance, use, enjoyment, or disposal of their investments.

373. According to Garanti Koza, Article 5 of the France-Turkmenistan BIT contains one additional condition not found in Article 5 of the BIT that would make a direct or an indirect expropriation unlawful: Under the France-Turkmenistan BIT, an expropriation must not be contrary to a specific commitment of the host state.<sup>542</sup>

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<sup>542</sup> Mem. ¶ 126.



# ANNEX 418





## Document information

## Publication

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'8. Expropriation', in  
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## 8. Expropriation

### A. Introduction—The Classical Claim and its Modern Elasticity

**8.01** At the heart of foreign investors' claims against States prior to the 1950s was the claim of nationalisation or expropriation. The classical situation was a State's blatant seizure of the investor's assets while the State implemented a general programme of economic reform, (1) or the State's highly visible acts in depriving the investor of its assets, without compensation. A small minority of investors might have had a concession contract with the host State, governed by international law, which incorporated its own contractual protections against expropriation, and allowed for international arbitration.

P 360 (2) Otherwise, the investor in search of compensation or redress was usually left with the options of (a) seeking to persuade its home State to intervene through diplomatic protection (perhaps leading to international arbitration), or (b) pursuing remedies in the municipal courts of the State that had seized the assets. Neither option was particularly attractive to the aggrieved investor.

**8.02** With the proliferation of investment treaties providing for direct access to international arbitral tribunals by foreign investors, and the more sophisticated efforts at domestic regulatory control undertaken by States in recent years, the classical claim has expanded. The treaty framers may have thought that they were codifying customary international law, but treaty claims on expropriation—and arbitral tribunals' interpretation of treaty provisions—have arguably overtaken customary international law and have become the focal point of the development of the international law of expropriation. Moreover, an *indirect* deprivation of a foreign investor's asset (which itself might take a variety of forms), possibly through a series of actions over time, rather than a militia storming a factory, has come to characterise modern expropriation claims. International law has thus recognised an elasticity in the nature and range of expropriatory acts, and assessing this elasticity—for example, how far does it extend? (3)—has become a central issue in international investment arbitration.

### B. Towards More Precise Definitions of Expropriation

**8.03** The core concept of expropriation is reasonably clear: it is a governmental taking of property for which compensation is required. Actions 'short of direct possession of the assets may also fall within the category' of expropriation. (4) Expropriation is therefore lawful, but the compensation requirement 'makes the legality conditional'. (5) However, it is difficult to define with precision the situations covered by the concept. The definitions of expropriation appearing in investment treaties are of such a generality that they provide little guidance to parties or arbitral tribunals confronted by concrete cases.

(6) It should be noted, as discussed further below, that modern treaties are defining expropriation with ever greater precision (though still often at a level of generality that makes it hard to determine, in specific cases, what is and is not expropriation). In the absence of firm guidance, arbitral tribunals have fashioned a variety of tests for assessing whether States are liable for expropriation, which can create both opportunities and uncertainties for parties in circumstances where expropriation arguably has occurred. As argued in the conclusion, the tests developed to determine expropriation by arbitral tribunals have become increasingly detailed and specific. International law should not necessarily be viewed as less certain or variable than national law, which has had the advantage of a lengthy period of development within a narrower jurisprudential framework. As Higgins observed in the early 1980s, the 'reality is that most municipal law systems have themselves developed doctrines on the taking of property that are at best incoherent'. (7)

**8.04** For example, in analysing three decades of US Supreme Court judgments in expropriation cases, a scholar referred to the 'crazy-quilt pattern of Supreme Court doctrine' on expropriation. (8) It has further been noted that although the 'process of describing general criteria to guide resolution of regulatory taking claims, begun in *Penn Central*, (9) has reduced to some extent the ad hoc character of takings law', it is 'nonetheless true that not all cases fit neatly into the categories delimited to date, and that still other cases that might be so categorised are explained in different terms by the Court'. (10) If the US position on certain significant aspects of domestic expropriation, especially as regards the issue of regulatory or 'indirect' takings, has not crystallised into a clear formulation, it is not surprising that arbitral tribunals comprising members from many different legal backgrounds and interpreting international law have not developed a coherent doctrine of expropriation, especially as regards indirect expropriation.

**8.05** Analysis of the tests fashioned by arbitral tribunals as a whole, and their application in specific cases to date, would not necessarily lead to the conclusion, at this stage of the development of the international law of expropriation, that arbitral tribunals have favoured investors at the expense of States. However, international law has undoubtedly

nationalization or expropriation' in Article 1110 broadens the ordinary concept of expropriation under international law to require compensation for measures affecting property interests without regard to the magnitude or severity of that effect ... 'Tantamount' means nothing more than equivalent. Something that is equivalent to something else cannot logically encompass more. (126)

**8.82** This conclusion was approved in a later case:

The primary meaning of the word 'tantamount' given by the Oxford English Dictionary is 'equivalent'. Both words require a Tribunal to look at the substance of what has occurred and not only at form. A Tribunal ... must look at the real interests involved and the purpose and effect of the government measure ... The Tribunal agrees with the conclusion in the Interim Award of the Pope & Talbot Arbitral Tribunal that something that is 'equivalent' to something else cannot logically encompass more. In common with the Pope & Talbot Tribunal, this Tribunal considers that the drafters of the NAFTA intended the word 'tantamount' to embrace the concept of so-called 'creeping expropriation', rather than to expand the internationally accepted scope of the term expropriation. (127)

**8.83 Actions of State courts** The actions of State courts in unjustifiably preventing the enforcement of a valid award may constitute measures 'tantamount to' or 'equivalent to' expropriation. For example, the tribunal in *Saipem SpA v Bangladesh* held that a contractual right to arbitrate was an asset having economic value and hence constituted an investment. (128) Thus, a court's failure to enforce a valid award could constitute expropriation. Specifically, the Tribunal held that, 'the right to arbitrate and the rights determined by [an] Award are capable in theory of being expropriated.' (129) In this case, the Tribunal considered that 'the alleged expropriated property is [the investor's] residual contract rights under the investment as crystallized in the ICC Award.' (130)

**8.84** The Tribunal held that the actions of the Bangladeshi courts in preventing the enforcement of a valid ICC Award won by the investor against a Bangladeshi State entity constituted an expropriation. The Tribunal stated: ●

In respect of the taking, the actions of the Bangladeshi courts do not constitute an instance of direct expropriation, but rather of 'measures having similar effects' within the meaning of Article 5(2) of the BIT. Such actions resulted in substantially depriving [the investor] of the benefit of the ICC Award. This is plain in light of the decision of the Bangladeshi Supreme Court that the ICC Award is 'a nullity.' Such a ruling is tantamount to a taking of the residual contractual rights arising from the investments as crystallized in the ICC Award. As such, it amounts to an expropriation within the meaning of Article 5 of the BIT.' (131)

**8.85** Yet not all actions by State courts unfavourable to investor-claimants are expropriatory. In order to constitute expropriation, the actions of the State courts must be illegal. In *Swisslion*, the Tribunal cited *Saipem* in recognising that a 'predicate for alleging a judicial expropriation is unlawful activity by the court itself'. (132) In *Swisslion*, there was no expropriation in the national courts' finding that the host State's actions were legitimate responses to the investor's contractual breaches. The Tribunal stated: (133)

In the Tribunal's view, the courts' determination of breach of the Share Sale Agreement and its consequential termination did not breach the Treaty and therefore was not unlawful. The internationally lawful termination of a contract between a State entity and an investor cannot be equated to an expropriation of contractual rights simply because the investor's rights have been terminated; otherwise, a State could not exercise the ordinary right of a contractual party to allege that its counterparty breached the contract without the State's being found to be in breach of its international obligations. Since there was no illegality on the part of the courts, the first element of the Claimant's expropriation claim is not established.

**8.86** Another case where the claimant unsuccessfully challenged the actions of State courts is *Arif v Moldova*. (134) There, the Moldovan judiciary (including the Supreme Court) declared the agreements in question invalid. The claimant alleged that the Moldovan judiciary had misapplied Moldovan law and that such misapplication constituted expropriation. (135) The Tribunal rejected this argument for two reasons. First, there was no evidence to suggest that the Moldovan judiciary had not applied Moldovan law legitimately and in good faith. (136) Certainly there was no evidence of 'collusion between the courts and the investor's competitors in the Moldovan courts over the ... agreements or that the Moldovan courts have acted in denial of justice in any way'. (137) Secondly, the Tribunal held that the claimant had a fair opportunity to defend its position before the Moldovan courts. (138) The Tribunal was not to be treated as 'a court of appeal of last resort.' Further, there was 'no compelling reason that would justify a new legal analysis by this Tribunal regarding the validity of these agreements which ha[d]



already been repeatedly, consistently and irrevocably denied by the whole of the Moldovan judicial system.' (139) Thus, the Tribunal ● held that no wrongful taking arose from the Moldovan courts' legitimate application of Moldovan law. (140)

P 387

**8.87 The many forms of indirect expropriation** Thus, forms of indirect expropriation are numerous and cannot readily be differentiated. Some tribunals do not even seek to differentiate these expressions, noting that their scope should be regarded as 'functionally equivalent': (141)

The essence of any claim of expropriation is that there has been a taking of property without prompt and adequate compensation. However, many investment protection treaties and the Treaty which is the basis for the present arbitration extend the notion of a taking to include what has often been referred to as 'creeping' or 'indirect' expropriation by the State through measures which so substantially interfere with the investor's business activities that they are considered to be 'tantamount' to an expropriation. (142)

When measures are taken by a State the effect of which is to deprive the investor of the use and benefit of his investment even though he may retain nominal ownership of the respective rights being the investment, the measures are often referred to as a 'creeping' or 'indirect' expropriation or, as in the BIT, as measures 'the effect of which is tantamount to expropriation'. (143)

Such measures are sometimes referred to as 'indirect', 'creeping' or 'de facto' expropriation and are frequently assimilated to formal expropriation as regards their legal consequences. (144)

**8.88** For some tribunals, as indicated above, 'the form of the measures of control or interference is less important than the reality of their impact' (145) on the owner of the investment. Along the same lines, it has been decided that a positive act of the State may not even be necessary: 'it makes no difference whether the deprivation was caused by actions or by inactions'. (146) However, the 'sole effect doctrine' (ie that the effect on the investor is the only relevant criterion) remains a highly controversial approach to indirect expropriation. (147)

#### ***A significant interference***

**8.89** Although the 'sole effect doctrine' is controversial, it is clear that an indirect expropriation will at least in part be assessed on the basis of the effect of the measure in dispute on the investor: 'De facto expropriations or indirect expropriations measures that do not involve an overt taking but that effectively neutralize the benefit of the property of the foreign owner, are subject to expropriation claims.' (148) ●

P 388

**8.90** Although there is not a traditional 'taking' of the investment, if the State authorities interfere to a significant degree with the enjoyment of its use or its benefit, an indirect expropriation may be found. The definition of expropriation given in the *Metalclad v Mexico* case is particularly pertinent on this point:

Thus, expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State. (149)

**8.91** Discussion of the concept of significant interference can also be found, for example, in *Feldman v Mexico*: 'indirect expropriations and measures "tantamount" to expropriation ... potentially encompass a variety of government regulatory activity that may significantly interfere with an investor's property rights.' (150)

**8.92** Since it is the effect of the alleged expropriatory acts upon the investor's use or enjoyment of its property that is a key consideration, it is not necessary that the investor has been divested of legal title to his property. Expropriation can have occurred in cases where, although legal title to the investment may remain with the original owner, the rights that go with that title have been rendered useless:

... it is recognised in international law that measures taken by a State can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the State does not purport to have expropriated them and the legal title to the property formally remains with the original owner. (151)

A deprivation or taking of property may occur under international law through interference by a state in the use of that property or with the enjoyment of its benefits, even where legal title to the property is not affected. (152)

The Tribunal agrees with the Claimant in that expropriation need not involve



# ANNEX 419





**BLOOMBERG EXTRACTS – BANK MARKAZI SECURITY ENTITLEMENTS**

<b>ISIN</b>	<b>Issuer</b>	<b>Country</b>	<b>Page</b>
US45905UCG76	International Bank for Reconstruction and Development	Supranational	1
US298785CW43	European Investment Bank	Supranational	2
US465410BH09*	Republic of Italy	Italy	3
US65562QAC96	Nordic Investment Bank	Supranational	4
US45950KAM27	International Finance Corporation	Supranational	5
US459056QS92	International Bank for Reconstruction and Development	Supranational	6
US65562QAD79*	Nordic Investment Bank	Supranational	7
US45950KAN00*	International Finance Corporation	Supranational	8
US465410BP25	Republic of Italy	Supranational	9
US500769BG84	KfW	Germany	10
US298785DP82	European Investment Bank	Supranational	11
US676167AR05	Oesterreichische Kontrollbank AG (OeKB)	Austria	12
US48245RAX26	KfW	Germany	13
US500769BL79	KfW	Germany	14
US045167BL65	Asian Development Bank	Supranational	15
US298785EC60	European Investment Bank	Supranational	16
US298785EE27	European Investment Bank	Supranational	17
US45950KAQ31	International Finance Corporation	Supranational	18
US500769CF92	European Investment Bank	Supranational	19

\* Iran's list includes multiple purchases of these securities. Iran's Reply, ¶ 3.25.

ISIN: US45905UCG76

IBRD 4 1/8 08/12/09 Cc		Settings ▾	Actions ▾	Page 1/12	Security Description: Bond
<b>MATURED</b>		94 No Notes		95 Buy	96 Sell
25 Bond Description		20 Issuer Description			
<b>Pages</b>	<b>Issuer Information</b>			<b>Identifiers</b>	
11 Bond Info	<b>Name</b>	INTL BK RECON & DEVELOP		<b>ID Number</b>	EC6456973
12 Addtl Info	<b>Industry</b>	Supranational (BCLASS)		<b>CUSIP</b>	45905UCG7
13 Reg/Tax	<b>Security Information</b>			<b>ISIN</b>	US45905UCG76
14 Covenants	<b>Mkt Iss</b>	GLOBAL		<b>Bond Ratings</b>	
15 Guarantors	<b>Country</b>	SNAT	<b>Currency</b>	USD	
16 Bond Ratings	<b>Rank</b>	Sr Unsecured	<b>Series</b>		
17 Identifiers	<b>Coupon</b>	4.125000	<b>Type</b>	Fixed	
18 Exchanges	<b>Cpn Freq</b>	S/A	<b>Day Cnt</b>	ISMA-30/360	<b>Iss Price</b> 99.91000
19 Inv Parties	<b>Maturity</b>	08/12/2009		<b>Issuance &amp; Trading</b>	
20 Fees, Restrict	<b>BULLET</b>			<b>Amt Issued/Outstanding</b>	
21 Schedules	<b>Iss Sprd</b>	+97.00bp vs T 4 <sup>3</sup> / <sub>8</sub> 05/15/07		USD	1,000,000.00 (M) /
22 Coupons	<b>Calc Type</b>	(1)STREET CONVENTION		USD	(M)
<b>Quick Links</b>	<b>Pricing Date</b>	08/05/2002		<b>Min Piece/Increment</b>	
32 ALLQ Pricing	<b>Interest Accrual Date</b>	08/12/2002		1,000.00 / 1,000.00	
33 QRD Qt Recap	<b>1st Settle Date</b>	08/12/2002		<b>Par Amount</b>	1,000.00
34 TDH Trade Hist	<b>1st Coupon Date</b>	02/12/2003		<b>Book Runner</b>	DRKW,HSBC
35 CACS Corp Action				<b>Exchange</b>	Multiple
36 CF Prospectus					
37 CN Sec News					
38 HDS Holders					
66 Send Bond					

ISIN: US298785CW43

EIB 3 06/16/08 Corp		Settings ▾	Actions ▾	Page 1/12	Security Description: Bond
<b>MATURED</b>		94) No Notes		95) Buy	96) Sell
75) Bond Description		26) Issuer Description			
<b>Pages</b>	<b>Issuer Information</b>	<b>Identifiers</b>			
11) Bond Info	<b>Name</b> EUROPEAN INVESTMENT BANK	<b>ID Number</b>	EC9230359		
12) Addtl Info	<b>Industry</b> Supranational (BCLASS)	<b>CUSIP</b>	298785CW4		
13) Reg/Tax	<b>Security Information</b>	<b>ISIN</b>	US298785CW43		
14) Covenants	<b>Mkt Iss</b> GLOBAL	<b>Bond Ratings</b>			
15) Guarantors	<b>Country</b> SNAT	<b>Currency</b>	USD		
16) Bond Ratings	<b>Rank</b> Sr Unsecured	<b>Series</b>			
17) Identifiers	<b>Coupon</b> 3.000000	<b>Type</b>	Fixed		
18) Exchanges	<b>Cpn Freq</b> S/A	<b>Day Cnt</b>	ISMA-30/360	<b>Iss Price</b>	99.69800
19) Inv Parties	<b>Maturity</b> 06/16/2008	<b>Issuance &amp; Trading</b>			
20) Fees, Restrict	<b>BULLET</b>	<b>Amt Issued/Outstanding</b>			
21) Schedules	<b>Iss Sprd</b> +33.00bp vs T 3 02/15/08	USD	3,000,000.00 (M) /		
22) Coupons	<b>Calc Type</b> (1)STREET CONVENTION	USD	(M)		
<b>Quick Links</b>	<b>Pricing Date</b> 04/01/2003	<b>Min Piece/Increment</b>			
32) ALLQ Pricing	<b>Interest Accrual Date</b> 04/08/2003	1,000.00 / 1,000.00			
33) QRD Qt Recap	<b>1st Settle Date</b> 04/08/2003	<b>Par Amount</b> 1,000.00			
34) TDH Trade Hist	<b>1st Coupon Date</b> 06/16/2003	<b>Book Runner</b> CSFB,GSI,SSB			
35) CACS Corp Action		<b>Exchange</b> Multiple			
36) CF Prospectus					
37) CN Sec News					
38) HDS Holders					
60) Send Bond	SHORT 1ST CPN. ALSO LUX.				

ISIN: US465410BH09

ITALY 2 1/2 07/15/08 C		Settings ▾	Actions ▾	Page 1/12	Security Description: Bond
<b>MATURED</b>		94) No Notes		95) Buy	96) Sell
25) Bond Description		26) Issuer Description			
<b>Pages</b>	<b>Issuer Information</b>	<b>Identifiers</b>			
11) Bond Info	<b>Name</b> REPUBLIC OF ITALY	<b>ID Number</b>	ED0394822		
12) Addtl Info	<b>Industry</b> Sovereign (BCLASS)	<b>CUSIP</b>	465410BH0		
13) Reg/Tax	<b>Security Information</b>	<b>ISIN</b>	US465410BH09		
14) Covenants	<b>Mkt Iss</b> GLOBAL	<b>Bond Ratings</b>			
15) Guarantors	<b>Country</b> IT	<b>Currency</b>	USD		
16) Bond Ratings	<b>Rank</b> Sr Unsecured	<b>Series</b>			
17) Identifiers	<b>Coupon</b> 2.500000	<b>Type</b>	Fixed		
18) Exchanges	<b>Cpn Freq</b> S/A	<b>Iss Price</b>	99.52100		
19) Inv Parties	<b>Day Cnt</b> 30/360	<b>Reoffer</b>	99.521		
20) Fees, Restrict	<b>Maturity</b> 07/15/2008	<b>Issuance &amp; Trading</b>			
21) Schedules	<b>BULLET</b>	<b>Amt Issued/Outstanding</b>			
22) Coupons	<b>Iss Sprd</b> +23.00bp vs T 2 5 <sub>8</sub> 05/15/08	USD	2,000,000.00 (M) /		
<b>Quick Links</b>	<b>Calc Type</b> (1)STREET CONVENTION	USD	(M)		
32) ALLQ Pricing	<b>Pricing Date</b>	<b>Min Piece/Increment</b>			
33) QRD Qt Recap	<b>Interest Accrual Date</b>	1,000.00 / 1,000.00			
34) TDH Trade Hist	<b>1st Settle Date</b>	<b>Par Amount</b>	1,000.00		
35) CACS Corp Action	<b>1st Coupon Date</b>	<b>Book Runner</b>	LEH,MS,UBS		
36) CF Prospectus	<b>LONG 1ST CPN. ALSO LISTED LUX &amp; TLX.</b>	<b>Exchange</b>	Multiple		
37) CN Sec News					
38) HDS Holders					
60) Send Bond					



ISIN: US65562QAC96

NIB 2 7/8 06/15/09 Cor		Settings ▾	Actions ▾	Page 1/12	Security Description: Bond
<b>MATURED</b>		94 No Notes		95 Buy	96 Sell
25 Bond Description		26 Issuer Description			
<b>Pages</b>	<b>Issuer Information</b>	<b>Identifiers</b>			
11 Bond Info	<b>Name</b> NORDIC INVESTMENT BANK	<b>ID Number</b>	ED3835839		
12 Addtl Info	<b>Industry</b> Supranational (BCLASS)	<b>CUSIP</b>	65562QAC9		
13 Reg/Tax	<b>Security Information</b>	<b>ISIN</b>	US65562QAC96		
14 Covenants	<b>Mkt Iss</b> GLOBAL	<b>Bond Ratings</b>			
15 Guarantors	<b>Country</b> SNAT	<b>Currency</b>	USD		
16 Bond Ratings	<b>Rank</b> Unsecured	<b>Series</b>	MTNC		
17 Identifiers	<b>Coupon</b> 2.875000	<b>Type</b>	Fixed		
18 Exchanges	<b>Cpn Freq</b> S/A	<b>Day Cnt</b>	ISMA-30/360	<b>Iss Price</b>	99.85300
19 Inv Parties	<b>Maturity</b> 06/15/2009	<b>Reoffer</b>	99.853		
20 Fees, Restrict	<b>BULLET</b>	<b>Issuance &amp; Trading</b>			
21 Schedules	<b>Iss Sprd</b> +22.00bp vs T 2 5/8 03/15/09	<b>Amt Issued/Outstanding</b>			
22 Coupons	<b>Calc Type</b> (1)STREET CONVENTION	USD	1,000,000.00 (M) /		
<b>Quick Links</b>	<b>Pricing Date</b> 03/17/2004	USD	(M)		
32 ALLQ Pricing	<b>Interest Accrual Date</b> 03/25/2004	<b>Min Piece/Increment</b>			
33 QRD Qt Recap	<b>1st Settle Date</b> 03/25/2004	1,000.00 / 1,000.00			
34 TDH Trade Hist	<b>1st Coupon Date</b> 06/15/2004	<b>Par Amount</b>	1,000.00		
35 CACS Corp Action	<b>UNSEC'D. SHORT 1ST CPN. SERIES C. ALSO LUX SE</b>	<b>Book Runner</b>	CITI,NOMURA		
36 CF Prospectus		<b>Exchange</b>	Multiple		
37 CN Sec News					
38 HDS Holders					
66 Send Bond					



ISIN: US45950KAM27

IFC 3 3/4 06/30/09 Corr		Settings ▾	Actions ▾	Page 1/12	Security Description: Bond	
<b>MATURED</b>		94 No Notes		95 Buy	96 Sell	
25 Bond Description		26 Issuer Description				
<b>Pages</b> 11) Bond Info 12) Addtl Info 13) Reg/Tax 14) Covenants 15) Guarantors 16) Bond Ratings 17) Identifiers 18) Exchanges 19) Inv Parties 20) Fees, Restrict 21) Schedules 22) Coupons <b>Quick Links</b> 32) ALLQ Pricing 33) QRD Qt Recap 34) TDH Trade Hist 35) CACS Corp Action 36) CF Prospectus 37) CN Sec News 38) HDS Holders 66) Send Bond		<b>Issuer Information</b> <b>Name</b> INTL FINANCE CORPORATION <b>Industry</b> Supranational (BCLASS) <b>Security Information</b> <b>Mkt Iss</b> GLOBAL <b>Country</b> SNAT <b>Currency</b> USD <b>Rank</b> Sr Unsecured <b>Series</b> <b>Coupon</b> 3.750000 <b>Type</b> Fixed <b>Cpn Freq</b> S/A <b>Day Cnt</b> ISMA-30/360 N... <b>Iss Price</b> 99.94100 <b>Maturity</b> 06/30/2009 <b>Reoffer</b> 99.941 <b>BULLET</b> <b>Iss Sprd</b> +24.00bp vs T 3 1/8 04/15/09 <b>Calc Type</b> (1)STREET CONVENTION <b>Pricing Date</b> 04/20/2004 <b>Interest Accrual Date</b> 04/28/2004 <b>1st Settle Date</b> 04/28/2004 <b>1st Coupon Date</b> 12/30/2004 <b>UNSEC'D. LONG 1ST CPN.</b>			<b>Identifiers</b> <b>ID Number</b> ED4343791 <b>CUSIP</b> 45950KAM2 <b>ISIN</b> US45950KAM27 <b>Bond Ratings</b> <b>Issuance &amp; Trading</b> <b>Amt Issued/Outstanding</b> USD 1,000,000.00 (M) / USD (M) <b>Min Piece/Increment</b> 1,000.00 / 1,000.00 <b>Par Amount</b> 1,000.00 <b>Book Runner</b> JPM,NOMURA <b>Exchange</b> Multiple	

ISIN: US459056QS92

DES IBRD 4 1/8 06/24/2009 Options

CANCEL HELP SEARCH NEWS QUOTE QUOTE MSG MENU PRINT PG B4 PG F4

< > IBRD 4 1/8 06/24/2009 Corp | DES | Related Functions Menu Message

**IBRD 4 1/8 06/24/09 \$Matured**

IBRD 4 1/8 06/24/09 Cc Settings Actions Page 1/12 Security Description: Bond

MATURED 90 No Notes 95 Buy 90 Sell

25 Bond Description 26 Issuer Description

Pages	Issuer Information	Identifiers
11 Bond Info	<b>Name</b> INTL BK RECON & DEVELOP	<b>ID Number</b> ED5133779
12 Addtl Info	<b>Industry</b> Supranational (BCLASS)	<b>CUSIP</b> 459056QS9
13 Reg/Tax	<b>Security Information</b>	<b>ISIN</b> US459056QS92
14 Covenants	<b>Mkt Iss</b> GLOBAL	<b>Bond Ratings</b>
15 Guarantors	<b>Country</b> SNAT <b>Currency</b> USD	
16 Bond Ratings	<b>Rank</b> Sr Unsecured <b>Series</b>	
17 Identifiers	<b>Coupon</b> 4.125000 <b>Type</b> Fixed	
18 Exchanges	<b>Cpn Freq</b> S/A	
19 Inv Parties	<b>Day Cnt</b> 30/360 <b>Iss Price</b> 99.68700	<b>Issuance &amp; Trading</b>
20 Fees, Restrict	<b>Maturity</b> 06/24/2009 <b>Reoffer</b> 99.687	<b>Amt Issued/Outstanding</b>
21 Schedules	BULLET	USD 1,350,000.00 (M) /
22 Coupons	<b>Iss Sprd</b> +20.00bp vs T 4 06/15/09	USD (M)
<b>Quick Links</b>	<b>Calc Type</b> (1)STREET CONVENTION	<b>Min Piece/Increment</b>
32 ALLQ Pricing	<b>Pricing Date</b> 06/17/2004	1,000.00 / 1,000.00
33 QRD Qt Recap	<b>Interest Accrual Date</b> 06/24/2004	<b>Par Amount</b> 1,000.00
34 TDH Trade Hist	<b>1st Settle Date</b> 06/24/2004	<b>Book Runner</b> CITI,DAIWA,MS
35 CACS Corp Action	<b>1st Coupon Date</b> 12/24/2004	<b>Exchange</b> Multiple
36 CF Prospectus	ISS'D UNDER GDIF PROG.	
37 CN Sec News		
38 HDS Holders		
60 Send Bond		

60 Send Bond

Suggested Functions **GP** Chart securities & technical studies **GPO** Track the open/high/low/close price

ISIN: US65562QAD79

DES NIB 3 7/8 06/15/2010 Corp X + Options

CANCEL HELP SEARCH NEWS QUOTES QUOTES MSG MENU PRINT HG BAL HG #W

< > | NIB 3 7/8 06/15/2010 Corp | DES | Related Functions Menu Message

**NIB 3 7/8 06/15/10 \$Matured**

NIB 3 7/8 06/15/10 Cor Settings Actions Page 1/12 Security Description: Bond

MATURED 94 No Notes Buy Sell

25 Bond Description 20 Issuer Description

Pages	Issuer Information	Identifiers
11 Bond Info	<b>Name</b> NORDIC INVESTMENT BANK	<b>ID Number</b> ED8227834
12 Addtl Info	<b>Industry</b> Supranational (BCLASS)	<b>CUSIP</b> 65562QAD7
13 Reg/Tax	<b>Security Information</b>	<b>ISIN</b> US65562QAD79
14 Covenants	<b>Mkt Iss</b> EURO MTN	<b>Bond Ratings</b>
15 Guarantors	<b>Country</b> SNAT <b>Currency</b> USD	
16 Bond Ratings	<b>Rank</b> Sr Unsecured <b>Series</b> GMTN	
17 Identifiers	<b>Coupon</b> 3.875000 <b>Type</b> Fixed	
18 Exchanges	<b>Cpn Freq</b> S/A	
19 Inv Parties	<b>Day Cnt</b> 30/360 <b>Iss Price</b> 99.99500	<b>Issuance &amp; Trading</b>
20 Fees, Restrict	<b>Maturity</b> 06/15/2010 <b>Reoffer</b> 99.995	<b>Amt Issued/Outstanding</b>
21 Schedules	BULLET	USD 1,000,000.00 (M) /
22 Coupons	<b>Iss Sprd</b> +18.00bp vs T 3 3/2 02/15/10	USD (M)
<b>Quick Links</b>	<b>Calc Type</b> (1)STREET CONVENTION	<b>Min Piece/Increment</b>
32 ALLQ Pricing	<b>Pricing Date</b> 02/16/2005	1,000.00 / 1,000.00
33 QRD Qt Recap	<b>Interest Accrual Date</b> 02/24/2005	<b>Par Amount</b> 1,000.00
34 TDH Trade Hist	<b>1st Settle Date</b> 02/24/2005	<b>Book Runner</b> JOINT LEADS
35 CACS Corp Action	<b>1st Coupon Date</b> 06/15/2005	<b>Exchange</b> Multiple
36 CF Prospectus	SHORT 1ST CPN.	
37 CN Sec News		
38 HDS Holders		
66 Send Bond		

Suggested Functions **BXT** Capture non-electronic cash purchases **CAST** Identify key issuers & debt types issued

ISIN: US45950KAN00

DES IFC 4 06/15/2010 Corp

CANCEL HELP SEARCH NEWS QUOTE QUOTE MSG MENU PRINT PG.BRI PG.FW

< > IFC 4 06/15/2010 Corp DES | Related Functions Menu Message

**IFC 4 06/15/10 Corp Matured**

Page 1/12 Security Description: Bond

MATURED 94 No Notes 93 Buy 96 Sell

25 Bond Description 26 Issuer Description

Pages

11) Bond Info Issuer Information Identifiers

12) Addtl Info Name INTL FINANCE CORPORATION ID Number ED9204899

13) Reg/Tax Industry Supranational (BCLASS) CUSIP 45950KAN0

14) Covenants Security Information ISIN US45950KAN00

15) Guarantors Mkt Iss GLOBAL Bond Ratings

16) Bond Ratings Country SNAT Currency USD

17) Identifiers Rank Sr Unsecured Series

18) Exchanges Coupon 4.000000 Type Fixed

19) Inv Parties Cpn Freq S/A

20) Fees, Restrict Day Cnt ISMA-30/360 Iss Price 99.45600

21) Schedules Maturity 06/15/2010 Reoffer 99.456

22) Coupons BULLET

Quick Links

32) ALLQ Pricing Iss Sprd +23.00bp vs T 4 04/15/10

33) QRD Qt Recap Calc Type (1)STREET CONVENTION

34) TDH Trade Hist Pricing Date 04/27/2005

35) CACS Corp Action Interest Accrual Date 05/06/2005

36) CF Prospectus 1st Settle Date 05/06/2005

37) CN Sec News 1st Coupon Date 12/15/2005

38) HDS Holders LONG 1ST CPN. SERIES 633.

66) Send Bond

Issuance & Trading

Amt Issued/Outstanding

USD 1,000,000.00 (M) /

USD (M)

Min Piece/Increment

1,000.00 / 1,000.00

Par Amount 1,000.00

Book Runner BNPPAR,C,UBSINV

Exchange LUXEMBOURG

Suggested Functions HP Analyze a security's historical prices YASQ Price a bond & see how it's quoted



ISIN: US465410BP25

DES ITALY 4 06/16/2008 Corp X + Options

CANCEL HELP SEARCH NEWS QUOTE QUOTE MSG MENU PRINT PG BAI PG FW

< > ITALY 4 06/16/2008 Corp DES Related Functions Menu Message

ITALY 4 06/16/08 Matured

ITALY 4 06/16/08 Corp Settings Actions Page 1/12 Security Description: Bond

MATURED 90 No Notes 90 Buy 90 Sell

25 Bond Description 20 Issuer Description

Pages

Pages	Bond Description	Issuer Description	Identifiers
11	Bond Info	<b>Name</b> REPUBLIC OF ITALY	<b>ID Number</b> ED9237626
12	Addtl Info	<b>Industry</b> Sovereign (BCLASS)	<b>CUSIP</b> 465410BP2
13	Reg/Tax	<b>Security Information</b>	<b>ISIN</b> US465410BP25
14	Covenants	<b>Mkt Iss</b> GLOBAL	<b>Bond Ratings</b>
15	Guarantors	<b>Country</b> IT	
16	Bond Ratings	<b>Rank</b> Sr Unsecured	
17	Identifiers	<b>Coupon</b> 4.000000	<b>Currency</b> USD
18	Exchanges	<b>Cpn Freq</b> S/A	<b>Series</b> Fixed
19	Inv Parties	<b>Day Cnt</b> ISMA-30/360	
20	Fees, Restrict	<b>Maturity</b> 06/16/2008	<b>Iss Price</b> 99.93200
21	Schedules	<b>Reoffer</b> 99.932	
22	Coupons	<b>BULLET</b>	<b>Reoffer</b> 99.932
<b>Quick Links</b>		<b>Iss Sprd</b> +34.00bp vs T 3 % 02/15/08	<b>Issuance &amp; Trading</b>
22	ALLQ Pricing	<b>Calc Type</b> (1)STREET CONVENTION	<b>Amt Issued/Outstanding</b>
33	QRD Qt Recap	<b>Pricing Date</b> 04/28/2005	USD 3,000,000.00 (M) /
34	TDH Trade Hist	<b>Interest Accrual Date</b> 05/09/2005	USD (M)
35	CACS Corp Action	<b>1st Settle Date</b> 05/09/2005	<b>Min Piece/Increment</b>
36	CF Prospectus	<b>1st Coupon Date</b> 12/16/2005	1,000.00 / 1,000.00
37	CN Sec News		<b>Par Amount</b> 1,000.00
38	HDS Holders		<b>Book Runner</b> DB, GSI, HSBC
			<b>Exchange</b> LUXEMBOURG

60 Send Bond

Suggested Functions **HP** Analyze a security's historical prices **RELS** See an issuer's securities & structure

ISIN: US500769BG84

des KFW 3 7/8 06/30/2009 Corp X + Options - □ X

CANCEL HELP SEARCH NEWS QUOTE QUOTE MSG MENU PRINT PG BA PG FW

< > KFW 3 7/8 06/30/2009 Corp DES Related Functions Menu Message ☆ ?

**KFW 3 7/8 06/30/09 \$Matured**

KFW 3 7/8 06/30/09 Cor Settings Actions Page 1/12 Security Description: Bond  
 MATURED 94 No Notes 95 Buy 96 Sell

25 Bond Description 20 Issuer Description

Pages	Issuer Information	Identifiers
11) Bond Info	<b>Name</b> KFW	<b>ID Number</b> ED9957934
12) Addtl Info	<b>Industry</b> Government Guaranteed (BCLASS)	<b>CUSIP</b> 500769BG8
13) Reg/Tax	<b>Security Information</b>	<b>ISIN</b> US500769BG84
14) Covenants	<b>Mkt Iss</b> GLOBAL	<b>Bond Ratings</b>
15) Guarantors	<b>Country</b> DE	
16) Bond Ratings	<b>Rank</b> Sr Unsecured	
17) Identifiers	<b>Currency</b> USD	
18) Exchanges	<b>Series</b>	
19) Inv Parties	<b>Coupon</b> 3.875000	
20) Fees, Restrict	<b>Type</b> Fixed	
21) Schedules	<b>Cpn Freq</b> S/A	
22) Coupons	<b>Day Cnt</b> ISMA-30/360 N...	<b>Iss Price</b> 99.89700
	<b>Maturity</b> 06/30/2009	<b>Reoffer</b> 99.897
<b>Quick Links</b>	<b>BULLET</b>	<b>Issuance &amp; Trading</b>
32) ALLQ Pricing	<b>Iss Sprd</b> +24.00bp vs T 3 3/4 05/15/08	<b>Amt Issued/Outstanding</b>
33) QRD Qt Recap	<b>Calc Type</b> (1)STREET CONVENTION	USD 1,000,000.00 (M) /
34) TDH Trade Hist	<b>Pricing Date</b> 06/23/2005	USD (M)
35) CACS Corp Action	<b>Interest Accrual Date</b> 06/30/2005	<b>Min Piece/Increment</b>
36) CF Prospectus	<b>1st Settle Date</b> 06/30/2005	1,000.00 / 1,000.00
37) CN Sec News	<b>1st Coupon Date</b> 12/30/2005	<b>Par Amount</b> 1,000.00
38) HDS Holders		<b>Book Runner</b> ML,RBCCM
60) Send Bond		<b>Exchange</b> Multiple

Suggested Functions **BXT** Capture non-electronic cash purchases **CAST** Identify key issuers & debt types issued



ISIN: US298785DP82

EIB 4 1/8 09/15/10 Cor		Settings ▾	Actions ▾	Page 1/12	Security Description: Bond
<b>MATURED</b>		94 No Notes		95 Buy	96 Sell
25 Bond Description		26 Issuer Description			
<b>Pages</b>	<b>Issuer Information</b>	<b>Identifiers</b>			
11 Bond Info	<b>Name</b> EUROPEAN INVESTMENT BANK	<b>ID Number</b>	EF0774432		
12 Addtl Info	<b>Industry</b> Supranational (BCLASS)	<b>CUSIP</b>	298785DP8		
13 Reg/Tax	<b>Security Information</b>	<b>ISIN</b>	US298785DP82		
14 Covenants	<b>Mkt Iss</b> GLOBAL	<b>Bond Ratings</b>			
15 Guarantors	<b>Country</b> SNAT	<b>Currency</b>	USD		
16 Bond Ratings	<b>Rank</b> Sr Unsecured	<b>Series</b>			
17 Identifiers	<b>Coupon</b> 4.125000	<b>Type</b>	Fixed		
18 Exchanges	<b>Cpn Freq</b> S/A	<b>Issuance &amp; Trading</b>			
19 Inv Parties	<b>Day Cnt</b> ISMA-30/360	<b>Iss Price</b>	99.86400		
20 Fees, Restrict	<b>Maturity</b> 09/15/2010	<b>Reoffer</b>	99.864		
21 Schedules	<b>BULLET</b>	<b>Amt Issued/Outstanding</b>			
22 Coupons	<b>Iss Sprd</b> +23.00bp vs T 4 1/8 08/15/10	USD		3,000,000.00 (M) /	
<b>Quick Links</b>	<b>Calc Type</b> (1)STREET CONVENTION	USD		(M)	
32 ALLQ Pricing	<b>Pricing Date</b>	08/30/2005		<b>Min Piece/Increment</b>	
33 QRD Qt Recap	<b>Interest Accrual Date</b>	09/08/2005		1,000.00 / 1,000.00	
34 TDH Trade Hist	<b>1st Settle Date</b>	09/08/2005		<b>Par Amount</b>	
35 CACS Corp Action	<b>1st Coupon Date</b>	03/15/2006		1,000.00	
36 CF Prospectus	<b>LONG 1ST CPN.</b>			<b>Book Runner</b>	
37 CN Sec News				BARCBK,GSI,MS	
38 HDS Holders				<b>Exchange</b>	
60 Send Bond				Multiple	

ISIN: US676167AR05

OKB 4 1/4 10/06/10 Cor		Settings ▾	Actions ▾	Page 1/12	Security Description: Bond
<b>MATURED</b>		94 No Notes		95 Buy	96 Sell
25) Bond Description		26) Issuer Description			
<b>Pages</b>	<b>Issuer Information</b>	<b>Identifiers</b>			
11) Bond Info	<b>Name</b> OEKB OEST. KONTROLLBANK	<b>ID Number</b>	EF1171141		
12) Addtl Info	<b>Industry</b> Government Guaranteed (BCLASS)	<b>CUSIP</b>	676167AR0		
13) Reg/Tax	<b>Security Information</b>	<b>ISIN</b>	US676167AR05		
14) Covenants	<b>Mkt Iss</b> GLOBAL	<b>Bond Ratings</b>			
15) Guarantors	<b>Country</b> AT	<b>Currency</b>	USD		
16) Bond Ratings	<b>Rank</b> Sr Unsecured	<b>Series</b>			
17) Identifiers	<b>Coupon</b> 4.250000	<b>Type</b>	Fixed		
18) Exchanges	<b>Cpn Freq</b> S/A	<b>Issuance &amp; Trading</b>			
19) Inv Parties	<b>Day Cnt</b> ISMA-30/360	<b>Iss Price</b>	99.65700		
20) Fees, Restrict	<b>Maturity</b> 10/06/2010	<b>Reoffer</b>	99.657		
21) Schedules	<b>BULLET</b>	<b>Amt Issued/Outstanding</b>			
22) Coupons	<b>Quick Links</b>	USD 1,000,000.00 (M) /			
32) ALLQ Pricing	<b>Iss Sprd</b> +24.00bp vs T 3 7/8 09/15/10	USD (M)			
33) ORD Qt Recap	<b>Calc Type</b> (1)STREET CONVENTION	<b>Min Piece/Increment</b>			
34) TDH Trade Hist	<b>Pricing Date</b> 09/29/2005	100,000.00 / 100,000.00			
35) CACS Corp Action	<b>Interest Accrual Date</b> 10/06/2005	<b>Par Amount</b> 100,000.00			
36) CF Prospectus	<b>1st Settle Date</b> 10/06/2005	<b>Book Runner</b> JPM,NOMURA			
37) CN Sec News	<b>1st Coupon Date</b> 04/06/2006	<b>Exchange</b> Multiple			
38) HDS Holders					
60) Send Bond					

ISIN: US48245RAX26

DES KFW 4 5/8 11/17/2008 Corp X + Options - □ ×

CANCEL HELP SEARCH NEWS QUOTE QUOTE MSG MENU PRINT PG.BA PG.HV

< > KFW 4 5/8 11/17/2008 Corp DES Related Functions Menu Message ★ □ ?

**KFW 4 5/8 11/17/08 \$Matured**

KFW 4 5/8 11/17/08 Cor Settings Actions Page 1/12 Security Description: Bond  
**MATURED** 94 No Notes 99 Buy 90 Sell

25 Bond Description 20 Issuer Description

Pages	Issuer Information	Identifiers
11 Bond Info	<b>Name</b> KFW	<b>ID Number</b> EF1650227
12 Addtl Info	<b>Industry</b> Government Guaranteed (BCLASS)	<b>CUSIP</b> 48245RAX2
13 Reg/Tax	<b>Security Information</b>	<b>ISIN</b> US48245RAX26
14 Covenants	<b>Mkt Iss</b> GLOBAL	<b>Bond Ratings</b>
15 Guarantors	<b>Country</b> DE	
16 Bond Ratings	<b>Rank</b> Unsecured	
17 Identifiers	<b>Coupon</b> 4.625000	<b>Currency</b> USD
18 Exchanges	<b>Cpn Freq</b> S/A	<b>Series</b>
19 Inv Parties	<b>Day Cnt</b> ISMA-30/360	<b>Type</b> Fixed
20 Fees, Restrict	<b>Maturity</b> 11/17/2008	<b>Iss Price</b> 99.76700
21 Schedules	<b>BULLET</b>	<b>Issuance &amp; Trading</b>
22 Coupons	<b>Iss Sprd</b> +28.00bp vs T 4 5/8 08/15/08	<b>Amt Issued/Outstanding</b>
<b>Quick Links</b>	<b>Calc Type</b> (1)STREET CONVENTION	USD 2,000,000.00 (M) / USD (M)
32 ALLQ Pricing	<b>Pricing Date</b> 11/08/2005	<b>Min Piece/Increment</b>
33 QRD Qt Recap	<b>Interest Accrual Date</b> 11/16/2005	1,000.00 / 1,000.00
34 TDH Trade Hist	<b>1st Settle Date</b> 11/16/2005	<b>Par Amount</b> 1,000.00
35 CACS Corp Action	<b>1st Coupon Date</b> 05/17/2006	<b>Book Runner</b> MS,RBS,UBS
36 CF Prospectus	<b>LONG 1ST CPN.</b>	<b>Exchange</b> Multiple
37 CN Sec News		
38 HDS Holders		
66 Send Bond		

Suggested Functions **GP** Chart securities & technical studies **HDS** Find the holders influencing price

ISIN: US500769BL79

KFW 4 5/8 01/20/11 Cor		Settings ▾	Actions ▾	Page 1/12	Security Description: Bond
<b>MATURED</b>		94 No Notes		95 Buy	96 Sell
25) Bond Description		20 Issuer Description			
<b>Pages</b>	<b>Issuer Information</b>			<b>Identifiers</b>	
11) Bond Info	<b>Name</b>	KFW		<b>ID Number</b>	EF2419937
12) Addtl Info	<b>Industry</b>	Government Guaranteed (BCLASS)		<b>CUSIP</b>	500769BL7
13) Reg/Tax	<b>Security Information</b>			<b>ISIN</b>	US500769BL79
14) Covenants	<b>Mkt Iss</b>	GLOBAL		<b>Bond Ratings</b>	
15) Guarantors	<b>Country</b>	DE	<b>Currency</b>	USD	<b>Fitch</b>
16) Bond Ratings	<b>Rank</b>	Sr Unsecured	<b>Series</b>		
17) Identifiers	<b>Coupon</b>	4.625000	<b>Type</b>	Fixed	
18) Exchanges	<b>Cpn Freq</b>	S/A		<b>Issuance &amp; Trading</b>	
19) Inv Parties	<b>Day Cnt</b>	ISMA-30/360	<b>Iss Price</b>	99.68700	
20) Fees, Restrict	<b>Maturity</b>	01/20/2011	<b>Reoffer</b>	99.687	
21) Schedules	BULLET				
22) Coupons	<b>Iss Sprd</b>	+33.00bp vs T 4 1/4 01/15/11			<b>Amt Issued/Outstanding</b>
<b>Quick Links</b>	<b>Calc Type</b>	(1)STREET CONVENTION			USD 3,000,000.00 (M) /
32) ALLQ Pricing	<b>Pricing Date</b>	01/12/2006			USD (M)
33) QRD Qt Recap	<b>Interest Accrual Date</b>	01/20/2006			<b>Min Piece/Increment</b>
34) TDH Trade Hist	<b>1st Settle Date</b>	01/20/2006			1,000.00 / 1,000.00
35) CACS Corp Action	<b>1st Coupon Date</b>	07/20/2006			<b>Par Amount</b>
36) CF Prospectus					1,000.00
37) CN Sec News					<b>Book Runner</b>
38) HDS Holders					CSFB,JPM,NOMU...
					<b>Exchange</b>
					Multiple
60) Send Bond					



ISIN: US045167BL65

ASIA 4 1/8 09/15/10 Co		Settings ▾	Actions ▾	Page 1/12	Security Description: Bond
<b>MATURED</b>		94 <input type="checkbox"/> No Notes		95 Buy	96 Sell
25) Bond Description		26) Issuer Description			
<b>Pages</b>	<b>Issuer Information</b>	<b>Identifiers</b>			
11) Bond Info	<b>Name</b> ASIAN DEVELOPMENT BANK	<b>ID Number</b>	EF0282246		
12) Addtl Info	<b>Industry</b> Supranational (BCLASS)	<b>CUSIP</b>	045167BL6		
13) Reg/Tax	<b>Security Information</b>	<b>ISIN</b>	US045167BL65		
14) Covenants	<b>Mkt Iss</b> EURO MTN	<b>Bond Ratings</b>			
15) Guarantors	<b>Country</b> SNAT	<b>Currency</b>	USD		
16) Bond Ratings	<b>Rank</b> Sr Unsecured	<b>Series</b>	GMTN		
17) Identifiers	<b>Coupon</b> 4.125000	<b>Type</b>	Fixed		
18) Exchanges	<b>Cpn Freq</b> S/A	<b>Issuance &amp; Trading</b>			
19) Inv Parties	<b>Day Cnt</b> ISMA-30/360	<b>Iss Price</b>	99.65200		
20) Fees, Restrict	<b>Maturity</b> 09/15/2010	<b>Reoffer</b>	99.652		
21) Schedules	<b>BULLET</b>	<b>Amt Issued/Outstanding</b>			
22) Coupons	<b>Quick Links</b>	USD 1,000,000.00 (M) /			
32) ALLQ Pricing	<b>Iss Sprd</b> +20.00bp vs T 3 7/8 07/15/10	USD (M)			
33) QRD Qt Recap	<b>Calc Type</b> (1)STREET CONVENTION	<b>Min Piece/Increment</b>			
34) TDH Trade Hist	<b>Pricing Date</b> 07/19/2005	1,000.00 / 1,000.00			
35) CACS Corp Action	<b>Interest Accrual Date</b> 07/26/2005	<b>Par Amount</b> 1,000.00			
36) CF Prospectus	<b>1st Settle Date</b> 07/26/2005	<b>Book Runner</b> CITI,GSI,NOMURA			
37) CN Sec News	<b>1st Coupon Date</b> 09/15/2005	<b>Exchange</b> Multiple			
38) HDS Holders	ISS'D UNDER GLOBAL MTN PROGRAM. SHORT 1ST CPN.				
60) Send Bond					

ISIN: US298785EC60

EIB 5 02/08/10 Corp		Settings ▾	Actions ▾	Page 1/12	Security Description: Bond
<b>MATURED</b>		94 No Notes		95 Buy	96 Sell
25) Bond Description		26) Issuer Description			
<b>Pages</b>	<b>Issuer Information</b>	<b>Identifiers</b>			
11) Bond Info	<b>Name</b> EUROPEAN INVESTMENT BANK	<b>ID Number</b>	EG1493014		
12) Addtl Info	<b>Industry</b> Supranational (BCLASS)	<b>CUSIP</b>	298785EC6		
13) Reg/Tax	<b>Security Information</b>		<b>ISIN</b>	US298785EC60	
14) Covenants	<b>Mkt Iss</b> GLOBAL	<b>Bond Ratings</b>			
15) Guarantors	<b>Country</b> SNAT	<b>Currency</b>	USD		
16) Bond Ratings	<b>Rank</b> Sr Unsecured	<b>Series</b>			
17) Identifiers	<b>Coupon</b> 5.000000	<b>Type</b>	Fixed		
18) Exchanges	<b>Cpn Freq</b> S/A	<b>Day Cnt</b> ISMA-30/360		<b>Iss Price</b>	99.70500
19) Inv Parties	<b>Maturity</b> 02/08/2010	<b>Reoffer</b>	99.705		
20) Fees, Restrict	<b>BULLET</b>	<b>Issuance &amp; Trading</b>			
21) Schedules	<b>Iss Sprd</b>	USD 3,000,000.00 (M) /			
22) Coupons	<b>Calc Type</b> (1)STREET CONVENTION	USD (M)			
<b>Quick Links</b>	<b>Pricing Date</b> 01/30/2007	<b>Min Piece/Increment</b> 1,000.00 / 1,000.00			
32) ALLQ Pricing	<b>Interest Accrual Date</b> 02/06/2007	<b>Par Amount</b> 1,000.00			
33) QRD Qt Recap	<b>1st Settle Date</b> 02/06/2007	<b>Book Runner</b> BARCBK,DB,JPM			
34) TDH Trade Hist	<b>1st Coupon Date</b> 08/08/2007	<b>Exchange</b> Multiple			
35) CACS Corp Action	<b>LONG 1ST CPN.</b>				
36) CF Prospectus					
37) CN Sec News					
38) HDS Holders					
60) Send Bond					



ISIN: US298785EE27

EIB 4 5/8 03/21/12 Cor		Settings ▾	Actions ▾	Page 1/12	Security Description: Bond
<b>MATURED</b>		94 No Notes		95 Buy	96 Sell
25 Bond Description		20 Issuer Description			
<b>Pages</b>	<b>Issuer Information</b>	<b>Identifiers</b>			
11 Bond Info	<b>Name</b> EUROPEAN INVESTMENT BANK	<b>ID Number</b>	EG2667269		
12 Addtl Info	<b>Industry</b> Supranational (BCLASS)	<b>CUSIP</b>	298785EE2		
13 Reg/Tax	<b>Security Information</b>		<b>ISIN</b>	US298785EE27	
14 Covenants	<b>Mkt Iss</b> GLOBAL	<b>Bond Ratings</b>			
15 Guarantors	<b>Country</b> SNAT	<b>Currency</b>	USD		
16 Bond Ratings	<b>Rank</b> Sr Unsecured	<b>Series</b>			
17 Identifiers	<b>Coupon</b> 4.625000	<b>Type</b>	Fixed		
18 Exchanges	<b>Cpn Freq</b> S/A	<b>Day Cnt</b> ISMA-30/360	<b>Iss Price</b>	99.70400	
19 Inv Parties	<b>Maturity</b> 03/21/2012	<b>Reoffer</b>	99.704		
20 Fees, Restrict	<b>BULLET</b>	<b>Iss Sprd</b> +31.00bp vs T 4 5 <sub>B</sub> 02/29/12		<b>Issuance &amp; Trading</b>	
21 Schedules	<b>Calc Type</b> (1)STREET CONVENTION	<b>Pricing Date</b>	03/14/2007		
22 Coupons	<b>Interest Accrual Date</b>	03/21/2007		<b>Amt Issued/Outstanding</b>	
<b>Quick Links</b>	<b>1st Settle Date</b>	03/21/2007		USD 3,000,000.00 (M) /	
32 ALLQ Pricing	<b>1st Coupon Date</b>	09/21/2007		USD (M)	
33 QRD Qt Recap	<b>Min Piece/Increment</b>	1,000.00 / 1,000.00			
34 TDH Trade Hist	<b>Par Amount</b>	1,000.00			
35 CACS Corp Action	<b>Book Runner</b>	JPM,ML,MS			
36 CF Prospectus	<b>Exchange</b>	Multiple			
37 CN Sec News					
38 HDS Holders					
60 Send Bond					

ISIN: US45950KAQ31

IFC 4 3/4 04/25/12 Cor		Settings ▾	Actions ▾	Page 1/12	Security Description: Bond
<b>MATURED</b>		94 No Notes		Buy	Sell
25 Bond Description		20 Issuer Description			
<b>Pages</b>	<b>Issuer Information</b>	<b>Identifiers</b>			
11 Bond Info	<b>Name</b> INTL FINANCE CORP	<b>ID Number</b>	EG3801677		
12 Addtl Info	<b>Industry</b> Supranational (BCLASS)	<b>CUSIP</b>	45950KAQ3		
13 Reg/Tax	<b>Security Information</b>		<b>ISIN</b>	US45950KAQ31	
14 Covenants	<b>Mkt Iss</b> GLOBAL	<b>Bond Ratings</b>			
15 Guarantors	<b>Country</b> SNAT	<b>Currency</b>	USD		
16 Bond Ratings	<b>Rank</b> Sr Unsecured	<b>Series</b>			
17 Identifiers	<b>Coupon</b> 4.750000	<b>Type</b>	Fixed		
18 Exchanges	<b>Cpn Freq</b> S/A	<b>Issuance &amp; Trading</b>			
19 Inv Parties	<b>Day Cnt</b> ISMA-30/360	<b>Iss Price</b>			
20 Fees, Restrict	<b>Maturity</b> 04/25/2012	<b>Reoffer</b>	99.64		
21 Schedules	<b>BULLET</b>	<b>Amt Issued/Outstanding</b>			
22 Coupons	<b>Iss Sprd</b> +27.00bp vs T 4 3/2 03/31/12	USD 1,000,000.00 (M) /			
<b>Quick Links</b>	<b>Calc Type</b> (1)STREET CONVENTION	USD (M)			
32 ALLQ Pricing	<b>Pricing Date</b>	<b>Min Piece/Increment</b>			
33 QRD Qt Recap	<b>Interest Accrual Date</b>	1,000.00 / 1,000.00			
34 TDH Trade Hist	<b>1st Settle Date</b>	<b>Par Amount</b>			
35 CACS Corp Action	<b>1st Coupon Date</b>	1,000.00			
36 CF Prospectus		<b>Book Runner</b>			
37 CN Sec News		CITI,NOMURA			
38 HDS Holders		<b>Exchange</b>			
		Multiple			
60 Send Bond					

ISIN: US500769CF92

KFW 5 06/01/10 Corp		Settings ▾	Actions ▾	Page 1/12	Security Description: Bond
<b>MATURED</b>		94 No Notes		95 Buy	96 Sell
25 Bond Description		26 Issuer Description			
<b>Pages</b>	<b>Issuer Information</b>	<b>Identifiers</b>			
11 Bond Info	<b>Name</b> KFW	<b>ID Number</b>	EG4752234		
12 Addtl Info	<b>Industry</b> Government Guaranteed (BCLASS)	<b>CUSIP</b>	500769CF9		
13 Reg/Tax	<b>Security Information</b>	<b>ISIN</b>	US500769CF92		
14 Covenants	<b>Mkt Iss</b> GLOBAL	<b>Bond Ratings</b>			
15 Guarantors	<b>Country</b> DE	<b>Currency</b>	USD		
16 Bond Ratings	<b>Rank</b> Unsecured	<b>Series</b>	Fixed		
17 Identifiers	<b>Coupon</b> 5.000000	<b>Type</b>	Fixed		
18 Exchanges	<b>Cpn Freq</b> S/A	<b>Issuance &amp; Trading</b>			
19 Inv Parties	<b>Day Cnt</b> ISMA-30/360	<b>Iss Price</b>	99.90100		
20 Fees, Restrict	<b>Maturity</b> 06/01/2010	<b>Reoffer</b>	99.901		
21 Schedules	<b>BULLET</b>	<b>Amt Issued/Outstanding</b>			
22 Coupons	<b>Iss Sprd</b> +26.00bp vs T 4 ½ 05/15/10	USD 3,000,000.00 (M) /			
<b>Quick Links</b>	<b>Calc Type</b> (1)STREET CONVENTION	USD (M)			
32 ALLQ Pricing	<b>Pricing Date</b>	<b>Min Piece/Increment</b>			
33 QRD Qt Recap	<b>Interest Accrual Date</b>	1,000.00 / 1,000.00			
34 TDH Trade Hist	<b>1st Settle Date</b>	<b>Par Amount</b> 1,000.00			
35 CACS Corp Action	<b>1st Coupon Date</b>	<b>Book Runner</b> BCLY,MS,NOMURA			
36 CF Prospectus	<b>LONG 1ST CPN.</b>	<b>Exchange</b> Multiple			
37 CN Sec News					
38 HDS Holders					
60 Send Bond					

# ANNEX 420



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## Most-Favoured-Nation Treatment in International Investment Law

OECD





**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS**

**WORKING PAPERS ON INTERNATIONAL INVESTMENT  
Number 2004/2**

## **MOST-FAVOURED-NATION TREATMENT IN INTERNATIONAL INVESTMENT LAW**

*September 2004*

*This document, derestricted under the OECD Secretary General's responsibility, has been developed as an input to the Investment Committee's work aimed at enhancing understanding of investment protection provisions in international investment agreements.*

*This document benefited from discussions and a variety of perspectives in the Committee. The document as a factual survey, however, does not necessarily reflect the views of the OECD or those of its Member governments. It cannot be construed as prejudging ongoing or future negotiations or disputes pertaining to international investment agreements.*

*This document was prepared by Marie-France Houde, Senior Economist, Investment Division, Directorate for Financial and Enterprise Affairs and Fabrizio Pagani, Legal Directorate.*

# MOST-FAVOURED-NATION TREATMENT IN INTERNATIONAL INVESTMENT LAW

## 1. Introduction

Bilateral and regional investment agreements have proliferated in the last decade and new ones are still being negotiated. Most-Favoured-Nation (MFN) clauses link investment agreements by ensuring that the parties to one treaty provide treatment no less favourable than the treatment they provide under other treaties in areas covered by the clause. MFN clauses have thus become a significant instrument of economic liberalisation in the investment area. Moreover, by giving the investors of all the parties benefiting from a country's MFN clause the right, in similar circumstances, to treatment no less favourable than a country's closest or most influential partners can negotiate on the matters the clause covers, MFN avoids economic distortions that would occur through more selective country-by-country liberalisation. Such a treatment may result from the implementation of treaties, legislative or administrative acts of the country and also by mere practice.

The present article provides a factual survey of jurisprudence and related literature on MFN treaty clauses in investment agreements with a view to contributing a better understanding of the MFN interfaces between such agreements.

- *Section II* defines the MFN clause, traces back its origins and provides some examples of such provisions in the two major types of model investment agreements in existence (the “North American model” and the “European model”).
- *Section III* summarises the relevant aspects of the extensive work carried out by the International Law Commission (ILC) between 1968 and 1978 on MFN clauses.
- *Section IV* describes recent arbitral awards on the scope of application of MFN treatment clauses resulting from disputes under investment treaties.
- *Section V* provides a summing up.

## 2.. Definition, origins and examples of MFN clauses

### 2.1. Definition

To provide MFN treatment under investment agreements is generally understood to mean that an investor from a party to an agreement, or its investment, would be treated by the other party “no less favourably” with respect to a given subject-matter than an investor from any third country, or its investment.<sup>1</sup> MFN treatment clauses are found in most international investment agreements. Although the text of the MFN clause, its context and the object and purpose of the treaty containing it need to be considered whenever that clause is being interpreted, it is the “multilateralisation” instrument *par excellence* of the benefits accorded to foreign investors and their investments.

While MFN is a standard of treatment which has been linked by some to the principle of the equality of States,<sup>2</sup> the prevailing view is that a MFN obligation exists only when a treaty clause creates it.<sup>3</sup> In the absence of a treaty obligation (or for that matter, an MFN obligation under national law), nations retain the possibility of discriminating between foreign nations in their economic affairs.

## 2.2. *Origins*<sup>4</sup>

MFN treatment has been a central pillar of trade policy for centuries. It can be traced back to the twelfth century, although the phrase seems to have first appeared in the seventeenth century. MFN treaty clauses spread with the growth of commerce in the fifteenth and sixteenth centuries. The United States included an MFN clause in its first treaty, a 1778 treaty with France.<sup>5</sup> In the 1800s and 1900s the MFN clause was included frequently in various treaties, particularly in the Friendship, Commerce, and Navigation treaties. MFN treatment was made one of the core obligations of commercial policy under the Havana Charter where Members were to undertake the obligation “to give due regard to the desirability of avoiding discrimination as between foreign investors”.<sup>6</sup> The inclusion of MFN clauses became a general practice in the numerous bilateral, regional and multilateral investment-related agreements which were concluded after the Charter failed to come into force in 1950.

Its importance for international economic relations is underscored by the fact that the MFN treatment provisions of the GATT (Article I *General Most-Favoured-Nation Treatment*) and the GATS<sup>7</sup> (Article II *Most-Favoured-Nation Treatment*) provide that this obligation shall be accorded “immediately and unconditionally” (although in the case of the GATS, a member may maintain a measure inconsistent with this obligation provided that such measure is listed in, and meets the conditions of, the Annex on Article II Exemptions).

## 2.3. *Examples of MFN Clauses in Investment Agreements*

A stock taking of MFN clauses in investment treaties will not yield a uniform picture. In fact the universe of MFN clauses in investment treaties is quite diverse. Some MFN clauses are narrow, others are more general. Moreover, the context of the clauses varies, as does the object and the purpose of the treaties which contain them. Following is a representative sample of these clauses.

Germany has concluded the largest number of BITs. Article 3 (1) and (2) of the **German 1998 Model Treaty** combines the MFN obligation with the national treatment obligation by providing that:

*“(1) Neither Contracting State shall subject investments in its territory owned or controlled by investors of the other Contracting State to treatment less favourable than it accords to investments of its own investors or to investments of investors of any third State.*

*“(2) Neither Contracting State shall subject investors of the other Contracting State, as regards their activity in connection with investments in its territory, to treatment less favourable than it accords to its own investors or to investors of any third State.”*

This general MFN provision is not restricted in its scope to any particular part of the treaty containing it. It may also be noted that the 1998 German model BIT contains another MFN provision which only relates to full protection and security and to expropriation which are the matters dealt with by Article 4. Article 4(4) specifically provides that:

*“Investors of either Contracting State shall enjoy most-favoured-nation treatment in the territory of the other Contracting State in respect of the matters provided for in this Article.”*

The same approach is followed by the **Netherlands Model BIT** which in addition combines in its Article 3 the MFN obligation with other standards of treatment, i.e. national treatment (whichever of these two treatments is more favourable), fair and equitable treatment and full protection and security. The non-discriminatory treatment is formulated in Article 3(1) and 3(2) as follows:

*“(1) Each Contracting Party shall ensure fair and equitable treatment of the investments of nationals of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those nationals. Each Contracting Party shall accord to such investments full physical security and protection.*

*(2) More particularly, each Contracting Party shall accord to such investments treatment which in any case shall not be less favourable than that accorded either to investments of its own nationals or to investments of nationals of any third State, whichever is more favourable to the national concerned.”*

Article 3 of the 1996 **Albania/United Kingdom BIT** provides that:

*“National Treatment and Most-Favoured-Nation Provisions*

*(1) Neither Contracting Party shall in its territory subject investments or returns of nationals or companies of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own nationals or companies or to investments or returns of nationals or companies of any third State.*

*(2) Neither Contracting Party shall in its territory subject nationals or companies of the other Contracting Party, as regards the management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to its own nationals or companies or to nationals or companies of any third State.*

*(3) For the avoidance of doubt it is confirmed that the treatment provided for in paragraphs (1) and (2) above shall apply to the provisions of Articles 1 to 11 of this Agreement.”*

Articles 1 to 11 cover all the provisions of the Agreement, except the final clauses.

The typical formulation of an MFN clause in the **US and Canadian BITs** covers both the establishment and post establishment phases. It also lists the various operations covered<sup>8</sup> and is explicit in stating that the right only applies “in like circumstances”, unlike other BITs (particularly the “European model BIT”) which make no reference to the comparative context against which treatment is to be assessed. Recent examples are to be found in the investment chapter of US-Chile Free Trade Agreement<sup>9</sup> and the US-Singapore Free Trade Agreement<sup>10</sup> concluded in 2003, and the 1997 Canada-Chile Free Trade Agreement, which are based on NAFTA language. In the **US-Chile FTA**, Article 10.3: Most Favoured Nation Treatment reads:

*“(1) Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investment in its territory.*

*(2) Each Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments in its territory of investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments.”*

In the **US-Singapore FTA**, National Treatment and MFN treatment are part of a same article:

*“Article 15.4: National Treatment and Most-Favoured Nation Treatment*

*(3) Each Party shall accord to investors of the other Party treatment no less favourable than it accords, in like circumstances, to investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory. Each Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments in its territory of investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. The treatment each Party shall accord under this paragraph is “most-favoured-nation treatment”.*

*(4) Each Party shall accord to investors of the other Party and to their covered investments the better of national treatment or most-favoured-nation treatment.”*

In the **Canada-Chile FTA**, Article G-03: Most Favoured Nation Treatment reads:

*“(1) Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.*

*(2) Each Party shall accord to investments of investors of the other Party treatment no less favourable than that it accords, in like circumstances, to investments of investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.”*

The texts of these agreements are alike in that they make clear that the intent to use the likeness of the circumstances in which the treatment is granted as the basis for comparison. Jurisprudence from MFN clauses with a different basis for comparison, and which focuses on categorizing industries affected by treatment, or categorizing the types of treaties that require the treatment, may be of little relevance to the analysis required by these agreements.

#### **2.4. Restrictions and Exceptions**

Many MFN clauses in investment treaties contain specific restrictions and exceptions, which exclude certain areas from their application. Such areas may include *inter alia* regional economic integration, matters of taxation, subsidies or government procurement and country exceptions. Depending on the way these exceptions are drafted, the fact that these limitations are specifically mentioned could be a factor in deciding whether certain other matters are within the scope of an MFN clause. Consider the following examples.

The **1998 German Model BIT** provides in its Article 3, points (3) and (4) that:

*“(3) Such treatment shall not relate to privileges which either Contracting State accords to investors of third States on account of its membership of, or association with, a customs or economic union, a common market or a free trade area.*

# ANNEX 421







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**Negotiating Group on the Multilateral Agreement on Investment (MAI)**

**THE MULTILATERAL AGREEMENT ON INVESTMENT  
COMMENTARY TO THE CONSOLIDATED TEXT**

This document was issued during the MAI negotiations which took place between 1995 and 1998.  
All available documentation can be found on the OECD website: [www.oecd.org/daf/investment](http://www.oecd.org/daf/investment)

(Note by the Secretariat)

This document contains the commentary to text of the agreement considered in the course of the MAI negotiations so far. The text reproduced here results mainly from the work of expert groups and has not yet been adopted by the Negotiating Group. The Negotiating Text itself, which is presented with footnotes and proposals that are still under consideration, is available separately as DAFPE/MAI(98)7/REV1.

### **III. TREATMENT OF INVESTORS AND INVESTMENTS**

#### ***GENERAL***

It was understood that the drafting of articles 1 and 2 was without prejudice to other aspects of the Agreement, including definitions, exceptions, standstill and rollback, and the role of the Parties Group.

#### ***NATIONAL TREATMENT AND MOST FAVOURED NATION TREATMENT***

1. While some delegations would have preferred separate articles on pre- and post-establishment, the majority of delegations felt that a single text would better capture the intended coverage of the agreement and avoid the difficult task of defining the boundary between pre- and post establishment. It was agreed, as a starting point, to work on the basis of a single text. Some delegations pointed to the links between a single text covering treatment of investors both pre- and post-establishment and the issues of definitions and the scope of the Agreement. Two delegations reserved their position pending the outcome of the discussion on these issues. DG3 also felt that the scope of the commitments by individual countries could be identified by using precise language in any agreed reservations to National Treatment/MFN and perhaps by including references to relevant laws or regulations. The Group agreed that all diversification activities are covered by the references to “establishment, acquisition and expansion”.

2. Including the words “in its territory” in Articles 1.1 and 1.2 was suggested for two reasons: *i)* to define the scope of application of national treatment and MFN; and *ii)* to provide an appropriate benchmark for assessing national treatment and MFN. Adding these words would make it clear that the Contracting Parties do not have obligations with regard to investors of another Contracting Party in a third country. One delegation suggested that a third reason for including “in its territory” would be to underline the need to avoid conflicting requirements on multinational enterprises. At the same time, however, it was important not to unduly limit the scope of the agreement, for example by excluding the international activities of established foreign investors and their investments. The place of this term in these paragraphs is still to be determined. It was also suggested that a solution might be found, as in NAFTA, in the article dealing with the scope of the Agreement. Whatever should be decided on this matter, it should be treated consistently throughout the Agreement.

3. Some delegations proposed the “same” or “comparable” treatment as the appropriate standard rather than “no less favourable” treatment. The purpose would be to prevent unlimited competition for international investment funds with consequential costs and distortions to investment flows. However, most delegations considered that this would unacceptably weaken the standard of treatment from the investor’s viewpoint.

4. Different views were expressed on the value of a “closed” or “open” list of investment activities to be covered by the National Treatment and MFN provisions, before and/or after establishment. A closed list had the advantage of certainty, but risked omitting elements that could be important to the investor. An open list would cover all possible investment activities, including new activities. But it could also create uncertainties as to the scope of the Agreement and might have adverse effects on the operation of existing bilateral and other investment agreements using a closed list. Several Delegations believed that the list “establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment and sale or other disposition of investments” should be considered a comprehensive one whose terms were intended to cover all activities of investors and their investments for both the pre- and post-establishment phases. In their view, this was the preferable approach. It was also suggested that the term “sale or other disposition” should replace “disposal” in Article 1.2 of the draft articles on selected topics on Investment Protection.

5. National treatment and MFN treatment are comparative terms. Some delegations believed that the terms for national treatment and MFN treatment implicitly provide the comparative context for determining whether a measure discriminates against foreign investors and their investments; they considered that the words “in like circumstances” were unnecessary and open to abuse. Other delegations believed that the comparative context should be spelled out and thus inclusion of the phrase “in like circumstances”. Examples of the inclusion of a specific reference are found in the NTI, some BITs and NAFTA. Examples of no specific reference are found in some other BITS and the ECT (although two delegations made a Declaration concerning the term “in like circumstances”).

6. DG3 considered two options: “In like circumstances” deleted (option A) and: “In like circumstances” included (option B).

Regarding Option A. National treatment and MFN treatment are comparative terms. They permit fair and equitable difference in treatment justified by relevant differences of circumstances. In this context, nationality is not relevant. Some delegations may wish to modify this text in the light of the Commentary on Option B below which was not discussed.

Regarding Option B. One delegation provided the following commentary:

*“National treatment and most favoured nation treatment are relative standards requiring a comparison between treatment of a foreign investor and on investment and treatment of domestic or third country investors and investments. The goal of both standards is to prevent discrimination in fact or in law compared with domestic investors or investments or those of a third country. At the same time, however, governments may have legitimate policy reasons to accord differential treatment to different types of investments.*”

*“In like circumstances” ensures that comparisons are made between investors and investments on the basis of characteristics that are relevant for the purposes of the comparison. The objective is to permit the consideration of all relevant circumstances, including those relating to a foreign investor and its investment, in deciding to which domestic or third country investors and investments they should appropriately be compared, while excluding from consideration those characteristics that are not germane to such a comparison.”*

7. The question was asked whether the treatment accorded to foreign investors by a sub-federal state or province would meet the national treatment test only if it were no less favourable than the treatment accorded to the investors of the same state or province, or whether it would be sufficient to accord treatment no less favourable than that accorded to the investors from any other state or province. The question will need to be answered by the Negotiating Group in due course.

8. As indicated by the Negotiating Group, Article 1 is intended to address any problem of *de facto* as well as *de jure* discrimination.

9. Some delegations expressed the view that Article 1.3 was not strictly necessary since it does not add any substantive obligation to Articles 1.1 and 1.2. Article 1.3 underlines, however, that, taken together, the purpose of Articles 1.1 and 1.2 is to give the investors and their investments the better of National Treatment and MFN.





# ANNEX 422



Document:-  
**A/33/10**

**Report of the International Law Commission on the work of its Thirtieth session, 8 May -  
28 July 1978, Official Records of the General Assembly, Thirty-third session, Supplement  
No. 10**

Topic:  
**<multiple topics>**

Extract from the Yearbook of the International Law Commission:-  
**1978, vol. II(2)**

*Downloaded from the web site of the International Law Commission  
(<http://www.un.org/law/ilc/index.htm>)*

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clause. The extent of the favours to which the beneficiary of that clause may lay claim will be determined by the actual favours extended by the granting State to the third State.

(8) The parties stipulating the clause, i.e. the granting State and the beneficiary State, can, however, restrict in the treaty or agreement itself the extent of the favours that can be claimed by the beneficiary State. For example, the restriction can consist in the imposition of a condition, a matter that is dealt with below.<sup>114</sup> If the clause contains a restriction, the beneficiary State cannot claim any favours beyond the limits set by the clause, even if this extent does not reach the level of the favours extended by the granting State to a third State. In other words, the treatment granted to the third State by the granting State is applicable only within the framework set by the clause. This is the reason for the wording of paragraph 2 of article 8, which expressly states that the most-favoured-nation treatment to which the beneficiary State—for itself or for the benefit of the persons or things in a determined relationship with it—is entitled *under a clause referred to in paragraph 1*, is determined by the treatment extended by the granting State to a third State or to persons or things in the same relationship with that third State. Paragraph 2 reflects in general the *ejusdem generis* rule, whose substance is developed in articles 9 and 10 that follow.

*Article 9. Scope of rights under a most-favoured-nation clause*

1. Under a most-favoured-nation clause the beneficiary State acquires, for itself or for the benefit of persons or things in a determined relationship with it, only those rights which fall within the limits of the subject-matter of the clause.

2. The beneficiary State acquires the rights under paragraph 1 only in respect of persons or things which are specified in the clause or implied from its subject-matter.

*Article 10. Acquisition of rights under a most-favoured-nation clause*

1. Under a most-favoured-nation clause the beneficiary State acquires the right to most-favoured-nation treatment only if the granting State extends to a third State treatment within the limits of the subject-matter of the clause.

2. The beneficiary State acquires rights under paragraph 1 in respect of persons or things in a determined relationship with it only if they:

(a) belong to the same category of persons or things as those in a determined relationship with a third State which benefit from the treatment extended to them by the granting State and

(b) have the same relationship with the beneficiary State as the persons and things referred to in subparagraph (a) have with that third State.

<sup>114</sup> See articles 11, 12 and 13 below, and the commentary thereto.

*Commentary to articles 9 and 10*

*Scope of the most-favoured-nation clause regarding its subject-matter*

(1) The rule which is sometimes referred to as the *ejusdem generis* rule is generally recognized and affirmed by the jurisprudence of international tribunals and national courts and by diplomatic practice. The essence of the rule has been explained in the following graphic way:

Suppose that a most-favoured-nation clause in a commercial treaty between State A and State B entitled State A to claim from State B the treatment which State B gives to any other State, that would not entitle State A to claim from State B the extradition of an alleged criminal on the ground that State B has agreed to extradite alleged criminals of the same kind to State C, or voluntarily does so. The reason, which seems to rest on the common intention of the parties, is that the clause can only operate in regard to the subject-matter which the two States had in mind when they inserted the clause in their treaty.<sup>115</sup>

Although the meaning of the rule is clear, its application is not always simple. From the abundant practice the following selection of cases may illustrate the difficulties and solutions.

(2) In the *Anglo-Iranian Oil Company case* (1952), the International Court of Justice stated:

The United Kingdom also put forward, in a quite different form, an argument concerning the most-favoured-nation clause. If Denmark, it is argued, can bring before the Court questions as to the application of her 1934 Treaty with Iran, and if the United Kingdom cannot bring before the Court questions as to the application of the same Treaty to the benefit of which she is entitled under the most-favoured-nation clause, then the United Kingdom would not be in the position of the most-favoured-nation. *The Court needs only observe that the most-favoured-nation clause in the Treaties of 1857 and 1903 between Iran and the United Kingdom has no relation whatever to jurisdictional matters between the two Governments.\** If Denmark is entitled under Article 36, paragraph 2, of the Statute, to bring before the Court any dispute as to the application of its Treaty with Iran, it is because that Treaty is subsequent to the ratification of the Iranian Declaration. This cannot give rise to any question relating to most-favoured-nation treatment.<sup>116</sup>

(3) In the *Ambatielos case*,<sup>117</sup> the Commission of Arbitration, in its award of 6 March 1956, held the following views on article X (most-favoured-nation clause) of the Anglo-Greek Treaty of Commerce and Navigation of 1886:

The Commission [of Arbitration] does not deem it necessary to express a view on the general question as to whether the most-favoured-nation clause can never have the effect of assuring to its beneficiaries treatment in accordance with the general rules of international law, because in the present case the effect of the clause is expressly limited to "any privilege, favour or immunity which either Contracting Party has actually granted or may hereafter grant to the subjects or citizens of any other State",

<sup>115</sup> McNair, *op. cit.*, p. 287.

<sup>116</sup> *Anglo-Iranian Oil Co. case (Preliminary objection)*, Judgment of 22 July 1952, *I.C.J. Reports 1952*, p. 110. For the facts and other aspects of the case, see *Yearbook ... 1970*, vol. II, pp. 202 and 205, doc. A/CN.4/228 and Add.1, paras. 10-30.

<sup>117</sup> *The Ambatielos case (merits: obligation to arbitrate)*, Judgment of 19 May 1953, *I.C.J. Reports 1953*, p. 10.

which would obviously not be the case if the sole object of those provisions were to guarantee to them treatment in accordance with the general rules of international law.

On the other hand, the Commission [of Arbitration] holds that the most-favoured-nation clause can *only attract matters belonging to the same category of subject as that to which the clause itself relates*<sup>118</sup>.

The Commission [of Arbitration] is, however, of the opinion that in the present case the application of this rule can lead to conclusions different from those put forward by the United Kingdom Government.

In the Treaty of 1886 the field of application of the most-favoured-nation clause is defined as including "all matters relating to commerce and navigation". It would seem that this expression has not, in itself, a strictly defined meaning. The variety of provisions contained in Treaties of commerce and navigation proves that, in practice, the meaning given to it is fairly flexible. For example, it should be noted that most of these Treaties contain provisions concerning the administration of justice. That is the case, in particular, in the Treaty of 1886 itself, Article XV, paragraph 3, of which guarantees to the subjects of the two Contracting Parties "free access to the Courts of Justice for the prosecution and defence of their rights". That is also the case as regards the other Treaties referred to by the Greek Government in connexion with the application of the most-favoured-nation clause.

It is true that "the administration of justice", when viewed in isolation, is a subject-matter other than "commerce and navigation", but this is not necessarily so when it is viewed in connexion with the protection of the rights of traders. Protection of the rights of traders naturally finds a place among the matters dealt with by Treaties of commerce and navigation.

Therefore it cannot be said that the administration of justice, in so far as it is concerned with the protection of these rights, must necessarily be excluded from the field of application of the most-favoured-nation clause, when the latter includes "all matters relating to commerce and navigation". The question can only be determined in accordance with the intention of the Contracting Parties as deduced from a reasonable interpretation of the Treaty.<sup>118</sup>

In summing up its views with respect to the interpretation of article X of the Treaty of 1886, the Commission of Arbitration stated that it was of the opinion:

(1) that the Treaty concluded on 1st August 1911 by the United Kingdom with Bolivia cannot have the effect of incorporating in the Anglo-Greek Treaty of 1886 the "principles of international law", by the application of the most-favoured-nation clause;

(2) that the effects of the most-favoured-nation clause contained in Article X of the said Treaty of 1886 can be extended to the system of the administration of justice in so far as concerns the protection by the courts of the rights of persons engaged in trade and navigation;

(3) that none of the provisions concerning the administration of justice which are contained in the Treaties relied upon by the Greek Government can be interpreted as assuring to the beneficiaries of the most-favoured-nation clause a system of "justice", "right", and "equity" different from that for which the municipal law of the State concerned provides;

(4) that the object of these provisions corresponds with that of Article XV of the Anglo-Greek Treaty of 1886, and that the only question which arises is, accordingly, whether they include

more extensive "privileges", "favours" and "immunities" than those resulting from the said Article XV;

(5) that it follows from the decision summarized in (3) above that Article X of the Treaty does not give to its beneficiaries any remedy based on "unjust enrichment" different from that for which the municipal law of the State provides.

... the Commission [of Arbitration] is of the opinion that "free access to the Courts", which is vouchsafed to Greek nationals in the United Kingdom by Article XV of the Treaty of 1886, includes the right to use the Courts fully and to avail themselves of any procedural remedies of guarantees provided by the law of the land in order that justice may be administered on a footing of equality with nationals of the country.

The Commission [of Arbitration] is therefore of the opinion that the provisions contained in other Treaties relied upon by the Greek Government do not provide for any "privileges, favours or immunities" more extensive than those resulting from the said Article XV, and that accordingly the most-favoured-nation clause contained in Article X has no bearing on the present dispute.<sup>119</sup>

(4) Decisions of national courts also testify to the general recognition of the rule. In an early French case (1913), the French Court of Cassation had to decide whether certain procedural requirements for bringing suit, as provided in a French-Swiss Convention on jurisdiction and execution of judgement, applied also to German nationals as a result of a most-favoured-nation clause in a Franco-German commercial treaty concluded at Frankfurt on 10 May 1871. The Franco-German treaty guaranteed most-favoured-nation treatment in their commercial relations, including the "admission and treatment of subjects of the two nations". The decision of the Court was based in part on the following propositions: that these provisions pertain exclusively to the commercial relations between France and Germany, considered from the viewpoint of the rights under international law, but they do not concern, either expressly or implicitly, the rights under civil law, particularly, the rules governing jurisdiction and procedure that are applicable to any disputes that develop in commercial relations between the subjects of the two States,

and that

the most-favoured-nation clause may be invoked only if the subject of the treaty stipulating it is the same as that of the particularly favourable treaty the benefit of which is claimed.<sup>120</sup>

(5) In *Lloyds Bank v. de Ricqlès and de Gaillard* before the Commercial Tribunal of the Seine, Lloyds Bank, which as plaintiff had been ordered to give security for costs (*cautio judicatum solvi*), invoked article I of an Anglo-French Convention of 28 February 1882.<sup>121</sup> That Convention intended, according to its preamble, "to regulate the commercial maritime relations between the

<sup>119</sup> *Ibid.*, pp. 109 and 110.

<sup>120</sup> M. Whiteman, *Digest of International Law*, Washington, D. C., U. S. Government Printing Office, 1970, vol. 14, pp. 755 and 756, quoting the decision of the French Court of Cassation, 22 December 1913, in the case of *Braunkohlen Briket Verkaufsverein Gesellschaft c. Goffart, ès qualités*. The decision is also quoted by P. Level, "Clause de la nation la plus favorisée", *Encyclopédie Dalloz - Droit International*, Paris, Dalloz, 1968, vol. I, p. 338, para. 38, and by H. Batiffol, *Droit international privé*, 4th ed. Paris, Librairie générale de droit et de jurisprudence, 1967, p. 216, No. 189.

<sup>121</sup> *British and Foreign State Papers, 1881-1882* (London, Ridgway, 1889), vol. 73, p. 22.

<sup>118</sup> United Nations, *Reports of International Arbitral Awards*, vol. XII (United Nations publication, Sales No. 63.V.3), pp. 106 and 107.



two countries, as well as the status of their subjects", and article I provided, with an exception not relevant here, that:

... each of the High Contracting Parties engages to give the other immediately and unconditionally the benefit of every favour, immunity or privilege in matters of commerce or industry which have been or may be conceded by one of the High Contracting Parties to any third nation whatsoever, whether within or beyond Europe.<sup>122</sup>

On the basis of that article, Lloyds Bank claimed the benefit of the provisions of a Franco-Swiss Treaty of 15 June 1889, which gave Swiss nationals the right to sue in France without being required to give security for costs. The court rejected that claim, holding that a party to a convention of a general character such as the Anglo-French Convention regulating the commercial and maritime relations of the two countries could not claim under the most-favoured-nation clause the benefits of a special convention such as the Franco-Swiss Convention, which dealt with one particular subject, namely, freedom from the obligation to give security for costs.<sup>123</sup>

(6) Drafters of a most-favoured-nation clause are always confronted with the dilemma either of drafting the clause in too general terms, risking thereby the loss of its effectiveness through a rigid interpretation of the *ejusdem generis* rule, or of drafting it too explicitly, enumerating its specific domains, in which case the risk consists in the possible incompleteness of the enumeration.

(7) The rule is observed also in the extra-judicial practice of States, as shown by the case concerning the Commercial Agreement of 25 May 1935 between the United States of America and Sweden, article I of which provided as follows:

Sweden and the United States of America will grant each other unconditional and unrestricted most-favoured-nation treatment in all matters concerning the customs duties and subsidiary charges of every kind and in the method of levying duties, and, further, in all matters concerning the rules, formalities and charges imposed in connexion with the clearing of goods through the customs, and with respect to all laws or regulations affecting the sale or use of imported goods within the country.<sup>124</sup>

A request was submitted in 1949 to the Department of State that it inform the New York State Liquor Authority that a liquor licence to sell imported Swedish beer in New York should be issued to a certain firm of importers. The Office of the Legal Adviser, Department of State, interpreted the treaty provisions as follows:

Since the most-favoured-nation provision in the Reciprocal Trade Agreement between the United States and Sweden signed in 1935 is designed only to prevent discrimination between imports

from and exports to Sweden as compared with imports from and exports to other countries, I regret that this Department would be unable to send to the New York Liquor Authority a letter such as you suggest to the effect that the Agreement accords to Swedish *nationals* the same treatment as is accorded to the nationals of other countries.

All of the countries listed in the enclosure to your letter (countries, nationals of which are held by the New York State Liquor Authority to be entitled to liquor licences) have treaties with the United States which grant either national or most-favoured-nation rights as to engaging in trade to nationals of those countries. Thus existence of the trade agreements to which you refer in addition to these treaties is irrelevant...<sup>125</sup>

(8) In the following examples, the question of the application of the rule arose under extraordinary circumstances. In the case of *Nyugat-Swiss Corporation Société Anonyme Maritime et Commerciale v. State* (Kingdom of the Netherlands), the facts were as follows. On 13 April 1941, the steamship *Nyugat* was sailing outside territorial waters of the former Dutch East Indies. It sailed under the Hungarian flag. The Netherlands destroyer *Kortenaer* stopped it, searched it and took it into Surabaya, where it was sunk in 1942. The plaintiffs claimed that the action taken with regard to the *Nyugat* was illegal. The vessel was Swiss property. It had formerly belonged to a Hungarian company, but the Swiss corporation became the ship's owner in 1941, when it already held all shares in the Hungarian company. The Hungarian flag was a neutral flag. Defendant relied upon the fact that on 9 April 1941 diplomatic relations between the Netherlands and Hungary were severed, that on 11 April 1941 Hungary, as an ally of Germany, attacked Yugoslavia, and that consequently on the basis of certain relevant Dutch decrees the capture of the ship was legal. Plaintiffs contended that those decrees were in conflict with the Treaty of Friendship, Establishment and Commerce concluded with Switzerland at Berne on 19 August 1875<sup>126</sup> and with the Treaty of Commerce concluded with Hungary on 9 December 1924,<sup>127</sup> and notably with the most-favoured-nation clause contained in those treaties. Plaintiffs referred to the Treaty of Friendship, Navigation and Commerce signed on 1 May 1829 with the Republic of Colombia, providing that, "if at any time unfortunately a rupture of the ties of friendship should take place", the subjects of the one party residing in the territory of the other party "will enjoy the privilege of residing there and of continuing their business... as long as they behave peacefully and do not violate the laws; their property ... will not be subject to seizure and attachment".<sup>128</sup> The Court held:

The invoking of this provision fails, since it is unacceptable that a rupture of friendly relations, as understood in the year 1829, can be assimilated to a severance of diplomatic relations as it occurred during the Second World War; in the present case the determination of the flag was also based upon the assumption by

<sup>122</sup> *Ibid.*, pp. 23-24.

<sup>123</sup> H. Lauterpacht, ed., *Annual Digest of Public International Law Cases, 1929-30*, London, vol. 5, 1935, Case No. 252, p. 404; *Journal du droit international*, Paris, 58th year, 1931, p. 1018, digested by McNair, *op. cit.*, p. 287. Other cases before French courts based on the *ejusdem generis* rule are cited by A.-Ch. Kiss, "La convention européenne d'établissement et la cause de la nation la plus favorisée", *Annuaire français de droit international*, 1957, Paris, vol. III, p. 478, and for cases before American courts, by G. H. Hackworth, *Digest of International Law*, Washington, D. C., U. S. Government Printing Office, vol. V, 1943, pp. 292 and 293.

<sup>124</sup> League of Nations, *Treaty Series*, vol. CLXI, p. 111.

<sup>125</sup> Legal Adviser Fisher, Department of State, 3 November 1949, MS. Department of State, quoted by Whiteman, *op. cit.*, p. 760.

<sup>126</sup> Netherlands, *Staatsblad van het Koninkrijk der Nederlanden*, No. 137, 1878, Decree of 19 September 1878.

<sup>127</sup> *Ibid.*, No. 36, 1926, Decree of 3 March 1926.

<sup>128</sup> *British and Foreign State Papers, 1829-1830*, London Ridgway, 1832, p. 902.

Hungary of an attitude contrary to the interests of the Kingdom by collaborating in the German attack against Yugoslavia. This case surely does not fit in with the provisions of the 1829 Treaty. From the preceding it follows that the shipowners are wrong in their opinion that the Court should not apply the Decree as being contrary to international provisions.<sup>129</sup>

(9) According to one source, "some authority exists" for the view that rights and privileges obtained in the course of a territorial and political arrangement or a peace treaty

cannot be claimed under a most-favoured-nation clause... The reason presumably is that such concessions are not commercial, while most-favoured-nation clauses are usually concerned with trade and commerce.<sup>130</sup>

The author quotes an opinion of a law officer given in 1851, which denied to Portugal and Portuguese subjects the right "to dry on the coast of Newfoundland the codfish caught by them on the banks adjoining thereto". The claim was based on a most-favoured-nation clause in a treaty of 1842 between Great Britain and Portugal designed to secure the same privileges as were granted by Britain to France and to the United States of America by the treaties of 1783. Those treaties formed part of a general arrangement made at the termination of a war. The law officer stated:

... I am of opinion that the stipulation of the 4th Article of the Treaty of 1842 cannot justly be considered as applicable to the permission which he [the Portuguese Chargé d'Affaires] claims on behalf of Portuguese subjects.

I consider that these privileges were conceded to France and the United States of America as part of a territorial and political arrangement extorted from Great Britain at the termination of a war which had been successfully carried on against her by those nations.<sup>131</sup>

(10) No writer would deny the validity of the *ejusdem generis* rule which, for the purposes of the most-favoured-nation clause, derives from its very nature. It is generally admitted that a clause conferring most-favoured-nation rights in respect of a certain matter, or class of matter, can attract the rights conferred by other treaties (or unilateral acts) only in regard to the same matter or class of matter.<sup>132</sup>

(11) The effect of the most-favoured-nation process is, by means of the provisions of one treaty, to attract those of another. Unless this process is strictly confined to cases where there is a substantial identity between the subject-matter of the two sets of clauses concerned, the result in a number of cases may be to impose upon the granting State obligations it never contemplated.<sup>133</sup> Thus the rule follows clearly from the general principles of treaty interpretation. States cannot be regarded as being bound beyond the obligations they have undertaken.

(12) The essence of the rule is that the beneficiary of a most-favoured-nation clause cannot claim from the granting State advantages of a kind other than that stipulated in the clause. For instance, if the most-favoured-nation clause promises most-favoured-nation treatment solely for fish, such treatment cannot be claimed under the same clause for meat.<sup>134</sup> The granting State cannot evade its obligations, unless an express reservation so provides,<sup>135</sup> on the ground that the relations between itself and the third country are friendlier than or "not similar" to those existing between it and the beneficiary. It is only the subject-matter of the clause that must belong to the same category, the *idem genus*, and not the *relation* between the granting State and the third State on the one hand and the relation between the granting State and the beneficiary State on the other. It is also not proper to say that the *treaty* or *agreement* including the clause must be of the same category (*ejusdem generis*) as that of the benefits that are claimed under the clause.<sup>136</sup> To hold otherwise would seriously diminish the value of a most-favoured-nation clause.

#### *Scope of the most-favoured-nation clause regarding persons or things*

(13) In respect of the subject-matter, the right of the beneficiary State is restricted in two ways: first, by the clause itself, which always refers to a certain matter,<sup>137</sup> and secondly by the right conferred by the granting State on the third State.

(14) The situation is similar, although not identical, in respect of the subjects in the interest of which the beneficiary State is entitled to claim most-favoured-nation treatment. The clause itself may indicate those persons, ships, products, etc., to which it applies, but it may not necessarily do so. The clause may simply state that the beneficiary State is accorded most-favoured-nation treatment in respect of customs duties, or in the sphere of commerce, shipping, establishment, etc., without specifying the persons or the things that will be given most-favoured-nation treatment. In such cases the indication of the sphere of operation for the clause implicitly denotes the class of persons or things in whose interest the beneficiary State may exercise its rights.

<sup>129</sup> Judgment of 6 March 1959 by the Supreme Court of the Netherlands (*Nederlandse Jurisprudentie 1962*, No. 2, pp. 18 and 19).

<sup>130</sup> McNair, *op. cit.*, p. 302.

<sup>131</sup> *Ibid.*, p. 303.

<sup>132</sup> See *Yearbook ... 1970*, vol. II, p. 210, doc. A/CN.4/228 and Add.1, para. 68.

<sup>133</sup> *Ibid.*, p. 211, doc. A/CN.4/228 and Add.1, para. 72.

<sup>134</sup> In connexion with the problem of "like products", see the relevant passage in the excerpts from the conclusions of the Economic Committee of the League of Nations in regard to the most-favoured-nation clause annexed to the Special Rapporteur's first report (*Yearbook ... 1969*, vol. II, p. 178, doc. A/CN.4/213, annex 1), and articles I, II and XIII of the General Agreement on Tariffs and Trade (GATT, *Basic Instruments and Selected Documents*, vol. IV, *op. cit.*, pp. 2-5 and 21-23). Notable efforts are being made to facilitate the identification and comparison of products by setting up uniform standards for the purpose; these efforts include the Brussels Convention of 15 December 1950 establishing a Customs Co-operation Council (United Nations, *Treaty Series*, vol. 157, p. 129) and the Convention on the Nomenclature for the Classification of Goods in Customs Tariffs of 15 December 1950 (*ibid.*, vol. 347, p. 127).

<sup>135</sup> See article 29 below, and commentary thereto.

<sup>136</sup> Vignes, *loc. cit.*, p. 282.

<sup>137</sup> With very rare exceptions, there is no clause in modern times that would not be restricted to a certain sphere of relations, e.g. commerce, establishment and shipping. See article 4 above, paras. (14) and (15) of the commentary.



(15) The beneficiary State may claim most-favoured-nation treatment only for the category of persons or things (merchants, commercial travellers, persons taken into custody, companies, vessels, distressed or wrecked vessels, products, goods, textiles, wheat, sugar, etc.) that receives or is entitled to receive certain treatment, certain favours, under the right of a third State. And, further, the persons or things in respect of which most-favoured-nation treatment is claimed must be in the same relationship with the beneficiary State as are the comparable persons or things with the third State (nationals, residents in the country, companies having their seat in the country, companies established under the law of the country, companies controlled by nationals, imported goods, goods manufactured in the country, products originating in the country, etc.).<sup>138</sup>

(16) The following French case may serve as an illustration of the proposed rule. Alexander Serebriakoff, a Russian subject, brought an action against Mme. d'Oldenbourg, also a Russian subject, alleging the nullity of a will under which she was a beneficiary. The defendant, after having obtained French citizenship by naturalization, obtained an *ex parte* decision from the Court of Appeal of Paris ordering Serebriakoff to furnish 100,000 francs security. Serebriakoff appealed, against that *ex parte* decision, claiming *inter alia* that he was exempt from furnishing security by the terms of the Franco-Soviet agreement of 11 January 1934. The Court held that the appeal must be dismissed. The Court stated:

Whereas the Decree of 23 January 1934 ordering the provisional application of the trade agreement concluded on 11 January 1934 between France and the USSR ... is not applicable in the current case; and Alexander Serebriakoff is not entitled to claim the benefit of that agreement; and, while the agreement does provide, on the basis of reciprocity, free and unrestricted access by Russian subjects to French courts, the privilege thus granted to such subjects is limited strictly to merchants and industrialists; and this conclusion results inevitably both from the agreement as a whole and from the separate consideration of each of its provisions; and the agreement in question is entitled "Trade Agreement"; and the various articles of which it is composed confirm that description, and its article 9, on which Serebriakoff specifically relies, in determining the beneficiaries of the provisions in question, begins with the words: "Save in so far as may be otherwise provided subsequently, French merchants and manufacturers, being natural or legal persons under French law, shall not be less favourably treated ... than nationals of the most-favoured-nation..."<sup>139</sup>

(17) In another case, the Tribunal de Grande Instance de la Seine held that the most-favoured-nation clause embodied in the Franco-British Convention of 28 February 1882, as supplemented by an exchange of letters of interpretation of 21 and 25 May 1929, by which British subjects were entitled to rely on treaties stipulating the assimilation of foreigners to nationals, applied solely to British subjects who settled in France. The Tribunal stated:

... [a] British national domiciled in Switzerland may not rely on a treaty of establishment which grants the benefit of the most-favoured-nation clause only to British nationals established in

France and therefore entitled to carry on a remunerative activity there on a permanent basis."<sup>140</sup>

(18) Article 10, when referring to the same category of things, implicitly states the rule regarding the controversial notion of "like articles" or "like products". It is not uncommon for commercial treaties to state explicitly that, in respect to customs duties or other charges, the products, goods, articles, etc., of the beneficiary State will be accorded any favours accorded to like products, etc., of the third State.<sup>141</sup> Obviously, even in the absence of such an explicit statement, the beneficiary State may claim most-favoured-nation treatment only for the goods specified in the clause or belonging to the same category as the goods enjoying most-favoured-nation treatment by the third State.

(19) The Commission did not wish to delve into all the intricacies of the notion of "like products". The following paragraphs supply a brief explanation. As to exactly what is meant by the expression as it appears in commercial treaties, it has been said that:

One test in such cases is a comparison of the intrinsic characteristics of the goods concerned. Such a test would prevent the classification of articles on the basis of external characteristics. If products are intrinsically alike, they should be considered to be like products, and differing rates of duty on them would contravene the most-favored-nation clause. For example, in the Swiss Cow case [<sup>142</sup>], the question arises whether a cow raised at a certain elevation is "like" a cow raised at a lower level. Applying the intrinsic characteristics test gives a simple answer to the question. The cows are intrinsically alike, and a tariff classification based on such an extraneous consideration as the place where the cows are raised is clearly designed to discriminate in favour of a particular country.

In other situations the application of the intrinsic characteristics test would show clearly that a classification was *not* objectionable. To invent such a case: under the tariff law of the United States, apples are dutiable and bananas are free of duty. If Canada and the United States have a treaty providing that products of either party will be accorded treatment no less favorable than that accorded to "like articles" of any third country, Canada might argue that apples should be free of duty. Any such claim would have to be based on the argument that since both bananas and apples are used for the same purpose, i.e. eating, they are "like articles". Applying the test of intrinsic characteristics in this case would promptly settle the question, since apples and bananas are intrinsically different products.<sup>143</sup>

(20) With regard to the "Swiss Cow" case, mentioned in the text quoted in the preceding paragraph, the Special Rapporteur in his second report had the following to say:

The difficulties inherent in the expression "like product" can *ad oculos* be demonstrated in the following manner. In the working paper on the most-favoured-nation clause in the law of treaties, submitted by the Special Rapporteur on 19 June 1968, the following classical example of an unduly specialized tariff was cited under the heading "Violations of the clause".<sup>144</sup> In 1904 Germany granted a duty reduction to Switzerland on

<sup>137</sup> Yearbook ... 1968, vol. II, p. 170, doc. A/CN.4/L.127, para. 31.

<sup>140</sup> *Ibid.*, pp. 145 and 146, doc. A/CN.4/269, para. 78.

<sup>141</sup> See article I, para. 1, of the General Agreement on Tariffs and Trade, quoted above (article 4, para. 10) of the commentary.

<sup>142</sup> See para. (20) below.

<sup>143</sup> Hawkins, *op. cit.*, pp. 93 and 94.

<sup>138</sup> See article 5 above, para. (4) of the commentary.

<sup>139</sup> See Secretariat Digest, Yearbook ... 1973, vol. II, p. 132, doc. A/CN.4/269, para. 40.

"large dappled mountain cattle or brown cattle reared at a spot at least 300 metres above sea level and which have at least one month's grazing each year at a spot at least 800 metres above sea level".<sup>145</sup>

Sources quoting this example generally consider a cow raised at a certain elevation "like" a cow raised at a lower level. This being so, they believe—and the working paper followed this belief—that a tariff classification based on such an extraneous consideration as the place where the cows are raised is clearly designed to discriminate in favour of a particular country, in the case in question, in favour of Switzerland and against, for example, Denmark.<sup>146</sup> However, the Food and Agriculture Organization of the United Nations, being an interested agency and having special expertise in matters of animal trade, in its reply to the circular letter of the Secretary-General, made the following comment on the example given in the working paper:

"In view of the background situation relating to the case cited in the example, it would seem that the specialized tariff may have been technically justified because of the genetic improvement programme which was carried out in Southern Germany at that time. At present, this specialized tariff would presumably have been worded in a different way, but in 1904 terms like Simmental or Brown Swiss were probably not recognized as legally valid characteristics [...]. Apart from this, it must be recognized that unduly specialized tariffs and other technical or sanitary specifications have been—and continue to be—used occasionally for reasons that may be regarded as discriminatory."

<sup>145</sup> League of Nations, Economic and Financial Section, *Memorandum on Discriminatory Classifications* (Ser. L.O.N.P. 1927.11.27), p. 1.

<sup>146</sup> H. C. Hawkins, *Commercial Treaties and Agreements; Principles and Practice* (New York, Rinehart, 1951, pp. 93-94; J. E. S. Fawcett, "Trade and Finance in International Law", ... *Recueil des cours ... 1968* (Leyden, Sijthoff, 1969), vol. 123, p. 263.<sup>144</sup>

(21) That the difficulties caused by the interpretation of the phrase "like products" are not insurmountable between parties acting in good faith is shown by an exchange of views made in the Preparatory Committee of the International Conference on Trade and Employment:

... the United States said:

"This phrase had been used in the most-favoured-nation clause of several treaties. There was no precise definition, but the Economic Committee of the League of Nations had put out a report that 'like product' meant 'practically identical with another product'."

This lack of definition, however, in the view of the British delegate,

"has not prevented commercial treaties from functioning, and I think it would not prevent our Charter from functioning until such time as the ITO is able to go into this matter and make a proper study of it. I do not think we could suspend other action pending that study..."

and Australia further noted:

"All who have had any familiarity with customs administration know how this question of 'like products' tends to sort itself out. It is really adjusted through a system of tariff classification, and from time to time disputes do arise as to whether the classification that is placed on a thing is really a correct classification. I think while you have provision for complaints

procedure through the Organization you would find that this issue would be self-solving."<sup>146</sup>

(22) The Commission is aware that in certain cases the application of the rule contained in article 9 and 10 can cause considerable difficulties. It has stated already that the expression "same relationship" has to be used with caution because, for example, the relationship between State A and its nationals is not necessarily the "same" as the relationship between State B and its nationals. Nationality laws of States are so diverse that the sum total of the rights and obligations arising from one State's nationality laws might be quite different from that arising from another State's nationality laws.<sup>146</sup> Similar difficulties can be encountered when treaties refer to internal law in other instances; for example, where the right of establishment of legal persons is concerned. The case of legal persons can raise a particularly difficult problem because they are defined by internal law. When, for example, a treaty expressly grants to a third State favourable treatment for a category of legal persons specified according to the internal law of the third State, e.g. a particular kind of German limited liability company ("Gesellschaft mit beschränkter Haftung") that is unknown to the Anglo-Saxon countries, could the United Kingdom invoke the most-favoured-nation clause to claim the same advantages for the British type of company referred to in the treaty, or would it be debarred from doing so? Similarly, if a treaty grants some advantage to French companies of the type known as "association en participation", which corresponds to the "joint venture" of the common law countries, would an Anglo-Saxon country be able to invoke the most-favoured-nation clause to claim the same advantages for those of its companies which are of the "joint venture" type?

(23) A similar problem may arise in connexion with the nationality of companies, which is not determined by international law. For when, under a treaty of establishment, a State grants to another advantages for its national companies, it is the law of that State that determines the nationality of those companies. That being so, could the State that claims the benefit of the most-favoured-nation clause claim it for all the companies defined as national under its own law? Under that law a company might be regarded as national merely if it had its registered offices or principal place of business in the territory of the State in question, or if that State controlled a substantial part of the registered capital. Might not then the granting State be able to object that the national companies of a third State to which it had extended advantages were defined much more restrictively under the law of that third State? Hence, the granting State might refuse to accord the benefit of the clause, arguing that it had extended to the third State a specific kind of advantage which, if it

<sup>145</sup> J. H. Jackson, *World Trade and the Law of GATT (A Legal Analysis of the General Agreement on Tariffs and Trade)*, Indianapolis, Bobbs-Merrill, 1969, pp. 260 and 261. Excerpts from the reports of the Economic Committee of the League of Nations are annexed to the Special Rapporteur's first report (see *Yearbook ... 1969*, vol. II, p. 175, doc. A/CN.4/213, annex I).

<sup>146</sup> See article 5 above, para. (4) of the commentary.

<sup>144</sup> *Yearbook ... 1970*, vol. II, pp. 221-222, doc. A/CN.4/228 and Add.1, para. 148.



were transposed into the law of another State, would become more extensive.

(24) Some of the cases quoted above testify to the difficulties that are encountered when it comes to the question whether a particular right falls within the limits of the subject-matter of the clause or is outside it. All these difficulties are inherent in the application of a most-favoured-nation clause and do not detract from the usefulness of articles 9 and 10 which, as a general rule, state and elucidate the mechanism of the most-favoured-nation clause.

(25) On the basis of the foregoing, article 9, entitled "Scope of rights under a most-favoured-nation clause", indicates indeed the *potential* scope of the clause. Its paragraph 1 provides that the beneficiary State acquires only those rights which fall within the limits of the subject-matter of the clause, and *paragraph 2* gives a further precision to the rule in stating that the beneficiary State acquires the rights falling within the limits of the subject-matter of the clause only in respect of those persons or things which are specified in the clause or implied from the subject-matter of that clause. If the clause refers simply, e.g. to shipping or to consular matters or to commerce in general, then these general references imply in a more or less precise fashion the persons or things in respect of which the beneficiary State acquires the rights under a most-favoured-nation clause.

(26) Article 10, which appears under the heading "Acquisition of rights under a most-favoured-nation clause", indicates the *actual* scope of the clause. The general rule concerning the acquisition by the beneficiary State of most-favoured-nation treatment is stated in paragraph 1, whereas paragraph 2 provides the further specification of that rule regarding such acquisition in respect of persons or things in a determined relationship with that beneficiary State. *Paragraph 1* provides that, even if the beneficiary State wishes to claim rights falling within the limits of the subject-matter of the clause, it will acquire those rights only if a condition is fulfilled, namely, that the granting State extends to a third State treatment which falls within the same limits of the subject-matter. *Paragraph 2* of the article provides that, if the beneficiary State makes claim to rights in respect of persons or things, it will acquire the rights under paragraph 1 only if the persons or things in question: (a) fall into the same category of persons or things as those in a determined relationship with a third State which benefit from the treatment extended to them by the granting State, and (b) have the same relationship with the beneficiary State as those persons or things have with that third State.

**Article 11. Effect of a most-favoured-nation clause not made subject to compensation**

**If a most-favoured-nation clause is not made subject to a condition of compensation, the beneficiary State acquires the right to most-favoured-nation treatment without the obligation to accord any compensation to the granting State.**

**Article 12. Effect of a most-favoured-nation clause made subject to compensation**

**If a most-favoured-nation clause is made subject to a condition of compensation, the beneficiary State acquires the right to most-favoured-nation treatment only upon according the agreed compensation to the granting State.**

**Article 13. Effect of a most-favoured-nation clause made subject to reciprocal treatment**

**If a most-favoured-nation clause is made subject to a condition of reciprocal treatment, the beneficiary State acquires the right to most-favoured-nation treatment only upon according the agreed reciprocal treatment to the granting State.**

*Commentary to articles 11, 12 and 13*

*The conditional form and the conditional interpretation*

(1) For the explanation of the necessity of the provisions of articles 11, 12 and 13 reference has to be made to the development of the most-favoured-nation clauses historically known as "conditional" and to the "conditional" interpretation of clauses which in their terms made no reference to conditions.

(2) It was in the eighteenth century that the "conditional" form made its first appearance, in the treaty of amity and commerce concluded between France and the United States of America on 6 February 1778. Article II of that treaty read as follows:

The Most Christian King and the United States engage mutually not to grant any particular favour to other nations, in respect of commerce and navigation, which shall not immediately become common to the other Party, who shall enjoy the same favour, freely, if the concession was freely made, or on allowing the same compensation, if the concession was conditional.<sup>147</sup>

It has been held that the "conditional" clause was inserted in the treaty of 1778 at French insistence. Even if it were true that the idea was of French origin, the "conditional" form of the clause seemed peculiarly suited to the political and economic interests of the United States for a long period.<sup>148</sup>

(3) The phrase "freely, if the concession was freely made, or on allowing the same compensation [or the equivalent], if the concession was conditional" was the model for practically all commercial treaties of the United States until 1923. Prior to that year, the commercial treaties of the United States contained (with only three exceptions) conditional rather than unconditional pledges on the part of that country.<sup>149</sup>

<sup>147</sup> W. M. Malloy, *Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and other Powers, 1776-1909*, Washington, D. C., United States Government Printing Office, 1910, vol. I, p. 468.

<sup>148</sup> V. G. Setser, "Did Americans originate the conditional most-favored-nation clause?", *The Journal of Modern History*, Chicago, vol. V (September 1933), pp. 319-323.

<sup>149</sup> C. C. Hyde, *International Law, Chiefly as Interpreted and Applied by the United States*, 2nd rev. ed., Boston, Little, Brown, 1947, vol. II, p. 1504.

# ANNEX 423





**UNITED NATIONS CONFERENCE ON TRADE AND  
DEVELOPMENT**

**MOST-FAVOURED-  
NATION TREATMENT**

**UNCTAD Series on Issues in International Investment  
Agreements II**



**UNITED NATIONS**  
New York and Geneva, 2010

## EXECUTIVE SUMMARY

The inclusion of most-favoured-nation (MFN) treatment provisions in international investment agreements (IIAs) followed its use in the context of international trade and was meant to address commitments made by States in free trade agreements (FTA) to grant preferential treatment to goods and services regarding market access. However, in the context of international investment that takes place behind borders, MFN clauses work differently. In early BITs, as national treatment (NT) was not granted systematically, the inclusion of MFN treatment clauses was generalized in order to ensure that the host States, while not granting NT, would accord a covered foreign investor a treatment that is no less favourable than that it accords to a third foreign investor and would benefit from NT as soon as the country would grant it. Nowadays the overwhelming majority of IIAs have a MFN provision that goes alongside NT, mostly in a single provision.

The MFN treatment provision has the following main legal features:

- It is a **treaty-based obligation** that must be contained in a specific treaty.
- It requires a comparison between the treatment afforded to two foreign investors in like circumstances. It is therefore, a **relative standard** and must be applied to **similar objective situations**.
- An MFN clause is governed by the *ejusdem generis principle*, in that it may only apply to issues belonging to the same subject matter or the same category of subjects to which the clause relates.
- The MFN treatment operates without prejudice to the freedom of contract and thus, States have no obligation under the MFN treatment clause to grant special privileges or incentives granted

through a contract to an individual investor to other foreign investors.

- In order to establish a violation of MFN treatment, a **less favourable treatment** must be found, based on or originating from **the nationality** of the foreign investor.

In practice, violation or breaches of the MFN treatment *per se* have not been controversial. However, an unexpected application of MFN treatment in investment treaties gave rise to a debate that has so far not found an end and that has generated different and sometimes inconsistent decisions by arbitral tribunals. The issue at stake is the application of the MFN treatment provision to import investor-State dispute settlement (ISDS) provisions from third treaties considered more favourable to solve issues relating to admissibility and jurisdiction over a claim, such as the elimination of a preliminary requirement to arbitration or the extension of the scope of jurisdiction.

In this context, and in order to provide negotiators and policy makers with informed options, this paper takes stock of the evolution of MFN treatment clauses in IIAs. It also reviews arbitral awards against the background of the cases that have followed the *Maffezini v. Spain* case of 2000 that was the first to apply the MFN treatment provision in this unexpected way.

Section I of the paper contains an explanation of MFN treatment and some of the key issues that arise in its negotiation, particularly the scope and application of MFN treatment to the liberalization and protection of foreign investors in recent treaty practice. MFN treatment provisions are used in different phases or stages of investment and can apply to either pre-and/or post establishment phases of investment, MFN treatment can apply to investors and/or to their investments and treaties usually contain exceptions, either systemic (regional economic integration organization (REIO) or

taxation) or country-specific exceptions to pre-establishment commitments.

Subsequently, the paper analyses whether and under what conditions the application of the MFN treatment clauses contained in IIAs can be used by arbitral tribunals to modify the substantive protection and conditions of the rights granted to investors under IIAs to enter and operate in a host State. With some notable exceptions, arbitral tribunals have generally been cautious in importing substantive provisions from other treaties, particularly when absent from the basic treaty or when altering the specifically negotiated scope of application of the treaty.

When it comes to importing procedural provisions, mainly ISDS provisions from other treaties, arbitral tribunals have gone into divergent directions. A series of cases have accepted to follow the argument raised by the claimant that an MFN clause can be used to override a procedural requirement that constitutes a condition to bring a claim to arbitration. On a slightly different issue, namely jurisdictional requirements, a number of cases have however decided that jurisdiction can not be formed simply by incorporating provisions from another treaty by means of an MFN provision.

The paper finally provides policy options as regards the traditional application of MFN treatment to pre and/or post-establishment, to investors and/or investments. It identifies the systemic exceptions relating to REIO and taxation agreements or issues that have been used in IIAs to avoid extending commitments made under other arrangements. In recent treaty practice, States may choose to continue to extend MFN treatment to all phases of an investment or limit its application to post-establishment activities of investors.

The paper also identifies reactions by States to the unexpected broad use of MFN treatment, and provides several drafting options, such as specifying the scope of application of MFN treatment to certain types of activities, clarifying the nature of "treatment" under the IIA, clarifying the comparison that an arbitral tribunal needs to undertake as well as a qualification of the comparison "in like circumstances". Options are also given to States wishing to expressly allow or prohibit the use of MFN treatment to import substantive or procedural provisions from other treaties. The last option is to avoid the granting of MFN treatment given the open ended and uncertain application that can be made in the case of disputes.

While identifying options for a new generation of IIAs, the paper also addresses how to deal with MFN treatment provisions of existing treaties that are based on several different models. Possible options consist of clarifying either bilaterally or even unilaterally through interpretative statements, the scope and application of MFN treatment in IIAs.



related to the covered person/beneficiary or the asset enterprise as listed in the investment definition.

#### **4. It requires a legitimate basis of comparison**

In order to compare subject matters that are reasonably and objectively comparable, an MFN treatment provision must be applied to similar objective situations. Providing MFN treatment does not require that all foreign investors have to be treated equally irrespective of their concrete business activities or circumstances. Different treatment is justified amongst investors who are not legitimate comparators, e.g. do not operate in the same economic sector or do not have the same corporate structure. The MFN treatment clause requires that the host State does not discriminate – *de jure* or *de facto*<sup>12</sup> – on the basis of nationality. For instance, MFN treatment does not impede host countries from according different treatment to different sectors of the economic activity, or to differentiate between enterprises of different size, or businesses with or without local partners.

During the MAI negotiations<sup>13</sup> some delegations indicated that they understood both MFN treatment and NT to implicitly require a comparative context to be applied. Other delegations considered it necessary to specifically include the formula “in like circumstances”. Currently, as we shall see in Section II, some IIAs explicitly include a reference to “like circumstances”, “like situations” or similar wordings, while others remain silent. Irrespective of the precise wording, the proper interpretation of a relative standard requires that the treatment afforded by a host State to foreign investors can only be appropriately compared if they are in objectively similar situations. However, it is important to note that by not making a specific reference to “like circumstances” or any other criteria for comparison, the Contracting Parties do not intend to dispense with the comparative context, as it would distort the entire sense and nature of the MFN treatment clause.

There are not many arbitration cases dealing with the actual comparison between the treatment two foreign investors receive from the host State in given circumstances. There is therefore little guidance to be found in arbitral awards on how the comparison should be made. However, assessing a possible violation of MFN treatment may be done by borrowing from findings of violation of NT. Indeed, both treatment provisions share the same comparison requirement (the only difference being that under NT the applicable comparator of the foreign investor/investment is a national investor/investment). In this connection several awards rendered under NAFTA (1992) have consistently established that an assessment of an alleged breach of NT requires an identification of the comparators and a consideration of the treatment each of them receives. Tribunals have used a variety of criteria for comparison depending on the specific facts and the applicable law of each case. They include: same business or economic sector,<sup>14</sup> same economic sector and activity,<sup>15</sup> less like but available comparators<sup>16</sup> and direct competitors.<sup>17</sup> Flexibility has prevailed, with the aim of comparing what is reasonably comparable and considering all the relevant factors.

##### **5. It relates to discrimination on grounds of nationality**

Both MFN treatment and NT are designed to prevent discrimination for reasons of or on the grounds of nationality. In order to establish a violation of MFN treatment, the difference in the treatment must be based on or caused by the nationality of the foreign investor. After a reasonable comparison has been made amongst appropriate comparators, there are factors that may justify differential treatment on the part of the State among foreign investors, such as legitimate measures that do not distinguish, (neither *de jure* nor *de facto*) between nationals and foreigners.<sup>18</sup> In *Parkerings v. Lithuania*, the tribunal established that, to constitute a violation of international law, discrimination had to be unreasonable

publications, or printed or electronic newspapers and music scores (see box 19).

**Box 19. China-Peru FTA (2009)**

**Article 131 Most-Favoured-Nation Treatment**

*1. Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to investors of any third State with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.*

[...]

*3. Notwithstanding paragraphs 1 and 2, the Parties reserve the right to adopt or maintain any measure that accords differential treatment:*

*(a) to socially or economically disadvantaged minorities and ethnic groups; or*

*b) involving cultural industries related to the production of books, magazines, periodical publications, or printed or electronic newspapers and music scores.*

**4. Conditions and qualifications**

**(i) “Like circumstances” or “like situations”**

As outlined above, the MFN treatment obligation does not mean that foreign investors have to be treated equally irrespective of their concrete activity or circumstance. Different treatment is justified if the would-be comparators are in different objective situations. This requires comparing what is reasonably comparable. Some treaties

refer to “like circumstances”, “like situations” or similar wording. This is the case with the NAFTA (1992), the United States model BIT (2004), the Canadian model BIT (2004), BITs concluded by Mexico and many recent FTAs/EPAs. Many classical BITs do not include any such comparison formula. However, the absence thereof does not mean that the contracting parties to such treaties intended that the standard be applied without a proper comparison. This comparison formula has to be seen as an implicit component of MFN treatment, although for purposes of greater certainty and according to the legal tradition of some countries, it may be preferable to make it explicit.

**(ii) Specific investment related activities covered by the MFN treatment clause**

MFN treatment applies to the treatment afforded by the host State, as applicable, to investors and/or their investment, during the post-establishment or pre/post-establishment phases. As mentioned above, this treatment covers the life-cycle of the investment as regulated by the host State’s laws and regulations. However, some MFN clauses are more precise than others.

Some MFN clauses, specifically those applying to pre-establishment, link the treatment to a closed set of activities (sometimes for both investors/investments or only for investments) (see box 20).

This list of investment activities includes pre- or post-establishment activities. Hence, special attention must be paid in order to reach the intended effect. Pre-establishment activities typically include the “establishment, acquisition and expansion” of investments, whereas post-establishment activities include the “management, maintenance, conduct, operation, use, enjoyment, sell, disposal or disposition” of investments. Expansion of investment that is subject to prior approval or other authorization may be considered part of the post-establishment activities by some countries.



# ANNEX 424





**BILATERAL  
INVESTMENT  
TREATIES**

**BILATERAL  
INVESTMENT  
TREATIES**

**HISTORY, POLICY, AND  
INTERPRETATION**

**KENNETH J. VANDEVELDE**

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## 7.2 MOST FAVORED NATION AND NATIONAL TREATMENT

### 7.2.1 Structure and Policy

The great majority of BITs include guarantees of national and most favored nation (MFN) treatment for covered investments or investors.<sup>1</sup> National treatment provisions appear somewhat less frequently than MFN treatment provisions. National and MFN treatment provisions have parallel structures and thus they will be discussed together to the extent possible.

The national and MFN treatment provisions always comprise at least three components: a beneficiary, a comparator, and an obligation of equivalency. Some provisions include a fourth component defining their scope of application. Most such provisions also contain a fifth component identifying special exceptions to which one or both obligations are subject.

The beneficiary is the person or asset entitled to national or MFN treatment. In BITs, the beneficiary of the MFN and national treatment provisions is usually the investment,<sup>2</sup> but in some provisions it is the investor.<sup>3</sup> The definitions of investment and investor thus are critical to determining which persons or assets are protected. Clearly, a BIT that guarantees nondiscrimination to both the investor and the investment provides a more favorable investment climate.

Where a BIT guarantees a right of establishment, ideally the investor should be named as a beneficiary. Although an entity that qualifies as an investment may seek to establish an investment, often the entity establishing an investment falls within the definition of a covered investor but not of a covered investment. If the investor is not a beneficiary of the standard, then any commitment of MFN (or national) treatment with respect to establishment may be lost as a practical matter. If only an investment is a beneficiary and the host state denies permission to establish the investment, no entity entitled to claim the protection of the national or MFN treatment provision comes into existence. Other situations also may exist where the host state's conduct is directed at the investor rather than the investment and thus naming the investor as a beneficiary could expand the scope of treaty protection.<sup>4</sup>

1 On National Treatment generally, see Andrea K. Bjorklund, "National Treatment," in *Standards of Investment Protection* (August Reinisch, 2008). On MFN treatment generally, see Andreas P. Ziegler, "Most-Favoured-Nation (MFN) Treatment," in *id.* and Pia Acconci, "Most-Favoured-Nation Treatment," in *The Oxford Handbook of International Investment Law* (Peter Muchlinski, Frederico Ortino, and Christoph Schreuer, eds. 2008).

2 See, e.g., United Kingdom-Bosnia-Herzegovina BIT, Art. 3(1); Netherlands-Ethiopia, Art. 3(2); Thailand-Argentina BIT, Art. 4(1); Australia-India, Art. 4(1)-(2); Sweden-Kazakhstan BIT, Art. 3(1); Mexico-Iceland BIT, Art. 3(2); Germany-Timor-Leste, Art. 3(1); Canada-Uruguay BIT, Art. IV(1); Cambodia-Vietnam BIT, Art. III(2); Egypt-Zambia, Art. 3(1); (MFN only); Chile-Indonesia BIT, Art. IV(2).

3 See, e.g., BLEU-Sudan BIT, Art. 4(1); Austria-Armenia BIT, Art. 3(3); Thailand-Argentina BIT, Art. 4(2); Australia-India, Art. 4(3) (MFN only); Mexico-Iceland BIT, Art. 3((3)); Germany-Timor-Leste, Art. 3(2); Canada-Uruguay BIT, Art. IV(2); United Kingdom-Bosnia-Herzegovina BIT, Art. 3(2); Egypt-Zambia BIT, Art. 3(2) (MFN only).

4 For an example, see the discussion of *RosInvestCo v. Russia* in Section 7.2.3.



The comparator is the person or asset the treatment of which sets the standard that must be met. Once again, the definitions of the terms "investor" and "investment" are critical, but here they are critical for purposes of establishing the content of the standard, rather than the scope of its application. If an entity is not an investor or an investment, then the host state's treatment of that entity is not relevant for purposes of establishing the content of the MFN or national treatment standard. For example, if the term "investor" includes state enterprises, then the host state's treatment of its own state enterprises defines the treatment that must be accorded to a covered investor that is entitled to national treatment. If state enterprises are excluded, however, then the host state may discriminate in favor of its own state enterprises without violating the national treatment provision.

Two general problems arise with respect to identifying the comparator. The first problem is determining whether every potential comparator that falls within the literal language of the provision should be treated as relevant. Thus, for example, it must be determined whether national treatment requires that covered investment be treated as favorably as any investment of the host state or only certain investment of the host state. Some BITs explicitly address this question by providing that the appropriate comparator is one that is "in like situations"<sup>5</sup> or "in like circumstances"<sup>6</sup> with the beneficiary. Such language, however, is absent from most BITs.

Yet, it would seem that the concept of MFN and national treatment assumes that the treatment of covered investment shall be compared only to the treatment of comparable investments. The purpose of national treatment, for example, does not require that covered investment be treated as favorably as every investment in the host state in every respect. For example, a large automobile manufacturing plant located in a major urban area and owned by a covered investor might be required to satisfy various municipal regulations on matters such as land use that would not be applied to a small domestically owned grocery store located in a remote rural area. Read literally, the national treatment standard would seem to be violated in such a case because the covered investment was treated less favorably than a domestic investment. Yet, the different treatment can be justified by the fact that the covered investment and the domestic investment are not in the same situation. They are in different sectors of the economy, they are on different scales, and they are situated in areas of radically different population densities. Nor is the automobile plant being put at a competitive disadvantage. The host state can be allowed the different treatment based on the dissimilar circumstances of the two investments without defeating any of the purposes of the national treatment provision. To apply the national treatment standard literally and to require that the two investments be treated the same would impose a senseless restriction on host-state regulatory discretion. As this example illustrates, the MFN and national treatment standards not only may, but must, be interpreted to require that the treatment of covered investment or investors be evaluated only with respect to the treatment of comparable investments or investors. Even where a phrase such as "in like situations" or "in like

5 See, e.g., United States-Argentina BIT, Art. II(1).

6 See, e.g., Mexico-Iceland BIT, Art. 3(2)-(3); Canada-Uruguay BIT, Art. IV; Japan-Vietnam BIT, Art. 2.



circumstances” does not appear in the provision, such a limitation should be treated as implicit.

The BITs provide little guidance concerning the meaning of the phrase “in like situations” or “in like circumstances,” which should be treated as synonymous.<sup>7</sup> It has been argued that, in the case of national treatment, for example, the ideal comparator is an investment that is identical to the beneficiary in every respect except nationality. Given that it may not be possible to find such a comparator, this view regards choosing the comparator that is most like the beneficiary as a second-best solution. In other words, the phrase “in like circumstances” would be interpreted as if it read “in the most like circumstances.” Obviously, the effect of this interpretation is potentially to weaken the provision by eliminating a large number of comparators. The covered investment may have been treated less favorably than a large number of potential comparators, but if it is treated no less favorably than the closest comparator then no violation of the standard would be found. Further, where a covered investment is comparable to other investments in different ways, the question is of which is the most comparable may not have an obvious solution.

Alternatively, one might treat as a comparator any investment in the same sector of the economy. The argument in favor of this approach is that one purpose of the relative standards is to ensure a level playing field among competitors and this purpose is served by prohibiting discrimination among competitors. Presumably, an investment’s competitors are other investments in the same sector of the economy. Equating “like circumstances” with operating in the same sector of the economy, however, presents some potential difficulties. One is that no other investment in the same sector may exist. Another is that sectors can be described at different levels of generality, which allows the test to be manipulated easily.<sup>8</sup> In addition, ensuring competitive equality does not exhaust the purpose of a nondiscrimination provision. For example, a nondiscrimination provision also promotes a favorable investment climate by prohibiting at least some forms of arbitrary treatment and it promotes the rule of law by requiring equal treatment under the law.

A better approach is to consider whether the differences between the beneficiary and the comparator are relevant to the host state’s legitimate regulatory objectives. A regulatory objective is legitimate only to the extent that it is consistent with BIT principles. For example, if a covered investment and a comparator were subject to different environmental regulations, one would consider whether the different treatment of the investment and the comparator was based on a legitimate regulatory objective. Environmental preservation would be such an objective, while economic protectionism would not be. If the different treatment was based on environmental preservation, then the beneficiary and the comparator would be regarded as in unlike circumstances and the different treatment would not violate the MFN or national treatment standard. If the different treatment was based on economic protectionist objectives, then the beneficiary and comparator would be regarded as in like circumstances because the

7 The two appear interchangeable, for example, in U.S. BIT practice. See Kenneth J. Vandeveld, *U.S. International Investment Agreements* 252 (2009).

8 See Section 7.2.3.

difference was not related to a legitimate regulatory objective. Treating them differently would violate the national or MFN treatment provision.

As this suggests, where no obvious comparator exists, the covered investment or investor should be permitted to show a violation of the national or MFN treatment provision by demonstrating that its treatment was the result of a discriminatory motive. For example, if an investment was subjected to adverse treatment because it was a foreign investment, then it would seem clear that the investment did not receive national treatment. A discriminatory motive should be provable by circumstantial evidence, such as the inability of the host state to articulate a legitimate nondiscriminatory motive for its treatment of the investment.

The second general problem raised by the identification of the comparator is that the host state may treat some comparators more favorably than others. For example, a host state may discriminate among its own investments. Assuming that all are appropriate comparators, the question arises as to which potential comparator establishes the required standard of treatment: the one receiving the best treatment, the one receiving the worst treatment, or some other comparator, such as one receiving the typical treatment. As a practical matter, this problem may arise infrequently because many of the putative comparators might be found not to be in like circumstances with the beneficiary. Where it does arise, however, BITs rarely provide any explicit guidance.

The solution may turn on the level of generality at which one defines the purpose of the MFN and national treatment standards. At a very low level of generality, the purpose of the MFN and national treatment provisions is to preclude discrimination based on nationality. On that assumption, the most poorly treated comparator would set the standard. As long as the beneficiary were treated no less favorably than a national investment or an investment of the most favored nation, one could not say that the beneficiary had been treated unfavorably on the basis of nationality.

At a higher level of generality, the purpose of the MFN and national treatment provisions, like any nondiscrimination provision, is to establish a level playing field and thereby promote market-based allocations of capital as well as a rules-based investment regime. On that assumption, the most poorly treated comparator would not set the standard because treatment in accordance with that standard would not level the playing field between the beneficiary and other potential comparators.

This is an issue with respect to which clarification in the text of the BIT would be desirable. In fact, a few BITs do provide some clarification with respect to this issue in one context. The context is that of a federal system in which political subdivisions may discriminate against investments from other political subdivisions. For example, in the case of the United States, California might enact a law that provided California corporations with more favorable treatment than corporations of the other 49 states. The U.S. BITs have adopted explicit language providing that, in this situation, the appropriate comparator for purposes of the national treatment provision is investments of the other political subdivisions.<sup>9</sup> Thus, in the example, California would be required to accord covered investment with treatment no less favorable than that which it accords

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<sup>9</sup> See, e.g., United States-Argentina BIT, Art. II(8).



# ANNEX 425



**PARKERINGS-COMPAGNIET AS**

**Claimant**

**v.**

**REPUBLIC OF LITHUANIA**

**Respondent**

---

**AWARD**

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**TRIBUNAL**

Dr. Julian Lew Q.C., *Arbitrator*

The Hon. Marc Lalonde P.C., O.C., Q.C., *Arbitrator*

Dr. Laurent Lévy, *President*

**Secretary of the Tribunal**

Ms. Martina Polasek

Date of dispatch to the parties: September 11, 2007



356. The Claimant alleges damages to its materials due to vandalism. However, the Claimant does not show that such vandalism would have been prevented if the authorities had acted differently. The Claimant only contends that the police did not find the authors of this offence. Both parties agree that Lithuanian authorities started an investigation to find the authors of the vandalism.
357. The Arbitral Tribunal finds that the record does not show in which way the process of investigation amounted to a violation of the Treaty. In *Tecmed*, the Tribunal underlined that “*the guarantee of full protection and security is not absolute and does not impose strict liability upon the State that grants it.*”<sup>95</sup>
358. The Claimant criticized the alleged failure of the Prime Minister to protect its investment against the action and omission of the municipality. However, the record does not show that the Prime Minister did not act in any manner that should be incompatible with his function and duties. The Claimant failed also to demonstrate a negligence of the Prime Minister that could amount to a breach of the BIT.
359. The Claimant also criticized the Respondent for its passivity when the City of Vilnius breached the Agreement. However, the Arbitral Tribunal considers that the investment Treaty created no duty of due diligence on the part of the Respondent to intervene in the dispute between the Claimant and the City of Vilnius over the nature of their legal relationships.
360. The Respondent’s duty under the Treaty was, first, to keep its judicial system available for the Claimant to bring its contractual claims and, second, that the claims would be properly examined in accordance with domestic and international law by an impartial and fair court. There is no evidence - not even an allegation – that the Respondent has violated this obligation.
361. The Claimant had the opportunity to raise the violation of the Agreement and to ask for reparation before the Lithuanian Courts. The Claimant failed to show that it was prevented to do so. As a result, the Arbitral Tribunal considers that the Respondent did not violate its obligation of protection and security under the Article III of the BIT.

### **8.3 CLAIMS FOR VIOLATION OF THE OBLIGATION TO ACCORD TREATMENT NO LESS FAVORABLE THAN THE TREATMENT ACCORDED TO INVESTMENTS BY INVESTORS OF A THIRD STATE (ARTICLE IV OF THE TREATY)**

362. Article IV of the Treaty provides that

1. *[i]nvestments made by investors of one contracting party in the territory of the other contracting party, as also the returns therefrom, shall be accorded treatment no less favourable than that accorded to investments made by investors of any third state.*

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<sup>95</sup> See *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003, *supra* note 80, ¶ 177.

### 8.3.1 Position of the parties

363. In substance, the Claimant alleges that the Respondent violated Article IV of the Treaty as follows:<sup>96</sup>

- (a) the City of Vilnius rejected the project of MSCP proposed by BP on the Gedimino site for cultural heritage concerns, because the project was situated in the Old Town of the City of Vilnius. However, the Municipality authorized another company (Pinus Proprius) to build a MSCP on the same site;
- (b) the City of Vilnius refused to sign a Joint Activity Agreement (JAA) with BP for the Gedimino MSCP and for the Pergales MSCP for legal reason, but signed a JAA with the Company Pinus Proprius;
- (c) Once the JAA signed with the Company Pinus Proprius has been declared unlawful, the City of Vilnius transformed it into a Cooperation Agreement. However, the City of Vilnius refused to conclude a similar Cooperation Agreement with BP as a substitute of the JAA.

364. In the Claimant's view, the Companies Pinus Proprius and BP were facing similar circumstances. The refusal of the City of Vilnius to sign a JAA or a Cooperation Agreement prevented BP from the construction of any MSCP in Vilnius and thus deprived it of the opportunity to carry out its investment as it was entitled to do under the Agreement.

365. The Respondent alleges that the situation of the MSCP built by Pinus Proprius on the Gedimino site was clearly different from the project proposed by the Claimant on the Gedimino site and the Pergales site.<sup>97</sup>

- (a) The MSCP built by Pinus Proprius on the Gedimino site was smaller than the MSCP project proposed by the Claimant. The proposed MSCP designed by the Claimant extended to the Odiminiu Square, which is part of the Old Town area as defined by the Annex No. 5 of the Agreement, but the one constructed by Pinus Proprius was not. The Respondent underlines that a construction in the Old Town needed the approval of the Government's Cultural heritage Commission.
- (b) The Joint Activity Agreement could not be signed with BP since the modification of the Article 9(2) of the Law on Self-Government which prohibited the conclusion of such agreement with private entities. The Respondent alleges that the Cooperation Agreement signed with Pinus Proprius was not a JAA. However, the conclusion of a similar Cooperation Agreement with BP was not possible for various reasons:
  - A transfer of land was necessary for the MSCP proposed by BP and not for the MSCP built by Pinus Proprius, as the latter was already the owner of part of the land where the MSCP was built. Consequently, a Public Auction was necessary for the transfer of state-owned land to BP<sup>98</sup>;
  - Pinus Proprius had the contractual obligation to transfer its own land to the State when the building would be achieved. Pinus Proprius also agreed to sell the MSCP to the City. On the contrary, BP could remain the owner of the MSCP built on the Gedimino site and on Pergales site and would have the possibility to lease the state-owned land or to buy it<sup>99</sup>.

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<sup>96</sup> See Claimant's memorial, p. 74 and Claimant's Post-Hearing Brief, p. 99.

<sup>97</sup> See Respondent Counter-Memorial, p. 90 and Respondent Post-Hearing Brief, p. 5

<sup>98</sup> See Respondent Counter-Memorial, ¶ 248.

<sup>99</sup> See Respondent Post-Hearing Brief, p. 6.

- The MSCP built by Pinus Proprius was under state-owned land that was not delineated by a land plot and, therefore, could never be owned or leased by Pinus Proprius. On the contrary, the project of MSCP on Pergales site proposed by BP was situated on a state-owned land delineated as a land plot and therefore required a Public Auction.<sup>100</sup>

366. Article IV of the Treaty is known as the standard of the “*Most-favoured-nation Treatment*”. *Most-favoured-nation (MFN)* clauses are by essence very similar to “*National Treatment*” clauses. They have similar conditions of application and basically afford indirect advantages to their beneficiaries, namely a treatment no less favourable than the one granted to third parties. Tribunals’ analyses of the *National Treatment* standard will therefore also be useful to discuss the alleged violation of the *MFN* standard.

367. *National treatment* and *Most-Favoured-Nation treatment* are treaty clauses that have the same substantive effect as the international treatment standard: foreigners should be afforded treatment no less favourable than the one granted to local citizens. The international law requirement in fact acts as a minimum requirement as it would be useless for the States party to a treaty to grant benefits less sweeping than customary law. In other words, all the requirements, be they national treatment, most favoured-nation-treatment or non-discrimination at large, will in effect bar discrimination against foreign national investing in the country concerned. All investors benefiting from a treaty will benefit of a treatment identical or better than nationals or third countries persons. There is, thus, no reason discretely to address the issue of non-discrimination: the two aspects, under most-favoured-nation requirements (Article IV of the Treaty) on the one hand and under international customary law on the other.

368. Discrimination is to be ascertained by looking at the circumstances of the individual cases. Discrimination involves either issues of law, such as legislation affording different treatments in function of citizenship, or issues of fact where a State unduly treats differently investors who are in similar circumstances. Whether discrimination is objectionable does not in the opinion of this Tribunal depend on subjective requirements such as the bad faith or the malicious intent of the State: at least, Article IV of the Treaty does not include such requirements. However, to violate international law, discrimination must be unreasonable or lacking proportionality, for instance, it must be inapposite or excessive to achieve an otherwise legitimate objective of the State. An objective justification may justify differentiated treatments of similar cases. It would be necessary, in each case, to evaluate the exact circumstances and the context.

369. The essential condition of the violation of a *MFN* clause is the existence of a different treatment accorded to another foreign investor in a similar situation.<sup>101</sup> Therefore, a

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<sup>100</sup> *Idem*, pp. 5-6.

<sup>101</sup> See *Goetz and others v. Burundi*, ICSID Case No. ARB/95/3, Award, February 10, 1999, *supra* note 40, ¶ 121.

comparison is necessary with an investor in *like circumstances*. The notion of *like circumstances* has been broadly analyzed by Tribunals<sup>102</sup>.

370. For example, in *Pope and Talbot Inc. v. Government of Canada*, the Tribunal held that:

*[i]n evaluating the implication of the legal context, the Tribunal believes that, as a first step, the treatment accorded a foreign owned investment protected [...] should be compared with that accorded domestic investment in the same business or economic sector.<sup>103</sup> [...]*

*Once it is established that a foreign and domestic investor are in the same business or economic sector, “[d]ifference in treatment will presumptively violate [the principle] unless they have a reasonable nexus to rational government policies that (1) do not distinguish, on their face or de facto, between foreign-owned and domestic companies, and (2) do not otherwise unduly undermine the investment liberalizing of NAFTA. [...] A formulation focusing on the like circumstances [...] will require addressing any difference in treatment, demanding that it be justified by showing that it bears a reasonable relationship to rational policies not motivated by preference of domestic over foreign-owned investment.<sup>104</sup>*

371. In order to determine whether Parkerings was in *like circumstances* with Pinus Proprius, and thus whether the MFN standard has been violated, the Arbitral Tribunal considers that three conditions should be met:

- (i) Pinus Proprius must be a foreign investor;
- (ii) Pinus Proprius and Parkerings must be in the same economic or business sector;
- (iii) The two investors must be treated differently. The difference of treatment must be due to a measure taken by the State. No policy or purpose behind the said measure must apply to the investment that justifies the different treatments accorded. *A contrario*, a less favourable treatment is acceptable if a State’s legitimate objective justifies such different treatment in relation to the specificity of the investment.

372. With regard to the first condition **(i)**: The parties are not disputing the fact that the company Pinus Proprius is an investor in Lithuania. As Pinus Proprius is owned by the Dutch company Litprop Holding BV, it is a foreign investor within the meaning of the BIT.<sup>105</sup>

373. With regard to the second condition **(ii)**: BP and Pinus Proprius are engaged in similar activities. Both Pinus Proprius and BP are companies acting in the construction and management of parking garages. Both are competitors for the same MSCP project in

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<sup>102</sup> See for instance: Occidental Exploration and Production Company v. Republic of Ecuador, UNICITRAL Case No. UN 3467, Final Award, July 1, 2004, ¶¶ 173-176; Marvin Roy Feldman Karpa v. United Mexican States, ICSID Case No. AB(AF)/99/1, Award, December 16, 2002, reprinted in 18 ICSID Rev.—FILJ 488 (2003), ¶¶ 170 et seq; S.D. Myers, Inc v. The Government of Canada, NAFTA UNICITRAL Arbitration, First Partial Award, November 13, 2000, ¶¶ 248-250.

<sup>103</sup> See Pope & Talbot Inc. v. The Government of Canada, NAFTA Case, Award on the merits of phase 2, April 10, 2001, ¶ 78.

<sup>104</sup> *Idem*, ¶¶ 78-79.

<sup>105</sup> See Exhibit CE 249.

Gedimino. Thus, the Arbitral Tribunal finds that Pinus Proprius and BP are in a similar economic and business sector.

374. With regard to the last condition (iii): The Claimant alleges that Pinus Proprius has been treated differently than BP, because, first, Pinus Proprius has been authorised to construct its MSCP in Gedimino, but BP's project also situated in Gedimino has been refused. Second, the Municipality of Vilnius refused to conclude a JAA or a Cooperation agreement with BP but accepted such a conclusion with Pinus Proprius.
375. However, the situation of the two investors will not be in *like circumstances* if a justification of the different treatment is established.
376. The Arbitral Tribunal will discuss separately the two alleged discriminatory measures, namely whether the Municipality wrongfully granted Pinus and denied BP an authorisation to build a MSCP under Gedimino Avenue (see below *the situation of the Gedimino MSCP*, section 8.3.2.1); and whether the Municipality wrongfully refused to enter into a Cooperation Agreement with BP, whilst it had concluded such a Cooperation Agreement with Pinus (see below *The Situation of the Pergales MSCP*, section 8.3.2.2).

#### **8.3.1.1 The situation of the Gedimino MSCP**

377. In order to determine if the two investors were *in like circumstances*, or if the measure taken by the Municipality was justified, the Arbitral Tribunal analyses below the situation of the two investors.
378. In substance, the Respondent argues that BP's MSCP project in Gedimino was *fundamentally different* from the MSCP built by Pinus Proprius. First, the MSCP project proposed by the Claimant was clearly bigger than the MSCP built by Pinus Proprius. Second, the proposed MSCP designed by the Claimant extended to the Odiminiu Square, which is part of the Old Town area as defined by Annex No. 5 of the Agreement, but the one constructed by Pinus Proprius did not. Finally, BP's project reached the Vilnius' historic Cathedral Square. The Respondent underlines that a construction in the Old Town needed the approval of the Government's Cultural Heritage Commission.
379. The record confirms that Claimant's proposed project on the Gedimino site and the MSCP built by Pinus Proprius were almost identically located in the sense that they are both situated in the Old Town. Indeed, the maps produced by the Respondent<sup>106</sup> show that the Pinus Proprius MSCP is partly superimposed with the MSCP project of BP.
380. However, the Claimant's project is considerably bigger than the MSCP constructed by Pinus Proprius<sup>107</sup>. All the maps clearly show that BP's MSCP extended under Gedimino Street as far as the Cathedral Square.<sup>108</sup> The Claimant's project involved the

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<sup>106</sup> See Exhibits RE 97, RE 102-103.

<sup>107</sup> See Respondent Counter-Memorial, p. 93; Exhibits RE 97 and RE 102-103.

<sup>108</sup> See Exhibits RE 97, RE 102-103.



430. Under the circumstances, the Arbitral Tribunal concludes that Pinus Proprius' situation differed from BP's situation. As a result, the decision of the Municipality of Vilnius to refuse the conclusion of a JAA or a Cooperation Agreement with BP could be justified by the difference.

#### 8.4 EXPROPRIATION

431. Article VI of the Treaty provides that:

*Investments made by investors of one contracting party in the territory of the other contracting party cannot be expropriated, nationalized or subjected to other measures having a similar effect (all such measure hereinafter referred to as "expropriation") except when the following conditions are fulfilled:*

- (I) The expropriation shall be done for public interest and under domestic legal procedures;*
- (II) It shall not be discriminatory;*
- (III) It shall be done only against compensation. [...]*

##### 8.4.1 Position of the parties

432. The Claimant alleges that pursuant to Article VI of the Treaty, the investment cannot be expropriated, nationalized or subjected to measures having a similar effect except for a public purpose, in a non-discriminatory manner, upon payment of compensation and in accordance with domestic laws.

433. Claimant argues that by repudiating the Agreement, the Republic of Lithuania destroyed the value of BP and VPK. Moreover, the Claimant contends that the "Government's litigious, legislative, and administrative interference with the Agreement deprived BP of the legal security afforded by the Agreement."<sup>152</sup> By preventing the execution and demanding full performance of the Agreement at the same time, and then repudiating the Agreement, the Municipality of Vilnius destroyed BP. Thus, by taking the asset that was the sole purpose of BP's existence, Lithuania indirectly expropriated Parkering's ownership interest in BP.<sup>153</sup> BP became a "company with assets, but without business." By failing to provide compensation for this expropriation, Lithuania breached its obligation under Article VI of the Treaty.<sup>154</sup>

434. The Claimant contends that whether Lithuania benefited or not from the expropriation is irrelevant. On the contrary, whether the investor continues to enjoy the benefit of ownership is decisive.<sup>155</sup>

435. The Respondent alleges that the termination of a contract only amounts to an expropriation in limited cumulative circumstances. First, the termination must be wrongful; second, there must be no remedy under the contract for the wrongful

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<sup>152</sup> See Claimant's Memorial ¶ 237.

<sup>153</sup> *Idem*, ¶ 238

<sup>154</sup> *Idem* ¶ 239 and Claimant's Post-Hearing Brief, p. 123.

<sup>155</sup> *Idem* ¶ 235.





# ANNEX 426



# **International Centre for Settlement of Investment Disputes**

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**BAYINDIR INSAAT TURIZM TICARET VE SANAYI A.Ş.**

CLAIMANT

**v.**

**ISLAMIC REPUBLIC OF PAKISTAN**

RESPONDENT

ICSID Case No. ARB/03/29

## **AWARD**

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Rendered by an Arbitral Tribunal composed of:

Prof. Gabrielle Kaufmann-Kohler, President

Sir Franklin Berman, Arbitrator

Prof. Karl-Heinz Böckstiegel, Arbitrator

Martina Polasek, Secretary

384. As to the facts relevant to a finding of discrimination, the Claimant recalls the Tribunal's Decision on Jurisdiction:

"The fact remains that, taken together, Bayindir's allegations in respect of the selective tender, and that the expulsion was due to Pakistan's decision to favour a local contractor, and that the local contractor was awarded longer completion time-limits, if proven, are clearly capable of founding a MFN claim."<sup>101</sup>

## **2. Pakistan's position**

385. Pakistan submits that Bayindir's claim under Article II(2) requires a showing of intent, since Bayindir alleges that its expulsion from the Project was designed to benefit a pre-determined group of local contractors, which "design" necessarily comprises intent. In Pakistan's view, Bayindir's reliance on the decision in *SD Myers* is therefore irrelevant, as that case "merely suggests that protectionist intent on its own (i.e. without a practical effect) is insufficient for a finding of breach of Article 1102 NAFTA" (C.-Mem. M., ¶ 4.58).

## **3. Tribunal's determination**

386. It is common ground that Bayindir's claim must be assessed under Article II(2) of the Treaty, which reads as follows:

"Each Party shall accord to these investments, once established, treatment no less favourable than that accorded in similar situations to investments of its investors or to investments of investors of any third country, whichever is the most favourable."

387. Article II(2) thus covers both national treatment and MFN obligations. Its purpose is to provide a level playing field between foreign and local investors as well as between foreign investors from different countries.<sup>102</sup>

388. As noted in the Decision on Jurisdiction, the Tribunal considers that the scope of the national treatment and MFN clauses in Article II(2) is not limited to regulatory treatment.<sup>103</sup> It may also apply to the manner in which a State concludes an investment contract and/or exercises its rights thereunder. Indeed, the Tribunal stressed that:

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<sup>101</sup> Decision on Jurisdiction, ¶ 223.

<sup>102</sup> Noah Rubins & N. Stephan Kinsella, *International Investment, Political Risk and Dispute Resolution – A Practitioner's Guide* (2005), pp. 225-226.

<sup>103</sup> See Decision on Jurisdiction, ¶¶ 205-206, 213.

"[t]he mere fact that Bayindir had always been subject to exactly the same legal and regulatory framework as everybody else in Pakistan does not necessarily mean that it was actually treated in the same way as local (or third countries) investors."<sup>104</sup>

389. To decide whether Pakistan has breached Article II(2), the Tribunal must first assess whether Bayindir was in a "similar situation" to that of other investors. The inquiry into the similar situation is fact specific.<sup>105</sup> In line with *Occidental v. Ecuador*,<sup>106</sup> *Methanex*,<sup>107</sup> and *Thunderbird*,<sup>108</sup> the Tribunal considers that the national treatment clause in Article II(2) must be interpreted in an autonomous manner independently from trade law considerations.

390. If the requirement of a similar situation is met, the Tribunal must further inquire whether Bayindir was granted less favourable treatment than other investors. This raises the question whether the test is subjective or objective, i.e. whether an intent to discriminate is required or whether a showing of discrimination of an investor who happens to be a foreigner is sufficient. The Tribunal considers that the second solution is the correct one. This arises from the wording of Article II(2) quoted above. It is also in line with the rationale of the protection as was emphasized in *Feldman v. Mexico*,<sup>109</sup> to which the Claimant referred:

"It is clear that the concept of national treatment as embodied in NAFTA and similar agreements is designed to prevent discrimination on the basis of nationality, or "by reason of nationality." [...] However, it is not self-evident [...] that any departure from national treatment must be *explicitly* shown to be a result of the investor's nationality. There is no such language in Article 1102. Rather, Article 1102 by its terms suggests that it is sufficient to show less favorable treatment for the foreign investor than for domestic investors in like circumstances.

[...]

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<sup>104</sup> *Id.*, ¶ 206.

<sup>105</sup> *Pope & Talbot v. Canada*, *supra* footnote 87, ¶ 75; see also *S.D. Myers v. Canada*, *supra* footnote 94, ¶ 244.

<sup>106</sup> *Occidental v. Ecuador*, *supra* footnote 80, ¶¶ 174-176.

<sup>107</sup> *Methanex Corporation v. United States of America*, NAFTA Arbitration (UNCITRAL Rules), Award of 3 August 2005, ¶¶ 35, 37.

<sup>108</sup> *Thunderbird v. Mexico*, *supra* footnote 59, ¶¶ 176-178.

<sup>109</sup> *Feldman v. Mexico*, *supra* footnote 98, ¶¶ 181 and 183. See also *Pope & Talbot v. Canada*, footnote 87, in which the tribunal presumed that discriminatory treatment of foreign investors in like circumstances would be in violation of Article 1102, "unless they have a reasonable nexus to rational government policies that (1) do not distinguish, on their face or *de facto*, between foreign-owned and domestic companies, and (2) do not otherwise unduly undermine the investment liberalizing objectives of NAFTA" (¶ 78).



[R]equiring a foreign investor to prove that discrimination is based on his nationality could be an insurmountable burden to the Claimant, as that information may only be available to the government. [...]. If Article 1102 violations are limited to those where there is explicit (presumably de jure) discrimination against foreigners, e.g., through a law that treats foreign investors and domestic investors differently, it would greatly limit the effectiveness of the national treatment concept in protecting foreign investors."

**b. National treatment**

391. It is Bayindir's contention that it was expelled for reasons of cost and local favouritism, as evidenced by the selective tender that followed its expulsion. The Claimant also asserts that PMC-JV, the local contractors retained, were treated more favourably, in particular with respect to the construction schedule.

392. In paragraphs 297-300 *supra*, the Tribunal has already discussed Bayindir's allegation that the expulsion was due to Pakistan's intent to favour local contractors. In the present section, the Tribunal will review whether Bayindir was indeed accorded treatment less favourable than the local contractors in breach of the national treatment standard.

**1. Bayindir's position**

393. In Bayindir's submission, "the PMC-JV Contract forms a near perfect comparator against which to judge Pakistan's treatment of Bayindir" (Tr. M., 26 May 2008, 125, 15-17). Bayindir further asserts that it is objectively established that the Respondent accorded more favourable time schedules to PMC-JV and reacted more leniently to PMC-JV's unsatisfactory performance. Specifically, Bayindir alleges that

"PMC-JV was granted much more time to do the remaining work on the M-1 than Bayindir had been granted for the entire motorway, and when PMC-JV fell far behind even in this generous schedule, PMC-JV was allowed to continue on the Project. This is in stark contrast to the treatment Bayindir received, and in stark contradiction to Pakistan's claims that Bayindir had to be expelled out of concern for the timely completely [sic] of the M-1 Project." (Tr. M., 26 May 2008, 125-126)

394. In support of its allegation of less favourable treatment, the Claimant refers to the following facts: PMC-JV was granted 1460 days to complete the remainder of the M-1 Project, whereas Bayindir had been granted only 730 days in 1993 and 1095 days in 1997 to complete the entire motorway; in March 2001, Bayindir had been granted only

27 additional days to complete the two Priority Sections, whereas PMC-JV was granted 18 months to complete the remaining portion of the two Priority Sections, now for six lanes; PMC-JV was permitted seven reviews of its work schedule, yet failed to achieve the construction targets it proposed, whereas, as of the date of its expulsion from the Project, Bayindir had completed 90% of the work on the two Priority Sections on the areas which were free from obstructions; PMC-JV was not expelled for far more significant delays than Bayindir ever experienced, even though PMC-JV's performance was worryingly behind schedule, its progress very slow, and several sub-clause 46.1 notices had been issued. Bayindir adds that differences in performance between itself and PMC-JV must be appraised taking into account that Bayindir had to prepare the site, while PMC-JV started work on a site already prepared and developed by Bayindir.

395. In its post-hearing brief, Bayindir further referred to a series of acts such as the alleged expropriation of Bayindir's contractual rights and the attempted encashment of the Mobilisation Advance Guarantees (see paragraphs 349 and 360-364 *supra*) as discriminatory and in breach of the Treaty. However, Bayindir did not specify the manner in which these series of acts breached the national treatment/MFN clauses.

## **2. *Pakistan's position***

396. Pakistan maintains that the expulsion was lawful and later developments therefore irrelevant. It also denies that Bayindir's residual investment was in a "similar situation" to the investment of the local contractors (C.-Mem. M., ¶ 4.51). It adds that there is no room for a discrimination claim such as the one raised by Bayindir in a purely contractual context (Tr. M., 26 May 2008, 293-294).

397. To demonstrate that the investments were not in "similar situations," Pakistan points to differences in the financial terms;<sup>110</sup> the level of experience and expertise;<sup>111</sup> the scope of work;<sup>112</sup> and in the commitment of the two entities to progressing with the works after

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<sup>110</sup> In particular, Pakistan notes that PMC-JV received no mobilisation advance and did not benefit, as Bayindir, from having a foreign exchange component of its payments being settled by NHA in rupees at highly favourable exchange rates.

<sup>111</sup> Unlike Bayindir, PMC-JV was a consortium of diverse local Pakistani contractors with no equivalent experience on projects of the magnitude of M-1.

<sup>112</sup> In July 2003, shortly after the contract with PMC-JV had been signed, the scope of works was converted back to a six-lane motorway, and works also involved repair and rectification of works performed by Bayindir.

being issued sub-clause 46.1 notices.<sup>113</sup> Pakistan further notes that the position of NHA had changed as a result of Bayindir's expulsion, because NHA could neither avail itself of the large Mobilisation Advance given to Bayindir nor collect on the guarantees, and had to pay over Rs. 1 billion in order to alleviate the problem of Bayindir's sub-contractors. Under such different circumstances, Pakistan argues that NHA was fully justified in establishing new completion dates and, more generally, that it was justified in treating the two situations differently (PHB [Pak.] ¶¶ 5.53-5.99).

398. Pakistan finally insists that it was normal practice that the works be completed by a group of Bayindir's sub-contractors:

"[t]heir bid was lower, they were already on site, and it is what Bayindir wanted. These kinds of facts differentiate the present case from past cases of discrimination. It was also in Bayindir's interest under Clause 63.3 of the Contract that the cheapest option for a new contractor be chosen."  
(PHB [Pak.] ¶ 5.2).

### **3. Tribunal's determination**

399. The Tribunal will first determine whether Bayindir's investment was in a "similar situation." If so, it will then assess whether Bayindir's investment was accorded less favourable treatment than PMC-JV and whether the difference in treatment was justified.

400. In respect of the first requirement, the Tribunal must start by determining whether there is a relevant comparator to be used for the assessment of NHA's treatment of Bayindir and PMC-JV. In its Decision on Jurisdiction, the Tribunal did not rule out that the contracts with PMC-JV and Bayindir may be similar, as they both related to the same project.<sup>114</sup> The Tribunal must now go further and look at the terms and circumstances of the contractual relationships between, on the one hand, NHA and Bayindir, and, on the other hand, NHA and PMC-JV.

401. The Respondent has argued that, after its expulsion, Bayindir retained only residual rights under sub-clause 63.3 of the Contract and, therefore, Bayindir's contractual situation was not comparable to that of the local contractors who took over the Project.

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<sup>113</sup> In particular, Pakistan notes that, unlike Bayindir, PMC-JV had no prior history of shutting down the works when it was faced with sub-clause 46.1 notices.

<sup>114</sup> Decision on Jurisdiction, ¶ 216.

The Tribunal is unpersuaded by this argument, which seems to assume that two situations can only be "similar" if they are contemporaneous.

402. Turning to the terms and circumstances of the two contractual relationships, Pakistan raises a number of differences especially in the financial terms; the constitution of the two entities; their level of experience and expertise; the scope of work; and the commitment of the two entities to progressing with the works after receiving a sub-clause 46.1 notice. In contrast, Bayindir focuses on the identity of business sector and project. The Claimant is right that the project and business sectors are the same. This may be relevant in a trade law context. Under a free-standing test, however, such as the one applied here, that degree of identity does not suffice to displace the differences between the two contractual relationships.
403. The Claimant does not seriously dispute the existence of divergences in the financial terms. The contract between NHA and PMC-JV did not involve a foreign currency component. This difference must not be underestimated. The history of the dispute between the Parties over the availability of foreign currency for the continuation of the Contract illustrates this point. Indeed, as the Claimant emphasizes in its opening statement at the hearing (Tr. M., 26 May 2008, 16-29), the foreign currency issue was one of the main reasons why by the end of 1999 "Bayindir had nearly stopped work in the Project" (Tr. M., 26 May 2008, 27, 6-7). The dispute was then resolved by the conclusion of Addendum No. 9 in which Bayindir accepted payment in rupees for half of the Contract price. It is disputed whether Addendum No. 9 was more favourable to the Claimant or for the Respondent. What is clear is the role played by the foreign currency component.
404. Not surprisingly, the lack of a foreign currency component in the new contract price discouraged foreign contractors from participating in the tender, a fact acknowledged by the Claimant (Reply M., ¶ 219). Furthermore, the minutes of an NHA meeting held on 13 November 2002, regarding *inter alia* the award of the balance works of the M-1 Project (Exh. [Bay.] CX-99) confirm the importance of the foreign currency issue. In paragraph 24.1 of this document it is stated indeed that: "keeping in view the past unpleasant experience in M-1 project as also some other projects, it was made

absolutely clear to all the prospective bidders at the pre-qualification stage that no payment in foreign currency would be allowed" (Exh. [Bay.] CX-99).

405. Another difference in financial terms relates to the mobilization advance. The Claimant does not seriously contest that, unlike Bayindir, PMC-JV did not benefit from a large mobilisation advance. Under the terms of the Contract, Bayindir was to benefit from a Mobilisation Advance of 30% of the value of the Contract price, which was to be paid half in rupees and half in dollars. By contrast, the mobilisation advance contemplated in Part II of the conditions of contract between NHA and PMC-JV was far lower and paid exclusively in rupees (Exh. [Bay.] CX-240A).

406. One might think of explaining the differences in advance payments by reference to the equipment which Bayindir left on site. That explanation would be ill founded. The evidence shows that such equipment was not fit for use (Exh. [Pak.] CM-170). Mr. Nasir Khan, confirmed this point:

"Even though NHA had done an excellent job in preserving the equipment, machinery and plant left behind by Bayindir (including the dump trucks, motor graders, asphalt plants and crushing plants), the fact is that a large quantity of the equipment, machinery and plant was old, in bad condition and in some cases just not functioning."  
(Nasir Khan's WS, ¶ 36)

407. Asked on cross-examination about a presentation made by Colonel Azim in November 2002 to the NHA Executive Board (Exh. [Bay.] CX-224) stating that "the 300 pieces of Plant and Equipment have been parked in two camps and kept in perfect working conditions through regular maintenance by NHA's field staff," Mr. Nasir Khan confirmed his earlier testimony that the maintenance was good, but the plant was bad. He added that with the plant that was handed over PMC-JV "would not have been able to complete the project until today."<sup>115</sup>

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<sup>115</sup> Quoting the passage in full: "the maintenance and, I mean, the owning of the machine was in a very professional way, but it cannot change the status of the plant. Like, if – I mean, just I will give you an example, there was two small plant installed, one was installed at end of NWFP province, a camp which is called Barabanda – there were two camps. One was Burhan and one was Barabunda. One was in Punjab and one was in NWFP. The Punjab plant was definitely – they brought it second-hand. Used. Very used plant. [ ... ] That plant, when we took over, we never were able to get it – capacity even 10%, so then we installed another small part in replacement of that plant because that plant was not able to produce the production, the same was with the crushing plant, and the same was with batching plants, because when we assess the condition, and the capacity of plant and equipment, which was there, that according to that plant and

408. Likewise, the record confirms the existence and relevance of other differences in particular regarding the scope of work and the contractors' expertise and experience.

409. The scope of works was different to the extent the Contract as amended by Addendum No. 9 provided for four lanes and the contract with PMC-JV six. Mr. Nasir Khan explained the change in the following terms:

"this Contract was four-lane motorway and it was converted into six-lane after the award. Now, what happened was that there was some job done by Bayindir, and then we immediately start our job and we have done some job. Once it was converted to six lane, so we have to redo a lot of work. Now, that redoing a lot of work, it is not taken into consideration that that was a major factor of affecting our physical progress [ ... ] So, we took considerable time and definitely method of doing this, because usually we don't do this on ongoing Project."

(Tr. M., 30 May 2009, 93-94)

410. The expertise and experience of the contractors constitutes another difference. Bayindir benefited from considerable experience in handling large projects, while PMC-JV did not. This difference which was reflected in the higher rates charged by Bayindir, played a role in the expectations that NHA formed with respect to each contractor. So testified General Javed:

"The expectation that I had [from Bayindir], when I understood the Project was, that there would be a reasonable number of such high-tech equipment and machinery, because remember, we were paying them the state-of-the-art rates, and one expected to see a good quality of equipment."

(Tr. M., 29 May 2008, 14-15, 25, 1-5)

411. As a result, the Tribunal comes to the conclusion that the two contractual relationships are too different for Bayindir and the local contractors to be deemed in "similar situations." Consequently, the first requirement for a breach of the national treatment clause embodied in Article II(2) of the Treaty is not met. It thus makes no sense to pursue the analysis of the other requirements.

**c. MFN**

**1. Bayindir's position**

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equipment with you was handed over to us by NHA, we would not have been able to complete the Project until today, and maybe, maybe a year more, so then we supplement with new plant and equipment, with additional plant and equipment, and the plant and equipment was not able to produce efficiently, with just abandoned that plant, and it is still abandoned today."(Tr. M., 30 May 2008, 63-64).





# ANNEX 427



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# Threats to American Personnel and Facilities in Iraq

PRESS STATEMENT

MICHAEL R. POMPEO, SECRETARY OF STATE

SEPTEMBER 28, 2018

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**Press Statement**

**Michael R. Pompeo**

**Secretary of State**

**Washington, DC**

**September 28, 2018**

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The President and I have no more important priority than the safety and security of American citizens, including our diplomatic, military and other officials serving abroad.

Threats to our personnel and facilities in Iraq from the Government of Iran, the Islamic Revolutionary Guard Corps Quds Force, and from militias facilitated by and under the control and direction of the Quds Force leader Qasem Soleimani have increased over the past several weeks. There have been repeated incidents of indirect fire from elements of those militias directed at our Consulate General in Basrah and our Embassy in Baghdad, including within the past twenty-four hours.

I have advised the Government of Iran that the United States will hold Iran directly responsible for any harm to Americans or to our diplomatic facilities in Iraq or elsewhere and whether perpetrated by Iranian forces directly or by associated proxy militias. I have made clear that Iran should understand that the United States will respond promptly and appropriately to any such attacks.

Given the increasing and specific threats and incitement to attack our personnel and facilities in Iraq, I have directed that an appropriate temporary relocation of diplomatic personnel in Iraq take place. We are working closely with our partners in the Government and Security Forces of Iraq to address these threats. We look to all international parties interested in peace and stability in Iraq and the region to reinforce our message to Iran regarding the unacceptability of their behavior.

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# Remarks to the Media

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MICHAEL R. POMPEO, SECRETARY OF STATE

OCTOBER 3, 2018

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## Remarks

**Michael R. Pompeo**

**Secretary of State**

**Press Briefing Room**

**Washington, DC**

**October 3, 2018**



0:00 / 14:57



**SECRETARY POMPEO:** Good morning, everyone. I want to update you on three issues, four if you want to count the – my upcoming trip to Asia, including North Korea. First, the situation in Iraq; the second, a statement about the ruling this morning from the International Court of Justice; and finally, I want to talk about my effort to put America’s diplomatic corps back on the field.

To the situation in Iraq, Iran is the origin of the current threat to Americans in Iraq. It is to blame for the attacks against our mission in Basra and our embassy in Baghdad. Our intelligence in this regard is solid. We can see the hand of the ayatollah and his henchmen supporting these attacks on the United States.

On Friday, I ordered the temporary relocation of U.S. Government personnel from our consulate general in Basra. I also warned the Iranian Government that we will hold it directly responsible for any harm to Americans or our diplomatic facilities, whether perpetrated by Iranian forces or by associated proxies or elements of those militias.

These latest destabilizing acts in Iraq are attempts by the Iranian regime to push back on our efforts to constrain its malign behavior. Clearly, they see our comprehensive pressure campaign as serious and succeeding, and we must be prepared for them to continue their attempts to hit back, especially after our full sanctions are re-imposed on the 4th of November.

The United States will continue to stand with the people of Iraq as they chart a future based on

Iraqi interest, not those dictated by Iran. Even with the temporary relocation of our staff, we are supporting the delivery of clean water to the 750,000 residents in Basra.

Now let me turn to the ICJ ruling from today. I'm announcing that the United States is terminating the 1955 Treaty of Amity with Iran. This is a decision, frankly, that is 39 years overdue. In July, Iran brought a meritless case in the International Court of Justice alleging violations of the Treaty of Amity. Iran seeks to challenge the United States decision to cease participation in the Iran nuclear deal and to re-impose the sanctions that were lifted as a part of that deal. Iran is attempting to interfere with the sovereign rights of the United States to take lawful actions necessary to protect our national security. And Iran is abusing the ICJ for political and propaganda purposes and their case, as you can see from the decision, lacked merit.

Given Iran's history of terrorism, ballistic missile activity, and other malign behaviors, Iran's claims under the treaty are absurd. The court's ruling today was a defeat for Iran. It rightly rejected all of Iran's baseless requests. The court denied Iran's attempt to secure broad measures to interfere with U.S. sanctions and rightly noted Iran's history of noncompliance with its international obligations under the Treaty on the Nonproliferation of Nuclear Weapons.

With regard to the aspects of the court's order focusing on potential humanitarian issues, we have been clear: Existing exceptions, authorizations, and licensing policies for humanitarian-related transactions and safety of flight will remain in effect. The United States has been actively engaged on these issues without regard to any proceeding before the ICJ. We're working closely with the Department of the Treasury to ensure that certain humanitarian-related transactions involving Iran can and will continue.

That said, we're disappointed that the court failed to recognize it has no jurisdiction to issue any order relating to these sanctions measures with the United States, which is doing its work on Iran to protect its own essential security interests.

In light of how Iran has hypocritically and groundlessly abused the ICJ as a forum for attacking the United States, I am therefore announcing today that the United States is terminating the Treaty of Amity with Iran. I hope that Iran's leaders will come to recognize that the only way to secure a bright future for its country is by ceasing their campaign of terror and destruction around the world.

The third item, putting the diplomatic team from the United States Department of State back on the field: I want to talk about the fact that there are 65 nominees now sitting with the United States Senate. That's over a quarter of all the senior-level confirmable positions that the United States Department of State is tasked with using to achieve its diplomatic outcomes. And I want every single American to know that what Senator Menendez and members of the Senate are doing to hold back American diplomacy rests squarely on their shoulders.

Both Republicans and Democrats agree that a fully staffed State Department is critical to American national security. Indeed, when I was before the Senate Foreign Relations Committee, Senator Menendez told me, quote, "The problem is we have an emaciated State Department under this administration," end of quote. Well, we've now done our part to fix that. He now needs to do his, and the Senate needs to do its part.

These candidates are quality candidates. They are not sitting on the Senate floor because of objections with respect to their quality, their professionalism, or their excellence and their ability to deliver American foreign policy. Wave after wave of these extremely qualified nominees have been sent to the United States Senate.

Let me give a few examples: John Richmond. He's been stuck for 85 days while we try to make necessary progress on combating human trafficking, a priority for this administration and a shared priority of Senator Menendez. We have Kim Breier, the President's nominee to head up Western Hemisphere Affairs, stuck for 204 days while the crisis in Venezuela and Central America continues to rage. David Schenker, the President's nominee to lead the Bureau of Near East Affairs, is held up while the humanitarian crisis continues and while Iran continues to undermine peace and stability throughout the Middle East.

Russia is seeking to prey on our elections, but Ellen McCarthy, a 30-year veteran of the Intelligence Community and the President's choice to head the Bureau of Intelligence and Research sits on the Senate floor.

As American forces are engaged against terrorists around the world, Clarke Cooper, an experienced military professional designated to lead the Bureau of Political-Military Affairs waits for the Foreign Relations Committee to act on his nomination.

You should know that as a former member, I completely appreciate the Senate's advice and consent role and their duty to conduct oversight. And I understand their need to be fair and honest brokers. But that's not what is being engaged in. We need these people. What's happening is unprecedented. We have members of the United States Senate who – for whom partisanship has now driven delay and obstruction of getting America's diplomatic corps into every corner of the world.

It will impact our operations, our ability. We don't have a COO, the under secretary for management now coming on two years with no one filling that position, and enormous, complex operations keeping our diplomats safe around the world don't have a senior leader to manage those operations. There are real, direct impacts of not having these people confirmed and I implore the United States Senate to take these quality, talented people and allow them to do what it is they have agreed to do on behalf of the United States.

And with that, I'm happy to take a couple questions.

**MS NAUERT:** (Inaudible). We'll start with Lesley from Reuters.

**QUESTION:** Thank you very much. Mr. Secretary, does the ruling of the World Court, does that have any practical impact on what the U.S. is – on U.S. sanctions, number one? And number two, what other – what assurances can you give that this will not impact any humanitarian aid? Because the Court actually said that it was not enough, that the U.S. – that the U.S.'s assurances were not adequate.

**SECRETARY POMPEO:** The United States has been very clear: We will continue to make sure that we are providing humanitarian assistance in a way that delivers for the people we have spoken very clearly about, the Iranian people. We care deeply about them. We will make sure that we continue to afford the flexibility so that that assistance can be needed.

Having said that, the choices that are being made inside of Iran today – to use money to foment terror around the world, to launch ballistic missiles into airports throughout the Middle East, to arm proxy militias in Iraq and in Syria and in Lebanon – those are dollars that the Iranian leadership is squandering. They could be providing humanitarian assistance to their own people but have chosen instead a different path, a path of revolutionary effort around the world



showing utter disregard for the humanitarian needs of their own people.

**MS NAUERT:** Nick Kalman from Fox.

**QUESTION:** I wanted to ask about North Korea, Mr. Secretary. The North Koreans have a new commentary saying the end-of-war declaration issue should've been resolved half a century ago in light of your trip coming up. Will it be resolved this weekend? And if not, what would be the reasoning against offering this?

**SECRETARY POMPEO:** So I'm not going to comment on the progress of the negotiations on the end-of-war declaration or any other items, only to say this: I'm very happy to be going back to get another chance to continue to advance the commitment that Chairman Kim and President Trump made back in Singapore in the second week of June. I'm optimistic that we'll come away from that with better understandings, deeper progress, and a plan forward not only for the summit between the two leaders, but for us to continue the efforts to build out a pathway for denuclearization.

**MS NAUERT:** Next question, Michel from Al Hurra.

**QUESTION:** Yeah, thank you. Mr. Secretary, Russia has delivered today S-300 systems to Syria. You said in the past that it's a serious escalation. Are you planning to take any measures in this regard? And my second question on Iraq. Any comment on the election of Barham Salih as the president and the designation of Adel Abdul Mahdi as the prime minister?

**SECRETARY POMPEO:** So I've had a chance to speak with the new speaker of the house and the new president. I've not had a chance to speak with the new – the president designee as of yet. I hope to do so. And I am equally hopeful that they will follow through on the commitments that they made when we spoke. These are people that we know pretty well. They've been around the Iraqi Government scene for some time, and what we talked about was building out an Iraqi Government that was an Iraqi Government of national unity that was interested in the welfare and future good fortunes for the Iraqi people, not controlled by the Islamic Republic of Iran. It's something that was a shared set of objectives, and I'm very, very hopeful that we can continue to work with the Iraqi people and the soon-to-be-completed, formed new Iraqi Government to deliver against that.

Your first question was about the S-300. I'm certainly not going to comment on our intention on

how we will address that, but my comments before were true. Having the Russians deliver the S-300 into Syria presents greater risk to all of those in the affected areas and to stability in the Middle East. We consider this a very serious escalation.

**QUESTION:** Thank you.

**MS NAUERT:** Last question. Kylie from CBS News.

**QUESTION:** Hi, Secretary. Question. Can you explain to us a little bit the practical reality of the U.S. terminating the amity with Iran, and just how we'll see that play out? And then secondly, just because we're going to North Korea, is there any timeframe for what the U.S. wants to achieve given that last week we heard President Trump say that they're not – the U.S. is not playing a time game, but you said that you want rapid denuclearization of North Korea completed by January 2021?

**SECRETARY POMPEO:** Those are entirely consistent with each other. We want it fast, but we're not going to play the time game. My comment about 2021 was not mine. I repeated it, but it was a comment that had been made by the leaders who'd had their inter-Korean summit in Pyongyang. They'd talked about 2021 when they were gathered there, and so I was simply reiterating this as a timeline that they were potentially prepared to agree to.

President Trump's comments are exactly right. This is a long-term problem. This has been outstanding for decades. We've made more progress than has been made in an awfully long time. And importantly, we've done so in a condition which continues to give us the opportunity to achieve the final goal, that is the economic sanctions continue to remain in place, the core proposition; the thing which will give us the capacity to deliver denuclearization isn't changing. If you heard the comments at the UN Security Council, complete unanimity about the need for those to stay in place.

The Russians and the Chinese had some ideas about how we might begin to think about a time when it would be appropriate to reduce them, but to a country, they were supportive of maintaining the UN Security Council resolutions and the sanctions that underlay them. That is a – that is a global commitment that I'm not sure there's many issues in the world you can find such unanimity. And so my efforts this week will be one more step along the way towards achieving what the UN Security Council has directed the North Koreans to do.

**QUESTION:** And the practical fallout from pulling out of the treaty?

**SECRETARY POMPEO:** We'll see what the practical fallout is. The Iranians have been ignoring it for an awfully long time. We ought to have pulled out of it decades ago. Today marked a useful point with the decision that was made this morning from the ICJ. This marked a useful point for us to demonstrate the absolute absurdity of the Treaty of Amity between the United States and the Islamic Republic of Iran.

**MS NAUERT:** Thank you, everybody. We have to go now.

**SECRETARY POMPEO:** Thanks, everyone.

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# On U.S. Appearance Before the International Court of Justice

PRESS STATEMENT

MICHAEL R. POMPEO, SECRETARY OF STATE

OCTOBER 8, 2018

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**Press Statement**  
**Michael R. Pompeo**  
**Secretary of State**  
**Washington, DC**  
**October 8, 2018**



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Today, oral proceedings before the International Court of Justice (ICJ) began in The Hague in a case brought by Iran against the United States, *Certain Iranian Assets*. As I have stated previously, Iran's filings before the ICJ are a misuse of the Court for political and propaganda purposes. Iran brought this case in 2016 to challenge measures the United States adopted to deter Iran's support for terrorist attacks against the United States and others, as well as to respond to other internationally destabilizing actions taken by Iran. These measures include allowing victims of terrorism to recover damages from Iran and Iranian entities in U.S. courts. The actions at the root of this case, among many others, involve the Iran-sponsored bombing of the U.S. Marine Barracks in Beirut, Lebanon in 1983, which killed 241 U.S. peacekeepers.

We owe it to our fallen heroes, their families, and the victims of Iran's terrorist activities to vigorously defend against the Iranian regime's meritless claims this week in The Hague, where we will show that Iran's case should be dismissed.

We will continue to fight against the scourge of Iran's terrorist activities in all venues and will continue to increase the pressure on this outlaw state. These malign activities by Iran are among the reasons we decided last week to terminate the 1955 U.S.-Iran Treaty of Amity. We hope that Iran's leaders will come to recognize that the only way to ensure a positive future for their country is by ceasing their campaign of terror and destruction around the world.

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## ***Blaming Iran, U.S. Evacuates Consulate in Southern Iraq***

By Edward Wong

Sept. 28, 2018

WASHINGTON — The State Department announced Friday it had ordered the evacuation of the American consulate in Basra, Iraq, because of attacks in recent weeks by militias supported by the Iranian government.

Secretary of State Mike Pompeo said in a written statement that the consulate had come under “repeated incidents of indirect fire from elements of those militias.”

“Iran should understand that the United States will respond promptly and appropriately to any such attacks,” Mr. Pompeo said in the statement.

He blamed the security threat specifically on Iran, its elite Islamic Revolutionary Guard Quds Force and militias under the control of Qassem Suleimani, the powerful commander of the Quds Force.

The State Department described the moving of the consulate’s employees as a “temporary relocation.” Tim Davis, the consul general in Basra, posted a photograph on Facebook of himself talking to a crowd of employees. “They put their hearts into this effort and I had to tell them we are done for now,” he wrote. “I told them that leading them was the great honor of my life.”

Most of the estimated 1,000 employees are contractors working in security, food service and other support jobs; only a minority are diplomats.

The statement did not say whether the consulate would be closed permanently, and State Department press officers declined to provide further details.





Iran's ambassador to Iraq, Iraj Masjedi, gave a press conference outside the new building of the Iranian consulate in the southern city of Basra on Sept. 11, days after the old building was set ablaze by protesters. Haidar Mohammed Ali/Agence France-Press — Getty Images

The consulate in Basra, Iraq's second largest city, opened in 2011 and is one of three American missions in the country. The decision to evacuate it comes at the confluence of several separate events.

First, the Trump administration has begun a new campaign highlighting Iranian military activity in the region. Second, in Basra in August and September, violent protests by local residents led to the burning of the Iranian consulate and conspiratorial declarations by some Iraqi politicians that American officials had incited the protests.

Third, and perhaps most important, the State Department has been internally debating for more than a year whether to shut down the Basra consulate to save money.

Basra is in Iraq's far south, in a region of rich oil fields near the Persian Gulf. The vast majority of the people are Shiite Arabs, and Shiite political parties dominate. Some of those parties, as well as some militias, are supported by Iran, which is majority Shiites.

In August and early September, thousands of residents took to the streets of central Basra to call for the Iraqi government to deliver crucial services, including power and clean water. Frequent blackouts take place across the city in the summer months, when the region is sweltering.

This year, many of the protesters also criticized Iran's influence in Basra, and some stormed the Iranian consulate on Sept. 7, setting it on fire. Protesters also have been killed and injured in clashes with Iraqi security forces.

The United States consulate is inside the perimeter of the Basra airport and far from the city's center and protest sites. On Sept. 8, three rockets landed by the airport perimeter, but no one was injured or killed, according to a Reuters report from Iraq.

Four days later, the White House blamed militias supported by Iran for the attack. That attack and a similar one this week were typical of strikes that occurred regularly around the United States Embassy in the Green Zone in Baghdad at the height of the Iraq war. Officials never ordered the evacuation of the embassy.

Protesters take to the streets in Basra over poor living conditions in Basra, Iraq. Basra is in Iraq's far south, in a region of rich oil fields near the Persian Gulf. Frequent blackouts take place across the city in the summer. Murtaja Lateef/European Pressphoto Agency, via Shutterstock

The Trump administration has sought to highlight Iran's military activities across the Middle East. It is part of a campaign to contain Iran and justify President Trump's decision in May to withdraw from the nuclear agreement that the Obama administration forged in 2015 with Iran and world powers.

The European Union, China and Russia have called for sticking with the agreement and say they will work with Iran to avoid economic sanctions imposed by the United States.

Separately, senior State Department officials have been debating for more than a year whether to close down the Basra consulate, mainly to save money, according to three former State Department officials. The consulate costs at least \$200 million to operate each year; some estimates put that number at \$350 million.



Before he left office in March, Secretary of State Rex W. Tillerson demanded deep budget cuts from bureaus across the department. As a result, senior officials at its Bureau of Near Eastern Affairs began to consider closing the Basra consulate, the former officials said.

The consulate was put under a security review process, which meant that each year officials would assess the security situation to determine whether it was safe to keep it open.

The State Department said Friday night that it does not comment on internal deliberations.

This spring, a small group of officials in Washington held a vote on whether to keep the bureau open, and those favoring continuing the operations narrowly won out. In June, John J. Sullivan, the deputy secretary of state, decided to keep the consulate open for at least this year.

Andrew Miller, a former State Department official, said that before the current Basra unrest, the debate took place mainly because of budget concerns, though some of the costs were because of the security requirements of the mission.

The head of the bureau, David M. Satterfield, and Stuart E. Jones, the former ambassador to Iraq, were in favor of closing the consulate. Thomas A. Shannon Jr., a top department official, and Mr. Davis were among those arguing to keep it open.

“From a purely informational perspective, closing it would be detrimental to U.S. interests and maintaining contact with people in the community there,” said Mr. Miller, now deputy director for policy at the Project on Middle East Democracy.

# ANNEX 428



FEDERAL RULES  
OF  
CIVIL PROCEDURE

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DECEMBER 1, 2019



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**RULES OF CIVIL PROCEDURE  
FOR THE  
UNITED STATES DISTRICT COURTS<sup>1</sup>**

**Effective September 16, 1938, as amended to December 1, 2019**

TITLE I. SCOPE OF RULES; FORM OF ACTION

**Rule 1. Scope and Purpose**

These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.

(As amended Dec. 29, 1948, eff. Oct. 20, 1949; Feb. 28, 1966, eff. July 1, 1966; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 30, 2007, eff. Dec. 1, 2007; Apr. 29, 2015, eff. Dec. 1, 2015.)

**Rule 2. One Form of Action**

There is one form of action—the civil action.

(As amended Apr. 30, 2007, eff. Dec. 1, 2007.)

TITLE II. COMMENCING AN ACTION; SERVICE OF PROCESS,  
PLEADINGS, MOTIONS, AND ORDERS

**Rule 3. Commencing an Action**

A civil action is commenced by filing a complaint with the court.

(As amended Apr. 30, 2007, eff. Dec. 1, 2007.)

**Rule 4. Summons**

(a) CONTENTS; AMENDMENTS.

(1) *Contents.* A summons must:

- (A) name the court and the parties;
- (B) be directed to the defendant;
- (C) state the name and address of the plaintiff's attorney or—if unrepresented—of the plaintiff;
- (D) state the time within which the defendant must appear and defend;
- (E) notify the defendant that a failure to appear and defend will result in a default judgment against the defendant for the relief demanded in the complaint;
- (F) be signed by the clerk; and
- (G) bear the court's seal.

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<sup>1</sup>Title amended December 29, 1948, effective October 20, 1949.

(2) *Amendments.* The court may permit a summons to be amended.

(b) **ISSUANCE.** On or after filing the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons is properly completed, the clerk must sign, seal, and issue it to the plaintiff for service on the defendant. A summons—or a copy of a summons that is addressed to multiple defendants—must be issued for each defendant to be served.

(c) **SERVICE.**

(1) *In General.* A summons must be served with a copy of the complaint. The plaintiff is responsible for having the summons and complaint served within the time allowed by Rule 4(m) and must furnish the necessary copies to the person who makes service.

(2) *By Whom.* Any person who is at least 18 years old and not a party may serve a summons and complaint.

(3) *By a Marshal or Someone Specially Appointed.* At the plaintiff's request, the court may order that service be made by a United States marshal or deputy marshal or by a person specially appointed by the court. The court must so order if the plaintiff is authorized to proceed in forma pauperis under 28 U.S.C. §1915 or as a seaman under 28 U.S.C. §1916.

(d) **WAIVING SERVICE.**

(1) *Requesting a Waiver.* An individual, corporation, or association that is subject to service under Rule 4(e), (f), or (h) has a duty to avoid unnecessary expenses of serving the summons. The plaintiff may notify such a defendant that an action has been commenced and request that the defendant waive service of a summons. The notice and request must:

(A) be in writing and be addressed:

(i) to the individual defendant; or

(ii) for a defendant subject to service under Rule 4(h), to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process;

(B) name the court where the complaint was filed;

(C) be accompanied by a copy of the complaint, 2 copies of the waiver form appended to this Rule 4, and a prepaid means for returning the form;

(D) inform the defendant, using the form appended to this Rule 4, of the consequences of waiving and not waiving service;

(E) state the date when the request is sent;

(F) give the defendant a reasonable time of at least 30 days after the request was sent—or at least 60 days if sent to the defendant outside any judicial district of the United States—to return the waiver; and

(G) be sent by first-class mail or other reliable means.

(2) *Failure to Waive.* If a defendant located within the United States fails, without good cause, to sign and return a waiver requested by a plaintiff located within the United States, the court must impose on the defendant:

(A) the expenses later incurred in making service; and

(B) the reasonable expenses, including attorney's fees, of any motion required to collect those service expenses.



(3) *Time to Answer After a Waiver.* A defendant who, before being served with process, timely returns a waiver need not serve an answer to the complaint until 60 days after the request was sent—or until 90 days after it was sent to the defendant outside any judicial district of the United States.

(4) *Results of Filing a Waiver.* When the plaintiff files a waiver, proof of service is not required and these rules apply as if a summons and complaint had been served at the time of filing the waiver.

(5) *Jurisdiction and Venue Not Waived.* Waiving service of a summons does not waive any objection to personal jurisdiction or to venue.

(e) **SERVING AN INDIVIDUAL WITHIN A JUDICIAL DISTRICT OF THE UNITED STATES.** Unless federal law provides otherwise, an individual—other than a minor, an incompetent person, or a person whose waiver has been filed—may be served in a judicial district of the United States by:

(1) following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made; or

(2) doing any of the following:

(A) delivering a copy of the summons and of the complaint to the individual personally;

(B) leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or

(C) delivering a copy of each to an agent authorized by appointment or by law to receive service of process.

(f) **SERVING AN INDIVIDUAL IN A FOREIGN COUNTRY.** Unless federal law provides otherwise, an individual—other than a minor, an incompetent person, or a person whose waiver has been filed—may be served at a place not within any judicial district of the United States:

(1) by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;

(2) if there is no internationally agreed means, or if an international agreement allows but does not specify other means, by a method that is reasonably calculated to give notice:

(A) as prescribed by the foreign country's law for service in that country in an action in its courts of general jurisdiction;

(B) as the foreign authority directs in response to a letter rogatory or letter of request; or

(C) unless prohibited by the foreign country's law, by:

(i) delivering a copy of the summons and of the complaint to the individual personally; or

(ii) using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt; or

(3) by other means not prohibited by international agreement, as the court orders.

(g) **SERVING A MINOR OR AN INCOMPETENT PERSON.** A minor or an incompetent person in a judicial district of the United States

must be served by following state law for serving a summons or like process on such a defendant in an action brought in the courts of general jurisdiction of the state where service is made. A minor or an incompetent person who is not within any judicial district of the United States must be served in the manner prescribed by Rule 4(f)(2)(A), (f)(2)(B), or (f)(3).

(h) **SERVING A CORPORATION, PARTNERSHIP, OR ASSOCIATION.** Unless federal law provides otherwise or the defendant's waiver has been filed, a domestic or foreign corporation, or a partnership or other unincorporated association that is subject to suit under a common name, must be served:

(1) in a judicial district of the United States:

(A) in the manner prescribed by Rule 4(e)(1) for serving an individual; or

(B) by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process and—if the agent is one authorized by statute and the statute so requires—by also mailing a copy of each to the defendant; or

(2) at a place not within any judicial district of the United States, in any manner prescribed by Rule 4(f) for serving an individual, except personal delivery under (f)(2)(C)(i).

(i) **SERVING THE UNITED STATES AND ITS AGENCIES, CORPORATIONS, OFFICERS, OR EMPLOYEES.**

(1) *United States.* To serve the United States, a party must:

(A)(i) deliver a copy of the summons and of the complaint to the United States attorney for the district where the action is brought—or to an assistant United States attorney or clerical employee whom the United States attorney designates in a writing filed with the court clerk—or

(ii) send a copy of each by registered or certified mail to the civil-process clerk at the United States attorney's office;

(B) send a copy of each by registered or certified mail to the Attorney General of the United States at Washington, D.C.; and

(C) if the action challenges an order of a nonparty agency or officer of the United States, send a copy of each by registered or certified mail to the agency or officer.

(2) *Agency; Corporation; Officer or Employee Sued in an Official Capacity.* To serve a United States agency or corporation, or a United States officer or employee sued only in an official capacity, a party must serve the United States and also send a copy of the summons and of the complaint by registered or certified mail to the agency, corporation, officer, or employee.

(3) *Officer or Employee Sued Individually.* To serve a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf (whether or not the officer or employee is also sued in an official capacity), a party must serve the United States and also serve the officer or employee under Rule 4(e), (f), or (g).

(4) *Extending Time.* The court must allow a party a reasonable time to cure its failure to:

- (A) serve a person required to be served under Rule 4(i)(2), if the party has served either the United States attorney or the Attorney General of the United States; or
- (B) serve the United States under Rule 4(i)(3), if the party has served the United States officer or employee.
- (j) SERVING A FOREIGN, STATE, OR LOCAL GOVERNMENT.
- (1) *Foreign State*. A foreign state or its political subdivision, agency, or instrumentality must be served in accordance with 28 U.S.C. §1608.
- (2) *State or Local Government*. A state, a municipal corporation, or any other state-created governmental organization that is subject to suit must be served by:
- (A) delivering a copy of the summons and of the complaint to its chief executive officer; or
- (B) serving a copy of each in the manner prescribed by that state's law for serving a summons or like process on such a defendant.
- (k) TERRITORIAL LIMITS OF EFFECTIVE SERVICE.
- (1) *In General*. Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant:
- (A) who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located;
- (B) who is a party joined under Rule 14 or 19 and is served within a judicial district of the United States and not more than 100 miles from where the summons was issued; or
- (C) when authorized by a federal statute.
- (2) *Federal Claim Outside State-Court Jurisdiction*. For a claim that arises under federal law, serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if:
- (A) the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and
- (B) exercising jurisdiction is consistent with the United States Constitution and laws.
- (l) PROVING SERVICE.
- (1) *Affidavit Required*. Unless service is waived, proof of service must be made to the court. Except for service by a United States marshal or deputy marshal, proof must be by the server's affidavit.
- (2) *Service Outside the United States*. Service not within any judicial district of the United States must be proved as follows:
- (A) if made under Rule 4(f)(1), as provided in the applicable treaty or convention; or
- (B) if made under Rule 4(f)(2) or (f)(3), by a receipt signed by the addressee, or by other evidence satisfying the court that the summons and complaint were delivered to the addressee.
- (3) *Validity of Service; Amending Proof*. Failure to prove service does not affect the validity of service. The court may permit proof of service to be amended.
- (m) TIME LIMIT FOR SERVICE. If a defendant is not served within 90 days after the complaint is filed, the court—on motion or on its

own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f), 4(h)(2), or 4(j)(1), or to service of a notice under Rule 71.1(d)(3)(A).

(n) ASSERTING JURISDICTION OVER PROPERTY OR ASSETS.

(1) *Federal Law.* The court may assert jurisdiction over property if authorized by a federal statute. Notice to claimants of the property must be given as provided in the statute or by serving a summons under this rule.

(2) *State Law.* On a showing that personal jurisdiction over a defendant cannot be obtained in the district where the action is brought by reasonable efforts to serve a summons under this rule, the court may assert jurisdiction over the defendant's assets found in the district. Jurisdiction is acquired by seizing the assets under the circumstances and in the manner provided by state law in that district.

(As amended Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; Apr. 29, 1980, eff. Aug. 1, 1980; Pub. L. 97-462, §2, Jan. 12, 1983, 96 Stat. 2527, eff. Feb. 26, 1983; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 30, 2007, eff. Dec. 1, 2007; Apr. 29, 2015, eff. Dec. 1, 2015; Apr. 28, 2016, eff. Dec. 1, 2016; Apr. 27, 2017, eff. Dec. 1, 2017.)

RULE 4 NOTICE OF A LAWSUIT AND REQUEST TO WAIVE SERVICE OF SUMMONS.

(Caption)

To *(name the defendant or—if the defendant is a corporation, partnership, or association—name an officer or agent authorized to receive service)*:

WHY ARE YOU GETTING THIS?

A lawsuit has been filed against you, or the entity you represent, in this court under the number shown above. A copy of the complaint is attached.

This is not a summons, or an official notice from the court. It is a request that, to avoid expenses, you waive formal service of a summons by signing and returning the enclosed waiver. To avoid these expenses, you must return the signed waiver within *(give at least 30 days or at least 60 days if the defendant is outside any judicial district of the United States)* from the date shown below, which is the date this notice was sent. Two copies of the waiver form are enclosed, along with a stamped, self-addressed envelope or other prepaid means for returning one copy. You may keep the other copy.

WHAT HAPPENS NEXT?

If you return the signed waiver, I will file it with the court. The action will then proceed as if you had been served on the date the waiver is filed, but no summons will be served on you and you will have 60 days from the date this notice is sent (see the date below) to answer the complaint (or 90 days if this notice is sent to you outside any judicial district of the United States).

If you do not return the signed waiver within the time indicated, I will arrange to have the summons and complaint served on you. And I will ask the court to require you, or the entity you represent, to pay the expenses of making service.

Please read the enclosed statement about the duty to avoid unnecessary expenses.

I certify that this request is being sent to you on the date below.

Date: \_\_\_\_\_

\_\_\_\_\_  
(Signature of the attorney  
or unrepresented party)

\_\_\_\_\_  
(Printed name)

\_\_\_\_\_  
(Address)

\_\_\_\_\_  
(E-mail address)

\_\_\_\_\_  
(Telephone number)

RULE 4 WAIVER OF THE SERVICE OF SUMMONS.

(Caption)

To *(name the plaintiff's attorney or the unrepresented plaintiff)*:

I have received your request to waive service of a summons in this action along with a copy of the complaint, two copies of this waiver form, and a prepaid means of returning one signed copy of the form to you.

I, or the entity I represent, agree to save the expense of serving a summons and complaint in this case.

I understand that I, or the entity I represent, will keep all defenses or objections to the lawsuit, the court's jurisdiction, and the venue of the action, but that I waive any objections to the absence of a summons or of service.

I also understand that I, or the entity I represent, must file and serve an answer or a motion under Rule 12 within 60 days from \_\_\_\_\_, the date when this request was sent (or 90 days if it was sent outside the United States). If I fail to do so, a default judgment will be entered against me or the entity I represent.

Date: \_\_\_\_\_

\_\_\_\_\_  
(Signature of the attorney  
or unrepresented party)

\_\_\_\_\_  
(Printed name)

\_\_\_\_\_  
(Address)

\_\_\_\_\_  
(E-mail address)

\_\_\_\_\_  
(Telephone number)

(Attach the following)

DUTY TO AVOID UNNECESSARY EXPENSES  
OF SERVING A SUMMONS

Rule 4 of the Federal Rules of Civil Procedure requires certain defendants to cooperate in saving unnecessary expenses of serving a summons and complaint. A defendant who is located in the United States and who fails to return a signed waiver of service requested by a plaintiff located in the United States will be required to pay the expenses of service, unless the defendant shows good cause for the failure.

“Good cause” does not include a belief that the lawsuit is groundless, or that it has been brought in an improper venue, or that the court has no jurisdiction over this matter or over the defendant or the defendant’s property.

If the waiver is signed and returned, you can still make these and all other defenses and objections, but you cannot object to the absence of a summons or of service.

If you waive service, then you must, within the time specified on the waiver form, serve an answer or a motion under Rule 12 on the plaintiff and file a copy with the court. By signing and returning the waiver form, you are allowed more time to respond than if a summons had been served.

**Rule 4.1. Serving Other Process**

(a) **IN GENERAL. Process**—other than a summons under Rule 4 or a subpoena under Rule 45—must be served by a United States marshal or deputy marshal or by a person specially appointed for that purpose. It may be served anywhere within the territorial limits of the state where the district court is located and, if authorized by a federal statute, beyond those limits. Proof of service must be made under Rule 4(l).

(b) **ENFORCING ORDERS: COMMITTING FOR CIVIL CONTEMPT.** An order committing a person for civil contempt of a decree or injunction issued to enforce federal law may be served and enforced in any district. Any other order in a civil-contempt proceeding may be served only in the state where the issuing court is located or elsewhere in the United States within 100 miles from where the order was issued.

(As added Apr. 22, 1993, eff. Dec. 1, 1993; amended Apr. 30, 2007, eff. Dec. 1, 2007.)

**Rule 5. Serving and Filing Pleadings and Other Papers**

(a) **SERVICE: WHEN REQUIRED.**

(1) *In General.* Unless these rules provide otherwise, each of the following papers must be served on every party:

- (A) an order stating that service is required;
- (B) a pleading filed after the original complaint, unless the court orders otherwise under Rule 5(c) because there are numerous defendants;
- (C) a discovery paper required to be served on a party, unless the court orders otherwise;
- (D) a written motion, except one that may be heard *ex parte*; and



(2) promptly file a supplemental statement if any required information changes.

(As added Apr. 29, 2002, eff. Dec. 1, 2002; amended Apr. 30, 2007, eff. Dec. 1, 2007.)

### Rule 8. General Rules of Pleading

(a) CLAIM FOR RELIEF. A pleading that states a claim for relief must contain:

(1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;

(2) a short and plain statement of the claim showing that the pleader is entitled to relief; and

(3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

(b) DEFENSES; ADMISSIONS AND DENIALS.

(1) *In General*. In responding to a pleading, a party must:

(A) state in short and plain terms its defenses to each claim asserted against it; and

(B) admit or deny the allegations asserted against it by an opposing party.

(2) *Denials—Responding to the Substance*. A denial must fairly respond to the substance of the allegation.

(3) *General and Specific Denials*. A party that intends in good faith to deny all the allegations of a pleading—including the jurisdictional grounds—may do so by a general denial. A party that does not intend to deny all the allegations must either specifically deny designated allegations or generally deny all except those specifically admitted.

(4) *Denying Part of an Allegation*. A party that intends in good faith to deny only part of an allegation must admit the part that is true and deny the rest.

(5) *Lacking Knowledge or Information*. A party that lacks knowledge or information sufficient to form a belief about the truth of an allegation must so state, and the statement has the effect of a denial.

(6) *Effect of Failing to Deny*. An allegation—other than one relating to the amount of damages—is admitted if a responsive pleading is required and the allegation is not denied. If a responsive pleading is not required, an allegation is considered denied or avoided.

(c) AFFIRMATIVE DEFENSES.

(1) *In General*. In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including:

- accord and satisfaction;
- arbitration and award;
- assumption of risk;
- contributory negligence;
- duress;
- estoppel;
- failure of consideration;
- fraud;
- illegality;

- injury by fellow servant;
- laches;
- license;
- payment;
- release;
- res judicata;
- statute of frauds;
- statute of limitations; and
- waiver.

(2) *Mistaken Designation.* If a party mistakenly designates a defense as a counterclaim, or a counterclaim as a defense, the court must, if justice requires, treat the pleading as though it were correctly designated, and may impose terms for doing so.

(d) PLEADING TO BE CONCISE AND DIRECT; ALTERNATIVE STATEMENTS; INCONSISTENCY.

(1) *In General.* Each allegation must be simple, concise, and direct. No technical form is required.

(2) *Alternative Statements of a Claim or Defense.* A party may set out 2 or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient.

(3) *Inconsistent Claims or Defenses.* A party may state as many separate claims or defenses as it has, regardless of consistency.

(e) CONSTRUING PLEADINGS. Pleadings must be construed so as to do justice.

(As amended Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 2007, eff. Dec. 1, 2007; Apr. 28, 2010, eff. Dec. 1, 2010.)

### Rule 9. Pleading Special Matters

(a) CAPACITY OR AUTHORITY TO SUE; LEGAL EXISTENCE.

(1) *In General.* Except when required to show that the court has jurisdiction, a pleading need not allege:

- (A) a party's capacity to sue or be sued;
- (B) a party's authority to sue or be sued in a representative capacity; or
- (C) the legal existence of an organized association of persons that is made a party.

(2) *Raising Those Issues.* To raise any of those issues, a party must do so by a specific denial, which must state any supporting facts that are peculiarly within the party's knowledge.

(b) FRAUD OR MISTAKE; CONDITIONS OF MIND. In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.

(c) CONDITIONS PRECEDENT. In pleading conditions precedent, it suffices to allege generally that all conditions precedent have occurred or been performed. But when denying that a condition precedent has occurred or been performed, a party must do so with particularity.

(d) OFFICIAL DOCUMENT OR ACT. In pleading an official document or official act, it suffices to allege that the document was legally issued or the act legally done.

party. But costs against the United States, its officers, and its agencies may be imposed only to the extent allowed by law. The clerk may tax costs on 14 days' notice. On motion served within the next 7 days, the court may review the clerk's action.

(2) *Attorney's Fees.*

(A) *Claim to Be by Motion.* A claim for attorney's fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages.

(B) *Timing and Contents of the Motion.* Unless a statute or a court order provides otherwise, the motion must:

(i) be filed no later than 14 days after the entry of judgment;

(ii) specify the judgment and the statute, rule, or other grounds entitling the movant to the award;

(iii) state the amount sought or provide a fair estimate of it; and

(iv) disclose, if the court so orders, the terms of any agreement about fees for the services for which the claim is made.

(C) *Proceedings.* Subject to Rule 23(h), the court must, on a party's request, give an opportunity for adversary submissions on the motion in accordance with Rule 43(c) or 78. The court may decide issues of liability for fees before receiving submissions on the value of services. The court must find the facts and state its conclusions of law as provided in Rule 52(a).

(D) *Special Procedures by Local Rule; Reference to a Master or a Magistrate Judge.* By local rule, the court may establish special procedures to resolve fee-related issues without extensive evidentiary hearings. Also, the court may refer issues concerning the value of services to a special master under Rule 53 without regard to the limitations of Rule 53(a)(1), and may refer a motion for attorney's fees to a magistrate judge under Rule 72(b) as if it were a dispositive pretrial matter.

(E) *Exceptions.* Subparagraphs (A)–(D) do not apply to claims for fees and expenses as sanctions for violating these rules or as sanctions under 28 U.S.C. §1927.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Apr. 17, 1961, eff. July 19, 1961; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 29, 2002, eff. Dec. 1, 2002; Mar. 27, 2003, eff. Dec. 1, 2003; Apr. 30, 2007, eff. Dec. 1, 2007; Mar. 26, 2009, eff. Dec. 1, 2009.)

**Rule 55. Default; Default Judgment**

(a) **ENTERING A DEFAULT.** When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default.

(b) **ENTERING A DEFAULT JUDGMENT.**

(1) *By the Clerk.* If the plaintiff's claim is for a sum certain or a sum that can be made certain by computation, the clerk—on the plaintiff's request, with an affidavit showing the

amount due—must enter judgment for that amount and costs against a defendant who has been defaulted for not appearing and who is neither a minor nor an incompetent person.

(2) *By the Court.* In all other cases, the party must apply to the court for a default judgment. A default judgment may be entered against a minor or incompetent person only if represented by a general guardian, conservator, or other like fiduciary who has appeared. If the party against whom a default judgment is sought has appeared personally or by a representative, that party or its representative must be served with written notice of the application at least 7 days before the hearing. The court may conduct hearings or make referrals—preserving any federal statutory right to a jury trial—when, to enter or effectuate judgment, it needs to:

- (A) conduct an accounting;
- (B) determine the amount of damages;
- (C) establish the truth of any allegation by evidence; or
- (D) investigate any other matter.

(c) **SETTING ASIDE A DEFAULT OR A DEFAULT JUDGMENT.** The court may set aside an entry of default for good cause, and it may set aside a final default judgment under Rule 60(b).

(d) **JUDGMENT AGAINST THE UNITED STATES.** A default judgment may be entered against the United States, its officers, or its agencies only if the claimant establishes a claim or right to relief by evidence that satisfies the court.

(As amended Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 2007, eff. Dec. 1, 2007; Mar. 26, 2009, eff. Dec. 1, 2009; Apr. 29, 2015, eff. Dec. 1, 2015.)

#### **Rule 56. Summary Judgment**

(a) **MOTION FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY JUDGMENT.** A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

(b) **TIME TO FILE A MOTION.** Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

(c) **PROCEDURES.**

(1) *Supporting Factual Positions.* A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 30, 2007, eff. Dec. 1, 2007.)

#### **Rule 59. New Trial; Altering or Amending a Judgment**

(a) IN GENERAL.

(1) *Grounds for New Trial.* The court may, on motion, grant a new trial on all or some of the issues—and to any party—as follows:

(A) after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court; or

(B) after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court.

(2) *Further Action After a Nonjury Trial.* After a nonjury trial, the court may, on motion for a new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment.

(b) TIME TO FILE A MOTION FOR A NEW TRIAL. A motion for a new trial must be filed no later than 28 days after the entry of judgment.

(c) TIME TO SERVE AFFIDAVITS. When a motion for a new trial is based on affidavits, they must be filed with the motion. The opposing party has 14 days after being served to file opposing affidavits. The court may permit reply affidavits.

(d) NEW TRIAL ON THE COURT'S INITIATIVE OR FOR REASONS NOT IN THE MOTION. No later than 28 days after the entry of judgment, the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. In either event, the court must specify the reasons in its order.

(e) MOTION TO ALTER OR AMEND A JUDGMENT. A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Feb. 28, 1966, eff. July 1, 1966; Apr. 27, 1995, eff. Dec. 1, 1995; Apr. 30, 2007, eff. Dec. 1, 2007; Mar. 26, 2009, eff. Dec. 1, 2009.)

#### **Rule 60. Relief from a Judgment or Order**

(a) CORRECTIONS BASED ON CLERICAL MISTAKES; OVERSIGHTS AND OMISSIONS. The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

(b) GROUNDS FOR RELIEF FROM A FINAL JUDGMENT, ORDER, OR PROCEEDING. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
- (6) any other reason that justifies relief.

(c) **TIMING AND EFFECT OF THE MOTION.**

(1) *Timing.* A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

(2) *Effect on Finality.* The motion does not affect the judgment's finality or suspend its operation.

(d) **OTHER POWERS TO GRANT RELIEF.** This rule does not limit a court's power to:

- (1) entertain an independent action to relieve a party from a judgment, order, or proceeding;
- (2) grant relief under 28 U.S.C. §1655 to a defendant who was not personally notified of the action; or
- (3) set aside a judgment for fraud on the court.

(e) **BILLS AND WRITS ABOLISHED.** The following are abolished: bills of review, bills in the nature of bills of review, and writs of coram nobis, coram vobis, and audita querela.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 2007, eff. Dec. 1, 2007.)

**Rule 61. Harmless Error**

Unless justice requires otherwise, no error in admitting or excluding evidence—or any other error by the court or a party—is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.

(As amended Apr. 30, 2007, eff. Dec. 1, 2007.)

**Rule 62. Stay of Proceedings to Enforce a Judgment**

(a) **AUTOMATIC STAY.** Except as provided in Rule 62(c) and (d), execution on a judgment and proceedings to enforce it are stayed for 30 days after its entry, unless the court orders otherwise.

(b) **STAY BY BOND OR OTHER SECURITY.** At any time after judgment is entered, a party may obtain a stay by providing a bond or other security. The stay takes effect when the court approves the bond or other security and remains in effect for the time specified in the bond or other security.

(c) **STAY OF AN INJUNCTION, RECEIVERSHIP, OR PATENT ACCOUNTING ORDER.** Unless the court orders otherwise, the following are not stayed after being entered, even if an appeal is taken:

- (1) an interlocutory or final judgment in an action for an injunction or receivership; or





FEDERAL RULES  
OF  
EVIDENCE

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DECEMBER 1, 2019



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(c) **DISCLOSURE MADE IN A STATE PROCEEDING.** When the disclosure is made in a state proceeding and is not the subject of a state-court order concerning waiver, the disclosure does not operate as a waiver in a federal proceeding if the disclosure:

(1) would not be a waiver under this rule if it had been made in a federal proceeding; or

(2) is not a waiver under the law of the state where the disclosure occurred.

(d) **CONTROLLING EFFECT OF A COURT ORDER.** A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other federal or state proceeding.

(e) **CONTROLLING EFFECT OF A PARTY AGREEMENT.** An agreement on the effect of disclosure in a federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

(f) **CONTROLLING EFFECT OF THIS RULE.** Notwithstanding Rules 101 and 1101, this rule applies to state proceedings and to federal court-annexed and federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if state law provides the rule of decision.

(g) **DEFINITIONS.** In this rule:

(1) “attorney-client privilege” means the protection that applicable law provides for confidential attorney-client communications; and

(2) “work-product protection” means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

(As added Pub. L. 110–322, §1(a), Sept. 19, 2008, 122 Stat. 3537; amended Apr. 26, 2011, eff. Dec. 1, 2011.)

## ARTICLE VI. WITNESSES

### **Rule 601. Competency to Testify in General**

Every person is competent to be a witness unless these rules provide otherwise. But in a civil case, state law governs the witness’s competency regarding a claim or defense for which state law supplies the rule of decision.

(As amended Apr. 26, 2011, eff. Dec. 1, 2011.)

### **Rule 602. Need for Personal Knowledge**

A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness’s own testimony. This rule does not apply to a witness’s expert testimony under Rule 703.

(As amended Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 25, 1988, eff. Nov. 1, 1988; Apr. 26, 2011, eff. Dec. 1, 2011.)

### **Rule 603. Oath or Affirmation to Testify Truthfully**

Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness’s conscience.

(d) a person authorized by statute to be present.

(As amended Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 25, 1988, eff. Nov. 1, 1988; Pub. L. 100-690, title VII, §7075(a), Nov. 18, 1988, 102 Stat. 4405; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 26, 2011, eff. Dec. 1, 2011.)

#### ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

##### **Rule 701. Opinion Testimony by Lay Witnesses**

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

- (a) rationally based on the witness's perception;
- (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
- (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

(As amended Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 26, 2011, eff. Dec. 1, 2011.)

##### **Rule 702. Testimony by Expert Witnesses**

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

(As amended Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 26, 2011, eff. Dec. 1, 2011.)

##### **Rule 703. Bases of an Expert's Opinion Testimony**

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

(As amended Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 26, 2011, eff. Dec. 1, 2011.)

##### **Rule 704. Opinion on an Ultimate Issue**

(a) **IN GENERAL—NOT AUTOMATICALLY OBJECTIONABLE.** An opinion is not objectionable just because it embraces an ultimate issue.

(b) **EXCEPTION.** In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the

crime charged or of a defense. Those matters are for the trier of fact alone.

(As amended Pub. L. 98-473, title II, §406, Oct. 12, 1984, 98 Stat. 2067; Apr. 26, 2011, eff. Dec. 1, 2011.)

**Rule 705. Disclosing the Facts or Data Underlying an Expert's Opinion**

Unless the court orders otherwise, an expert may state an opinion—and give the reasons for it—without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.

(As amended Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 26, 2011, eff. Dec. 1, 2011.)

**Rule 706. Court-Appointed Expert Witnesses**

(a) APPOINTMENT PROCESS. On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act.

(b) EXPERT'S ROLE. The court must inform the expert of the expert's duties. The court may do so in writing and have a copy filed with the clerk or may do so orally at a conference in which the parties have an opportunity to participate. The expert:

- (1) must advise the parties of any findings the expert makes;
- (2) may be deposed by any party;
- (3) may be called to testify by the court or any party; and
- (4) may be cross-examined by any party, including the party that called the expert.

(c) COMPENSATION. The expert is entitled to a reasonable compensation, as set by the court. The compensation is payable as follows:

- (1) in a criminal case or in a civil case involving just compensation under the Fifth Amendment, from any funds that are provided by law; and
- (2) in any other civil case, by the parties in the proportion and at the time that the court directs—and the compensation is then charged like other costs.

(d) DISCLOSING THE APPOINTMENT TO THE JURY. The court may authorize disclosure to the jury that the court appointed the expert.

(e) PARTIES' CHOICE OF THEIR OWN EXPERTS. This rule does not limit a party in calling its own experts.

(As amended Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 26, 2011, eff. Dec. 1, 2011.)

ARTICLE VIII. HEARSAY

**Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay**

(a) STATEMENT. "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.